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September 20, 2002
DECISION AND ORDER
OFFICE OF HEARINGS AND APPEALS

Hearing Officer's Decision

Case Name: Personnel Security Hearing

Date of Filing: October 4, 2001

Case Number: VSO-0492

This Decision concerns the eligibility of XXXXXXX XXXXX XXXXXXX (hereinafter referred to as "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."^{1/} A Department of Energy (DOE) Operations Office suspended the individual's access authorization under the provisions of Part 710.^{2/} As set forth in this Decision, I have determined on the basis of the evidence and testimony presented in this proceeding that the individual's security clearance should be restored.

I. Background

The provisions of 10 C.F.R. Part 710 govern the eligibility of individuals who are employed by or are applicants for employment with DOE, contractors, agents, DOE access permittees, and other persons designated by the Secretary of Energy for access to classified matter or special nuclear material. Part 710 generally provides that "[t]he decision as to access authorization is a comprehensive, common-sense judgment, made

^{1/} An access authorization is an administrative determination that an individual is eligible for access to classified matter or special nuclear material. 10 C.F.R. § 710.5. Such authorization will be referred to variously in this Decision as an access authorization or security clearance.

^{2/} On September 11, 2001, the DOE issued revisions of the Part 710 regulations, amending procedures for making final determinations of eligibility for access authorization. 66 Fed. Reg. 47061 (September 11, 2001). The revised regulations were effective immediately upon publication and govern the present Decision.

after consideration of all relevant information, favorable and unfavorable, as to whether the granting or continuation of 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).

In this instance, the individual obtained a security clearance from DOE as a condition of his employment with a DOE contractor. However, DOE initiated formal administrative review proceedings by informing the individual that his access authorization was being suspended pending the resolution of certain derogatory information that created substantial doubt regarding his eligibility. This derogatory information is described in a Notification Letter subsequently issued to the individual on August 22, 2001, and falls within the purview of potentially disqualifying criteria set forth in the security regulations at 10 C.F.R. § 710.8, subsections k and l. More specifically, the Notification Letter alleges that the individual has "[t]rafficked in, sold, transferred, possessed, used, or experimented with a drug or other substance listed in the Schedule of Controlled Substances . . .," 10 C.F.R. § 710.8(k) (Criterion K), and has "engaged in unusual conduct . . . which tends to show that [he] is not honest, reliable, or trustworthy, or which furnishes reason to believe that [he] may be subject to pressure, coercion, exploitation, or duress which may cause [him] to act contrary to the best interests of the national security," 10 C.F.R. § 710.8(l) (Criterion L). The bases for these findings are summarized below.

The Notification Letter states that in April 2000, the individual tested positive for marijuana on a scheduled drug test taken by the individual to secure his commercial driver's license. During a subsequent Supplemental Investigation (SI) conducted concerning the matter, the individual freely admitted that he used marijuana that was provided to him by his spouse a few days prior to the drug test. The individual further acknowledged during the SI that he was aware that it was wrong and illegal to use any type of controlled substance. The Notification Letter further states that on June 16, 1992, the individual signed a DOE Drug Certification in which he agreed never to be involved with illegal drugs, and acknowledged his understanding that any such use would place his security clearance in jeopardy.

In a letter received by the DOE Office of Hearings and Appeals (OHA) on October 4, 2001, the individual exercised his right under Part 710 to request a hearing in this matter. 10 C.F.R. § 710.21(b). After conferring with the individual and the appointed DOE Counsel, 10 C.F.R. § 710.24, a hearing date was established. At the hearing, the DOE Counsel called a Personnel Security Specialist as its sole witness. Apart from testifying on his own behalf, the individual called as witnesses his supervisor and a co-worker, who are both close friends, and also his Employee Assistance Program counselor (EAP Counselor). The transcript taken at the hearing will be hereinafter cited as "Tr.". Various documents that were submitted by the DOE Counsel and the

individual during this proceeding constitute exhibits to the hearing transcript and will be cited as "Exh.".

Summary of Findings

The following factual summary is essentially uncontroverted. However, I will indicate instances in which there are disparate viewpoints regarding the information presented in the record.

