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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: January 30, 2019) Case No.: PSH-19-0007
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Issued: May 1, 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 granted.

I. BACKGROUND

The Individual is employed by a DOE Contractor in a position that requires him to hold a security clearance. The Local Security Office (LSO) obtained derogatory information regarding the Individual’s drug use and criminal conduct, and conducted a Personnel Security Interview (PSI) with the Individual in October 2017. In an August 2019 letter (Notification Letter), the Individual was informed that the LSO was in possession of information that cast substantial doubt regarding his eligibility to possess a security clearance.

The LSO began the present administrative review proceeding by issuing the Notification Letter to the Individual informing him 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. At the hearing I convened pursuant to 10 C.F.R. § 710.25(d), (e) and (g), the Individual testified on his own behalf and presented the testimony of four witnesses. *See* Transcript of Hearing, Case

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.

No. PSH-19-0007 (hereinafter cited as “Tr.”). The LSO submitted eight exhibits, marked as Exhibits 1 through 8 (hereinafter cited as “Ex.”).

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 her eligibility for a security clearance. That information pertains to Guidelines H and J 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), and the Bond Amendment.

The Adjudicative Guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The Administrative Judge’s overarching adjudicative goal is a fair, impartial, and commonsense decision. The entire process is a conscientious scrutiny of a number of variables known as the “whole person concept.” Adjudicative Guidelines ¶ 2(a). The Administrative Judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision. The protection of the national security is the paramount consideration.

Guideline H (Drug Involvement) references illegal drug usage. Guideline H states that “[t]he illegal use of controlled substances . . . can raise questions about an individual’s reliability and trustworthiness, both because such behavior may lead to physical or psychological impairment and because it raises questions about a person’s ability or willingness to comply with laws, rules, and regulations.” Adjudicative Guidelines at ¶ 24. The conditions set forth in the guideline that could raise a disqualifying security concern are testing positive for an illegal drug; illegal possession of a controlled substance, including cultivation, processing, manufacture, purchase, sale, or distribution; illegal possession of a controlled substance, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia; diagnosis by a duly qualified medical or mental health professional (e.g., physician, clinical psychologist, psychiatrist, or licensed clinical social worker) of substance use disorder; failure to successfully complete a drug treatment program prescribed by a duly qualified medical or mental health professional; any illegal drug use while granted access to classified information or holding a sensitive position; and expressed intent to continue drug involvement and substance misuse, or failure to clearly and convincingly commit to discontinue such misuse. Adjudicative Guidelines at ¶ 25. The LSO alleges that the Individual admitted that he unlawfully used marijuana in March 2017 and that he unlawfully used marijuana on a daily basis from 1986 to 1999. Ex. 1 at 1.

The LSO further alleged that the Individual’s use of an illegal drug in March 2017 prohibited him from possessing an access authorization pursuant to the Bond Amendment, codified at 50 U.S.C. § 3343(b). The Bond Amendment provides that agencies “may not grant or renew a security clearance for a covered person who is an unlawful user of a controlled substance or an addict.” 50 U.S.C. § 3343(b). Given the facts alleged in the Notification Letter, the LSO’s security concerns under Guideline H and the Bond Amendment are justified.

Guideline J refers to “[c]riminal activity [that] creates doubt about a person’s judgment, reliability, and trustworthiness.” Adjudicative Guidelines at ¶ 30. Such behavior “calls into question a person’s ability or willingness to comply with laws, rules, and regulations.” *Id.* The conditions set forth in the guideline that could raise a disqualifying security concern are a pattern of minor offenses, any one of which on its own would be unlikely to affect a national security eligibility decision, but which in combination cast doubt on the individual's judgment, reliability, or trustworthiness; evidence (including, but not limited to, a credible allegation, an admission, and matters of official record) of criminal conduct, regardless of whether the individual was formally charged, prosecuted, or convicted; the individual is currently on parole or probation; violation or revocation of parole or probation, or failure to complete a court-mandated rehabilitation program; and discharge or dismissal from the Armed Forces for reasons less than "Honorable." Adjudicative Guidelines at ¶ 31. The LSO alleges that the Individual unlawfully used marijuana in March 2017; was cited for Speeding in March 2016; was cited for marijuana possession in 1997 or 1998; unlawfully used marijuana on a daily basis from 1986 to 1998; unlawfully purchased marijuana on a weekly basis from 1986 to 1998; was arrested and charged in February 1992 with Second Degree Felony Burglary after he illegally jumped a fence at an airport; and was arrested and charged with Breaking and Entering in 1992 after he illegally jumped a fence at a hotel.² Ex. 1 at 2. Given this factual background, the LSO’s security concern under Guideline J is sufficiently justified.

