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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: June 22, 2018	)	Case No.: PSH-18-0049
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Issued: September 13, 2018

**Administrative Judge Decision**

Janet R. H. Fishman, Administrative Judge:

This Decision concerns the eligibility of XXXXXXXXX (hereinafter referred to as “the Individual”) to hold an access authorization<sup>1</sup> 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 discussed below, after carefully considering the record before me in light of the relevant regulations and the *National Security Adjudicative Guidelines for Determining Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position* (June 8, 2017) (Adjudicative Guidelines or Guidelines), I conclude 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. The Individual has held a security clearance since 2008, when it was granted by the Department of Homeland Security (DHS) in conjunction with the Individual’s position as a reservist with the United States Coast Guard. Ex. 9 at 11-15. In January 2017, DOE granted the Individual an “L” clearance, on a reciprocal basis for his “secret” clearance with DHS. Ex. 9 at 13. Also in January 2017, the Individual completed a Questionnaire for National Security Positions (QNSP) as part of his application for a “Q” clearance. Ex. 8 at 1; Ex. 9 at 12. The QNSP and subsequent investigation revealed derogatory information regarding the Individual’s personal conduct and involvement with marijuana. The Local Security Office (LSO) conducted a Personnel Security Interview of the Individual and issued a Letter of Interrogatory, which the Individual answered on January 14, 2018. Ex. 9; Ex. 7.

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<sup>1</sup> 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.

Because the Individual's behavior raised security concerns that were not allayed by the PSI or the Individual's interrogatory responses, the LSO began the present administrative review proceeding by issuing a Notification Letter to the Individual informing him that it possessed reliable information that created substantial doubt regarding his eligibility to hold a security clearance and that his security clearance had been suspended. In an attachment to the Notification Letter, the LSO explained that the derogatory information raised security concerns under "Guideline E: Personal Conduct" (Guideline E) and "Guideline H: Drug Involvement" of the Adjudicative Guidelines (Guideline H). Ex. 1 at 1-2. 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 regarding his eligibility to hold a security clearance. *See* 10 C.F.R. § 710.21.

The Individual requested a hearing and the LSO forwarded the Individual's request to the Office of Hearings and Appeals (OHA). The Director of OHA appointed me as the Administrative Judge in this matter on June 22, 2018. At the hearing I convened pursuant to 10 C.F.R. § 710.25(d), (e) and (g), I took testimony from the Individual and three witnesses. *See* Transcript of Hearing, Case No. PSH-18-0049 (hereinafter cited as "Tr."). The LSO submitted ten exhibits, marked as Exhibits 1 through 10 (hereinafter cited as "Ex."). The Individual submitted four exhibits, marked as Exhibits A through D.

## **II. Regulatory Standards**

A DOE administrative review proceeding under Part 710 requires me, as the Administrative Judge, to issue a Decision that reflects my comprehensive, common-sense judgment, made after consideration of all of 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). 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).

The individual must come forward at the hearing with evidence 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 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). Hence, an individual is afforded the utmost latitude in the presentation of evidence to mitigate the security concerns at issue.

### **III. The Notification Letter and the Associated Security Concerns**

As indicated above, the Notification Letter informed the Individual that information in the possession of the DOE created a substantial doubt concerning his eligibility for a security clearance. That information pertains to Guidelines E and H of the Adjudicative Guidelines.

Guideline E relates to conduct involving questionable judgment, lack of candor, or unwillingness to comply with rules and regulations, which raises questions about an individual's reliability, trustworthiness, and ability to protect classified information. Any failure to provide truthful and candid answers during the security clearance process is of particular concern. *See* Adjudicative Guidelines at ¶ 15. With respect to Guideline E, the LSO cited the Individual's allowing an uncleared person to enter a limited access area without an escort in November 2017. Ex. 1 at 1. Also cited were the Individual's admissions that (1) he used marijuana during 2010 to 2014 while possessing a security clearance and that he did not intend to report his illegal drug use to the Coast Guard; (2) he intentionally violated the Coast Guard's zero tolerance drug policy; (3) in 2014, a state agency investigated him for abuse after he struck a patient in his charge as a caregiver; (4) in 2013, the health facility employing him as a caregiver issued him a written warning for failing to administer prescription medication to a patient in accordance with company policy; (5) he was terminated from his employment for gross negligence in 2009 after consuming cookies he had not purchased; and (6) he was terminated from his employment in 2005 after speaking to his boss in a negative tone. *Id.* at 1-2.

