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United States Department of Energy
Office of Hearings and Appeals

In the Matter of:	Personnel Security Hearing	)	
		)	
Filing Date:	November 21, 2018	)	Case No.: PSH-18-0081
		)	
		)	

Issued: March 28, 2019

Administrative Judge Decision

Janet R. H. Fishman, Administrative Judge:

This Decision concerns the eligibility of XXXXXXXX (hereinafter referred to as "the Individual") for access authorization under the Department of Energy's (DOE) regulations set forth at 10 C.F.R. Part 710, entitled, "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's security clearance should be restored.

I. BACKGROUND

The Individual is employed by the DOE contractor in a position that requires him to hold a security clearance. Beginning on March 2011, the Individual completed three separate Questionnaires for National Security Positions (QNSP), in which he failed to report his one-time use of marijuana in March 2009.[2] Ex. 1. On September 2011, the Individual signed a letter of interrogatory certifying that he had used marijuana only twice in April 2002. Ex. 1. The Local Security Office (LSO) determined that the Individual had failed to provide accurate consistent information regarding his marijuana usage in the three QNSPs and in the LOI. Ex. 1.

The LSO began the present administrative review proceeding by issuing a Notification Letter to the Individual September, 2018, informing him that he was entitled to a hearing before an Administrative Judge in order to resolve the substantial doubt regarding his eligibility to continue holding a security clearance. *See* 10 C.F.R. § 710.21.

[1] Under the regulations, "Access authorization" means 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 also be referred to in this Decision as a security clearance.

[2] The Individual's QNSPs were dated March 2011, August 2011 and April 2012. Ex. 1. In these QNSPs, the Individual provided varying accounts of his marijuana usage. In the March 2011 QNSP, the Individual denied using illegal drugs in the past seven years. Ex. 10 at 32. His August 2011 QNSP reported that the Individual had used marijuana twice in 2000. Ex. 9 at 2. The April 2012 QNSP stated that the Individual had not used illegal drugs in the prior seven years. Ex. 8 at 2.

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 November 21, 2018. At the hearing I convened pursuant to 10 C.F.R. § 710.25(d), (e), and (g), the Individual testified on his own behalf. *See* Transcript of Hearing, Case No. PSH-18-0081 (hereinafter cited as "Tr."). The LSO submitted 13 exhibits, marked as Exhibits 1 through 13 (hereinafter cited as "Ex."). The Individual submitted 8 exhibits, marked as Exhibits A through H.

II. 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 Guideline E of the *National Security Adjudicative Guidelines for Determining Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position*, effective June 8, 2017 (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 failure to include his March 2009 marijuana use on his April, 2012, August, 2011, and March, 2011, QNSPs. Ex. 1. In addition, the LSO included the Individual's omission of his March 2009 marijuana use on a September 2011 Letter of Interrogatory (LOI). *Id.*

III. 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.

The discussion below reflects my application of these factors to the testimony and exhibits presented by both sides in this case.

IV. FINDINGS OF FACT

The Individual does not dispute the facts alleged in the Notification Letter, regarding his omission of his March 2009 marijuana use from his March 2011, August 2011, and April 2012 QNSPs and his September 2011 LOI. Ex. 2 at 1-2. As such, I adopt the factual allegations in the Notification Letter as my factual findings in this case. The Individual testified on his own behalf. Tr. at 7.

The Individual testified that he completed three QNSPs between March 2011 and April 2012. Tr. at 93. In addition, he stated that he completed a LOI in September of 2011. *Id.* In attempting to clarify his marijuana usage during his time in high school, he admitted that he used differing dates on the forms and completely omitted reporting any usage on the March 2011 and April 2012 QNSPs.[3] When questioned why he added his April 2000 high school marijuana use on the August 2011 QNSP, even though it was outside the parameters of the question, the Individual stated that he was told to include all illicit drug use back to the age of 16.[4] Tr. at 30.

