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DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Hearing Officer's Decision

Case Name: Personnel Security Hearing

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Case Number: VSO-0582

This Decision concerns the eligibility of XXXXXXXXXXXXXXX (hereinafter referred to as "the individual") for 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/}

I. Background

Because of the requirements of the individual's job, his employer, a Department of Energy (DOE) contractor, applied for a security clearance on his behalf. As part of the DOE's investigation of the individual, he completed Questionnaires for National Security Positions (QNSPs) in February and March 2001, and was interviewed by a DOE Personnel Security Specialist in October 2001. After reviewing the results of this investigation, the Director of the local Security Office determined that derogatory information existed which cast into doubt the individual's suitability for access authorization. The Director informed the individual of this determination in a letter which set forth in detail the DOE's security concerns and the reasons for those concerns. I will hereinafter refer to this letter as the Notification Letter. The Notification Letter also 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 a security clearance.

The individual requested a hearing on this matter. The Manager forwarded the individual's request to the Office of Hearings and Appeals and I was appointed the Hearing Officer. The hearing was convened near the individual's job site. Four witnesses testified at the hearing. A Personnel Security Specialist testified for the DOE and the individual and two of his co-workers testified for the individual.

^{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 in this Opinion as access authorization or a security clearance.

II. Statement of Derogatory Information

As indicated above, the Notification Letter included a statement of derogatory information in possession of the DOE that created a substantial doubt as to the individual's eligibility to hold a clearance. This information pertains to paragraphs (f), (k) and (l) of the criteria for eligibility for access to classified matter or special nuclear material set forth at 10 C.F.R. § 710.8.

Paragraph (f) defines as derogatory any information indicating that the individual has "deliberately misrepresented, falsified, or omitted significant information from a Personnel Security Questionnaire, a Questionnaire for National Security Positions, . . . a Personnel Security Interview . . . , or proceedings conducted pursuant to § 710.20 through § 710.31." Specifically, the Notification Letter cites the individual's answer to question 24 of the March 2001 QNSP. That question asks, in pertinent part, "Since the age of 16 or in the last 7 years, whichever is shorter, have you *illegally* used any controlled substance, for example, marijuana . . ." (Emphasis in original). Applicants answering this question in the affirmative are then required to disclose the substance or substances used, the number of usages and the dates of each usage. The individual indicated on the form that he occasionally used marijuana in October 1998. However, the Letter states that during the individual's October 2001 Personnel Security Interview (PSI), he admitted having used marijuana in January 2001 and in the summer of 2000, and that the reason that he did not list the more recent drug usages on the QNSP was because of fear and because of his general frustration and concern over the depth of invasion of his privacy.

Paragraph (k) refers to information indicating that the individual has "possessed, used, or experimented with a drug or other substance listed in the Schedule of Controlled Substances established pursuant to section 202 of the Controlled Substances Act of 1970 except as prescribed or administered by a physician licensed to dispense drugs in the practice of medicine, or as otherwise authorized by law." With regard to this paragraph, the Notification Letter cites the individual's admissions during the PSI that he used marijuana weekly while in high school and "maybe once or twice every other year after high school until January 2001;" cocaine "about a half dozen times in approximately 1987 and LSD three or four times in the early 1980s." Notification Letter at 1.

Paragraph (l) concerns information showing that the individual has engaged "in any unusual conduct or is subject to any circumstances which tend to show that [he] 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 [him] to act contrary to the best interests of national security. Such conduct or circumstances include, but are not limited to, criminal behavior . . . , or violation of any commitment or promise upon which DOE previously relied to favorably resolve an issue of access authorization eligibility." Under this paragraph, the Letter refers to the individual's statement during the PSI that "[p]art of the interest [in marijuana use] was the fact that you were sort of . . . trying to beat the system a little bit." PSI at 39. The Notification Letter also referenced the allegations made pursuant to paragraphs (f) and (k).

