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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: September 16, 2014)

Case No.: PSH-14-0087

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Issued: December 2, 2014

Administrative Judge Decision

Robert B. Palmer, Administrative Judge:

This Decision concerns the eligibility of XXXXXXXXXXXX (hereinafter referred to as “the individual”) for 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 For the reasons set forth below, I conclude that the individual should not be granted a security clearance at this time.²

I. FACTUAL AND PROCEDURAL BACKGROUND

A. Factual Background

¹An 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 also be referred to in this Decision as a security clearance.

² 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>.

The following facts are undisputed. In 1990, the individual was arrested as a result of a joint “reverse sting” operation by state law enforcement and Drug Enforcement Administration officials, and was charged with, and subsequently convicted of, Marijuana Trafficking and Using and Carrying a Firearm While Drug Trafficking. DOE Exhibit (DOE Ex.) 7 at 22, 25. After being convicted of these offenses and just prior to his incarceration, the individual was arrested for DUI after attending a “going away” party in 1992. *Id.* at 85. The individual was imprisoned as a result of his drug and firearm convictions from October 1992 to December 1997. In 2008, the individual tested positive for marijuana usage on a drug screening administered by his employer, and was fired. *Id.* at 52-54.

B. Procedural Background

A subsequent employer, a DOE contractor, requested a security clearance on the individual’s behalf. During the ensuing background investigation, the individual disclosed the above information about his incarceration, and the local security office determined that it raised valid and significant security concerns. In an attempt to resolve those concerns, the LSO summoned the individual for an interview with a personnel security specialist in March 2014. After this Personnel Security Interview (PSI) failed to resolve the concerns, the LSO determined that the individual was subject to the provisions of 50 U.S.C. § 3343, hereinafter referred to as “the Bond Amendment” or “the Amendment.”

The Bond Amendment states, in pertinent part, that a federal agency may not grant or renew a security clearance for a “covered person” who has been convicted of a crime, was sentenced to a term of imprisonment of more than one year for that crime, and was incarcerated as a result of that sentence for not less than one year. 50 U.S.C. § 3343(c)(1)(A). The Amendment further provides for the granting of a “meritorious waiver” in appropriate circumstances. 50 U.S.C. § 3343(c)(2). A meritorious waiver was denied by the DOE’s Office of Departmental Personnel Security on April 28, 2014, and the LSO initiated this Administrative Review by issuing to the individual a letter that set forth the DOE’s security concerns and the reasons for those concerns. *See* DOE Order 472.2, Appendix E. 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 an Administrative Judge in order to resolve the substantial doubt concerning his eligibility for access authorization.

The individual requested a hearing on this matter. The LSO forwarded this request to the Office of Hearings and Appeals, and I was appointed the Administrative Judge. The DOE introduced eight exhibits into the record of this proceeding. The individual introduced 20 exhibits and presented the testimony of two witnesses, in addition to testifying on his own behalf.

II. THE NOTIFICATION LETTER AND THE DOE’S SECURITY CONCERNS

As indicated above, the LSO concluded in the Notification Letter that derogatory information exists that creates a substantial doubt as to the individual’s eligibility to hold a security clearance. That information pertains to the Bond Amendment and to the information about the individual’s convictions and incarceration outlined above.

This circumstance adequately justifies the DOE's invocation of the Bond Amendment, and it raises significant security concerns. Illegal activity, by its very nature, calls into question a person's ability or willingness to comply with laws, rules and regulations, and creates doubt about his or her judgment, reliability and trustworthiness. See *Revised Adjudicative Guidelines for Determining Eligibility for Access to Classified Information, The White House (December 19, 2005)*, (*Adjudicative Guidelines*), *Guideline J*.

