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August 11, 2009

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Hearing Officer's Decision

Case Name: Personnel Security Hearing

Filing Date: April 29, 2009

Case Number: TSO-0744

This Decision considers the eligibility of XXXXX (the individual) to hold an access authorization under the regulations set forth at 10 C.F.R. Part 710, entitled "Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material." As I explain below, the Department of Energy (DOE) should not restore the individual's access authorization.

I. Background

The local security office (LSO) suspended the individual's access authorization and issued him a Notification Letter with a Statement of Charges that cites a Criterion K security concern. Criterion K includes possessing, using, or experimenting with illegal drugs. 10 C.F.R. § 710.8(k). The LSO alleges that:

- 1) In a January 2009 Personnel Security Interview (PSI), the individual admitted that in July 2007 he illegally smoked marijuana while holding an access authorization;
- 2) In an April 1992 PSI and a January 2009 PSI, he admitted that he illegally smoked marijuana from 1967 or 1968 or 1969 to 1980 or 1985; and
- 3) In a January 2009 PSI, he admitted that from 1971-1975 he illegally used hallucinogenic mushrooms; from 1972-1974 he illegally used hashish; from 1972-1975 he illegally used LSD; and in 1974 he illegally used amphetamines, and he illegally used PCP.

DOE Exh. 1 (Statement of Charges, Feb. 5, 2009).

The Statement of Charges also cites a Criterion L security concern. Criterion L includes “unusual conduct” and “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. Such conduct or circumstances include . . . violation of any commitment or promise upon which DOE . . . relied to favorably resolve an issue of access authorization eligibility.” 10 C.F.R. § 710.8(l). The LSO alleges that:

- 1) In April 1992, the individual signed a DOE Drug Certification, promising that he would not use illegal drugs or involve himself with them while holding an access authorization. In January 1991, January 1996, February 2001, and December 2005, the individual signed DOE Security Acknowledgments certifying that he understood that involvement with illegal drugs could result in the loss of his access authorization;
- 2) Despite his DOE Drug Certification and four DOE Security Acknowledgments, in July 2007 he illegally smoked marijuana; and
- 3) In a January 2009 PSI, he admitted that when he smoked marijuana in July 2007, he knew that it is illegal, but he did not think about his access authorization.

DOE Exh. 1 (Statement of Charges, Feb. 5, 2009).

The individual requested a hearing to respond to the LSO’s security concerns, and I conducted the hearing on June 26, 2009. The individual represented himself. He testified and called the following witnesses: his wife, an acquaintance, his ex-girlfriend, his neighbor, and his co-worker. The DOE counsel did not call a witness.

At the hearing, the individual stated that he does not dispute the truth of the allegations in the Statement of Charges. Tr. at 6-7. Therefore, at the hearing we heard testimony about whether the individual has mitigated the security concerns raised in the Statement of Charges.

II. Summary of Hearing Testimony

A. The Individual

The individual testified that he used illegal drugs up to his transition from undergraduate to graduate school, around 1981 or 1982. He gave them up because he could not concentrate on his school work. *Id.* at 18.

The individual read the DOE Drug Certification and DOE Security Acknowledgments before he signed them, and he understood them to be in effect for the rest of his employment. *See id.* at 15-16, 19.

After the individual began working at the DOE, he stopped associating with illegal drug users. *Id.* at 30. His younger sister has been involved in marijuana cultivation, but he rarely sees or speaks with her. *Id.* at 39-40. Avoiding drug users helped him stop using illegal drugs. *Id.* at 76.

The individual acknowledged that he was part of the counterculture. *Id.* at 68. The counterculture included “doing drugs routinely,” protesting nuclear power, and having anti-government opinions. *Id.* at 69-70. During the mid-1980’s, the individual no longer considered himself part of the counterculture – he had success in school and had a “sense” that he “could contribute meaningfully to society.” *Id.* at 72. He does not have anti-government views. *Id.* at 74. Further, he is now concerned that drug money funds wars. *Id.* at 78-79.