The individual accepted a position with a DOE contractor in 1992 and was required to obtain a security clearance as a condition of his employment. In the course of investigating the individual's suitability to hold a security clearance, the individual revealed that he had previously used illegal drugs and he therefore was required to complete a Drug Questionnaire. In his Drug Questionnaire, dated June 3, 1992, the individual specified that he had used one illegal drug, marijuana, on seven or eight different occasions while in college. On the basis of this information, DOE required the individual to execute a Drug Certification as a prerequisite to receiving his security clearance. In the Drug Certification, executed on June 16, 1992, the individual agreed to never be involved with illegal drugs while holding a DOE access authorization, and acknowledged his understanding that violation of this agreement may result in the loss of his security clearance and job.

However, as stated in the Notification Letter, the individual tested positive for marijuana on a drug test administered by his employer in April 2000. Upon receiving this information, the individual's employer immediately placed the individual on two weeks suspension without pay and required that he enter into a drug education/counseling program administered by the employer's Employee Assistance Program (EAP). This program entailed monthly counseling sessions with the EAP Counselor coupled with random drug screens, over a one-year period beginning in May 2000.

In March 2001, DOE initiated a Supplemental Investigation (SI), conducted by investigators from the U.S. Office of Personnel Management (OPM), into the circumstances that precipitated the individual's positive drug test for marijuana. During the SI, the individual freely admitted to the OPM investigators that in April 2000, he smoked a marijuana cigarette at home with his wife during the weekend prior to the failed drug test. The individual explained that the marijuana cigarette was given to his wife by an acquaintance at her health club. The individual stated further that they did not smoke the marijuana when his wife first showed it to him, but they later smoked the marijuana after talking about it and believing that it would create a feeling of nostalgia stemming back to their college days. The individual's wife corroborated the story recounted by the individual to the OPM investigators. The individual and his wife also stated that this marijuana use was an isolated event and

that neither of them had smoked marijuana since college. The individual erroneously believed that this one instance of sharing a single marijuana cigarette would not be detected in a drug screening and the individual himself ironically scheduled the failed drug test the following week. Although the individual is subject to random screening, the individual explained that he scheduled this particular drug test himself since it was required in order to maintain his commercial driver's license under Department of Transportation (DOT) regulations.

During the Supplemental Investigation, however, the individual further revealed that the information given on his 1992 Drug Questionnaire was not completely accurate. The individual informed the investigators that in addition to marijuana, he now remembers trying cocaine and quaaludes while in college. According to the individual, he did not intentionally conceal this other drug use but did not recall it when rushing to complete the Drug Questionnaire by the deadline imposed. The individual stated that in the course of his EAP counseling sessions, however, he was led to reflect more deeply upon prior instances of drug use and recollected single occurrences in which he used cocaine and quaaludes in college. The individual therefore reported this additional drug use to the OPM investigators.

The individual was fully cooperative in his EAP treatment program and successfully completed all requirements in May 2001. The EAP Counselor is highly complimentary of the individual and his efforts toward full rehabilitation and reformation. The individual is adamant that he learned his lesson and will never use illegal drugs again. For reasons unrelated to the incident, the individual is now divorced from the wife who brought home the marijuana cigarette.

II. Analysis

A DOE administrative review proceeding under 10 C.F.R. Part 710 is not a criminal matter, in which the burden is on the government to prove the defendant guilty beyond a reasonable doubt. *See Personnel Security Hearing*, Case No. VSO-0078, 25 DOE ¶ 82,802 (1996). In this type of case, we are dealing with a different standard designed to protect national security interests. A hearing is "for the purpose of affording the individual an opportunity of supporting his eligibility for access authorization." 10 C.F.R. § 710.21(b)(6). Once DOE has made a showing of derogatory information raising security concerns, the burden is on the individual to come forward at the hearing with evidence to convince the DOE that restoring his access authorization "would not endanger the common defense and security and would be clearly consistent with the national interest." 10 C.F.R. § 710.27(d). This standard implies that there is a strong presumption against the granting or restoring of a security clearance. *See Department of Navy v. Egan*, 484 U.S. 518, 531 (1988) ("clearly consistent with the national interest" standard for the granting of security clearances indicates "that security determinations should err, if they must, on the side of denials"); *Dorfmont v.*

Brown, 913 F.2d 1399, 1403 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991) (strong presumption against the issuance of a security clearance).

