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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, 2014) Case No.: PSH-14-0069
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Issued: November 12, 2014

Administrative Judge Decision

Kimberly Jenkins-Chapman, Administrative Judge:

This Decision concerns the eligibility of xxxxxxxxxxxxxxxxxxxx (hereinafter referred to as “the individual”) to hold an access authorization¹ 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 not be restored.

I. Background

The individual is employed by a DOE contractor in a position that requires him to hold a DOE security clearance. In February 2014, as part of a background investigation, the Local Security Office (LSO) conducted a Personnel Security Interview (PSI) of the individual to address concerns about the individual’s falsification and drug use. On June 12, 2014, the LSO sent a

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.

letter (Notification Letter) advising the individual that it possessed reliable information that created substantial doubt regarding his eligibility to hold an access authorization. In an attachment to the Notification Letter, the LSO explained that the derogatory information fell within the purview of three potentially disqualifying criteria set forth in the security regulations at 10 C.F.R. § 710.8, subsections (f), (k) and (l) (hereinafter referred to as Criteria F, K and L, respectively).²

Upon receipt of the Notification Letter, the individual filed a request for a hearing. The LSO transmitted the individual's hearing request to the Office of Hearings and Appeals (OHA), and the OHA Director appointed me as the Administrative Judge in this case. At the hearing that I convened, the individual presented his own testimony and that of four witnesses, including two managers and two colleagues. The DOE counsel did not present any witnesses. The DOE presented a number of written exhibits prior to the hearing.

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 denial"); *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).

² Criterion F pertains to information that a person has "[d]eliberately misrepresented, falsified, or omitted significant information from a Personnel Security Questionnaire, a Questionnaire for Sensitive (or National Security) Positions, a personnel qualifications statement, a personal 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, or proceedings conducted pursuant to § 710.20 through § 710.31." 10 C.F.R. § 710.8(f). Criterion K concerns information that a person has "[t]rafficked in, sold, transferred, 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 (such as marijuana, cocaine, amphetamines, barbiturates, narcotics, etc.) except as prescribed or administered by a physician licensed to dispense drugs in the practice of medicine, or as otherwise authorized by Federal law." 10 C.F.R. § 710.8(l). Finally, Criterion L relates to information that a person has "[e]ngaged in any unusual conduct or is subject to any 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 . . ." 10 C.F.R. § 710.8(l).

The individual must come forward at the hearing 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 may be admitted. 10 C.F.R. § 710.26(h). Hence, an individual is afforded the utmost latitude in the presentation of evidence to mitigate the security concerns at issue.

B. Basis for Administrative Judge’s Decision

In personnel security cases arising under Part 710, it is my role as the Administrative Judge 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 regulations to resolve any doubt as to a person’s access authorization in favor of the national security. *Id.*

III. The Notification Letter and the Security Concerns at Issue

As previously noted, the LSO cites three potentially disqualifying criteria as bases for suspending the individual’s security clearance, Criteria F, K and L. To support its reliance on Criterion F, the LSO alleges that the individual deliberately omitted information from an August 2010 Questionnaire for National Security Positions (QNSP) regarding his illegal drug use. From a security standpoint, false statements made by an individual in the course of an official inquiry regarding a determination of eligibility for DOE access authorization raise serious issues of honesty, reliability and trustworthiness. The DOE security program is based on trust, and when a security clearance holder breaches that trust, it is difficult to determine to what extent the individual can be trusted again in the future. *See* Guideline E 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*).

The LSO’s Criterion K concerns are predicated on the individual’s admission that he used marijuana, hallucinogenic mushrooms and Spice (synthetic marijuana) on various occasions from 2007 through 2012. The Criterion K concerns are also predicated on the individual’s admission that he grew marijuana plants at his residence, that he transported marijuana from a drug dealer to a buyer, and that he separated a large amount of marijuana so that a friend could sell it later. There are significant security concerns associated with past or current illegal drug

usage. First, engaging in criminal conduct can raise questions about a person's ability or willingness to comply with laws, rules and regulations. *See* Guideline H, *Adjudicative Guidelines*. Second, illegal drugs can impair a person's judgment which, in turn, can raise questions about the person's reliability and trustworthiness. *Id.* Moreover, from a common sense standpoint, a person's reliability and trustworthiness are questionable when he or she knowingly associates with persons who use illegal drugs.