As part of a reinvestigation, in October 2008 the individual filled out a new Questionnaire for National Security Positions. He self-reported that he used marijuana at a July 2007 wedding. *Id.* at 16-17. After helping to set up the reception tables, he visited with a group. He met the person standing next to him for the first time. *Id.* at 39. That person suddenly lit a marijuana cigarette, took “a hit off it,” and passed it to him. *Id.* at 24. He knew that it was a marijuana cigarette and that smoking marijuana is illegal. *Id.* at 27, 45. He smoked it because he felt “a pressure to look like [he] was fitting in.” *Id.* at 24. (Although no one pressured him. *Id.* at 28.) He did not think about his job or his written promise to the DOE. *Id.* at 24. Had he more time to think about what he was doing, he would have turned down the cigarette. *Id.* at 30, 41. He does not recall “much of anything” about the next 30 minutes, but about an hour later, another wedding guest commented that the group was high. *Id.* at 25-26. When the individual got home, he did not tell his wife that he had smoked marijuana at the wedding. He told her after his 2009 PSI. *Id.* at 33.

The individual testified that he has not used illegal drugs since the wedding. *Id.* at 39. The wedding was the first time he used illegal drugs in many years, and he does not intend to use them again because he finds them “debilitating.” *Id.* at 19.

The individual acknowledged that at his 1992 PSI he said that he last used illegal drugs around 1978-1980. *Id.* at 46-47. Then he acknowledged that at his 2009 PSI he said that he used illegal drugs “frequently” from 1967 to 1980 and “infrequently” from 1980 to 1985. To explain the inconsistency, he said that he was “just offering a general mid-decade guarantee, if you will. I couldn’t tell you the very – you know, what year, the very last time I ever did it.” *Id.* at 48. Although at his 2009 PSI he said that from 1980 to 1985 he used drugs every month, he testified that he “absolutely” did not use drugs every month; rather, his use was “very infrequent.” *Id.* at 50-51. Then he parsed his undergraduate and graduate courses and enrollment dates and concluded that he could not recall when he stopped using drugs because that time of his life is “fuzzy.” *Id.* at 54. But it was “definitely” before 1985 and “likely” before 1983. *Id.* at 57.

The individual acknowledged that had used drugs other than marijuana – mushrooms, hashish, LSD, amphetamines, and PCP. *Id.* at 64. Then he acknowledged that at his

1992 PSI, he testified that he had only used marijuana. *Id.* at 65. To explain the discrepancy, he guessed that he “was thinking back to the security questionnaire,” which limits the question to “the last five years.” He acknowledged that the interviewer had not limited the question, but stated, “I just don’t have a recollection of trying to omit in this fashion.” *Id.* at 65-66.

The individual agreed that over the years that he used marijuana, he used it over 700 times. He maintained his PSI testimony that he never purchased it. *Id.* at 60-61. (He also denied purchasing other illegal drugs. *Id.* at 64.) His friends gave him marijuana over 700 times. *Id.* at 62. He acknowledged that at his 2009 PSI he said, “I don’t like the idea of putting money in the hands of bad people, which is where the money usually goes.” *Id.* at 62-63. He explained his statement by saying that even if the money was not “coming out of [his] wallet directly,” he “assumed” that “other people are purchasing [drugs],” and that he was “encouraging the industry.” *Id.* at 63.

B. The Individual’s Wife

The individual’s wife testified that she and the individual have lived together for about 17 years. *Id.* at 84-85. When they first started living together, they were not married. When she became ill, he stayed with her. The fact that he did not leave “says a lot for his character.” *Id.* at 94-95.

A few weeks before the hearing, the individual told her that he had smoked marijuana at the wedding. *Id.* at 87. (She was not at the wedding. *Id.* at 83.) She was surprised because she had never seen him use illegal drugs, nor has she suspected him of doing so. *Id.* at 86, 87. (She knew that he had used drugs, but if he continued, she would have given him “the boot.” *Id.* at 88.)

The individual’s wife is not sure when the individual used drugs prior to 2007. (He never told her when he last used.) *Id.* at 99. It was before the early 1990’s, because that is when they got together. *Id.* at 99-100. If the individual had ever used illegal drugs since they have been together, she would have known. *Id.* at 97.

Sometimes the individual plays “devil’s advocate” to argue that drugs should be legalized, but he just likes to debate. She is not aware if the individual has strongly-held opinions about illegal drug use. *Id.* at 93-94. She does not consider him to be part of the counterculture. *Id.* at 101.

The individual rarely socializes out of the house because he is “a homebody.” *Id.* at 89. He does not have a group of friends that he sees regularly; he does not go out in the evenings and on the weekends. *Id.* at 90, 104.

The individual is sometimes “not . . . forthcoming” because he is “absent-minded.” *Id.* at 91-92. The individual’s wife does not believe that he is dishonest. *Id.* at 92.

