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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: December 5, 2019) Case No.: PSH-20-0019
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Issued: February 28, 2020

Administrative Judge Decision

Steven L. Fine, Administrative Judge:

This Decision concerns the eligibility of XXXXXXXXXXXXXXXX (hereinafter referred to as “the Individual”) to hold an access authorization 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 of Special Nuclear Material.”¹ 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), I conclude that the Individual’s access authorization should not be granted.

I. BACKGROUND

The Individual is an applicant for a DOE Security Clearance. The Individual began this process by completing, signing, and submitting a Questionnaire for National Security Positions (QNSP) to a Local Security Office (LSO) on May 28, 2017. Ex. 1 at 1. The National Background Investigation Bureau (NBIB) conducted an investigation of the Individual from May 29, 2018, through June 25, 2018. Ex. 2 at 1. As part of this investigation, a NBIB investigator (the Investigator) conducted a Triggered Enhanced Subject Interview (TESI) of the Individual on June 8, 2018. Ex. 2 at 1. Because the QNSP and TESI obtained derogatory information concerning the Individual, the LSO issued a Letter of Interrogatory (LOI) to the Individual on November 8, 2018. Ex. 3 at 1. The Individual submitted his response to the LOI (the Response) on November 16, 2018. Ex. 4 at 1. The Response did not resolve these security concerns. Accordingly, the LSO began the present administrative review proceeding on October 22, 2019, by issuing a Notification Letter informing the Individual that the LSO possessed reliable information that

¹ Access to authorization is defined as “an administrative determination that an individual is eligible for access to classified mater 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 to authorization or security clearance

created substantial doubt regarding his eligibility to hold a security clearance. Ex. 8 at 1. The Notification Letter further informed the Individual that he was entitled to a hearing before an Administrative Judge in order to resolve these substantial doubts. *See* 10 C.F.R. § 710.21.²

The Individual requested a hearing and the LSO forwarded his request to the Office of Hearings and Appeals (OHA). The Director of OHA appointed me as the Administrative Judge in this matter on December 6, 2019. At the hearing I convened pursuant to 10 C.F.R. § 710.25(d), (e), and (g), the Individual presented his own testimony. *See* Transcript of Hearing, Case No. PSH-20-0019 (hereinafter cited as “Tr.”). The DOE counsel submitted ten exhibits, marked as Exhibits 1 through 10. (hereinafter cited as “Ex.”). The Individual submitted seven exhibits, marked as Exhibits A through G.

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. In support of its determination that this information raises a substantial doubt about the Individual’s eligibility for a security clearance, the LSO cites Guidelines E, H, and J of the Adjudicative Guidelines.³

Under Guideline E (Personal Conduct), the LSO cites three omissions of information from the QNSP submitted by the Individual that would have revealed that he had: been terminated by an employer, used marijuana as recently as 2014, and been charged by a law official with illegal marijuana possession in 2012 or 2013. In addition, the LSO cited the Individual’s admissions to the Investigator that he made at least two of these omissions because of his concerns that his past illegal drug use and criminal record would disqualify him from obtaining a security clearance. These allegations adequately justify the LSO’s invocation of Guideline E. Guideline E provides: “[c]onduct 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 information. **Of special interest is any failure to cooperate or provide truthful and candid answers during national security investigative or adjudicative processes.**” Guideline E at § 15. (emphasis added).

Under Guideline H (Drug Involvement and Substance Misuse), the LSO cites the Individual’s admissions, made during the TESI and in his LOI Response, that he purchased and used marijuana from 2008 through 2014. These allegations sufficiently justify the LSO’s invocation of Guideline H. Guideline H states: “The illegal use of controlled substances, to include the misuse of

² On December 12, 2019, the LSO submitted an Amended Notification Letter.

³ 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 to issue a fair, impartial and common sense decision. The entire process is a conscientious scrutiny of a number of variables known as the “whole person concept.” Adjudicative Guidelines at § 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.

prescription and non-prescription drugs, and the use of other substances that cause physical or mental impairment or are used in a manner inconsistent with their intended purpose 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." Guideline H at § 24.

