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August 27, 2009

DECISION AND ORDER
OFFICE OF HEARINGS AND APPEALS

Hearing Officer Decision

Name of Case: Personnel Security Hearing

Date of Filing: April 27, 2009

Case Number: TSO-0737

This Decision concerns the eligibility of XXXXXXXXXXXXXXXXXXXX (the individual) to hold an access authorization (or security clearance) under the Department of Energy's (DOE) regulations set forth at 10 C.F.R. Part 710, Subpart A, entitled "General Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material."¹ In this Decision, I will consider whether, on the basis of the testimony and other evidence in the record of this proceeding, the individual should be granted an access authorization. As discussed below, after carefully considering the record before me in light of the relevant regulations, I have determined that the DOE should not grant the individual an access authorization.

I. Background

The individual is an applicant for a security clearance. On a Questionnaire for National Security Positions (QNSP) that he completed on May 28, 2008, the individual indicated that he had used illegal drugs from October 2001 to July 2005. Exhibit 6 at 30.² The local security office (LSO) then interviewed the individual regarding his use of illegal drugs on November 20, 2008. Exhibit 7 (Transcript of 11/20/08 Personnel Security Interview). During that interview, the individual gave inconsistent responses to inquiries about his history of illegal drug use. The LSO ultimately determined that the derogatory information concerning the individual's illegal drug use created a substantial doubt about his eligibility for an access authorization, and that the doubt could not be resolved in a manner favorable to him. Accordingly, the LSO proceeded to obtain authority to initiate an administrative review proceeding.

¹ Access authorization is defined as "an administrative determination that an individual is eligible for access to classified matter or is eligible for access to, or control over, special nuclear material." 10 C.F.R. § 710.5(a).

² The individual completed an electronic form of the QNSP, entitled Electronic Questionnaire for Investigations Processing, or e-QIP.

The administrative review proceeding began with the issuance of a Notification Letter to the individual. *See* 10 C.F.R. § 710.21. That letter informed the individual that information in the possession of the DOE created a substantial doubt concerning his eligibility for access authorization. Specifically, the DOE characterized this information as indicating that the individual had used marijuana and cocaine at various times between 1994 and 2005, and had engaged in conduct that tended to show that he was not honest, reliable, or trustworthy. Enclosure to Notification Letter, February 25, 2009 (citing 10 C.F.R. § 710.8(k) and (l)).³

The Notification Letter informed the individual that he was entitled to a hearing before a Hearing Officer in order to resolve the substantial doubt regarding his eligibility for access authorization. The individual requested a hearing, and the LSO forwarded the individual's request to the Office of Hearings and Appeals (OHA). The Director of OHA appointed me as the Hearing Officer in this matter on April 28, 2009.

At the hearing I convened pursuant to 10 C.F.R. § 710.25(e) and (g), I took testimony from the individual, two supervisors, and three friends who are or were co-workers. The DOE Counsel submitted seven exhibits prior to the hearing, and the individual submitted three exhibits.

II. Regulatory Standard

A hearing under Part 710 is held “for the purpose of affording the individual an opportunity of supporting his eligibility for access authorization,” i.e., “to have the substantial doubt regarding eligibility for access authorization resolved.” 10 C.F.R. § 710.21(b)(3), (6). It is my role as the Hearing Officer to issue a Decision that reflects my comprehensive, common-sense judgment, made after consideration of all the relevant evidence, favorable and unfavorable, as to whether the granting or continuation of a person's access authorization will not endanger the common defense and security and is clearly consistent with the national interest. 10 C.F.R. § 710.7(a). I am instructed by the regulations to resolve any doubt as to a person's access authorization eligibility in favor of the national security. *Id.*

I have thoroughly considered the record of this proceeding, including the submissions tendered in this case and the testimony of the witnesses presented at the hearing. In resolving the question of the individual's eligibility for access authorization, I have been guided by the applicable

³ Criterion K relates, in relevant part, to information that a person has “used . . . a drug or other substance listed in the Schedule of Controlled Substances established pursuant to section 202 of the Controlled Substances Act of 1970 (such as marijuana, cocaine, . . .) except as prescribed or administered by a physician licensed to dispense drugs in the practice of medicine, or as otherwise authorized by Federal law.” 10 C.F.R. § 710.8(k) (Criterion K). Criterion L relates, in relevant part, to information that a person “[e]ngaged in any unusual conduct or is subject to any unusual circumstances which tend to show that the individual is not honest, reliable, or trustworthy; or which furnishes reason to believe that the individual may be subject to pressure, coercion, exploitation, or duress which may cause the individual to act contrary to the best interests of the national security” 10 C.F.R. § 710.8(l) (Criterion L).

factors prescribed in 10 C.F.R. § 710.7(c).⁴ After due deliberation, I have determined that the individual should be not granted an access authorization. The specific findings that I make in support of this decision are discussed below.