I have thoroughly considered the record of this proceeding, including the submissions of the parties, the evidence presented and the testimony of the witnesses at the hearing convened in this matter. In resolving the question of the individual's eligibility for access authorization, I have been guided by the applicable factors prescribed in 10 C.F.R. § 710.7(c): the nature, extent, and seriousness of the conduct; the circumstances surrounding the conduct, to include knowledgeable participation; the frequency and recency of the conduct; the age and maturity of the individual at the time of the conduct; the voluntariness of the participation; the absence or presence of rehabilitation or reformation and other pertinent behavioral changes; the motivation for the conduct; the potential for pressure, coercion, exploitation, or duress; the likelihood of continuance or recurrence; and other relevant and material factors. After due deliberation, it is my determination that the individual's access authorization should be restored since I conclude that such restoration would not endanger the common defense and security and would be clearly consistent with the national interest. 10 C.F.R. § 710.27(d). The specific findings that I make in support of this determination are discussed below.

A. Derogatory Information

In this case, the individual admittedly used an illegal drug, marijuana. While the individual maintains that it was an isolated, one-time occurrence, any use of illicit drugs raises the legitimate security concerns of DOE. As explained by the Personnel Security Specialist during the hearing, illegal drug use raises a security concern with regard to an individual's reliability and trustworthiness for it reflects a deliberate disregard for state and federal laws prohibiting such use. Tr. at 17, 31. "The drug user puts his own judgment above the requirements of the laws, by picking and choosing which laws he will obey or not obey. It is the further concern of the DOE that the drug abuser might also pick and choose which DOE security regulations he will obey or not obey with respect to protection of classified information."

Personnel Security Hearing, Case No. VSO-0013, 25 DOE ¶ 82,752 at 85,512 (1995); *see Personnel Security Hearing*, Case No. VSO-0283, 27 DOE ¶ 82,822 (1999). In addition, a person who uses cocaine or other illegal drug may possibly open himself to blackmail or other forms of coercion, because he may want to conceal his use. It has also been noted that "any drug usage while the individual possesses a [security] clearance and is aware of the DOE's policy of absolute abstention demonstrates poor judgment." *Personnel Security Hearing*, Case No. VSO-0023, 25 DOE ¶ 82,761 at 85,579 (1995).

DOE also suspended the individual's security clearance citing Criterion L, based upon its finding that he has engaged in unusual conduct which tends to show that he is not honest, reliable or trustworthy. The individual was a security clearance holder at the

time of his marijuana use and was well aware of DOE's zero-tolerance drug policy. In addition, the individual willingly used marijuana despite his promise by signing the Drug Certification in June 1992, never to use illegal drugs again while holding a DOE security clearance. The DOE further found that in completing his Drug Questionnaire in 1992, the individual failed to list his experimental use of cocaine and marijuana while in college.

In view of the undisputed record in this case, I find that DOE appropriately invoked Criterion K and Criterion L in suspending the individual's access authorization. I now turn to the mitigating evidence presented in the record of this case. For the reasons below, I have concluded that the individual has presented sufficient mitigating evidence to overcome the security concerns of DOE.

B. Mitigating Evidence

1. Marijuana Use

I initially find that the individual's use of marijuana with his wife was a one-time isolated incident. The individual appears truthful to me and is adamant in stating that his use of marijuana in April 2000 was an isolated occurrence, and was the only time he used marijuana since college. Tr. at 62-63, 67. A number of Hearing Officers have considered cases in which an individual claims that a positive drug test was the result of an isolated incident of drug use occasioned by an uncharacteristic lapse in judgment. As it has previously been pointed out, a claim of this nature raises a degree of skepticism since while it is possible, it is certainly unlikely that a one-time drug use would happen to be followed in close proximity by a random drug test. *See Personnel Security Hearing*, Case No. VSO-0094, 26 DOE ¶ 82,753 at 85,515 (1996). In the present case, however, the drug test failed by the individual was not random but one scheduled by the individual himself who mistakenly believed that a one-time use of a small amount of marijuana would not be detected. Tr. at 50. That the individual would schedule a drug test shortly after such use appears to support his claim that it was a one-time isolated incident.