Under Guideline J (Criminal Conduct), the LSO cites the Individual's admissions, made during his TESI and in the Response, that police charged him with Unlawful Possession of Marijuana (UPM). This allegation adequately justifies the LSO's invocation of Guideline H. "Criminal activity creates doubt about a person's judgement, reliability, and trustworthiness. By its very nature, it calls into question a person's ability or willingness to comply with laws, rules and regulations." Guideline J at § 30.

III. REGULATORY STANDARDS

A DOE administrative review process under Part 710 requires me, as Administrative Judge, to issue a Decision that reflects my comprehensive, common-sense judgement, made after consideration of all of the relevant evidence, favorable or 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 personal 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 of this case.

IV. FINDINGS OF FACT

The QNSP

The Individual completed and signed his QNSP on May 28, 2017. This QNSP contained a "Statement of Understanding" requiring the Individual to acknowledge that he had read the instructions, and to further acknowledge that he understood that if he "withhold[s], misrepresent[s] or falsify[ies] on this form, [he is] subject to...denial or revocation of a security clearance[.]" Ex. 1

at 5. The QNSP included a series of questions to which the Individual was required to respond. Section 22 of the QNSP required the Individual to respond to the question: “[h]ave you ever been charged with an offense involving alcohol or drugs?” Ex. 1 at 22. The Individual responded “no.” Ex. 1 at 22. Section 23 of the QNSP asked the Individual: “[i]n the last seven (7) years, have you illegally used any drugs or controlled substances?” Ex. 1 at 23. The Individual responded “[n]o” to this question. Ex. 1 at 23.

Section 13A required the Individual to report each of his previous employments. For each employer, he was required to report his “Reason for Leaving.” For one employer, (the Employer) the Individual responded to this statement by stating “I was let go for opening a vent to air out the shop because I couldn’t breath [sic] due to the diesel fumes from trucks and also welding fumes.” Ex. 1 at 13. Section 13A’s next question was to ask whether the Individual had been “fired” from the employer during the previous seven years. Ex. 1 at 13. The Individual responded “no” to this question. Ex. 1 at 13.

The TESI

The Investigator conducted a TESI of the Individual on June 8, 2018. Ex. 2 at 1. During this TESI, the Individual spontaneously informed the Investigator that he had been arrested for UPM in or about 2012 or 2013.⁴ Ex. 2 at 2. The Individual further informed the Investigator that he began using marijuana on a weekly basis in 2008, and that he has not used marijuana since his arrest. Ex. 2 at 2. The Investigator’s report states:

[The Individual] stopped because he decided it was time to be an adult and be more responsible. [The Individual] wanted to get his life together. . . . [The Individual] did not list this on the case papers because he did not want it to effect his clearance. [The Individual] wanted to be truthful in his interview in case it came up in the investigation.

Ex. 2 at 2.

The Investigator’s report also states “[the Individual’s] listed firing at [the Employer] in February 2016 was discussed.” Ex. 2 at 1. The report does not indicate that the Investigator questioned the Individual about his contradictory statements concerning his termination during the QNSP, indicating to me that the Investigator was not concerned that the Individual was trying to conceal his termination by the Employer.

The LOI

On November 8, 2018, the LSO issued the LOI to the Individual. Ex. 3 at 1. The Individual submitted the Response on November 16, 2018. Ex. 4 at 1. In the Response, the Individual stated that he began using marijuana on a weekly basis “sometime in 2012.” Ex. 4 at 1. He further indicated that his last use of marijuana occurred “sometime in 2014,” and that he intended to avoid using marijuana in the future. Ex. 4 at 1. The LOI asked the Individual “Did you omit your drug

⁴ The report indicates the Individual was issued an appearance ticket at the scene and subsequently released. Ex. 2 at 2.

use on your QNSP as you believed you would not receive a clearance?” The Individual responded to this question in his response by stating “Yes.” Ex. 4 at 1. The Individual concluded his response to the LOI by stating:

As far as the [TESI], I was NOT arrested for Unlawful Possession of Marijuana I may not have been clear as to what I said during the meeting. I said I was charged with a UPM because I received a ticket. What happened was my girlfriend at the time was pulled over for speeding by a . . . State trooper. He searched the car and found marijuana. Both me and her got tickets. I appeared at court on the date on the ticket but when I got there I was told the officer [n]ever gave them any paperwork for me. I was told I would receive another court date in the mail. I never received anything. I also did not have any court fees or any fines. On November 14, 2018, I called . . . Town Court and asked if they had any records involving the UPM. They had nothing. On November 15, I wrote an email to the . . . state troopers records department to see if they have anything on record. They replied that they will look into it but it could take until May of 2019 because of their volume of requests.