C. The Individual's Acquaintance

The individual's acquaintance testified that he met the individual for the first time at the July 2007 wedding. *Id.* at 109. Prior to the hearing, they met once and spoke on the phone once. *Id.* at 110.

Before the ceremony, fifteen or twenty people were standing "off to one side." The individual's acquaintance had brought a "joint," which he "fired up" and "passed." *Id.* at 111. The individual's acquaintance does not remember whether he first handed it to the individual, but the individual "definitely" did not expect it, nor did he ask for it. *Id.* at 112, 114. The individual "took a hit" and then "passed it." *Id.* at 112. Others declined. *Id.* at 113.

D. The Individual's Ex-Girlfriend

The individual's ex-girlfriend testified that she and the individual lived together from about 1975 to 1988. *Id.* at 118-19. He smoked marijuana "every now and then" and stopped around 1977. *Id.* at 119, 120. He may have stopped as a graduate or an undergraduate, but she "can't really remember when he got into school." *Id.* at 120, 123, 125.

After the individual and his ex-girlfriend split in 1988, they only saw each other "once or twice." *Id.* at 122. The individual is "a totally honest, straightforward person, and a very honorable and very trustworthy and a very sweet person." *Id.*

E. The Individual's Neighbor

The individual's neighbor testified that she has lived next door to the individual for almost 17 years. *Id.* at 128. She sees him "about every day," when they talk about her pets. *Id.* at 128, 129. Since the individual's wife got sick, she brings food to his house and they "chitchat." *Id.* at 130, 131. On occasion, she will "have . . . a group of people . . . over," including the individual. *Id.* at 129.

When the individual told her that he had smoked marijuana, she was surprised because he did not "strike" her as "someone who would." *Id.* at 128. She has never seen him using illegal drugs, nor has she suspected him of doing so. *Id.* at 129.

The individual's neighbor considers him honest – "he's just a nice guy." *Id.* at 129-30.

The individual makes few social outings. *Id.* Other than relatives, she has never seen anyone visit the individual. *Id.* at 132.

F. The Individual's Supervisor

The individual's supervisor testified that since 1990, he and the individual have worked together on and off. *Id.* at 134. Around 2000, he began seeing the individual daily. For

the past one or two years, he has supervised the individual. *Id.* at 135, 140. He does not socialize with the individual outside of work. *Id.* at 137.

The individual's co-worker has never witnessed the individual using drugs, nor has he ever suspected that he has. *Id.* at 136.

The individual's co-worker considers the individual honest because he has "never seek any . . . reason not to trust him." *Id.* at 137.

III. Legal Standard

In order to grant or restore an individual's access authorization, the Hearing Officer must find that the grant or restoration "will not endanger the common defense and security and is clearly consistent with the national interest." 10 C.F.R. §§ 710.7(a), 710.27(a); *see also Dep't of the Navy v. Egan*, 484 U.S. 518, 528 (1988). In order for the Hearing Officer to make this finding, the individual must resolve the security concerns that the DOE identifies in its Notification Letter. *See, e.g., Personnel Security Hearing*, Case No. TSO-0586 (2008).¹

The individual must resolve the DOE's security concerns by presenting evidence to rebut, refute, explain, extenuate, or mitigate the allegations supporting the DOE's security concerns. *See, e.g., Personnel Security Hearing*, Case No. TSO-0598 (2008). The individual must present corroborating evidence to support his or her efforts to resolve the DOE's security concerns. *See Personnel Security Hearing*, Case No. TSO-0693 (2009).

The individual has the burden to resolve the DOE's security concerns because once the DOE finds a security concern, "[T]here is a strong presumption against granting a[n access authorization]." *Dorfmont v. Brown*, 913 F.2d 1399, 1401 (9th Cir. 1990). "[D]eterminations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531; *see also* 10 C.F.R. § 710.7(a) ("Any doubt as to an individual's access authorization eligibility shall be resolved in favor of the national security.").

