

record of this proceeding (Exs. 1-9). The individual introduced two exhibits into the record (Exs. A & B) and at the hearing, only the individual and two other witnesses testified. *See* Transcript of Hearing, Case No. PSH-15-0056 [hereinafter cited as “Tr.”].

II. REGULATORY STANDARDS

The criteria for determining eligibility for security clearances set forth at 10 C.F.R. Part 710 dictate that, in these proceedings, an Administrative Judge must undertake a careful review of all of the relevant facts and circumstances, and make a “common-sense judgment . . . after consideration of all relevant information.” 10 C.F.R. § 710.7(a). I must therefore consider all information, favorable and 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 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. 10 C.F.R. § 710.7(c).

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 “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 regulations further instruct me to resolve any doubts concerning the individual’s eligibility for access authorization in favor of the national security. 10 C.F.R. § 710.7(a).

III. NOTIFICATION LETTER AND ASSOCIATED SECURITY CONCERNS

The Notification Letter cited information pertaining to subsections (k)³ and (l)⁴ of the criteria for eligibility for access to classified matter or special nuclear material set forth at 10 C.F.R. § 710.8, and the Bond Amendment. Ex. 1. The Bond Amendment prohibits federal agencies from granting or renewing the security clearances of persons who are addicted to, or are unlawful users of, illegal drugs. In its Summary of Security Concerns, the LSO cited the individual’s admission in the PSI of the following: 1) in January 2015, he ingested one Rice Krispy treat that contained marijuana, which

³ Criterion (k) defines as derogatory information when an individual 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(k).

⁴ Criterion (l) defines as derogatory information when an individual 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).

resulted in his positive drug test in January 2015; 2) from 1978 to 1981, when he was 18 to 21 years old, he smoked marijuana twice a month and purchased a marijuana cigarette once or twice; 3) he illegally used steroids for six months from 1988 to 1989 and purchased about \$30 worth of steroids a month; and 4) he failed to report his drug use after ingesting the Rice Krispy treat, which he did while possessing a DOE access authorization. Ex. 1.

The use of illegal drugs raises questions about an individual's reliability, trustworthiness and ability to protect classified information because it may impair judgment and it demonstrates that a person may not be willing to comply with laws, rules, and regulations. *See Revised Adjudicative Guidelines for Determining Eligibility for Access to Classified Information*, The White House, Guideline H (December 19, 2005) [hereinafter *Adjudicative Guidelines*]. The failure to report unlawful drug use while holding a security clearance also raises questions about an individual's reliability, trustworthiness and ability to protect classified information. *Id.*, Guideline E. Thus, the above information adequately justifies the LSO's invocation of criteria (l) and (k) and the Bond Amendment, and raises significant security concerns.

IV. FINDINGS OF FACT

The individual holds a DOE access authorization that was suspended after he tested positive for marijuana in January 2015 on a urine test. It is uncontested that he tested positive for marijuana and ingested marijuana in January 2015. Before January 2015, the last time the individual ingested marijuana was during 1978 to 1981, when he was in his late teens and early 20s. Tr. at 30. During that period, he consumed marijuana twice a month and he purchased a joint of marijuana once or twice. Ex. 8 at 12-13. Additionally, in the late 1980s, the individual illegally used steroids for six months and purchased about \$30 worth of them each month in that period. Ex. 8 at 19-23. He used steroids to become strong, and stopped because his wife became upset as they were trying to have children. Ex. 8 at 21; Tr. at 23, 30. Aside from his use of marijuana and steroids in the 1970s and 80s, the individual has never knowingly taken illegal drugs. Ex. 8 at 24; Tr. at 26.

