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**United States Department of Energy
Office of Hearings and Appeals**

In the Matter of:	Personnel Security Hearing)	
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Filing Date:	July 17, 2013)	Case No.: PSH-13-0091
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Issued : October 10, 2013

Hearing Officer Decision

Janet R. H. Fishman, Hearing Officer:

This Decision concerns the eligibility of XXXXXXXXXXXXXXXXXXXX (hereinafter referred to as “the Individual”) to hold an access authorization^{1/} 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.” As fully discussed below, after carefully considering the record before me in light of the relevant regulations and Adjudicative Guidelines, I have determined that the Individual’s access authorization should be granted.

I. Background

The Individual is an applicant for a DOE security clearance. In 2013, the Individual completed a Questionnaire for Security Positions (QNSP). His responses to the question regarding his illegal drug use differed from his responses on other security forms completed in 2007 and 2011 when he occupied positions that required a security clearance.

On May 31, 2013, the Local Security Office (LSO) sent a letter (Notification Letter) to the Individual advising him that it possessed reliable information that created a substantial doubt regarding his eligibility to hold a security clearance. In an attachment to the Notification Letter,

^{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). Such authorization will be referred to variously in this Decision as access authorization or security clearance.

the LSO explained that the derogatory information fell within the purview of one potentially disqualifying criterion set forth in the security regulations at 10 C.F.R. § 710.8, subsection (f) (hereinafter referred to as “Criterion F”).^{2/}

Upon his receipt of the Notification Letter, the Individual exercised his right under the Part 710 regulations by requesting an administrative review hearing. The Director of the Office of Hearings and Appeals (OHA) appointed me the Hearing Officer in the case, and I subsequently conducted an administrative hearing in the matter. At the hearing, the Individual presented his own testimony and the testimony of three witnesses. The Individual also submitted one exhibit into the record. The LSO submitted nine exhibits into the record.

II. Regulatory Standard

A. Individual’s Burden

A DOE administrative review proceeding under Part 710 is not a criminal matter, where the government has the burden of proving the defendant guilty beyond a reasonable doubt. Rather, the standard in this proceeding places the burden on the Individual because it is designed to protect national security interests. This is not an easy burden for the Individual to sustain. The regulatory standard implies that there is a presumption against granting or restoring a security clearance. *See Department of Navy v. Egan*, 484 U.S. 518, 531 (1988) (“clearly consistent with the national interest” standard for granting 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).

An individual must come forward with evidence to convince the DOE that restoring his access authorization “will not endanger the common defense and security and will be clearly consistent with the national interest.” 10 C.F.R. § 710.27(d). The individual is afforded a full opportunity to present evidence supporting his eligibility for an access authorization. The Part 710 regulations are drafted so as to permit the introduction of a very broad range of evidence at personnel security hearings. Even appropriate hearsay evidence may be admitted. 10 C.F.R. § 710.26(h). Thus, an individual is afforded the utmost latitude in the presentation of evidence to mitigate the security concerns at issue.

B. Basis for the Hearing Officer’s Decision

In personnel security cases arising under Part 710, 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

^{2/} Criterion F concerns information where an individual has “deliberately misrepresented, falsified, or omitted significant information from a Personnel Security Questionnaire, a Questionnaire for Sensitive National Security Positions, a personnel security interview, written or oral statements made in response to official inquiry on a matter that is relevant to a determination regarding eligibility for DOE access authorization . . .” 10 C.F.R. § 710.8(f).

regulations to resolve any doubt as to a person's access authorization eligibility in favor of the national security. *Id.*

III. The Notification Letter and the Security Concerns at Issue

As previously noted, the LSO cites Criterion F as the basis for suspending the Individual's security clearance. To support its Criterion F allegations, the LSO relies on the Individual's falsification on his 2007 and 2013 QNSPs regarding his illegal drug use. Conditions that can raise a security concern include the deliberate omission, concealment, or falsification of relevant facts from any questionnaire completed during the personnel security process. *See* Guideline E ¶ 16 (a) 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).

IV. Findings of Fact

At age 27, after accepting a position with a DOE contractor, the Individual completed a QNSP in April 2007 without any advice or counsel. DOE Ex. 5; Tr. at 44-45. On that QNSP, the Individual responded negatively to the question regarding his illegal drug use. DOE Ex. 5 at 29.