III. Findings of Fact and Analysis

The criteria for determining eligibility for security clearances set forth at 10 C.F.R. Part 710 dictate that in these proceedings, a Hearing Officer must undertake a careful review of all of the relevant facts and circumstances, and make a “common-sense judgment . . . after consideration of all the relevant information.” 10 C.F.R. § 710.7(a). I must therefore consider all information, favorable or unfavorable, that has a bearing on the question of whether restoring the individual’s security clearance would compromise national security concerns. Specifically, the regulations compel me to consider the nature, extent, and seriousness of the individual’s conduct; the circumstances surrounding his conduct; the frequency and recency of the conduct; the age and maturity of the individual at the time of the conduct; the absence or presence of rehabilitation or reformation and other pertinent behavioral changes; the likelihood of continuation or recurrence of the conduct; and any other relevant and material factors. 10 C.F.R. § 710.7(c).

A DOE Personnel Security 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 the DOE has made a showing of derogatory information raising security concerns, the burden is on the individual to produce evidence sufficient 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). See Personnel Security Hearing, Case No. VSO-0013, 24 DOE ¶ 82,752 at 85,511 (1995) (affirmed by OSA, 1996), and cases cited therein. After careful consideration of the factors mentioned above and of all the evidence in the record in this proceeding, I find that the individual has failed to make this showing, and that he should therefore not be granted a security clearance at this time.

At the hearing, the individual did not contest the facts upon which the allegations in the Notification Letter are based. Instead, he attempted to explain his incomplete answer to question 24(a) by stating that it was his intention from the beginning to provide more complete information during the PSI. Hearing Transcript (Tr.) at 54. He further testified that he is no longer using illegal drugs, and that he is an honest and trustworthy person and would not represent an unacceptable security risk.

In support of this latter contention, the individual presented the testimony of two of his co-workers. These witnesses testified that in their experience, the individual has proven to be an excellent employee who is honest and of good character. Tr. at 28-52.

The individual testified that he has not “deliberately misrepresented or falsified information in any way to the Department of Energy” Tr. at 53-54. While he acknowledged that his answer to question 24(a) was incomplete, he testified that the question frustrated him because it asked for the dates of any usage, which he found difficult to provide. Tr. at 58. He said that he gave a date of October 1998 and indicated that his usage was “occasional” because “my thinking at the time . . . was . . . that I would have a chance to clarify all this information during the final interview” Tr. at 54. He stated that all of the information cited in the Notification Letter was “information that [he] freely gave,” and that this indicated that he was

trying “to be as honest as [he] could.” Id. Regarding his statement that part of his interest in marijuana was due to wanting to “beat the system a little bit,” Tr. at 60, he explained that this was how he felt about using the drug in high school, that, “like every rebellious teen, [he was trying] to find ways to just have fun. . . . But certainly not as an adult. . . . I believe that I, as an employee and as an adult, I’ve done everything . . . to conform. . . . I do everything I can to lead an upstanding life.” Id. He testified that his drug usage since high school has been “infrequent,” Tr. at 58, and that from 1989 to 1995, he was subject to a number of random drug screenings as a consequence of his employment, and passed all of them. Tr. at 70. The individual concluded that it was his intention to avoid all illegal drug use in the future. Tr. at 72.

After reviewing this testimony and the record in this matter as a whole, including the information submitted by the individual, I find that he has failed to successfully allay the security concerns set forth in the Notification Letter. With regard to the DOE’s “falsification” allegation under paragraph (f), I did not find the explanation that the individual gave at the hearing for his incomplete answer to question 24 to be credible. Instead, I believe that the individual intentionally omitted his most recent drug usage from his answer to that question in order to present himself in a more favorable light. When asked during the PSI why he had not listed his most recent marijuana usage on the QNSP, he replied

A: Fear. I don’t know, I don’t know why I didn’t list it.

Q: You don’t know why?

A: No. I guess the only concern . . . just fear.

Q. Were you afraid you wouldn’t get a clearance? What were you afraid of?

A: I guess the clearance and just . . . the depth of the invasion, the privacy . . . I was a little frustrated I think . . .with the questions.

Q. Okay. But you were concerned about how someone might view that. Or might view you if you had listed January 2001 [as the date of your last marijuana usage], is that right?