Guideline H relates to security risks arising as a result of an Individual's use of illegal drugs. Illegal drug use raises concerns about an Individual's reliability and trustworthiness because such drug use may impair a person's judgment and because using drugs illegally raises questions about a person's ability or willingness to comply with laws, rules, and regulations. *See* Adjudicative Guidelines at ¶ 24. With respect to Guideline H, the LSO cited the Individual's admissions that he used marijuana one or two times per year from 2010 to 2014 while possessing a security clearance. Ex. 1 at 2.

### **IV. Findings of Fact and Hearing Testimony**

At the hearing, I took testimony from the Individual, his sister, his girlfriend, and one of his current supervisors. All of the Individual's witnesses described him as trustworthy. Tr. at 17, 26, 40. The Individual's sister testified that she was only aware of one instance in which the Individual used marijuana but admitted that there could have been other times of which she was not aware. *Id.* at 11, 19. The Individual's girlfriend testified that, prior to this proceeding, the Individual told her that he had used marijuana after high school. *Id.* at 27. She claimed that the Individual has not used any illegal drug in the two years she has known him. *Id.* at 26, 28. The Individual's supervisor asserted that he has never known the Individual to be under the influence of an illegal substance. *Id.* at 55.

The Individual testified that he used marijuana about eight times—but no more than 12 times—between 2010 and 2013. *Id.* at 113. He claimed that he did not experience cravings and that he had never purchased marijuana. *Id.* at 116, 119. He stated that he only used marijuana when visiting his sister and that he did not use marijuana at all during his Coast Guard deployment in 2011 and

2012. *Id.* at 118. There were several inconsistencies between the Individual's descriptions of his marijuana use at his PSI, at the hearing, and on his QNSP. However it is undisputed that the Individual ingested edible marijuana products and smoked marijuana. *Id.* at 131-44. When asked about his stated intent to not inform the Coast Guard about his drug use, the Individual asserted that he only said that because he was upset during his PSI. *Id.* at 145. Nevertheless, as of his hearing, the Individual still had not disclosed his marijuana use to the Coast Guard. *Id.* He maintained that he did not believe he had an affirmative duty to disclose his drug use. The Individual, nevertheless, testified that he would disclose his marijuana use if asked or if presented with a policy stating his affirmative duty to disclose it. *Id.* at 145-46. The Individual also testified that he used marijuana while holding a security clearance because he was experimenting and that he regretted doing so. *Id.* at 139.

The Individual testified that in 2005 he spoke sharply to his employer, which resulted in his termination. He stated that he regrets the way he spoke to his manager. *Id.* at 69. The Individual asserted that he regrets the circumstances surrounding his 2009 termination where he consumed cookies without paying for them. *Id.* at 74. He stated that it was a mistake and a "dumb decision." *Id.* at 74-75. The Individual claimed that he had intended to pay for the item the following morning, since he could not pay the night before because the cash registers were closed. *Id.* at 76. However, he later testified that he did not pay for the item the following morning because when he arrived at the store he was told he was being placed on administrative leave. *Id.* at 82-83.

The Individual testified that, while working as a caregiver, he once forgot to administer a patient's afternoon medication. *Id.* at 92. He asserted that he proactively disclosed the missed dose to his supervisor and received a written warning. *Id.* While with the same company, the Individual was investigated for alleged abuse of another patient. *Id.* at 104-09. He testified that the investigation showed that he had not abused the patient but rather had unintentionally harmed the patient while attempting to ward off the patient's attack. *Id.* Again, the Individual proactively disclosed the incident. *Id.* The Individual asserted that he stayed with the company for several years after both incidents. *Id.* at 94-96.

The Individual testified that, while at he was guarding an interior gate that required a clearance to pass through, he allowed an uncleared person to enter a limited access area to retrieve his credentials. *Id.* at 152-53. He stated that a vehicle approached the gate with two passengers, including the driver who did not have a clearance and needed an escort to enter the limited access area. *Id.* The Individual claimed that after a conversation with the other passenger, he believed that the person held a security clearance but had left his credentials inside the restricted area. *Id.* at 148. The Individual testified that he allowed the second person to enter the limited access area alone to retrieve his identification. *Id.* at 149. Upon the person's return, the Individual reviewed his credentials and realized that the person did not hold a security clearance. *Id.* at 149, 152. At that point, he called for an escort for the driver and passenger. *Id.* at 149.

The Individual claimed a lack of training as the reason he allowed a person without any credentials into the limited access area. *Id.* at 151-52. However, when asked about the site's policy for handling people without visible credentials, the Individual testified that he knew the correct policy; he would challenge the person to produce their credentials and, if they could not do so, would call a supervisor to handle the situation. *Id.* at 157. He also testified that he knew this policy when he

first spoke to the security office about the incident shortly after it happened. *Id.* at 154. The supervisor testified that he trained the Individual for four hours at the gate where the security incident occurred. *Id.* at 49.