The Hearing Officer considers "all relevant information, favorable and unfavorable," to issue a decision that is "a comprehensive, common-sense judgment." 10 C.F.R. § 710.7(a). The Hearing Officer shall consider the following factors: witness demeanor and credibility; the authenticity and accuracy of documentary evidence; the nature, extent, and seriousness of the conduct; the circumstances surrounding the conduct, to include knowledge and participation; the frequency and recency of the conduct; the age and maturity of the individual at the time of the conduct; the voluntariness of participation; the absence or presence of rehabilitation or reformation and other pertinent behavior changes; the motivation of the conduct; the potential for pressure, coercion, exploitation, or duress; the likelihood of continuation or recurrence; and other relevant and material factors. *Id.* at §§ 710.7(c), 710.27(a)-(b).

¹ OHA decisions may be accessed by entering the case number in the search engine on the OHA website, www.oha.doe.gov.

IV. Analysis

Criterion K

The LSO's Criterion K security concern stems from the individual's use of illegal drugs. To resolve the security concern, the individual (i) testified that his illegal drug use in July 2007 was his first in many years, and that he no longer participates in the counterculture, which included drug use; (ii) presented testimony from witnesses who vouched for his abstinence from illegal drugs and his honesty; and (iii) showed that in November 2008 he was randomly tested for illegal drugs, and the results came back negative. I find that the individual's evidence does not resolve the security concern.

First, the individual's evasive and inconsistent responses about his drug use cast doubt on his contention that he no longer uses illegal drugs. In the 1992, PSI he said that he had only used marijuana. But in the 2009 PSI he acknowledged an extensive history of using other illegal drugs. At the hearing, when asked to reconcile his testimony, he said that he was not trying to omit his additional drug use, because in 1992 he thought that the interviewer was asking about "the last five years."

Yet, this testimony conflicts with his hearing testimony that he stopped using illegal drugs in the early 1980's. It also conflicts with his 1992 PSI testimony that he stopped using drugs in 1980 and his 2009 PSI testimony that he stopped using drugs in 1985. (The only witness who knew him at the time, his ex-girlfriend, provided a fourth date – that he stopped in 1977.)

The individual testified that he has never purchased illegal drugs. I find this improbable because he acknowledged having used illegal drugs more than 700 times. It also conflicts with common sense and his testimony that suggests that he did purchase drugs; i.e., that he "[doesn't] like the idea of putting money in the hands of bad people."

Second, the individual's witnesses presented testimony of limited value. His ex-girlfriend and his acquaintance do not regularly see the individual. His neighbor and his supervisor have little social contact with him. His wife testified that he has not been using illegal drugs and that she would know if he had. Although she was a dignified and credible witness, she had not known of his drug use at the wedding until he told her some time later.

Third, the individual submitted results from a random drug test administered in November 2008. While negative results cut in the individual's favor, they only show that he abstained from using illegal drugs for a period prior to the test. Given his poor credibility and the limited value of the testimony of his witnesses, the results from a single drug test do not resolve the security concern.

Criterion L

In signing a DOE Drug Certification, an individual gives the DOE their personal commitment that they will avoid illegal drugs while holding a DOE access authorization. The DOE Drug Certification also reflects the individual's understanding that absent their personal commitment, their prior drug use would have precluded them from holding an access authorization. *Personnel Security Hearing, Case No. TSO-0655 (2009)*. When an individual uses illegal drugs after signing a DOE Drug Certification, they break the trust that the DOE security program is based upon. *Personnel Security Hearing, Case No. TSO-0690 (2009)*. By signing each DOE Security Acknowledgment, the individual recognized that if he used illegal drugs again, he may lose his access authorization.

The LSO's Criterion L security concern stems from the individual's use of illegal drugs after signing a DOE Drug Certification and four DOE Security Acknowledgments. To resolve the security concern, the individual testified that his acquaintance presented him the marijuana unexpectedly and that he smoked it because he felt social pressure to do so. He testified that he did not think of his access authorization, and had he more time to consider whether to smoke the marijuana, he would not have done so.

I find the individual's explanation unpersuasive. He could have abstained and left the group. Instead, he did not think of his access authorization, succumbed to internal pressure, and stayed for at least an hour. An access authorization holder must remain cognizant of their clearance and handle compromising situations. The individual's failure to do so shows that he is not fit for an access authorization.

Therefore, I find that the individual has not resolved the LSO's Criterion L security concern.

V. Conclusion

Because the individual has not resolved the LSO's Criterion K and L security concerns, I find that the DOE should not restore his access authorization.

The parties may seek review of this Decision by an Appeal Panel, under the regulation set forth at 10 C.F.R. § 710.28.

David M. Petrush
Hearing Officer
Office of Hearings and Appeals

Date: August 11, 2009