In late January 2015, the individual ate a Rice Krispy treat, which he did not know contained marijuana. This resulted in a positive drug test five days later. The Rice Krispy bar belonged to his son, who had a medical marijuana card. Tr. at 11. The night before the individual ate the Rice Krispy treat, his son was working at a bar, then came to the individual's home late, and left three Rice Krispy bars that contained medical marijuana in a clear Ziploc bag on the countertop before going to bed. Tr. at 13. There was no packaging or information on it indicating that it contained medical marijuana. Tr. at 11. When the individual woke up the next morning, he saw the Rice Krispy bars and ate one with his coffee. Tr. at 23-24. Even after ingesting the Rice Krispy treat, he did not realize that it contained marijuana until about an hour later, when his son told him. Tr. at 24; Ex. 8 at 8. When his son woke up and discovered that a Rice Krispy bar was missing from the Ziploc bag, he asked who ate it and the individual said that he did. Tr. at 11, 13. His son then informed him that there was marijuana in it and the individual became upset, but did not know what to do. Tr. at 11, 26, 30.

The individual's son does not live with him and his wife, and while the individual knew that his son used medical marijuana, he has never known him to bring it to his home. Tr. at 31. He also did not

know how his son used marijuana, specifically through ingesting edibles, and he has never seen medical marijuana packaged as it was when he ingested the Rice Krispy bar – in a Ziploc bag with no label on it. Tr. at 25, 31.

The individual's son testified that he has never known his father to smoke or ingest marijuana, aside from the Rice Krispy treat that he ate, and that to his knowledge, his father does not use marijuana. Tr. at 12. Moreover, he stated that he rarely leaves medical marijuana at his parents' home and only left it out in the open once before. Tr. at 13-14.

The individual's wife testified that she never saw the Rice Krispy bars that day at her house but that she was informed by her son that someone ate a bar containing marijuana. Tr. at 19. She did not know it was her husband until several days later, after he received a positive drug test result. Tr. at 20. When asked whether she knew if her son ingested marijuana through the Rice Krispy bars, she stated that she knew he ingested marijuana through edibles, but that he mostly smokes it. Tr. at 19. She further testified that she has not seen her husband smoke marijuana since he was in college and that he has not engaged in illegal behavior while employed by a DOE contractor. Tr. at 19.

The individual did not report that he ingested marijuana until after his drug test result came back positive. Tr. at 24; Ex. 8 at 9. He had to give a urine sample a few days after he ate the Rice Krispy bar. Ex. 8 at 9. Even before giving the urine sample, the individual did not report that he ingested marijuana as he was unsure whether or not he would test positive for it because he did not know how long it stayed in his system. *Id.* It was after he was confronted by a doctor about his positive drug test result a few days after taking the urine test and told that he needed to report his marijuana use, that he reported it. *Id.*; Ex. 4. The individual attributed his failure to report it to his naïveté, and said that he now realizes that he should have reported it. Tr. at 24. After he received the drug test result, he enrolled in an early recovery program upon the recommendation of a psychologist that he completed in June 2015. Ex. A; Tr. at 32. He also took several urine tests that all resulted negative for drugs. Tr. at 32; Ex. B.⁵

While testifying, the individual became emotional, stating that he has had a great record since starting his job with the contractor and that he felt “really bad,” has “done everything that they’ve asked me to do,” that he was just trying to get through the next six years before retiring. Tr. at 26-27.

In discussing how he has been affected by this, he appeared very credible – he was consistent, genuinely emotional, earnest and forthright.

V. ANALYSIS

A. Criterion (k) and the Bond Amendment

I find that the individual has sufficiently mitigated the concerns associated with his drug use and under the Bond Amendment. As indicated by the individual and corroborated by the testimony of his son and wife, his drug use in this instance “happened under such circumstances that it is unlikely to recur or does not cast doubt on the individual’s current reliability, trustworthiness, or good

⁵ The results of the drug tests were for the following dates: February 19, 2015, March 2, 2015, and April 29, 2015.

judgment.” *Adjudicative Guidelines* ¶ 26(a). I wholly credit his testimony that his ingestion of marijuana was accidental. There was testimony that the Rice Krispy treat he consumed did not have any packaging indicating that it contained marijuana and that both he and his wife did not realize their son would bring medical marijuana to their home. He therefore had no knowledge that he was ingesting marijuana at the time and it was an isolated incident. The individual also completed a chemical dependency early recovery program, met with a counselor and participated in drug testing to comply with any requirements of him to maintain his access authorization. *Id.* at ¶ 26(d). As for the concerns related to his steroids and marijuana use in the 1970s and 1980s, I find that they have been mitigated as they occurred so long ago. *Id.* at ¶ 26(a). Upon consideration of these factors, and the record as a whole, I therefore conclude that the individual has resolved the concerns under criterion (k) and is not an unlawful user of a controlled substance under the Bond Amendment.