## **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) and the Adjudicative Guidelines. After due deliberation, I have determined that the Individual's security clearance should not be restored. I cannot 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.

### **A. Guideline E**

Guideline E provides that the following conditions (in relevant part) may mitigate Personal Conduct security concerns: (1) the Individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts; (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 contributed to untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur; and (4) association with persons involved in criminal activities was unwitting, 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. Adjudicative Guidelines at ¶ 17(a), (c), (d), (g).

Regarding the two incidents that occurred while the Individual was a caregiver, the Individual's prompt reporting and continued employment with the company support a finding that the Individual appropriately handled the situations. Given this, I find that the Individual has mitigated the security concerns related to these incidents.

The Individual's testimony that he did not report his marijuana use to the Coast Guard, for which he is still a reservist, and that he did not intend to do so unless confronted, is evidence of ongoing lack of candor. The Individual has knowledge of the Coast Guard's zero tolerance drug policy and knew that DOE considered his lack of candor to be a security concern. Even so, he continues to withhold his drug use from the Coast Guard. Consequently, I cannot be certain that the Individual can be relied upon to demonstrate honesty and forthrightness to the DOE. *See* Adjudicative Guidelines at ¶17(a), (d). Therefore, I find that the Individual has not mitigated the Guideline E concerns regarding his lack of candor with the Coast Guard.

The remaining Guideline E concerns focus on the Individual's conduct at work. His workplace record include a verbal altercation, theft, and improperly allowing access to a secure government

facility. The Individual has offered a list of excuses (inability to pay for an item because the registers were closed and lack of training) to explain why his conduct yielded such negative outcomes. The Individual expressed regret for his mistakes and appears to be sincere in that sentiment. Without sufficient evidence of improvement in his judgment and decision-making skills, there is significant doubt that the Individual can be relied upon to consistently uphold security policies, rules, regulations, and laws. Thus, I cannot find that the Guideline E security concerns raised by his workplace conduct have been resolved.

In sum, I find that the Individual has, in the past, demonstrated questionable judgment, lack of candor, and unwillingness to comply with rules and regulations. Such conduct raises significant questions about the Individual's reliability, trustworthiness, and ability to protect classified information. Consequently, I find that the Individual has failed to mitigate the Guideline E security concerns raised in the Notification Letter.

### **B. Guideline H**

Guideline H security concerns may be mitigated when (1) the behavior was so infrequent or so long ago that it is unlikely to recur and does not cast doubt on his or her current reliability, trustworthiness, or judgment; (2) the Individual acknowledges his or her drug involvement, provides evidence of actions taken to overcome this problem, and has established pattern of abstinence, including dissociating from drug-using associations, avoiding the environment where he or she used drugs, and providing a signed statement of intent to abstain from all drug-involvement; (3) the drug use was prescription drug abuse after a severe illness for which the drugs were prescribed and the drug use has ended; and (4) the Individual has satisfactorily completed a drug treatment program, including aftercare requirements, without relapse and has a favorable prognosis from a qualified medical professional. Adjudicative Guidelines at ¶ 26(a)-(d).

The Individual has not used illegal drugs in several years and when he did his use was infrequent. Further, he acknowledged his drug use to the DOE. Given the Individual's limited marijuana usage and the time that has elapsed since that usage, I find that he has mitigated DOE's concern regarding his illegal drug usage. *See* Adjudicative Guidelines at ¶ 26(a); 10 C.F.R. §710.7(c). However, a security concern is raised by the Individual's decision to use an illegal drug while holding a security clearance. The Individual has yet to inform the Coast Guard that he used marijuana and this failure casts significant doubt on his ability or willingness to comply with laws, rules, and regulations. The Individual does not appear to acknowledge that it was a problem that his marijuana use occurred while he held a security clearance and he certainly does not appear ready to accept the consequences of his choice. *See* Adjudicative Guidelines at Guideline H ¶ 24. Accordingly, I cannot find that the Individual has sufficiently mitigated DOE's Guideline H security concerns.

## **VI. CONCLUSION**

Upon consideration of the entire record in this case, I find that there was evidence that raised Guideline E and H security concerns under the Adjudicative Guidelines. I further find that the Individual has not succeeded in fully resolving those concerns. Therefore, I cannot conclude that restoring DOE access authorization to the Individual "will not endanger the common defense and

security and is clearly consistent with the national interest.” 10 C.F.R. § 710.7(a). Accordingly, the DOE should not restore access authorization to the Individual at this time. Either party may seek review of this Decision by an Appeal Panel pursuant to 10 C.F.R. § 710.28.

Janet R. H. Fishman  
Administrative Judge  
Office of Hearings and Appeals