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 her 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.

² In the State where the 1992 arrests occurred, the act of improperly jumping a fence led to a criminal offense because the Individual was trespassing.

IV. FINDINGS OF FACT

The Individual testified that he had fractured his arm approximately eight months prior to his March 2017 marijuana usage. Tr. at 49; Ex. 7 at 35. He was meeting a friend at a bar, but the friend failed to arrive. Tr. at 49; Ex. 7 at 36. He was in pain from his injured arm, because the pain medication he was taking had “weakened” and he does not like taking medication. Tr. at 49, 52-53. The Individual testified that he went outside the bar and that he met someone who had a marijuana cigarette, he stated that he inhaled one puff from the marijuana cigarette, hoping it would help with his pain. *Id.* at 50. The Individual stated during his PSI that he did not know the person who was smoking the marijuana and that none of his friend “do drugs.” Ex. 7 at 37. He admitted that he demonstrated a lack of judgment to smoke marijuana rather than going home to take his prescribed pain medication. Tr. at 50. The Individual stated that when the Office of Personnel Management (OPM) investigator asked if he had used any illegal substances, he admitted to his recent marijuana use and his past illegal drug use. *Id.* at 56.

The Individual testified that his past marijuana usage was less frequent than he stated in the PSI. Tr. at 44. He claimed that he probably used marijuana every other week between 1986 and 1998. *Id.* The Individual asserted, in both the PSI and at the hearing, that he only purchased marijuana when he could afford it. Tr. at 44; Ex. 7 at 66. He stated that he used marijuana because he “wasn't a happy person. I wasn't upset, but I had a bad temper. I was just angry all the time, ticked off. So I started smoking marijuana, and that helped me relax . . . you know, kept me from going out and . . . getting into trouble other ways.” *Id.* at 45. The Individual asserted that he stopped using marijuana in 1998 immediately after he was cited for possession. *Id.* at 47. He stated that he began doing Yoga and studying Buddhism. *Id.* at 48.

In going over his past criminal behavior, the Individual admitted that he was cited for speeding in 2016. Tr. at 61. *Id.* The Individual claimed that he was not arrested again after his February 1992 arrest. *Id.* at 67. He testified that, “[a]fter I did that 30 days [in jail], I was like I don't like being locked up.” *Id.* at 69.

The Individual concluded his testimony by talking about his work in a volunteer organization that help victims of child abuse. Tr. at 73. He testified that the organization has many procedures that need to be followed; as he is on the security team for the organization, he is required to have more knowledge about the child victims than other organization members. *Id.* In addition, the Individual asserted that, in his role holding another position within the organization, he is required to have regular contact with a number of different police agencies. *Id.* at 76.

The Individual's testimony regarding the volunteer organization was confirmed by two of his witnesses from that organization. *Id.* at 28-30, 35-36. Both of these witnesses testified that they trust the Individual implicitly. *Id.* at 31, 36. One of the witnesses testified that the Individual's judgment is impeccable; the other witness, who is a police captain in a neighboring jurisdiction, testified that he has never doubted the Individual. *Id.* at 30, 33, 35. The Individual's other two witnesses were both prior supervisors. Tr. at 8, 18. They both testified that he had excellent judgment and produced an exceptional work product, even during difficult situations. Tr. at 10, 21.

V. ANALYSIS

A person who seeks access to classified information enters into a fiduciary relationship with the government predicated upon trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours. The government places a high degree of trust and confidence in individuals to whom it grants access authorization. Decisions include, by necessity, consideration of the possible risk that the applicant may deliberately or inadvertently fail to protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information.

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 for access for national security eligibility will be resolved in favor of the national security.” Adjudicative Guidelines ¶ 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 the clearance 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.