However, other evidence leads me to accept the individual's assertion that his use of marijuana was an isolated occurrence. First, the individual's wife corroborated the individual's account to the OPM investigators who conducted the Supplemental Investigation. The individual's wife confirmed that she was given the marijuana cigarette by an acquaintance she met while exercising at her health club,^{3/} and that

^{3/} According to the individual's wife, she met the woman at the gym where she works out two to three times per week. On one occasion, they began talking about their high school and college experiences while using the treadmill adjacent to one another, and the individual's wife mentioned that she and the individual occasionally used marijuana while in college. The woman subsequently gave her a marijuana cigarette wrapped in a brown paper, stating that it was a gift for "old times sake." Exh. E (SI) at 4-5.

prior to the evening when they smoked the marijuana neither she nor the individual had used or experimented with any illegal substance since college. Exh. E (SI) at 4-5. Secondly, the individual has been tested a number of times prior to May 2000 and had never tested positive for a controlled substance. The individual has been subject to drug random testing since he was hired by the DOE contractor and has been randomly selected on four or five occasions under this program. In addition, the individual was required to submit to mandatory drug testing a minimum of four times a year under DOT rules. Tr. at 51-52. The EAP Counselor confirmed that the individual had never received a positive test result prior to May 2000. *Id.*

Next, I also find convincing evidence in the record that the individual is fully reformed from the behavior which led him to yield to his wife's suggestion that they smoke the marijuana. After receiving the positive test result, the individual was required by his employer to immediately begin monthly counseling sessions with his EAP Counselor and random drug screens over the next twelve months. *See* Exh. L and N. The individual fully satisfied all aspects of the treatment program, as reported by the EAP Counselor in her letter to the individual's employer dated May 29, 2001. Exh. O. However, the EAP Counselor was much more glowing in her praise of the individual in her hearing testimony. According to the EAP Counselor, the individual "took to treatment like a duck to water, [p]articipated, got involved" Tr. at 39, and "[h]e completed the program to the best of his ability . . . a success story for my office." Tr. at 43. Indeed, the EAP Counselor stated that she considered the individual to be a model and would use him to counsel others in the drug treatment program. Tr. at 48.

I believe the individual has remained drug free in the two and one-half years that have elapsed since April 2000, and that he will continue to do so. As noted by EAP Counselor, the individual has remained subject to random drug testing by his employer as well as mandatory drug testing (now six times a year) under DOT rules, and has not received another positive test result. Tr. at 42, 51-52. The EAP Counselor considers the individual reformed and rehabilitated from his isolated instance of drug use, and does not believe that the individual will return to use of illegal drugs. Tr. at 46-47, 52. Finally, I found the individual very persuasive in his testimony that he learned his lesson and that the EAP counseling he received has strengthened his resolve to never use illegal drugs again. Tr. at 64-65.

In similar cases, Hearing Officers have concluded that the security concerns arising from drug use were overcome where the individual was able to present persuasive evidence that the drug use was an aberrational, isolated occurrence and that the

individual will not be involved in the use of illegal drugs again. *See, e.g., Personnel Security Hearing, Case No. VSO-0116, 26 DOE ¶ 82,765 (1997), aff'd (OSA 1997); Personnel Security Hearing, Case No. VSO-0128, 26 DOE ¶ 82,784 (1997), aff'd (OSA 1997).* Accordingly, I conclude that the individual has adequately mitigated the concerns of DOE under Criterion K.^{4/}

2. Trustworthiness

DOE also expresses security concerns in the Notification Letter under Criterion L that the individual has engaged in conduct which tends to show that he is not honest, reliable and trustworthy. In this regard, DOE states that the individual violated the Drug Certification that he signed in 1992 promising to never use illegal drugs again, and failed to disclose on his 1992 Drug Questionnaire his experimentation with cocaine and quaaludes while in college.

Certainly, the violation of a Drug Certification is a very serious matter, casting doubt upon the individual's judgment and trustworthiness. *See Personnel Security Hearing, Case No. VSO-0512, 28 DOE ¶ _____ (August 15, 2002); Personnel Security Hearing, Case No. VSO-0321, 27 DOE ¶ 82,842 (2000); Personnel Security Hearing, Case No. VSO-0266, 27 DOE ¶ 82,811(1999).* In the present case, however, the individual did not go seeking drugs on his own volition but was instead tempted by his wife who brought the marijuana home. The individual proved to be vulnerable to this temptation apparently because he and his wife had used marijuana together on several occasions while in college, where they met. The individual maintains that he did not recall signing the Drug Certification at the time, but he was well aware that use of an illegal drug could place his security clearance and job in jeopardy. Tr. at 68. Thus, the individual admittedly exercised very poor judgment in yielding to his wife's suggestion

^{4/} The "Adjudicative Guidelines for Determining Eligibility for Access to Classified Information," 10 C.F.R. Part 710, Appendix B, specify the conditions that mitigate security concerns stemming from illegal drug use:

- (a) The drug involvement was not recent;
- (b) The drug involvement was an isolated or aberrational event;
- (c) A demonstrated intent not to abuse drugs in the future;
- (d) Satisfactory completion of a prescribed drug treatment program, including rehabilitation and aftercare requirements, without recurrence of abuse, and a favorable prognosis by a credentialed medical professional.

