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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 14, 2020)	Case No.: PSH-20-0027
)	
_____)	

Issued: July 13, 2020

Administrative Judge Decision

James P. Thompson III, Administrative Judge:

This Decision concerns the eligibility of XXXXXX (“Individual”) for access authorization under the United States 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 and 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 should not be granted access authorization.

I. BACKGROUND

The Individual, an applicant for a DOE Security Clearance, underwent a Personal Security Interview (PSI) on June 6, 1991, as part of a prior investigation to obtain a security clearance. Ex. 15. For the most recent investigation, the Individual completed and signed a Questionnaire for National Security Positions (QNSP) on December 5, 2018. Ex. 14. The United States Office of Personnel Management’s (OPM) Investigation Service conducted an investigation of the Individual, and issued a report of its findings (“OPM Report”) on March 26, 2019. Ex. 16. As a result of the investigation, the Local Security Office (LSO) issued a Letter of Interrogatory to the Individual, and on May 20, 2019, the Individual submitted his response to the letter (hereafter, both the letter and response will be collectively referred to as “LOI”). Ex. 11. At the LSO’s request, a DOE consulting psychologist (“DOE Psychologist”) conducted a psychological evaluation of the Individual and issued a report (“The Report”) of her findings on August 2, 2019. Ex. 12.

Subsequently, the LSO determined that unresolved derogatory information existed regarding the Individual, which raised significant security concerns. Accordingly, the LSO began the present administrative review proceeding on December 4, 2019, by issuing a Notification Letter informing

¹ The regulations define access authorization 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). This Decision will refer to such authorization as access authorization or security clearance.

the Individual that the LSO possessed reliable information that created substantial doubt regarding his eligibility to hold a security clearance. 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.

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 January 15, 2020. At the hearing I convened pursuant to 10 C.F.R. § 710.25(d), (e), and (g), I took testimony from the Individual and two other witnesses. *See* Transcript of Hearing, Case No. PSH-20-0027 (hereinafter cited as “Tr.”). The DOE Counsel submitted sixteen exhibits, marked as Exhibits 1 through 16 (hereinafter cited as “Ex.”). The Individual declined to submit any exhibits.

II. 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 *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).

The LSO cited Guideline E (Personal Conduct) of the Adjudicative Guidelines as the first basis for denying the Individual a security clearance. Ex. 1 at 1-2. An individual’s personal conduct is a concern as “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.” Adjudicative Guidelines at ¶ 15. The Summary of Security Concerns asserted that: the Individual has an account in collection status that he failed to list in his responses in the QNSP; the Individual had been charged with drug and alcohol-related offenses in 1978 and 1981 that he failed to list in his QNSP; the answers provided in his QNSP, LOI, and first PSI, indicated that the Individual had been using illegal substances during the same years that he held a prior secret clearance; the Individual was terminated from prior employment for using marijuana in 2015; and, the Individual consumed the marijuana in 2015 while he possessed a security clearance despite knowing that he was scheduled for a drug test. Ex. 1 at 1-2. The above information justifies the LSO’s invocation of Guideline E. Adjudicative Guidelines at ¶ 16 (a)-(c).

The LSO also cited Guideline H (Drug Involvement) as a basis for denying the Individual a security clearance. Ex. 1. Not only do illegal substances cause mental or physical impairment, but they also raise “questions about a person’s ability or willingness to comply with laws, rules, and regulations.” Adjudicative Guidelines ¶ 24. The Summary of Security Concerns asserted that: the Individual intentionally consumed marijuana in 2015 while holding a security clearance and after having signed a Drug Certification in which he agreed to abide by DOE’s zero tolerance illegal drug policy; the Individual admitted that he had used marijuana from 1973 to 1986, a period which included military service; and, the Individual was charged with separate drug-related offenses in 1978 and 1981. Ex. 1 at 3. The above information justifies the LSO’s invocation of Guideline H. Adjudicative Guidelines at ¶ 25 (a), (c), (f), and (g).

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.

IV. FINDINGS OF FACT

The Individual underwent a Personnel Security Interview (PSI) in June 1991. Ex. 15. During the PSI, the Individual indicated that between 1973 and 1978 he used marijuana a couple of times a week and that his drug use decreased after he joined the military. *Id.* at 51-52.² The Individual was granted a secret clearance in June 1982, and he specifically stated in the LOI that he did not use marijuana while he held his secret clearance. Ex. 11 at 3. He stated that he "seldom" used marijuana while in the service, and that he would use marijuana approximately "a couple times a month" after he left the military. Ex. 15 at 52-53. The Individual also stated that his marijuana use "really tapered off" when he enrolled in college in 1985, as it "would have affected [his] studies." *Id.* at 52.³ In June 1991, the Individual signed a Drug Certification attesting that he understood the potential ramifications of any involvement with illegal drugs during the course of his employment and agreed to refrain from using illegal drugs. Ex. 10 at 1.