B. Criterion (l)

The LSO also raised concerns of the individual’s honesty, reliability or trustworthiness due to his failure to report his drug use. Ex. 1. On this point, the individual stated that in hindsight, he should have reported that he ingested marijuana sooner than later. As stated above, his ingestion of marijuana was accidental and therefore, he did not engage in any unlawful or prohibited activity as he did not intend to ingest marijuana. Nevertheless, given that the individual knew he ingested marijuana, he should have reported it. He only reported it after his drug test came back positive a little over a week after he ingested the marijuana, stating that he did not report it earlier because he either did not think about it or know whether it would show up in the drug test. While this explanation demonstrates a lapse in judgment by the individual, I do not find it significant enough to warrant him a security risk. In concluding so, I am considering the regulatory factors, such as the nature, extent, and seriousness of the individual’s conduct, the circumstances surrounding the conduct, the frequency and recency of the conduct, the likelihood of continuation or recurrence of the conduct, and any other relevant and material factors. 10 C.F.R. § 710.7(c). There is nothing in the record evincing that such conduct is frequent and in fact, it is infrequent as this is a one-time incident that the record demonstrates has not occurred before. Moreover, the individual’s son has left medical marijuana out in the open at his home only one other time, and given that the individual had to undergo this administrative process as a result of his accidental ingestion of marijuana, which his wife and son are aware of, I am confident that this particular incident will likely not recur. *Id.* at ¶ 17(c).

Even though I have determined that the individual has resolved the security concerns contained in the Notification Letter, the principal concern is nevertheless whether the individual will act in the future in a manner that places the national security at risk by not rigorously following security procedures. *See Personnel Security Hearing*, Case No. PSH-12-0098 (2012). The record in this case convinces me that the individual’s failure to report his accidental marijuana use before his drug test does not constitute a pattern of similar behavior so as to place national security at risk. Furthermore, given his sincere testimony about the steps he has taken after reporting his marijuana ingestion, his belief that he had a good record as an employee and desire to retire six years from now, I am convinced that his awareness is raised so as to prevent anything similar or of greater security risk happening again. *See Personnel Security Hearing*, Case No. PSH-12-0083(2012)(hearing officer found that criterion (l) concerns were resolved where the individual failed to report security mistakes even after taking a

polygraph, stating, “[t]he record in this case convinces me that the individual’s self-reported history of security mistakes does not constitute a pattern of misconduct that predicts a similar future. Rather, it convinces me that his knowledge of security concerns is now stronger than ever, and taken together with the threat of dismissal for any future incidents and the humbling experience of this administrative review process, has raised his awareness such that he will be appropriately vigilant in the future.”); PSH-12-0081(2012)(hearing officer concluded that the individual mitigated the concerns regarding his failure to report security violations before taking a polygraph examination, which he did pass, because he provided additional derogatory information in his PSI after the polygraph examination). In all, the individual appeared to be very sincere throughout the hearing, exhibiting that he is honest, reliable and trustworthy, and I therefore find no reason that his access authorization should not be restored.

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 criteria (k) and (l) of the Part 710 regulations. After considering all the relevant information, favorable and unfavorable, in a comprehensive common-sense manner, including weighing the testimony and other evidence presented at the hearing, I have found that the individual has brought forth sufficient evidence to fully resolve the security concerns at issue. I therefore find that restoring the individual’s DOE access authorization will not endanger the common defense and is consistent with the national interest. Accordingly, I have determined that the DOE should restore the individual’s access authorization. The parties may seek review of this Decision by an Appeal Panel under the regulations set forth at 10 C.F.R. § 710.28.

Shiwali G. Patel
Administrative Judge
Office of Hearings and Appeals

Date: September 22, 2015