III. The Notification Letter and the Security Concerns at Issue

In the Notification Letter, the LSO sets forth its concerns regarding the individual's eligibility for access authorization and the facts that support each of those concerns. The LSO cites the following derogatory information for its security concerns under Criteria K and L. Under Criterion K, the LSO stated that the individual, by his own report, had used marijuana an average of five times a week from 2000 to 2005, and purchased marijuana three to four times a month during that period. The individual also admitted that he used cocaine once in 1991 and once in 1992, used marijuana five to seven times in 1998 or 1999 and five or six times in the summer of 1994, and was released from the military in 1994 after testing positive for marijuana. Enclosure to Notification Letter (Exhibit 1). Under Criterion L, the LSO stated that the individual provided conflicting information about his past illegal drug use during his November 20, 2008, Personnel Security Interview (PSI). In the course of the PSI, the individual initially stated that his first use was in 2000; later he amended the starting year to 1998 or 1999, and yet later he admitted trying it for the first time during the summer of 1994. He first stated he smoked marijuana only once in 1998, but later corrected himself and stated he had used it five to seven times in that year. He also stated initially that he had used cocaine once, but later in the interview admitted he had used it twice. When asked to account for his inconsistent reporting of his illegal drug use, the individual responded that he was embarrassed and was afraid that full disclosure would prevent him from getting a security clearance. *Id.*

I find that the information set forth above constitutes derogatory information that raises legitimate questions regarding the individual's eligibility for access authorization under Criteria K and L. Use of illegal drugs raises questions about an individual's reliability and trustworthiness, not only because drug use may impair judgment, but also because it may indicate an inability or unwillingness to comply with laws, rules, and regulations. *See* Guideline H of the *Revised Adjudicative Guidelines for Determining Eligibility for Access to Classified Information*, issued on December 29, 2005, by the Assistant to the President for National Security Affairs, The White House (Adjudicative Guidelines). In addition, conduct that involves questionable judgment or dishonesty—in this case, providing inconsistent responses to inquiries made for the purpose of determining an individual's eligibility for access authorization—can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. *See* Guideline E of the Adjudicative Guidelines.

⁴ Those factors include the following: the nature, extent, and seriousness of the conduct, the circumstances surrounding his conduct, including knowledgeable participation, the frequency and recency of his conduct, the age and maturity at the time of the conduct, the voluntariness of his participation, the absence or presence of rehabilitation or reformation and other pertinent behavioral changes, the motivation for his conduct, the potential for pressure, coercion, exploitation, or duress, the likelihood of continuation or recurrence, and other relevant and material factors.

IV. Findings of Fact

The individual first smoked marijuana in the summer of 1994 after graduating from high school. Exhibit 7 (PSI Transcript) at 136. He used marijuana several times that summer, including once at a party to celebrate his enlistment in the military. *Id.* A drug screen revealed his marijuana use, and he was given an entry-level separation from the military. Transcript of Hearing (Tr.) at 126. He used marijuana several times in 1998. Exhibit 7 at 137. He met his future wife in 2000, and he began smoking periodically with her. Tr. at 114. They married in 2002, and their usage increased during their marriage; by 2005, they were smoking marijuana roughly five times a week. *Id.* at 117; Exhibit 7 at 12. He and his wife purchased marijuana from her friends three or four times a month. Exhibit 7 at 14.

The individual also used cocaine twice. In 2001, he tried it for the first time when it was offered at a party. The second usage occurred while he and his wife were on their honeymoon in 2002. He has never purchased cocaine; it was offered to him by other users each time. Tr. at 124.

The individual last used marijuana in 2006. *Id.* at 112. In September of that year, he relocated to a new city, and he has not used any illegal substance since the move. *Id.* at 110, 112. His wife followed him to the new city, and she continued to use illegal drugs. *Id.* at 115. His decision to stop using illegal drugs and her decision to continue using them caused tension and ultimately led to their separation in March 2007 and divorce, which was finalized in August 2007. *Id.* at 108-09, 115.

The individual completed a Questionnaire for National Security Positions (QNSP) on May 28, 2008. In response to Section 24a of that form, which asks whether the applicant has illegally used any controlled substance within the past seven years (or since age 16, if that period is shorter), the individual responded “yes” and stated that he had used marijuana “several times” and cocaine experimentally during the period from October 2001 to July 2005. Exhibit 6 at 30. The LSO conducted a PSI on November 20, 2008, to address, among other things, the individual’s illegal drug use. Regarding his first use of marijuana, the individual provided a series of inconsistent responses, at first stating that he began using it in 2000, then in 1998 or 1999, and finally in the summer of 1994. Exhibit 7 at 9, 118, 120, 124, 128. He also stated that he used marijuana once in 1998, but then later in the PSI stated that he used it five to seven times. *Id.* at 120, 137. Regarding cocaine, after first stating that he used it once, he then admitted to a second use. *Id.* at 19, 24-25.