In December 2018, the Individual completed and signed a QNSP. Ex. 14. Therein, the Individual provided information regarding several criminal charges that occurred approximately between 1977 and 1993. *Id.* at 30-3. However, DOE notified the Individual it obtained information that indicated the Individual was charged with additional offenses in 1977 and 1981 involving drugs and alcohol. Ex. 11 at 13. In response, the Individual explained the discrepancy by stating he has a "bad memory." *Id.* In his answer pertaining to the year 1977, he stated "[i]t was a long time

² The Individual served in a branch of the armed forces from October 1978 to November 1982. Ex. 14 at 17.

³ The Individual stated in the LOI and at the hearing that he stopped using marijuana in 1986. Ex. 11 at 5; Tr. at 71.

ago[.]” *Id.* He stated further, “I have nothing to hide, [b]ut it appears that I forgot a lot of things.” *Id.* The Individual also stated that specific charges from 1981 were “dropped because they were not valid.” *Id.*

Furthermore, the Individual indicated in the QNSP that in May 2015 he consumed a marijuana brownie during a celebration, and when he self-reported it, he lost his clearance. Ex. 14 at 33. Specifically, after consuming the brownie, the Individual contacted his supervisor and asked for two extra weeks of leave. Ex. 8 at 2. The Personnel Security Information Report regarding the matter indicates that the Individual told his supervisor that “he had been feeling so bad that he had taken some of the ‘medical stuff [marijuana]’ about 1.5 weeks ago[.]” *Id.* The Individual’s supervisor stated in the same report that she asked the Individual if he had been called for a drug test and he told her “no.” *Id.* A separate incident report dated June 11, 2015, indicated the Individual had been notified on May 5, 2015, that he had been selected for a drug test. Ex. 7 at 2. Accordingly, the Individual was terminated on May 27, 2015. *Id.* at 3.

As part of his present application, and at the direction of the LSO, the Individual underwent a psychological evaluation in July 2019. Ex. 12. The DOE Psychologist subsequently produced The Report in which the 2015 marijuana consumption was discussed. *Id.* at 3. In addition to stating that he drank to intoxication and subsequently knowingly consumed marijuana in a brownie, the Individual insisted that he had not been called for a drug test immediately prior to his 2015 termination but that he “anticipated being called for [a] drug test.” *Id.* at 3-4. The Individual was asked about the discrepancy between his admission that he had consumed a marijuana brownie at a celebration and the statement to his supervisor that he had consumed marijuana for medical use. *Id.* at 4. In response, the Individual stated that the brownie was a “medical edible” and that he had been feeling bad because he was “freaking out” about having ingested the brownie. *Id.* The Individual stated to the DOE Psychologist that, although he did not know how his supervisor would respond, he did hope that “she would keep the information to herself.” *Id.* at 5. The Individual also denied in his psychological evaluation that he used marijuana while he had his secret clearance in 1982. *Id.* at 8.

Regarding the collection account, the Individual indicated in his QNSP that he does not have any “bills or debts turned over to a collection agency.” *Id.* at 39–40. A credit check from December 2018 indicates that the Individual has an outstanding balance with a cable provider. Ex. 9 at 2. In the LOI, which notified the Individual that the DOE possessed information that the account had been turned over to collections in April 2015, the Individual indicated that he did not “know about it[.]” and that he had an account with the same provider that was current. Ex. 11 at 12.

V. THE HEARING

The first witness testified that he began working with the Individual in 1997 and that they worked together for approximately nine years thereafter. Tr. at 14, 21-22. The witness and the Individual see each other socially “a couple of times a year[.]” *Id.* at 15. The witness testified that he has never seen the Individual use illicit substances, but thinks the Individual engaged in that behavior “years and years and years ago.” *Id.* at 15-16. When asked about the Individual’s character, he described the Individual as “good” and a “straight-up guy,” and indicated that he believes the Individual complied with the requirements that accompany a security clearance and protecting

classified information. *Id.* at 17-19. The witness also stated that the Individual complies with rules pertaining to road and motorcycle safety. *Id.*

The second witness for the Individual testified that he has known the Individual for approximately twenty years, and that they worked together on a daily basis before the Individual sought employment elsewhere. *Id.* at 25, 29. The witness and the Individual see each other socially a “handful of times a year[,]” and the witness described the Individual as “one of the most honest people I’ve ever met[.]” *Id.* at 26-27. He stated that the Individual is trustworthy, and that when he worked with the Individual, he would observe the Individual comply with established work rules and procedures. *Id.* at 27-28. The witness made these observations based on the unclassified work that they performed in a collaborative manner. *Id.* at 33-35.

When the Individual testified about the additional drug and alcohol related criminal charges that he failed to list in his QNSP, he stated that the reason he left these offenses out was “[p]robably old age.” *Id.* at 44. He explained that he understood the importance of providing accurate information on his QNSP, but that he simply could not remember one of the charges from 1981. *Id.* He clarified that the other 1981 incident that he did list took place while he was stationed abroad and did not result in a conviction. *Id.* at 45. With regard to the incident from 1977 that he failed to list in his QNSP, the Individual first stated that he believed he “had the dates wrong” and he did not remember it. *Id.* at 46-47. He denied any intent to hide the offenses from the government. *Id.* at 63. In later testimony, the Individual stated that he was recounting the same set of facts for two different sets of charges, as he only recalls one incident but does not know if the charge was in 1977 or 1978. *Id.* at 92.