In January 2011, the Individual left the DOE contractor and took a position with the DOE. In conjunction with his change of employment, his new employer requested a higher level security clearance for him. When he completed his QNSP in 2011, the Individual indicated that he had used illegal drugs from 1996 to 2007, a time covered by the 2007 QNSP. DOE Ex. 4 at 9. The Individual stated that he corrected the falsehood from his 2007 QNSP because the stronger security culture at the DOE made him realize he was wrong to have lied. Tr. at 47. Upon learning of the discrepancies between the 2007 and 2011 QNSP responses regarding illegal drug use, the DOE initiated the administrative review process. The Individual was afforded a hearing, but left his employment with the DOE before a decision was rendered on his access authorization. DOE Ex. 6 at 31-36. He took a position with a DOE contractor that did not require a security clearance. Tr. at 54-58.

In January 2013, he completed a third QNSP for his new employment with the DOE contractor. DOE Ex. 9. On that QNSP, he responded "no" to the question regarding whether he had used illegal drugs in the last seven years. DOE Ex. 9 at 12. However, in response to the question number 25 on the QNSP, regarding his investigation and clearance record, the Individual revealed that he previously held a security clearance and that clearance had been suspended because he falsified information on his 2007 QNSP. He did not specify that the falsified information regarded his illegal drug use. DOE Ex. 9 at 12-13. He stated, "during my application for . . . clearance, I admitted to having falsified a question on my first QNSP. After admitting this, my . . . investigation was stopped and my clearance was suspended to perform an investigation and hearing." DOE Ex. 9 at 13. The LSO called him in for a Personnel Security Interview (PSI) in March 2013. DOE Ex. 6. At that time, the Individual expressed surprise that he falsified the question about his illegal drug use on the QNSP. DOE Ex. 6 at 16-17. In a previous PSI, conducted in January 2012, the Individual stated that he never used marijuana in 2007. DOE Ex. 7 at 45.

V. Analysis

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 factors prescribed in 10 C.F.R. § 710.7(c)^{3/} and the Adjudicative Guidelines. After due deliberation, I have determined that the Individual's access authorization should be granted. I find that granting the Individual's DOE security clearance will not endanger the common defense and security and is clearly consistent with the national interest. 10 C.F.R. § 710.27(a). The specific findings that I make in support of this decision are discussed below.

First, I must consider the Individual's falsification on his 2013 QNSP. The DOE regulations require that an Individual deliberately falsified information on his QNSP to be considered as a security concern raised un Criterion F. 10 C.F.R. § 710.8(f). First, I note that he was surprised at the PSI and at the hearing that it had been less than seven years since his last illegal drug use.^{4/} DOE Ex. 6 at 16-17; Tr. at 56.

“Well, that's . . . I don't remember the specific date that I -- the last time I smoked marijuana. I know it was -- I think I smoked sometime in grad school once -- once or twice, I don't really remember, and so the date 2007, I know -- I know because I know that I moved out here on the 1st of January in 2007 and I know that I haven't smoked marijuana since I've been out here. That's a convenient date for me to say that I haven't used it after that date. But it's not like I smoked marijuana on January 30th -- or December 31st, 2006. You know, I don't remember when the previous time was, and I -- you know, when I was adding my years, I honestly thought that, you know, I don't remember smoking marijuana in 2006, and so that -- that's where the mistake came in.”

Tr. at 48-49. In addition, when questioned during the March 2013 PSI about his false answer in 2013, the Individual stated that in 2011 he was pushed for a date but could not remember the last time he used marijuana. DOE Ex. 6 at 14. He could remember that he had not used it since he moved to his current state of residence and, therefore, he said he last used marijuana in 2007. DOE Ex. 6 at 14. The Individual testified that his answer to the question about his illegal drug usage was a mistake. Tr. at 56. “It was an honest mistake . . . I know that I wouldn't have done it willfully.” Tr. at 56. His supervisor testified that they had a discussion in which the Individual stated that he was going to be completely honest on the 2013 QNSP because of his previous falsification. Tr. at 15-16. The Individual stated on his 2013 QNSP that his clearance had been suspended after the 2011 QNSP because he answered a question falsely in 2007. DOE Ex. 9 at

^{3/} Those factors include the following: 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 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 the conduct, the potential for pressure, coercion, exploitation, or duress, the likelihood of continuation or recurrence, and other relevant and material factors.