A. Guideline H Security Concerns and the Bond Amendment

The illegal use of controlled substances can raise questions about an individual’s reliability and trustworthiness and also about a person’s ability or willingness to comply with laws, rules, and regulations. Adjudicative Guidelines at ¶ 24. Guideline H provides that the following relevant conditions may mitigate security concerns:

- (a) the behavior happened so long ago, was so infrequent, or happened under such circumstances that it is unlikely to recur or does not cast doubt on the individual's current reliability, trustworthiness, or good judgment (*id.* at ¶ 26(a));
- (b) the individual acknowledges his or her drug involvement and substance misuse, provides evidence of actions taken to overcome this problem, and has established a pattern of abstinence, including, but not limited to (*id.* at ¶ 26(b)):
 - (1) disassociation from drug-using associates and contacts (*id.* at ¶ 26(b)(1)); and
 - (2) changing or avoiding the environment where drugs were used (*id.* at ¶ 26(b)(2));

Id. at ¶ 26(a)-(b). I find the Individual’s testimony convincing that he inhaled marijuana only one time during the March 2017 incident. Prior to that usage, the Individual regularly used marijuana between 1986 and 1998, ceasing usage over 20 years prior to the hearing. He has acknowledged his marijuana use and no longer associates with people who use illegal substances. The March 2017 incident was prompted by the significant pain in his arm. I conclude that the circumstances leading to this one time use are such that it is unlikely that the Individual would use marijuana in the future. Further, I find that the Individual has established a current two year pattern of abstinence. Given my determinations regarding the Individual’s past illegal drug use, I find that the Guideline

H mitigating factors referenced in paragraphs 24 (a) and (b) are applicable in this case. Accordingly, I find that the Individual has resolved the DOE's Guideline H security concerns.

With regard to the Bond Amendment, as discussed above, I find that there is no evidence that the Individual is a current user of illegal drugs or is an addict. Consequently, I find that the Bond Amendment does not operate as a bar that prevents the Individual's security clearance from being granted. *See Personnel Security Hearing*, Case No. PSH-18-0013 (2018); *Personnel Security Hearing*, Case No. PSH-16-0062 (2016).

B. Guideline J Security Concerns

Criminal activity creates doubt about a person's judgment, reliability, and trustworthiness, and by its very nature calls into question a person's ability or willingness to comply with laws, rules, and regulations. Adjudicative Guidelines at ¶ 30. Guideline J provides that the following relevant conditions may mitigate security concerns:

- (1) so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances, that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment; (*id.* at ¶ 32(a));
- (2) there is evidence of successful rehabilitation; including, but not limited to, the passage of time without recurrence of criminal activity, restitution, compliance with the terms of parole or probation, job training or higher education, good employment record, or constructive community involvement (*id.* at ¶ 32(d)).

Id. at ¶ 32(a), (d). The Individual regularly purchased and used marijuana from 1986 through 1998 and was cited for possession of marijuana in 1997 or 1998, over 20 years prior to the hearing. In addition, he had two criminal charges in early 1992, also over 20 years prior to the hearing. Further, as described above, I find that the Individual's most recent criminal event, the March 2017 incident, happened under such unusual circumstances that it is unlikely to recur and does not cast doubt on his reliability, trustworthiness, or good judgment.

As for the March 2016 speeding citation, I find that this is not a significant violation of criminal law. The traffic citation entailed a fine of \$143. I note that the DOE security regulations exempt minor traffic violations from the reporting requirement for legal infractions. DOE Order 472.2, Attach. 4 at 1. *Cf.* Adjudicative Guidelines at Guideline J ¶ 31(a). *See Personnel Security Hearing*, Case No. PSH-17-0040 (2017). Given this, I conclude that the Individual's March 2016 speeding ticket does not in itself raise a significant Guideline J security concern. Other than his single inhalation of marijuana in March 2017 and his citation for speeding in March 2016, the Individual had not engaged in criminal activity in the prior 20 years. I thus conclude that the Guideline J mitigating factors referenced above are applicable to this case. Accordingly, I find that the Individual has resolved the DOE's Guideline J security concerns.

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 the Bond Amendment and Guidelines H and J of the Adjudicative Guidelines. I further find that the Individual has succeeded in fully resolving those concerns. Therefore, I conclude that granting 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 grant 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