At hearing, the individual confirmed that he first used marijuana during the summer of 1994. *Id.* at 113. He explained that he smoked marijuana just before leaving for military boot camp with the express purpose of being discharged from his service obligation, after deciding he did not in fact want to serve. He felt he had been pressured to enlist, and had been told that smoking marijuana after informing the military that he did not smoke marijuana was the only way to obtain the separation he desired. *Id.* at 125-27. He also confirmed that he used cocaine twice,

the last time in 2002. *Id.* at 124. Finally, he provided the same two explanations for his inconsistencies during the PSI as he did at the PSI. First, he was afraid that if he fully disclosed his involvement with illegal drugs, he would lose his job. *Id.* at 165; *see* Exhibit 7 at 135. Second, he testified that his co-workers counseled him not to offer information that was more than ten years old, and to provide as little information as possible. *Tr.* at 174; *see* Exhibit 7 at 125.

V. Hearing Officer Evaluation of Evidence

Criterion K: Involvement with Illegal Drugs

The individual has used marijuana and cocaine in the past. This usage occurred from 1994 to 2005, including periods when he used no illegal drugs and periods when he used marijuana as frequently as five times a week. As Hearing Officer, my evaluation of an individual's eligibility for access authorization does not end with such a finding. I must consider all of the evidence before me that relates to the individual's character and personal history, including any information that tends to mitigate the concerns that this activity raised, with the object of rendering an adjudication on the basis of the "whole person." *See* Adjudicative Guidelines at ¶ 2(a). Nothing in the record of this proceeding establishes that he has used any illegal drugs since his move to the new city in September 2006, nearly three years ago. The individual testified that he moved to the new city to get away from social contacts who used drugs and to start concentrating on his career. *Tr.* at 115. He no longer associates with those with whom he used illegal drugs or with those who sold marijuana to him. *Id.* at 121-23. Witnesses who testified on his behalf support his testimony. Three friends, who are also co-workers, testified that the individual is career-oriented and does not use illegal drugs in their presence or associate with drug users. *Id.* at 9-11, 33-34, 50-52. Two supervisors testified that the individual is an outstanding, reliable worker who is devoted to advancing his career. *Id.* at 66-67, 93-94, 102. His immediate supervisor stated that he is constantly willing and available to work extra hours early, late, or weekends on short notice; workers who use illegal recreational drugs, in her opinion, tend not to be so available. *Id.* at 70. She also testified that the individual has been subjected to two drug tests through his employment, one in 2007 and one in 2008, and both had negative results. *Id.* at 78-82. *See* Exhibit 3; E-Mail from DOE Counsel to Hearing Officer and Individual, June 4, 2009.

After considering all the evidence in the record with regard to the individual's use of illegal drugs, I find that the individual has mitigated the LSO's security concerns in this area. Guideline H of the Administrative Guidelines sets forth conditions that could mitigate such security concerns. Among those listed, the following apply to the individual's circumstances. The individual's last illegal drug usage was nearly three years ago, and his pattern of drug use "happened under such circumstances that it is unlikely to recur." Administrative Guidelines, Guideline H, ¶ 26(a). The individual has demonstrated through his testimony and that of others his "intent not to abuse any drugs in the future" by establishing "disassociation from drug-using associates and contacts" including his ex-wife, "changing or avoiding the environment where

drugs were used,” and “an appropriate period of abstinence.” *Id.* at ¶ 26(b). A common-sense consideration of all the evidence leads me to conclude that, although the individual used illegal drugs with some regularity from 1994 through 2005, the totality of the evidence presented in this proceeding mitigates the security concerns his illegal drug use raised.

Criterion L: Honesty, Reliability and Trustworthiness

A number of witnesses testified that the individual is an extremely reliable employee and has not, to their knowledge, used any illegal drugs since his September 2006 move to the new city. Nevertheless, the fact remains that the individual has behaved in a dishonest and unreliable manner by providing false and inconsistent information about his illegal drug use during the November 20, 2008, Personnel Security Interview. At the beginning of the PSI, and for more than two hours, the individual withheld the full extent of his involvement with illegal drugs. As stated above, at the hearing, he offered two distinct reasons for his behavior: that he feared he would lose his job if he fully disclosed his past, and that he had been advised not to provide information more than ten years old. I cannot find that either reason, or both taken together, mitigates the LSO’s security concerns that his lack of candor with that office has raised.

