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November 9, 2009

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Hearing Officer's Decision

Name of Case: Personnel Security Hearing

Date of Filing: July 7, 2009

Case Number: TSO-0783

This Decision concerns the eligibility of XXXXXXXXXXXX ("the Individual") for a DOE access authorization.¹ This Decision will consider whether, based on the testimony and other evidence presented in this proceeding, the Individual's request for a DOE access authorization should be granted. For the reasons detailed below, I find that the Individual's request for access authorization should be granted.

I. BACKGROUND

This administrative review proceeding began with the issuance of a Notification Letter by a Department of Energy (DOE) local security office (LSO), informing the Individual that information in the possession of the DOE created a substantial doubt pertaining to his eligibility for an access authorization.² See Notification Letter, June 8, 2009.

The Notification Letter cites as the basis for the security concerns in this case 10 C.F.R. § 710.8(l) (Criterion L). *Id.* Specifically, the Notification Letter states that the Individual tested positive for cocaine during a random drug screening in November 2004, despite the Individual (1) being aware of his employer's zero tolerance policy regarding illegal drugs, (2) having stated his intent in a November 1996 Letter of Interrogatory (LOI) and December 1996 Drug Certification form not to use illegal drugs in the future, (3) signing a DOE Security Acknowledgment form in September 2004, indicating his understanding of DOE's policy regarding illegal drug use, and (4) being in process for a security clearance at the time of the cocaine use.³ *Id.*

¹ Decisions issued by the Office of Hearings and Appeals (OHA) are available on the OHA website located at <http://www.oha.doe.gov>. The text of a cited decision may be accessed by entering the case number of the decision in the search engine located at <http://www.oha.doe.gov/search.htm>.

² Access authorization, also known as a security clearance, is an administrative determination that an individual is eligible for access to classified matter or special nuclear material. 10 C.F.R. § 710.5.

³ The 2004 request for the Individual's security clearance was withdrawn after the Individual resigned in lieu of termination following his positive drug test. The Individual's current employer submitted a request for a security clearance on the Individual's behalf in December 2008. DOE Ex. 4.

Upon receipt of the Notification Letter, the Individual requested a hearing in this matter. *See* Individual's Hearing Request, June 5, 2009. At the hearing, the Individual, represented by counsel, presented his own testimony, as well as the testimony of his wife, his friend, and five current or former work colleagues. The DOE counsel presented the testimony of one witness – the personnel security specialist assigned to this case.⁴

II. HEARING TESTIMONY

A. The Personnel Security Specialist

The personnel security specialist assigned to this matter testified regarding LSO's security concerns in this case.⁵ She stated that, given his past marijuana use, the Individual was offered the Drug Certification form in 1996 based on his stated intention in a 1996 LOI never to use illegal drugs again in the future. Hearing Transcript ("Tr.") at 15. Based on the Individual's promise to refrain from future illegal drug use, given in the LOI and on the Drug Certification form, the DOE granted the Individual a security clearance in 1996. At the same time the DOE granted the Individual's clearance, the Individual was given an initial briefing in which he was informed of the DOE's zero tolerance drug policy. Tr. at 16. The Individual relinquished his security clearance in 1997 when he left his employment with the DOE contractor. He returned in 2004 to work for a different contractor, who requested a security clearance for the Individual.⁶ In September 2004, the Individual completed a Questionnaire for National Security Positions (QNSP) and a Security Acknowledgement form, which reminded him of DOE's drug policy. Tr. at 16-17. Despite these factors, the Individual used cocaine two months after completing the QNSP and while in process for a security clearance. Tr. at 17.

According to the personnel security specialist, the LSO does not perceive the 2004 cocaine use to be a violation of the 1996 Drug Certification form. Rather, the drug use is a violation of the Individual's written promise to the DOE in his LOI to refrain from any future illegal drug use. *Id.* She added that the Individual was only offered the opportunity to sign the Drug Certification form, and subsequently granted an access authorization, based on that commitment to the DOE. Tr. at 17-18. She added that the violation of that promise is of concern because the Individual was a knowledgeable participant in the security process, having been informed at least four times of the DOE's drug policy (in the 1996 LOI, the 1996 Drug Certification form, the 1996 initial briefing when granted a security clearance, and on the 2004 QNSP), and still chose to use cocaine in November 2004. Tr. at 18-19. The personnel security specialist also added that there is a concern regarding the risk of recurrence. She noted that the Individual used an illegal drug eight years after signing the LOI stating his intent to refrain from future drug use and over 20

⁴ The Individual submitted 27 exhibits into the record; they are lettered Indiv. Exs. A-AA. The DOE Counsel tendered 15 exhibits, numbered DOE Exs. 1 - 15.