Regarding his March 2009 marijuana usage, the Individual testified that he forgot about his use until questioned by an Office of Personnel Management (OPM) investigator during his reinvestigation in 2017. Tr. at 12. The Individual was later questioned about his omission of his March 2009 marijuana use during a March 2018 PSI in response to the information included in his background investigation by OPM. Ex. 11 at 65. The Individual stated that he only remembered his March 2009 usage when the OPM investigator asked him if he used marijuana twice. *Id.* The Individual asserted that he corrected the investigator to tell him that he had used marijuana three times, including March 2009. *Id.* at 48. He declared that not mentioning his March 2009 usage prior to the interview was an oversight. *Id.* at 42, 57, 58. He stated during the Personnel Security Interview (PSI) "I'm sure it brings into question everything I've said from that point to now, as well." Ex. 11 at 69. At the hearing, he also asserted that "the only time you can get in more trouble is if you lie." Tr. at 43. The Individual concluded that "one lie can ruin a person's integrity in the eyes of their peers, their family members, or authority figures." *Id.* at 55.

V. ANALYSIS

The issue before me is whether the Individual, at the time of the hearing, presents an unacceptable risk to national security and the common defense. I must consider all the evidence, both favorable and unfavorable, in a common sense manner. "Any doubt concerning personnel being considered

[3] The question on the QNSP asks: "Since the age of 16 or in the last 7 years, whichever is shorter, have you illegally used any controlled substance, for example, marijuana, cocaine, crack cocaine, hashish, narcotics . . .?" Ex. 9 at 2 (emphasis included). On the August 2011 QNSP, the Individual answered "yes" and stated that he had used marijuana around April 2000. *Id.* In the September 2011 LOIs, the Individual again answered "yes" and stated that he had used marijuana in April 2002. Ex. 7 at 1. The question on the LOI is much broader and not limited by dates. *Id.*

[4] Again, his high school usage was not required to be included on any of his QNSPs since he was only required to report illegal drug use occurring in the prior 7 years.

for access for national security eligibility will be resolved in favor of the national security." Adjudicative Guidelines at ¶ 2(b). In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record. Because of the strong presumption against granting security clearances, I must deny granting if I am not convinced that the LSO's security concerns have been mitigated such that granting the Individual's clearance is not an unacceptable risk to national security.

Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness, and ability to protect classified or sensitive information. Of special interest is any failure to provide truthful and candid answers during national security investigative or adjudicative processes. Adjudicative Guidelines ¶ 15. The Individual's admitted marijuana use and his inconsistent accounts of his prior marijuana use in the three PSIs and the LOI, as recounted above, gave the LSO justification to invoke Guideline E. Ex. 1.

Guideline E security concerns may however be mitigated if "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." *Id.* at ¶ 17(c).

I found the Individual to be credible in his testimony that his omission was not deliberate, but rather an oversight on his part. This is supported by the fact that the Individual's limited three time usage of marijuana (twice in April 2002[5] and once in March 2009) occurred several years before he was asked to recount the usage in the QNSPs or the LOI. While his answers on the various QNSPs are inconsistent, the extent of the inconsistencies are not such that it appears to be a coordinated attempt to mislead LSO officials as to the fact of his involvement with his illegal drug use. For example, while the Individual failed to report any illegal drug use in the April 2012 QNSP, a mere six months prior the Individual reported in his September 2011 LOI that he had used marijuana twice in April 2002. Guideline E requires that the omission, concealment, or falsification be deliberate. I cannot find that the Individual's failure to include a one-time usage of marijuana (March 2009), when he self-reported that usage later, was deliberate. If the omission was not deliberate, such omission would not rise to a level of being a security concern under Guideline E. In addition, I also found him to be credible in his testimony that he failed to remember his March 2009 marijuana usage. There is no other evidence that he falsified or omitted any other information from any questionnaires or during an interview, consequently, I find that the mitigating factor described in in paragraph 17(c) of the Guidelines that the behavior "be so minor or the behavior be so infrequent" is applicable to this case. Further, I find the Individual's failure to include his March 2009 marijuana use on his QNSPs was not deliberate. Given this, I find that the Guideline E security concerns raised by his inconsistent responses in the QNSPs and LOI have been resolved.

VI. CONCLUSION

Upon consideration of the entire record in this case, I find that there was evidence that raised concerns regarding the Individual's eligibility for a security clearance under Guideline E of the

[5] The two occasions of marijuana use in April 2002 (or April 2000 as recorded in the August 2011 QNSP) would not have been reportable under the instructions given in the QNSP because it occurred more than seven years prior to the date of the March 2011 QNSP. Ex. 10 at 32.

Adjudicative Guidelines. I further find that the Individual has succeeded in fully resolving those concerns. Therefore, I 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, I find that the DOE should restore access authorization to the Individual at this time.

The parties may seek review of this Decision by an Appeal Panel, under the regulation set forth at 10 C.F.R. § 710.28.

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