Guideline H, 66 Fed. Reg. at 47070. In the present case, I find that the individual satisfies all of these conditions with the exception of (a), since his drug use in April 2000 still might be considered "recent." That the individual has had no further drug involvement in the 2½ years since that time, however, certainly supports his assertion that he will not use illegal drugs again.

to smoke the marijuana. The individual now states candidly that “I’m sorry that I did do that and I did break a promise.” Tr. at 68.

While the individual’s violation of his Drug Certification cannot totally be excused, I have determined that the individual has sufficiently mitigated the security concerns of DOE in this regard. In similar cases, Hearing Officers have found that the security concerns attached to the violation of a Drug Certification may be overcome under circumstances such as the present, where the individual’s drug use was an isolated aberrational event, the individual has acted in a forthright manner in facing the consequences of his action and there is convincing evidence that the individual’s drug use is highly unlikely to recur.^{5/} *See, e.g., Personnel Security Hearing, Case No. VSO-0313, 27 DOE ¶ 82,835 (2000).*

I am also persuaded by the testimony of the individual’s supervisor and co-worker, close friends of the individual, as well as the testimony of the EAP Counselor, with the regard to the individual’s reliability and trustworthiness. The supervisor and co-worker have known the individual for more than ten years and were uniform in their praise of the individual as honest, dependable and trustworthy. Both expressed considerable surprise when the individual was suspended for failing a drug test. Tr. at 54-55, 57-58. As noted above, the EAP Counselor deems the individual to be honest and trustworthy to the degree that she would use the individual to counsel others in her program. Tr. at 48. The EAP Counselor further noted that she had spoken to the individual’s general manager and other co-workers as part of her assessment of the individual. She found that “[the individual] has a very good reputation with that group of people and I don’t have any evidence to indicate that he’s been anything but trustworthy.” Tr. at 52.

Finally, I believe that the individual is being honest when he says that at the time he filled out his Drug Questionnaire in 1992, he did not recall the single instances in college when he tried cocaine and quaaludes. The individual explained that at the time he filled out the Drug Questionnaire, he had one day to complete the form and mail it in and he remembered using only marijuana which he admittedly smoked on several occasions with friends while in college. Tr. at 70; Exh. J. The individual appeared to me to be truthful during his testimony that he did not recall the instances of experimental use of cocaine and quaaludes until undergoing EAP counseling when he was induced to think more carefully about any instances of prior drug use. Tr. at 66. The individual readily admitted that he experimented with cocaine and quaaludes during the Supplemental Investigation although he could have withheld this information. I believe his candor on this issue is consistent with my overall impression

^{5/} The EAP Counselor also deemed in significant that the individual is now divorced from the wife who brought home the marijuana. Tr. at 50. The individual clarified, however, that it was not the marijuana incident that precipitated their divorce. Tr. at 62.

of his honesty and truthfulness. On the basis of the record before me, I have concluded that the individual did not knowingly attempt to conceal these other instances of drug use when completing his Drug Questionnaire in 1992, but that his willingness to admit these matters at this time reflects his honesty and a reformed attitude with regard to drug use, achieved through successful EAP counseling.

II. Conclusion

As explained in this Decision, I find that DOE properly invoked 10 C.F.R. §§ 710.8(k) and (l) in suspending the individual's access authorization. For the reasons I have described above, I find that the individual has engaged in the use of illegal drugs and engaged in conduct that tends to show that he is not honest, reliable and trustworthy. I have also determined, however, that the individual has adequately mitigated the legitimate security concerns stemming from these actions. I therefore conclude that restoring the individual's access authorization would not endanger the common defense and security and would be consistent with the national interest. Accordingly, I find that the individual's access authorization should be restored.

The review procedures applicable to proceedings under Part 710 were revised effective September 11, 2001. 66 Fed. Reg. 47061 (September 11, 2001). Under the prior procedures, the review of a Hearing Officer Opinion was performed by the Director, Office of Hearings and Appeals. 10 C.F.R. § 710.28(a). Under the revised procedures, the review is performed by an Appeal Panel. 10 C.F.R. § 710.28(b)-(e).

Fred L. Brown
Hearing Officer
Office of Hearings and Appeals

Date: September 20, 2002