Ex. 4 at 1.

Exhibits B, E, F, and G

On January 16, 2020, the Individual submitted seven exhibits. These Exhibits included Ex. B, a sworn declaration (the Declaration) by the Individual. In this Declaration the Individual states:

For my charge for Unlawful Possession of Marijuana, I originally stated that I was not charged with the offense. This was because at the time of the offense, I was not placed in handcuffs, nor was I brought to a local precinct. I changed the way I answered when I was verbally questioned because I was issued a ticket for the offense but the way I answered made it seem as though I was arrested for the charge. My answer remains as I was not charged or arrested for this offense. I was simply ticketed and told I would have to appear in court to clear the ticket. I was issued a court date in which I promptly showed. The officer who issued the ticket did not show up to court and the Judge had no option other than to reschedule and I was told I would receive another court date in the mail, which I never received. All charges were then dropped and there is no record of this ever occurring.

Ex. B at 1. The Individual also admitted using marijuana “until after my ticket for Unlawful Possession of Marijuana around 2013.” Ex. B at 1. The Individual further stated:

After receiving my ticket I realized I needed to get my life together and think of my future. I stopped all use of Marijuana so that I could pursue my career in Welding. I stopped talking to all friends who associated themselves with the use of Marijuana knowing that this would help me get on the right path. I am able to prove that I have not smoked with a Drug Test that I willingly took to prove my innocence and my Union requires a yearly drug test that I have to pass in order to keep my job.

Ex. B at 1-2. The Individual further declared that he: has not used marijuana for “about” seven years, has tested negative for drug use on several occasions, and has completed a course on drug awareness.” Ex. B at 2.

The Individual also submitted Ex. E, a certificate of completion for an online drug & alcohol awareness course; Ex. F, a laboratory report indicating that the Individual was tested for twelve illegal drugs, including Tetrahydrocannabinol (THC), on January 6, 2020, and that these tests did not detect any illegal drug use; and Ex. G, a statement signed by the Individual indicating that he intends to avoid any illegal drug involvement in the future.

The Hearing

The Individual was the only witness that testified at the hearing. He testified that he was only 20 or 21 when he completed the QNSP.⁵ Tr. at 15. The Individual indicated that he made a mistake when he answered “no” to the question asking if he had been fired from the Employer. Tr. at 17. The Individual testified that he had no intention to mislead when doing so, noting that he had disclosed that he had been “let go” by the Employer in his answer to the previous question in the QNSP. Tr. at 17-18. The Individual admitted that he should have taken greater care in answering this question. Tr. at 18.

With regard to the UPM charge, the Individual testified that, when he was 18 years old, the police had issued a “ticket” to him after finding marijuana in his vehicle. Tr. at 18-19. When the Individual was asked why he did not disclose this incident in his QNSP he answered by stating: “Because nothing happened with that, anything [sic] to disclose it.” Tr. at 19. The Individual went on to state: “But then when I had my interview I felt like I should say something about it instead of not saying something and them finding out and then me lying about it. I wanted to be honest and say something about it.” Tr. at 19. He noted that it was he, not the Investigator, who raised this issue at the TESI. Tr. at 19-20. The Individual testified that his failure to report this incident on his QNSP was not intended to mislead because “I didn't think of -- I didn't think to disclose it at first because I didn't get any ticket, or I didn't get -- nothing happened of the situation.” Tr. at 20.