A. I guess so, yes.

Q. Okay. That they might draw a different conclusion.

A. Well, I was concerned that . . . they would see this as . . . a serious problem versus what I was viewing it as, just sort of a coincidental . . . circumstantial thing where I just happened to be in a place where . . . that was there.

Q. Okay.

A. I mean, I was concerned that someone would look at that and say, “Well, this guy’s got a habit here.”

PSI at 57-59. Moreover, even if I believed the individual’s explanation that he did not intend to mislead the DOE and intended to make a more complete disclosure of his use at a later date, I could not conclude that he has adequately addressed the DOE’s security concerns under paragraph (f). This is because, despite the question’s stated requirement that respondents “answer the questions fully and truthfully,” the individual deliberately omitted information that he knew to be significant from his answer.

Q. . . . But you have to admit . . . listing October of '98 versus listing March of 2001 would look different.

A. Oh, yeah.

Q. And would lead someone to a possible other conclusion. I mean, You could easily be lead to the conclusion by what you . . . listed, that 10/98 was your last use.

A. I guess.

PSI at 58. I therefore conclude that unresolved security concerns remain concerning paragraph (f).

I reach a similar conclusion regarding the DOE's concerns under paragraph (k) about the individual's marijuana use. During the PSI, the individual admitted having purchased and used marijuana on a regular basis during his high school years in the early 1980s. PSI at 29-35. If his usage had been limited to that period, I might be able to conclude that the DOE's concerns under paragraph (k) had been mitigated by the passage of time and the individual's age at that time. However, the individual admitted to having used marijuana in 1998 and 2000 and again in 2001. Although he indicated at the hearing that he does not intend to use marijuana again, Tr. at 72, I find nothing in the record that convinces me that the individual will continue to abstain once his eligibility for a clearance is no longer in question. I conclude that the individual has not successfully addressed the DOE's concerns under paragraph (k).

Finally, the individual's marijuana use and his lack of honesty about that use are "circumstances which tend to show that [he] is not honest, reliable, or trustworthy" within the meaning of paragraph (l) of the criteria for eligibility for access to classified matter or special nuclear material. As previously stated, the individual's co-workers attested at the hearing to the individual's honesty and character, and I find this testimony to be of some mitigating value. However, I believe that it is possible to be honest in certain areas of one's life, and dishonest in others, as is the case here. The individual also indicated at the hearing that he made a complete disclosure of his marijuana use during the PSI, and asserted that this administrative review proceeding would not have occurred had he not done so. Tr. 63, 72. Even assuming that these statements are true, I find it to be of scant mitigating value that the individual has been completely forthcoming and honest in some, but not all, of the instances in which candor and truthfulness have been required of him. The evidence and arguments put forth by the individual at the hearing are therefore insufficient to allay the DOE's concerns under paragraph (l). 2/

2/ There is an additional factor that causes me concern in this regard. During the PSI, the individual disclosed that he had been arrested in "the mid-1980s" for possessing an open container of alcohol in a public place. PSI at 19-23. When the interviewer asked him why he had not listed this arrest on his QNSP as required by question 23d, the individual replied that he didn't remember, but speculated that it might have been because he considered it to be "just a violation," as opposed to a serious "criminal offense." PSI at 28. Question 23d asks "Have you ever been charged with or convicted of any offense(s) related to drugs or alcohol?" Because of the length of time between the arrest and the QNSP, it is possible that the individual forgot about this incident, or honestly

(continued...)

IV. Conclusion

As explained in this Decision, I find that the individual has not presented evidence that is sufficient to mitigate the DOE's security concerns. Based on the record in this proceeding, I am therefore unable to conclude that granting the individual access authorization would not endanger the common defense and security and would be clearly consistent with the national interest. Accordingly, I find that the individual's access authorization should not be granted.

Robert B. Palmer
Hearing Officer
Office of Hearings and Appeals

Date: April 15, 2003

2/ (...continued)

believed that he was not required to disclose it, as he suggests. However, given the individual's deliberate lack of candor concerning his marijuana use, I cannot discount the possibility that this is another instance of the individual intentionally withholding information in order to portray himself in a more favorable light.