As for Criterion L, the LSO alleges that the individual admitted that he used marijuana despite signing an August 2010 Security Acknowledgment certifying that he understood that involvement with any illegal drug could result in the loss of his clearance. The LSO also alleges that the individual admitted that subsequent to being granted an "L" access authorization on October 5, 2010, he used marijuana, hallucinogenic mushrooms and Spice on separate occasions in 2010, 2011 and 2012. Finally, the LSO alleges that the individual used illegal drugs even though he was aware that it was against his employer's policy. The individual's vulnerability to blackmail, exploitation, and duress calls into question the individual's judgment, reliability, trustworthiness and his ability to protect classified information. *See id.* at Guideline E.

IV. Findings of Fact

On August 26, 2010, the individual signed and dated a QNSP certifying that he had not used any controlled substance or prescription drugs in the last seven years. However, during a February 2014 PSI, the individual admitted that he used marijuana one to two times per month from the summer of 2007 until 2009 and one to two times per month between January of 2010 and the summer of 2010. He also admitted that he used mushrooms once in April 2009, once in the summer of 2011 or 2012, and once in the fall of 2012 and that he used Spice in the fall of 2012. The individual further admitted that he deliberately omitted this information because he worried that he would lose his job and clearance if he listed the information. In addition, in the course of signing and dating his August 2010 QNSP, the individual certified that he had not been involved in the illegal possession, purchase, manufacture, trafficking, production, transfer, shipping, receiving, handling or sale of any controlled substance in the last seven years. However, he admitted that on two to three occasions in 2008 and 2009, he transported \$20 to \$30 worth of marijuana from a drug dealer to a buyer and then took the money back to the drug dealer. He further admitted that in July of 2009, he used a scale to measure a large amount of marijuana for separation into bags for a friend, so the friend could later sell the marijuana. Finally, he admitted that in May of 2009, he grew a marijuana plant at his residence for approximately one month, and grew 18 marijuana plants at his residence in the summer of 2013. He again admitted that he deliberately omitted this information because he was worried that he would lose his job and his clearance. DOE Exh. 1.

During his February 2014 PSI, the individual also admitted to other conduct with respect to his illegal drug use, including the fact that he signed a Security Acknowledgement on August 19, 2010, certifying that he understood that involvement with any illegal drug could result in the loss of his clearance. However, he admitted to using marijuana, hallucinogenic mushrooms and Spice on various occasions. He further admitted that he used these illegal drugs subsequent to being granted an “L” access authorization on October 5, 2010 even though he was aware it was against his employer’s policy. In addition, he admitted that during an interview for a federal job that he started in December 2009, he answered “no” when asked if he had ever used illegal drugs even though he used marijuana up to two times per month between the summer of 2007 and the summer of 2010, and used mushrooms in April of 2009. Also, during his February 2014 PSI, the individual acknowledged that he associates once a week with friends who smoke marijuana frequently and is around them every other week while they are smoking marijuana. Moreover, he acknowledged that he associates with a good friend who is drug dealer once every two months and was at the friend’s house in December 2013, when he sold marijuana to another friend. The individual admitted that he intends to continue to associate with the friends. Finally, in addition to the individual’s illegal drug use, he admitted that in January 2011, a local police department detained him after he attempted to take home a 10 to 15 foot piece of bleachers from a basketball game. *Id.*

V. Analysis

I have thoroughly considered the record in 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 not be restored. I cannot find that restoring 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.

A. Criterion F

The key issue under Criterion F is whether the individual has brought forward sufficient evidence to demonstrate that he can now be trusted to be consistently honest and truthful with the DOE. In considering this question, I found that the nature of the individual’s misrepresentations

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.

was serious. The individual's lack of candor concerning his marijuana and other illegal drug use could increase his vulnerability to coercion or blackmail and raises important security concerns. The DOE must rely on individuals who are granted access authorization to be honest and truthful. This important principle underlies the criteria set forth in 10 C.F.R. § 710.8(f).

During the hearing, individual acknowledged that he lied on his August 2010 QNSP about his illegal drug use. Transcript of Hearing (Tr.) at 51. He testified that when he was hired as an intern in 2010, he was young and inexperienced, and noted that his internship was his first job in his field. *Id.* at 52. He explained that when he completed his QNSP paperwork, he was worried that if he admitted to his drug usage, he would lose his job. *Id.* The individual testified that he did not receive any guidance or assistance in completing his form and stated that no one ever explained the importance of being 100 percent truthful on his security form. *Id.* at 53. He further testified that he did not seek guidance because he did not know anyone to ask at that time, as it was only his second or third week of working. *Id.* When questioned about whether he made any good faith attempts to correct his omissions or whether he had any opportunities to correct his omissions, the individual stated that he did not know the procedures in place to correct his omissions. He stated that he believes his honesty on his security paperwork this year was his opportunity to correct his mistakes. *Id.* The individual testified that he has taken steps to alleviate the circumstances surrounding his untrustworthy behavior by disclosing all of the omissions he made in his 2010 QNSP. *Id.* at 54. Based on the foregoing, I find that the individual deliberately falsified his August 2010 QNSP.