I again take into consideration all of the evidence before me to render an adjudication on the basis of the “whole person.” The individual placed the blame for many of his inappropriate decisions, not just those he made during the PSI but throughout his adult life, on others. His decision to use marijuana in order to test positive and be released from the military was apparently based on advice he received, and he felt it was the only way he could achieve his goal. Tr. at 127, 133. Similarly, he relied on the advice of “many people not to give out too much information beyond what is contained within your [QNSP] packet” during the PSI: “Do not speak too much, do not give out too much information, just keep it short and sweet, just give them the ten years.” *Id.* at 173-74. The individual maintains that, despite the interviewer’s questions including such language as “Have you ever . . .” and “in your life . . .,” he continued to believe that the scope of the interview was limited to the past ten years, until the interview was nearly over, at which point he provided complete information. *Id.* at 158-60, 175-76.⁵

He also testified that other poor decisions he made were the result of pressure from others. At one point during the PSI, he stated that he had smoked marijuana for the first time in 1998, which was untrue. Exhibit 7 at 124. When asked at the hearing why he made that statement, he testified that he could not justify that response, but felt by that point in the PSI, the interviewer had “broke[n] me down,” and he felt as if he “was being treated like a criminal.” *Id.* at 161, 165. He also ascribed his drug use during the period of his marriage to his wife’s bad influence: “I

⁵ To his credit, the individual apologized for taking so long to realize that the scope of the PSI exceeded that of the QNSP. Exhibit 7 at 124; Tr. at 170-71. It appears to me that the advice he received fixed in his mind that the scope of the PSI was limited to the past ten years. I note that, under certain circumstances, improper advice can mitigate an individual’s derogatory actions. The improper advice, however, must have been received from “authorized personnel or legal counsel advising or instructing the individual specifically concerning the security clearance process.” Adjudicative Guidelines, Guideline E, ¶ 17(b). The individual has not contended, nor do I find, that the persons who advised him regarding his PSI fall into this category of advisors.

can't explain those actions. I just followed along with my wife at the time." *Id.* at 116. In each of the instances described above, the individual demonstrated poor judgment when he accepted and acted upon the advice or influence of other persons.

Each of the reasons the individual gave for not being straightforward during the PSI raises its own concern regarding his judgment and trustworthiness. Relying on the advice to limit his responses to the past ten years so tainted his judgment that he misunderstood the interviewer's questions and provided false responses until he was, with great effort, disabused of his notion. His alternative reason for not providing complete information about his past involvement with illegal drugs—that he feared he would lose his job—also demonstrates poor judgment. The security program relies on obtaining complete information about individuals in order to render accurate adjudications regarding their eligibility for access authorizations. Withholding information or providing unreliable information places the program, and national security itself, in jeopardy. Moreover, the two reasons the individual has offered to explain his behavior at the PSI are mutually inconsistent. Underlying the first is a mindset in which the individual had no idea that the interviewer was seeking information about him that was more than ten years old, and that he was providing the information she sought. However, if the individual feared losing his job, then he must have known what the interviewer was asking for and consciously decided to withhold information from her.

After considering the individual's testimony, I am not confident where the truth lies concerning his failure to act in a straightforward manner with the LSO. I believe he has now disclosed his full history of illegal drug use. But the manner in which he conducted himself at the PSI, and his explanation for it, do not invoke confidence that he will deal candidly with the LSO in the future. I am not convinced that he will not rely on the advice of others rather than comply fully and reliably with the LSO. I am not convinced that he will fully respond to future requests for information from the LSO, should he fix in his mind what he believes the scope of any questioning should be, whether on the basis of advice or his own interpretation. I am not convinced that he will be able to withstand the pressure of others to take actions not in his interest, as he did by following his ex-wife's lead to use illegal drugs or by providing untrue responses during the 2008 PSI when he felt he was under stress. Nor am I confident that embarrassment or fear of losing his job will not cause him to act in a manner contrary to the national security, or to report a breach of security, should one even inadvertently occur. After carefully considering the facts and rationales surrounding the individual's falsification and recent admission of the truth, I cannot conclude that the individual has mitigated the LSO's concerns regarding his lack of candor and questionable judgment.

VI. Conclusion

In the above analysis, I have found that there was sufficient derogatory information in the possession of the DOE that raises serious security concerns under Criteria K and L. After considering all the relevant information, favorable and unfavorable, in a comprehensive common-sense manner, including weighing all the testimony and other evidence presented at the

hearing, I have found that the individual has brought forth sufficient evidence to mitigate the security concerns raised under Criterion K, but not those raised under Criterion L. I therefore cannot find that granting the individual's access authorization would not endanger the common defense and would be clearly consistent with the national interest. Accordingly, I have determined that the individual's access authorization should not be granted. The parties may seek review of this Decision by an Appeal Panel under the regulations set forth at 10 C.F.R. § 710.28.

William M. Schwartz
Hearing Officer
Office of Hearings and Appeals

Date: August 27, 2009