⁵ Although the Individual signed a Drug Certification form in 1996, the Individual was not in possession of an access authorization at the time of his November 2004 cocaine use. The clearance had been requested on his behalf but not yet granted. Therefore, I requested the testimony of the personnel security specialist in order to clarify the LSO's position as to whether the LSO contended that the Individual's November 2004 cocaine use was a violation of the 1996 Drug Certification form.

⁶ The record indicates that the Individual left his position with the first DOE contractor in February 1997. Tr. at 156.

years since his previous illegal drug use, and it has only been five years since his last known illegal drug use. Tr. at 20.

B. The Individual

The Individual is fifty-one years old. Tr. at 153. He did not dispute any of the facts listed in the Notification Letter. Tr. at 177. The Individual used marijuana between 1977 and 1980, during his military career, and received an early discharge under honorable conditions as a result. Tr. at 156, 158, 178. He disclosed the prior marijuana use when he applied for a position with a DOE contractor in 1996. He completed a LOI in November 1996 on which he indicated that his intent was “never to use” illegal drugs. Tr. at 188; *see also* DOE Ex. 9. He was offered a DOE Drug Certification form in December 1996 in order to help mitigate the concerns raised by the marijuana use. Tr. at 156; *see also* DOE Ex. 11. The Individual stated that he was not lying regarding his intentions to refrain from illegal drug use when he completed the forms. Tr. at 185. In early 1997, the Individual left his position with the DOE contractor, unaware that he had been granted a security clearance. Tr. at 156. He became employed by another DOE contractor in 2004 who requested a security clearance on the Individual’s behalf. Tr. at 185.

The Individual admitted at the hearing that he was aware that the DOE contractor had a policy against the use of illegal drugs. *Id.* He further acknowledged that he used cocaine in November 2004, breaking his past promise to the DOE that he would refrain from the use of illegal drugs in the future. Tr. at 156 - 57. The Individual described the circumstances surrounding his 2004 cocaine use. He stated that he and his wife attended a party at the home of two college friends. Tr. at 157. He was drinking during the party. *Id.* At a point during the party, the Individual went to the master bedroom to use the rest room and saw some of the hosts’ friends he met earlier using cocaine in the bedroom. Tr. at 158. They offered him some of the drug and he used it. *Id.* He did not know the people who offered him the cocaine prior to meeting them at the party. *Id.* He does not currently associate with them. *Id.* That incident was the first time he ever tried cocaine. Tr. at 159. He does not know why he used it. *Id.* The Individual stated that it was “an impulsive sort of thing” and added that maybe it was a lapse in judgment attributable to the alcohol he consumed that night. *Id.* The following week, the Individual was selected for a random drug screening at work in which he tested positive for cocaine. *Id.* He resigned from his position that day. Tr. at 163.

The Individual stated that he immediately regretted his actions and knew the cocaine use was a mistake and it is “something that [he] would never repeat.” Tr. at 162, 173. He added that if he were ever in the same situation he would “just turn around and leave, immediately leave the premises.” Tr. at 173. He stated that it was “a very bad decision” and “an isolated occurrence.” Tr. at 186.

The Individual stated that he had not used any illegal drugs since 1980, and has not used any since the incident in November 2004. Tr. at 165, 193. He does not associate with anyone who uses illegal drugs. Tr. at 165, 197. He also no longer associates with the people who hosted the November 2004 party. Tr. at 197. Since 2004, the Individual has undergone random drug screenings as part of his current employment, and undergone other voluntary drug screenings, and has tested negative for illegal drugs on each of them. Tr. at 168 – 171; *see also* Individ. Exs. I

– L, Z, AA. The Individual spends his free time outside of work with his family, working on his home, or playing golf. Tr. at 173. He has again stated his intent to refrain from any illegal drug use in the future. Tr. at 189. He stated that this is different from the statements he signed in 1996 because he has learned his lesson since then and faced the repercussions. Tr. at 189 - 90. He understood what he was signing in 1996, but did not understand “the full ramifications of it.” Tr. at 191.