To determine whether the individual has mitigated the Criterion F concerns, I considered the relevant factors set forth in Adjudicative Guideline E. I find that none of the relevant factors apply in this case. Specifically, the individual did not meet ¶ 17(a) because the individual did not make prompt, good-faith efforts to correct his omission, concealment, or falsification before being confronted with the facts during his 2014 PSI. He did not meet ¶ 17(b) because his omissions were not caused by improper or inadequate advice of authorized personnel concerning the security clearance process. In addition, the individual did not meet ¶ 17(c) because the individual's verified falsifications were serious and relatively recent. Moreover, it is well-settled in previous cases of this office that where there exist security concerns attributable to irresponsible behavior, such as falsifications of security questionnaires or other forms of dishonesty, a subsequent pattern of responsible behavior is of critical importance in mitigating those concerns. In this case, as of the date of the hearing, it has only been seven months since the individual admitted his omissions and since the DOE learned of his omissions. While at the hearing I found the individual to be credible and forthright regarding his omissions, not enough time has passed for the individual to establish a pattern of honest and responsible behavior sufficient to mitigate the concerns raised by his recent dishonest conduct or to allow me to

conclude at this time that the individual's irresponsible conduct is unlikely to recur in the future.⁴ See *Adjudicative Guidelines* at Guideline E. Considering this, and the entirety of the record, I must conclude that the very serious concerns raised under Criterion F have not yet been resolved.

B. Criterion K

The Criterion K concerns raised by the LSO are predicated on the individual's illegal use of marijuana, hallucinogenic mushrooms and Spice, his admission that he grew marijuana plants at his residence in May of 2009 and the summer of 2013, his admission that he transported marijuana from a drug dealer to a buyer and his admission that he separated a large amount of marijuana into smaller bags so that a friend could sell it later. During the hearing, the individual acknowledged his drug use and handling of drugs. With respect to his admission that he grew marijuana plants, he testified that at some point during college, one of his friends gave him marijuana seeds and that he kept them in his closet for a number of years before he decided to plant them. Tr. at 55. The individual could not explain why he grew the marijuana plants, but attributes this behavior to youth and immaturity. *Id.* He testified that he no longer engages in this behavior and does not associate with the friend who gave him the marijuana seeds. *Id.*

The individual also acknowledged that he used Spice on one occasion while in college, out of curiosity, but testified that he has not used it since then. *Id.* at 56. Likewise, with respect to the individual's use of hallucinogenic mushrooms, the individual testified that he used mushrooms three times while in college. He stated that he no longer engages in this behavior or associates with individuals who use these drugs. *Id.* at 57. He further testified that he used marijuana at various times between 2007 and 2012, with his last use about two years ago. *Id.* at 58. He again stated that he no longer associates with the friends from his past who used illegal drugs. Although he acknowledged that he still knows a roommate who he used marijuana with in the past and who still uses marijuana, the individual stated that he no longer socializes or "hangs out" with this individual in the context of using drugs. *Id.* at 59. Finally, when questioned about the circumstances surrounding his handling of small amounts of marijuana in 2009, the individual acknowledged that he had a friend while in college who was a marijuana dealer. *Id.* According to the individual, this friend asked him to handle or transport marijuana on a couple of occasions. *Id.* He again testified that he no longer engages in this type of behavior and

⁴ Guideline E Paragraph 17 outlines the conditions that could mitigate security concerns raised under Criterion F. Paragraph 17 (a) states that "the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts." Paragraph 17 (b) states that "the refusal or failure to cooperate, omission, or concealment was caused or significantly contributed to by improper or inadequate advice of authorized personnel or legal counsel advising or instructing the individual specifically concerning the security clearance process." Paragraph 17(c) states that "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." Finally, Paragraph 17(e) states that "the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress." The *Adjudicative Guidelines* at Guideline E.

attributes his bad judgment to his lack of immaturity at the time. *Id.* at 60. The individual reiterated that a number of his friends who he knew in college no longer use drugs and that he no longer engages in any drug use. *Id.* at 63. He testified that he has no intention to use illegal drugs in the future. *Id.*, Individual Exhibit A.

In evaluating the totality of the circumstances surrounding the individual's illegal drug use, I have determined that the following factors do not weigh in the individual's favor. First, the individual's willful disregard for the law by using illegal drugs is a serious matter. Second, the individual's conduct was both voluntary and knowing.