III. STATUTORY AND REGULATORY STANDARDS

In making a determination as to an individual's eligibility for access authorization, the *Adjudicative Guidelines* require me to undertake a careful review of all of the relevant facts and circumstances, and make a "common-sense judgment" based on a consideration of the "whole person." *Adjudicative Guidelines*, ¶ 2(c). I must therefore consider all information, favorable or unfavorable, that has a bearing on the question of whether granting or restoring a security clearance would compromise national security concerns, including the nature, extent, and seriousness of the individual's conduct; the circumstances surrounding the 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. *Id.* at ¶ 2(a).

A DOE administrative proceeding under 10 C.F.R. Part 710 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 granting or restoring access authorization "is clearly consistent with the interests of national security." *Adjudicative Guidelines*, ¶ 2(c). See *Personnel Security Hearing*, Case No. VSO-0013, 24 DOE ¶ 82,752 at 85,511 (1995) (*affirmed* by OSA, 1996), and cases cited therein. The *Adjudicative Guidelines* further instruct me to resolve any doubts concerning the individual's eligibility for access authorization in favor of the national security. *Id.* at ¶ 2(b).

IV. ANALYSIS

As noted above, *Adjudicative Guideline J* concerns criminal conduct on the part of security clearance holders and applicants. That *Guideline* sets forth potentially disqualifying and mitigating conditions that I must consider in determining whether the individual has successfully mitigated the security concerns outlined in the Notification Letter. *Adjudicative Guideline J*, ¶ 31 and ¶ 32.

Of the five potentially disqualifying conditions listed, I find two to be applicable to the individual. First, the individual committed "a single serious offense or multiple lesser offenses." *Id.* at ¶ 31(a). In fact, the record indicates that the individual committed *multiple* serious offenses. During his March 2014 PSI, the individual provided further information about the criminal conduct that led up to his 1990 arrest. He admitted that, from 1987 to 1990, he supported himself and his wife by selling marijuana, making enough to pay his bills and to buy "a couple" of racehorses. DOE Exhibit (DOE Ex.) 7 at 26. He started out by selling all of the

marijuana produced from a field of the drug for a friend. *Id.* at 24. Consequently, he engaged in a series of significant criminal acts during this period, in addition to the crimes for which he was arrested. Furthermore, he was arrested for Driving Under the Influence in 1992 after becoming intoxicated at a “going away” party just before his imprisonment. *Id.* at 85.

The second potentially disqualifying factor is an “admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted, or convicted.” *Adjudicative Guideline J*, ¶ 31(c). The individual has admitted to an extensive history of illegal drug usage, culminating in a 2008 incident during which he smoked marijuana, tested positive on a drug screening administered by his employer, and was fired. DOE Ex. 7 at 10-22; 52-54.

I also conclude that two of the four mitigating factors set forth under *Adjudicative Guideline J* are applicable in this case. The first is that “so much time has passed since the criminal behavior happened, . . . that it is unlikely to recur” *Adjudicative Guideline J* at ¶ 32(a). There is no indication in the record that the individual has engaged in drug trafficking or the illegal possession of a firearm since his arrest in 1990. There is also no evidence of the individual being arrested subsequent to his 1992 DUI, a period of approximately 22 years. However, the mitigating value of these circumstances is significantly lessened by the fact that the individual engaged in illegal conduct and violated his employer’s drug usage policy when he tested positive for marijuana usage in 2008. Nevertheless, there is no other evidence in the record of significant illegal activity on the part of the individual since his 1992 DUI. The passage of time is a mitigating factor in this case.

The second applicable mitigating factor is that “there is evidence of successful rehabilitation; including but not limited to the passage of time without recurrence of criminal activity, remorse or restitution, job training or higher education, good employment record, or constructive community involvement.” *Id.* at ¶ 32(d). The testimony and evidence offered by the individual at the hearing was primarily designed to demonstrate that he has been successfully rehabilitated.

The individual testified that he was very unhappy just prior to his 1990 arrest because he realized that his behavior at that time could only produce two possible outcomes, death or imprisonment, and that he was actually relieved when he got arrested. Hearing transcript (Tr.) at 35-36. During his time in prison, he added, he decided that his old life was over, and that he was going to focus on what he needed to do to “make a clean, new life happen.” Tr. at 35. Towards that end, he “really got healthy physically,” and increased his involvement in religion. Tr. at 36. After his release in 1997, he completed a drug rehabilitation program. Tr. at 40-41. He continued that he has not been arrested since his release. Tr. at 41.