C. The Individual’s Wife

The Individual and his wife have known each other for 19 years and have been married for 17 years. Tr. at 113 - 14. Although she attended the November 2004 party with the Individual where he used cocaine, she was not aware of the Individual’s cocaine use until January 2005. Tr. at 116 - 17. The hosts of the party were friends the Individual knew from college. Tr. at 119. He no longer associates with those friends. *Id.* The Individual’s wife was surprised to learn there was cocaine at the party because she did not see any evidence of it. Tr. at 130. She was not aware the Individual used cocaine that night until the Individual told her about the incident several months later. Tr. at 129. She was both surprised and disappointed by his actions. Tr. at 131.

The Individual’s wife had never known the Individual to use illegal drugs. Tr. at 118. He has not used any illegal drug since November 2004. Tr. at 121. She has never seen any evidence of illegal drug use on the Individual or in their home. Tr. at 136. She believes the Individual’s mistake in using the cocaine in November 2004, and the resulting consequences, “just solidified his dedication to his family and his job. It was a mistake he made, he feels terrible about it, he wants to defend his character and his career.” Tr. at 121. The Individual’s wife believes the Individual will “absolutely not” repeat the mistake he made in using cocaine in 2004. Tr. at 135. She added that the incident has been “so devastating to him and potentially to his career.” *Id.* The Individual and his wife do not associate with anyone who uses illegal drugs. Tr. at 121.

According to his wife, the Individual is “a good guy” who has always been consistent as a husband and father. Tr. at 134. His priorities are his family and his work. Tr. at 120. The Individual spends his free time helping their children with their homework and sports. *Id.* They do not often attend parties or social gatherings. Tr. at 121. She believes the Individual is “a man of his word.” Tr. at 136.

D. The Individual’s Friend

The Individual’s friend has known the Individual for approximately 30 years. Tr. at 25. The Individual’s friend has never seen him use illegal drugs. Tr. at 27, 33. The friend has also never seen any evidence of drug use in the Individual’s home. Tr. at 37 - 38. The Individual’s friend stated that, for as long as he has known him, the Individual has always been honest and kept his word. Tr. at 27 – 28, 36. The Individual is “a real family man” whose priorities are his family and his work. Tr. at 35, 39. The Individual does not socialize much. Beyond getting together with the friend, the Individual spends most of his time with his family. Tr. at 41.

The Individual's friend is aware of the Individual's cocaine use in November 2004. Tr. at 29. The Individual "knew it was a bad decision" and regretted it. Tr. at 29, 40. The Individual's friend believed the drug use was out of character for the Individual, stating, "that's just not him." Tr. at 40.

E. The Individual's Co-Workers

Several of the Individual's current and former work colleagues testified on his behalf. Each of them believed the Individual to be honest and trustworthy and were surprised to learn of his November 2004 cocaine use. Tr. at 48, 79 - 80, 85, 98 - 100, 145. The Individual is considered an excellent worker and valuable employee. Tr. at 96, 101, 143. The Individual's work colleagues stated that the Individual knew his cocaine was a lapse in judgment and that he greatly regretted his mistake in using the drug. 58, 70, 84, 156.⁷

III. STANDARD OF REVIEW

The regulations governing the Individual's eligibility for an access authorization are set forth in 10 C.F.R. Part 710, "Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material." An individual is eligible for access authorization if such authorization "would not endanger the common defense and security and would be clearly consistent with the national interest." 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." *Id.* See generally *Dep't of the Navy v. Egan*, 484 U.S. 518, 531 (1988) (the "clearly consistent with the interests of national security" test indicates that "security clearance determinations should err, if they must, on the side of denials").

Under Part 710, the DOE may suspend an individual's access authorization where "information is received that raises a question concerning an individual's continued access authorization eligibility." 10 C.F.R. § 710.10(a). Derogatory information includes, but is not limited to, the information specified in the regulations. 10 C.F.R. § 710.8. Once a security concern is raised, the individual has the burden to bring forward sufficient evidence to resolve the concern.