During his testimony, the Individual repeatedly claimed that he failed to disclose his marijuana use on the QNSP because he thought his marijuana use occurred over seven years prior to his completion of the QNSP. Tr. at 22-23, 39, 44. When the Individual was asked why he previously indicated that he did not disclose his marijuana use because of his fear that it might prevent him from receiving a security clearance, the Individual stated:

Well, when asked -- because I disclosed what was going on. The investigator, he did -- he asked the question and then led up with a follow-up question. And I was nervous. And he said well, you didn't want it to affect your clearance and I agreed with him. In the back of my head, yes, it wasn't in my head that I didn't want it to affect my clearance, but I also didn't want to be -- I wanted to be -- tell the truth.

⁵ The Individual's QNSP indicates that he was actually 22 years old at the time. Ex. 1 at 5

Tr. at 23. The Individual further testified that he had no intent to mislead when he omitted his previous marijuana use from his responses to the QNSP, and that he believed he answered the QNSP honestly. Tr. at 24.

The Individual testified that he has matured, attended a trade school, has become career oriented and has plans to start a family. Tr. at 21, 25. His last use of marijuana occurred in 2013 or 2014. Tr. at 21-22. He testified that he stopped using marijuana because he was concerned it might negatively affect his career. Tr. at 22. He further testified that he will not use marijuana in the future. Tr. at 25. The Individual testified that he has been subjected to drug testing on several occasions since 2014, and has never tested positive for illegal drugs. Tr. at 26.

During a cross-examination conducted by the DOE Counsel, the Individual admitted that he disclosed his marijuana history during the TESI because he was concerned that the investigation might discover it. Tr. at 33.

V. ANALYSIS

Guideline E Concerns

At the hearing, the Individual contended that he never sought to mislead the LSO by omitting information concerning his marijuana use and arrest record. The Individual also attempted to resolve the security concerns raised by his three alleged omissions by acknowledging that he had erred, while contending that his errors resulted from a lack of knowledge and understanding of the application process which resulted in his failing to report his marijuana charge and his failure to remember that his marijuana use had occurred during the seven years preceding his submission of the QNSP. The Individual further contended that he made a good faith effort to correct his errors prior to confrontation by any investigators.

As an initial matter, I find that the Individual was not trying to mislead the LSO when he answered “no” to the question asking if he had been fired from the Employer. The Individual’s answer to the previous question in the QNSP disclosed that he had been “let go” by the Employer.

Nonetheless, I come to the opposite conclusion concerning the Individual’s other two omissions from the QNSP. Both of these omissions served to conceal the Individual’s illegal marijuana use. On two occasions, during the TESI and in his response to the LOI, the Individual admitted that he sought to conceal his marijuana use from the LSO because of his concern that this information might affect his ability to obtain a security clearance. I find the Individual’s assertions, at the hearing, *i.e.* that he did not believe that he had been arrested or charged with UMP and that he believed that he did not have to report the arrest because the matter had been dismissed, to have little credibility because of his two prior omissions. I find the Individual’s repeated assertions at the hearing that he thought his marijuana use had ended over seven years prior to his submission of the QNSP to be similarly lacking in credibility, both because of his admissions in the LOI and TESI concerning his motivation for omission, and my inability to believe that the Individual did not recall when he was ticketed for UMP after a traffic stop. The Individual’s obvious lack of candor during his hearing testimony shows that he continues to exhibit poor judgment, unreliability, and dishonesty.

The Adjudicative Guidelines set forth seven conditions which may provide mitigation of security concerns arising under Guideline E. Of these conditions, only Sections 17(a), 17(b), 17 (c), and 17(d), arguably apply to the circumstances existing in the present case.

Section 17 (a) can mitigate security concerns arising under Guideline E when the individual is able to show that they “made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts.” In the present case, the Individual did make an effort to correct his omissions when he informed the Investigator of his marijuana use and arrest. However the Individual’s effort to correct his omission was hardly “prompt,” he waited over one year before he provided the truth about his marijuana use and arrest to the Investigator. Moreover, the Individual was admittedly motivated to disclose this information by his concern that the investigation might disclose his marijuana charge.

Section 17 (a) can mitigate security concerns arising under Guideline E when the individual is able to show that “their . . . omission, or concealment was caused or significantly contributed to by advice of legal counsel or of a person with professional responsibilities for advising or instructing the individual specifically concerning security processes.” The Individual does not contend that he relied upon such advice in making his decision to omit information from his QNSP.