The individual then discussed his 2008 marijuana usage that resulted in a positive drug test and loss of his employment. He explained that he was emotionally distraught because his father had recently been diagnosed with stage three lung cancer, and because his son had run away from home. Tr. at 42-43. One evening, he was in the back lot behind his house, and his next door neighbor was in his backyard smoking marijuana. The neighbor came up to the fence and the two started talking, and the individual asked the neighbor if he could share the marijuana cigarette with him. Tr. at 43; DOE Ex. 7 at 52. The neighbor acquiesced, and the individual took “a few hits off of it.” Tr. at 43. Shortly thereafter, the individual was tested for illegal drug usage, and

the test results came back positive for marijuana. The individual added that he had not used illegal drugs since before his 1990 arrest, and that he has not used illegal drugs since 2008. Tr. at 44.

Regarding his current employment, the individual testified that he has worked on many “mission-critical” projects, often assuming a leadership role. Tr. at 46. He does not knowingly associate with anyone who uses illegal drugs or engages in any other criminal conduct, does not own a firearm, and has no intention of ever using illegal drugs again. Tr. at 49-50; 63-69.

Two of the individual’s co-workers also testified. One said that the individual was an honest and trustworthy person, and that he had never seen any signs of illegal drug usage or any instances in which the individual violated workplace regulations. Tr. at 13-14. The other testified that he was impressed with the individual’s work, and that he had never seen any indications of illegal drug usage or any other significant illegal activity in the eight or nine years that he had known him. Tr. at 22-23. The individual also submitted Letters of Commendation, Certificates of Recognition, and awards that he has received for his job performance. Individual’s Exhibits 10-20.

Despite this mitigating evidence, I harbor substantial doubts about the individual’s judgment, reliability and trustworthiness. As an initial matter, the record indicates that for a period of three years, the individual engaged in an ongoing criminal enterprise that involved multiple sales of an illegal drug. Even if his vague and unsupported assertion that the “Supreme Court” determined that his firearm offense was a “non-violent crime” is true, DOE Ex. 2, the fact that he was armed at the time of his arrest strongly suggests that he was ready and willing to use deadly force in furtherance of his illegal behavior. Moreover, since the individual was in his late twenties during the period of time in question, he cannot use youthful indiscretion as an excuse for his choice of vocation.

Although approximately 22 years have passed since the individual’s last arrest, the mitigating value of this factor is significantly lessened by the individual’s 2008 marijuana usage. That the individual would again use illegal drugs after completing two drug rehabilitation programs (in 1984, DOE Ex. 7 at 15-16, and after his release from prison), and after resolving while in prison to turn his life around, casts substantial doubt on his judgment and reliability, and on his ability to conform his conduct to the requirements of the law and of his employer. The individual testified that that instance was the only time that he used illegal drugs after his 1990 arrest. However, in the absence of adequate supporting evidence, I am skeptical of the individual’s claim that the one instance that he used illegal drugs in the 24 years since that arrest just happened to take place right before the drug test that led to his 2008 termination.

The prolonged and very serious nature of the individual’s criminal activity, when coupled with the individual’s 2008 marijuana usage, lead me to conclude that the disqualifying conditions set forth above outweigh the mitigating evidence presented by the individual. I therefore conclude that serious security concerns remain under *Adjudicative Guideline J*.

V. CONCLUSION

For the reasons set forth above, I find that the individual has failed to demonstrate that granting him access authorization would be clearly consistent with the interests of national security. Accordingly, I find that the DOE should not grant the individual a security clearance at this time.

Review of this decision by an Appeal Panel is available under the procedures set forth at 10 C.F.R. § 710.28.

Robert B. Palmer
Administrative Judge
Office of Hearings and Appeals

Date: December 2, 2014