In considering whether an individual has resolved a security concern, the Hearing Officer considers various factors, including the nature of the conduct at issue, the frequency or recency of the conduct, the absence or presence of reformation or rehabilitation, and the impact of the foregoing on the relevant security concerns. 10 C.F.R. § 710.7(c). The decision concerning eligibility is a comprehensive, common-sense judgment based on a consideration of all relevant information, favorable and unfavorable. 10 C.F.R. § 710.7(a). In order to reach a favorable decision, the Hearing Officer must find that "the grant or restoration of access authorization to the individual would not endanger the common defense and security and would be clearly consistent with the national interest." 10 C.F.R. § 710.27(a).

⁷ The Individual also submitted letters from several other work colleagues attesting to his honesty and good character. See *Indiv. Exs. B-H*.

IV. ANALYSIS

Criterion L concerns refer to conduct tending to show that the Individual was “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). In this case, the Criterion L concerns arise from the fact that the Individual used an illegal drug in November 2004, despite having previously made written commitments to the DOE that he would refrain from any future use or involvement with illegal drugs. Although the Individual was not in possession of a security clearance at the time the November 2004 cocaine use occurred, he was in process for a security clearance and his cocaine use violated both his stated intent in the 1996 LOI and the 2004 Security Acknowledgement form. There is no question that a violation of a written commitment to DOE raises security concerns. *See* 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”), Guideline E, ¶¶ 15, 16(f). In addition, the illegal drug use is illegal conduct which calls into question the Individual’s honesty and reliability, and his willingness to follow laws, rules, or regulations. *See* Adjudicative Guidelines, Guideline J, ¶¶ 24, 25b. Therefore, the only question remaining is whether the Individual has presented sufficient evidence to adequately mitigate the concerns.

Among the factors which could serve to mitigate both security concerns raised by the Individual’s criminal conduct and his violation of a written commitment to the DOE are the passage of time, the infrequency of the behavior, or that the behavior happened under such unusual circumstances that it is unlikely to recur in the future. *See* Adjudicative Guidelines, Guideline E, ¶ 17(c); Guideline J, ¶ 32(a). In this case, the Individual testified that he did not know why he used the cocaine in November 2004 and that he regrets his decision to do so. He also stated that he had not used any illegal drugs between 1980 and 2004, has not used any illegal drug since that time, and has no plans to do so in the future. His testimony was largely corroborated by the testimony of his wife and friend, both of whom testified that the Individual is not a drug user, does not socialize with anyone who uses illegal drugs, and recognizes that his actions were a mistake. All of the Individual’s witnesses testified that the Individual is an honest person, that his use of cocaine in November 2004 was out of character for him, and that the Individual was remorseful for his conduct.

There is no dispute that the Individual was fully aware of the DOE’s zero tolerance policy regarding illegal drug use, having participated in the security process as early as 1996, and that he chose to use an illegal drug in 2004, while in process for a security clearance. This is an extraordinary lapse in judgment which calls into question his trustworthiness, reliability, and willingness to comply with laws, rules, and regulations. However, based on the record in this case, I find that the Individual’s cocaine use in 2004 was an isolated lapse in otherwise good judgment, which occurred over five years ago. I find that the Individual, having been subject to the negative consequences of his lapse in judgment, has learned from his mistake and will not repeat it in the future. In addition, the Individual no longer socializes with the friends who hosted the 2004 party, making it unlikely that he will encounter the people who offered him the cocaine at the party. Further, the Individual rarely socializes with anyone other than his family

and one close friend, making it unlikely that he will place himself in the same circumstances which led to his cocaine use in 2004. Finally, the Individual has been subject to random drug screenings over the past several years through his employment, and has tested negative for drug use on each of them. This demonstrates a pattern of responsible behavior on the part of the Individual.

Based on the foregoing, I find that the Individual has presented evidence sufficient to mitigate the Criterion L security concerns raised by his use of cocaine in November 2004. Accordingly, he has mitigated the security concerns listed in the Notification Letter.

V. CONCLUSION

Upon consideration of the record in this case, I find that there was evidence that raised doubts regarding the Individual's eligibility for a security clearance under Criterion L. I also find that the Individual has presented sufficient information to fully resolve those concerns. Therefore, I conclude that granting the Individual's request for access authorization "would not endanger the common defense and security and would be clearly consistent with the national interest." 10 C.F.R. § 710.7(a). Accordingly, I find that the Individual's request for DOE access authorization should be granted.

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

Diane DeMoura
Hearing Officer
Office of Hearings and Appeals

Date: November 9, 2009