^{4/} At the hearing, the Individual determined that it had probably been more than seven years since his last illegal drug use; however, on his 2011 QNSP, he stated his last drug use was January 2007, a period of less than seven years prior to his completing the 2013 QNSP. Tr. at 53-55.

13. The Individual did not try to cover up his falsification on the 2013 QNSP, admitting that he had lied previously. DOE Ex. 9 at 13.

I found the Individual to be honest and forthright in his testimony. I also found his witnesses, who testified that he was trustworthy and honest, to be forthright. I also find that the Individual's admission of his 2007 falsification on his 2013 QNSP indicates that he was not trying to falsify the question about his illegal drug use. That fact that he did not specify which question he falsified in 2007 is inconclusive. He went through the administrative review process less than a year prior to completing his 2013 QNSP. It is inconceivable that he could believe that the DOE would not have knowledge of his 2007 falsification and that he was attempting to hide it.

Taking into consideration the Individual's demeanor when confronted with the fact that he falsified the illegal drug use question on his 2013 QNSP along with the fact that he was honest and forthright in his testimony, I find that the Individual did not *deliberately* falsify the information on his 2013 QNSP. Therefore, he has mitigated the concern raised by the falsification on his 2013 QNSP. I must now consider the falsification on the 2007 QNSP.

First, I must consider whether the Individual was deliberate in falsifying the information in 2007. 10 C.F.R. § 710.8(f). I find that he was. He admitted during the 2012 PSI that he deliberately lied about his marijuana usage. DOE ex. 6 at 22. In addition, at the hearing, he stated that he deliberately falsified the information in 2007. Tr. at 44-45. Therefore, I find that the Individual deliberately falsified the answer on his 2007 QNSP regarding his illegal drug use. I must now consider whether he has mitigated the concern raised by his falsification.

In considering the evidence before me, I first looked to the Adjudicative Guidelines to determine whether the individual has mitigated the Criterion F concerns. I considered the relevant factors set forth in Adjudicative Guideline E. Some of the conditions that could mitigate security concerns raised under Criterion F include the following: (1) the Individual made a good-faith effort to correct his omission prior to his being confronted with his falsification; (2) the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment; (3) the Individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that caused untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur; and (4) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress. *See Adjudicative Guidelines* at ¶17 (a), (c), (d), and (e). I find that all of these relevant factors apply in this case.

First, the Individual came forward in the 2011 QNSP without being confronted by the DOE regarding his falsification. Adjudicative Guidelines ¶ 17(a). The Individual's falsification in 2007 appears to be an anomaly in his behavior. His witnesses all testified that he is an honest and truthful person. Adjudicative Guidelines ¶ 17(c). The Individual has acknowledged that he falsified the information on the 2007 QNSP. I find that the Individual's behavior is not likely to recur. Adjudicative Guidelines ¶ 17(d). By coming forward with his omission in 2011, the Individual took positive steps to eliminate his vulnerability to exploitation or blackmail. Adjudicative Guidelines ¶ 17(e).

In considering this case under the factors listed in 710.7(c), the testimonial evidence persuades me that the Individual is an otherwise honest person. For example, the Individual's manager testified that she has no reason to question his honesty and integrity and that his falsification on the 2007 QNSP was a "momentary lapse in poor judgment." Tr. at 13, Ind. Ex. A at 32. In fact, she trusts him enough to allow him to close the DOE contractor's facility. Tr. at 13. She has never had a concern or problem in his closing the facility. Tr. at 17. In the end, I find that the Individual's 2007 falsehood was aberrational behavior.

After considering the "whole person concept" and all the evidence discussed above, I find that the Individual has adequately mitigated the Criterion F concern raised by his omission from his 2007 QNSP.

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 Criterion F. 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 resolve these security concerns associated with Criterion F. I, therefore, find that granting the Individual's access authorization will not endanger the common defense and is clearly consistent with the national interest. Accordingly, I have determined that the Individual's access authorization should 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.

Janet R. H. Fishman
Hearing Officer
Office of Hearings and Appeals

Date: October 10, 2013