Section 17(c) can mitigate security concerns arising under Guideline E when the individual is able to show that their “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.” Omitting information from a QNSP in order to avoid disclosing an individual’s past marijuana use and arrest is not a minor matter. Moreover, the Individual’s prevarication during his hearing testimony concerning this matter continues to cast serious doubt on his reliability, trustworthiness, and judgment.

Section 17(d) can mitigate security concerns arising under Guideline E when an individual is able to show that they have “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.” In the present case, the Individual has not shown that he has obtained counseling or taken any other positive steps to successfully address the poor judgment that led him to conceal his marijuana use and arrest from the LSO. While, the Individual did take positive action to reveal his marijuana use and arrest during the TESI and in the Response, his questionable hearing testimony indicates that his poor judgment, untrustworthiness, and dishonesty remains a present concern and is likely to recur.

For the reasons set forth above, I conclude that the Individual has not mitigated the security concerns raised in the Notification Letter under Guideline E.

Guideline H Concerns

The Adjudicative Guidelines set forth four conditions which may provide mitigation of security concerns arising under Guideline H. Guideline H at § 26. One of these conditions is present in the instant case.

Section 26(a) provides that an individual may mitigate concerns arising under Guideline H by showing “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 judgement.” The Individual testified at the hearing that his last use of marijuana occurred in 2013 or 2014. For the reasons discussed at length above, I am hesitant to rely solely upon the Individual’s testimony. However, the Record contains sufficient corroborating evidence to convince me that the Individual voluntarily decided to stop using marijuana at that time. For example, the Individual submitted an instant toxicology report dated January 2020 from a medical facility indicating that the Individual tested negative for 12 listed substances, including THC. Ex. G at 1. The Individual has also completed an online Drug and Alcohol Awareness Course in January 2020, and signed a letter of intent not to use drugs. Ex. E at 1; Ex. G at 1. Moreover, the Individual’s testimony has convinced me that his marijuana use was a youthful indiscretion, and that he now realizes continued illegal drug involvement would interfere with his adult goals of establishing a career and starting a family.

For the reasons set forth above, I conclude that the Individual has sufficiently mitigated the security concerns set forth in the Notification Letter with respect to Guideline H by providing evidence that the behavior happened so long ago, that it is unlikely to recur, and that he has intends to avoid future illegal drug use.

Guideline J Concerns

The Adjudicative Guidelines provide that an individual can mitigate concerns arising under Guideline J if “there is evidence of successful rehabilitation; including but not limited to the passage of time without recurrence of the criminal activity, remorse or restitution, job training or higher education, good employment record, or constructive community involvement.” Guideline J at § 32(d).

Around the time of the Individual’s drug-related offense in either 2013 or 2014, the Individual was enrolled as a full-time student at a technical institute, and the Individual continued receiving certifications in his chosen field of education through 2018. Ex. D at 21-39. The Individual testified that he has been with his current job for two years, and that he belongs to a professional organization. Tr. at 12-13. Further, the record does not reveal any evidence of any other drug-related offense, charge, or arrest. Ex. E at 1. In light of the passage of a significant period of time without the recurrence of criminal activity, as well as the Individual’s pursuit of higher education and good employment record following his criminal conduct, I find that the Individual has mitigated and resolved the security concerns arising under Guideline J.

VI. CONCLUSION

For the reasons set forth above, I conclude that the LSO properly invoked Guidelines E, H, and J. After considering all of the evidence, both favorable and unfavorable, in a common sense manner, I find that the Individual has mitigated those security concerns raised under Guidelines H and J. However, the Individual has not mitigated the security concerns raised under Guideline E. Accordingly, the Individual has not demonstrated that granting his security clearance would not endanger the common defense and would be clearly consistent with the national interest. Therefore, the Individual's security clearance should be denied. The parties may seek review of this Decision by an Appeal Panel under the procedures set forth at 10 C.F.R. § 710.28.

Steven L. Fine
Administrative Judge
Office of Hearings and Appeals.