Against these factors, I weighed the following positive ones. First, the individual's testimonial evidence convinced me that he understands the seriousness of his past drug usage and is now taking full responsibility for his actions. The individual's current behavior demonstrates that he is now comporting himself in a responsible manner. Second, the evidence convinced me that the individual's immaturity at the time he used marijuana contributed to his poor judgment in using illegal drugs. Third, the individual convinced me that he has not used illegal drugs for the last two years and does not associate or socialize with the same friends or with any persons who use drugs. Fourth, the individual's family and co-workers are aware of his past illegal drugs use, a fact that lessens his susceptibility to blackmail, coercion and undue duress. Fifth, the individual has provided convincing testimonial evidence that he will not use drugs in the future. In the end, the individual has provided credible testimonial evidence that leads me to conclude that his past use of illegal drugs is unlikely to recur. On balance, the weight of the evidence demonstrates that the individual is a responsible adult who now understands the importance of following rules and laws. Accordingly, after carefully weighing all the evidence, both favorable and unfavorable, I find that the individual has presented evidence to sufficiently mitigate the Criterion K security concerns at issue.

C. Criterion L

The key issue under Criterion L is whether the individual has brought forward sufficient evidence to demonstrate that he is reliable and trustworthy, and that he is no longer subject to pressure, coercion, exploitation or duress. For the reasons set forth below, I find that the individual has not provided sufficient information to resolve the Criterion L concerns at issue.

The DOE's concerns under Criterion L are that: 1) the individual engaged in criminal conduct including his use of marijuana, mushrooms and Spice on various occasions between 2007 and 2012, he grew marijuana plants at his residence, he handled illegal drugs in 2009 and he was detained by police after he attempted to take home a 10 to 15 foot piece of bleachers from a basketball game; and 2) the individual used illegal drugs despite signing an August 2010 Security Acknowledgement certifying that he understood that involvement with any illegal drug

could result in the loss of his clearance, that he used illegal drugs subsequent to being granted an “L” clearance, and that he used illegal drugs despite being aware that it was against his employer’s policy.

Among the factors which could serve to mitigate the security concerns raised by the individual’s lack of judgment and criminal conduct are: (1) 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; (2) the individual has acknowledged the behavior or has taken positive steps to alleviate the factors that caused untrustworthy, unreliable behavior and such behavior is unlikely to recur; (3) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress; and (4) association with persons involved in criminal activity has ceased or occurs under circumstances that do not cast doubt upon the individual’s reliability, trustworthiness, judgment, or willingness to comply with rules and regulations. *Id.* at ¶ 17 (c), (d), (e) and (g). In this case the individual has acknowledged his behavior with respect to his use of illegal drugs as well as his other criminal conduct, has taken steps to eliminate his vulnerability to exploitation, manipulation or duress by being candid about his criminal conduct with family and co-workers, and no longer associates with individual involved in illegal drug use or other criminal conduct.

However, I am concerned that the individual’s conduct is relatively recent, especially with respect to the handling of illegal drugs. As late as the summer of 2013, the individual grew 18 marijuana plants at his residence. When questioned about this behavior during the hearing, the individual stated that he was simply bored when he found the marijuana seeds in his closet that a friend had given him a couple of years earlier. *Tr.* at 71. He further stated that he had no intention of selling or giving away the marijuana, that he grew the plants for a few weeks and then destroyed them. *Id.* Similarly, as stated above with respect to the individual’s falsifications, given the recency of the individual’s lack of judgment and criminal conduct here, not enough time has passed for the individual to establish a pattern of responsible behavior sufficient to mitigate the concerns raised by his conduct or to allow me to conclude at this time that the individual’s irresponsible conduct is unlikely to recur in the future. After considering the “whole person,” I am not yet convinced that the DOE can rely on the individual’s ability to make sound judgment calls regarding the safeguarding of classified information. *See Adjudicative Guidelines* at (2)a. I therefore find that the individual has not sufficiently mitigated the LSO’s concerns under Criterion L.

VI. Conclusion

In the above analysis, I have found that there was sufficient derogatory information in the possession of the DOE that raised serious security concerns under Criterion F, K and L. 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 find that the individual has brought forth convincing evidence to mitigate the security concerns associated with Criterion K. However, I cannot find that the individual has brought forth convincing evidence to resolve the security concerns associated with Criteria F and L. I therefore cannot find 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 not be restored. The parties may seek review of this Decision by an Appeal Panel under the regulations set forth at 10 C.F.R. § 710.28.

Kimberly Jenkins-Chapman
Administrative Judge
Officer of Hearings and Appeals

Date: November 12, 2014