The Individual further testified that he possessed a security clearance the last six month of his military service in 1982. *Id.* at 49. He also confirmed that he stated in his LOI that he used marijuana from the years 1978 to 1986, and that he used less marijuana when he was in the service. *Id.* The Individual clarified that while he held his security clearance in 1982, he refrained from using any marijuana because he did not want to jeopardize his military career. *Id.* at 49-51. He testified that after leaving the armed forces in 1982, he “did partake here and there,” but stopped using marijuana when he went to college. *Id.* at 50.

The Individual testified that in May 2015, he knew that using marijuana was in violation of the rules set out in his employee handbook. *Id.* at 53. He indicated that in May 2015, before he went on vacation, he had been notified that he would be asked to take a drug test. *Id.* at 56-57. However, he testified that he did not receive the call to take the drug test before he went on vacation. *Id.* at 57. While on vacation, he consumed a marijuana brownie after drinking so much that he “lost control of [himself]”, and he tested positive for marijuana after taking an at-home drug test. *Id.* at 57, 72. The Individual then asked his supervisor for an extra two weeks of vacation so that the marijuana could process out of his system. *Id.* at 55-56. The Individual explained the situation by indicating that he initially asked his supervisor for an extra two weeks of vacation, but that he admitted to the drug use when she sensed he was upset. *Id.* at 53-54. He also confirmed that when he reported using marijuana to his supervisor in May 2015, he wanted his supervisor to keep this information to herself. *Id.* at 53. When he was asked about his supervisor’s statement that he had told her that he “had been feeling bad and had taken medical stuff[,]” the Individual stated that he did not remember making that statement to her but that he had been “freaking out[.]” *Id.* at 58. He

also stated that he “could have said that” to his supervisor. *Id.* at 59. When questioned if the statement that he had “been feeling bad and taken medical stuff” was true, he stated, briefly, “it is true[,] I had a hip replacement” before stating that it would not have been a true statement if he had told his supervisor that he had taken “medical stuff” a week-and-a-half before calling her. *Id.* at 57-59.

Finally, the Individual testified that he no longer gets extremely intoxicated and, moving forward, he is not going to allow himself to get as drunk as he did the night he consumed the marijuana brownie. *Id.* at 77. He also stated that he had faith that his son, sister, and daughter-in-law would make sure he would not “get that drunk anymore.” *Id.*

VI. ANALYSIS

A. Guideline E

The Adjudicative Guidelines provide, in relevant part, that an individual may mitigate security concerns under Guideline E if:

....

- c) 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;
- d) 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;

....

Adjudicative Guidelines at ¶ 17.

The record contains a number of discrepancies between the information provided by the Individual and the information the DOE uncovered. Throughout the record, the Individual has attempted to explain omissions and discrepancies by either denying he had made a statement or stating that he had simply forgotten the fact with which investigators confronted him. When confronted with the fact that he failed to mention several criminal charges in his QNSP, he stated in the LOI and during his hearing testimony that he simply did not remember those incidents. However, despite insisting that he could not remember facts so remote in time, the Individual could state with absolute certainty that he did not use marijuana while holding a security clearance during his time with the armed forces approximately thirty-eight years ago.

I also found the evidence related to his conduct regarding the marijuana incident in 2015 concerning. First, the supervisor's recollection of what happened differed from the Individual's memory. The supervisor recalled that the Individual stated he had been feeling bad and he had taken “medical stuff” about a week and a half before he made the call. When he was asked about this statement in his LOI, he indicated “I was feeling [b]ad, [b]ut I do not recall stating that.” When

later asked about this discrepancy by the DOE Psychologist, the Individual appeared to justify his statements to the supervisor by stating that the marijuana brownie was a medical edible and that he was feeling bad because he was “freaking out.” Ex. 12 at 4. This latter statement appears to be an attempt to reframe what his original statement likely conveyed to the supervisor as that person remembered it: that he had treated pain with a medical marijuana product. Similarly, when confronted with the discrepant timeframe – days before versus a week and a half before – his responses leave me with doubt regarding his candidness and credibility. Furthermore, he briefly attempted at the hearing to justify his original statement that he was “feeling bad” by stating that his hip had been hurting, but that statement again detracts from his own testimony that he consumed the marijuana brownie because he was intoxicated, not for its therapeutic value to treat physical pain. Further still, the noticeable difference in his ability to remember some important facts and not others casts doubt on the Individual’s credibility. All of the above does not suggest good judgement or trustworthiness. Accordingly, I cannot find that the Individual mitigated the Guideline E concerns.

A. Guideline H

The Adjudicative Guidelines provide, in relevant part, that an individual may mitigate security concerns under Guideline H if:

- 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;
- 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:
 - a. Disassociation from drug-using associates and contacts;
 - b. Changing or avoiding the environment where drugs were used; and
 - c. Providing a signed statement of intent to abstain from all drug involvement and substance misuse, acknowledging that any future involvement or misuse is grounds for revocation of national security eligibility;

....

Adjudicative Guidelines at ¶ 26.

In this case, the record does not contain any evidence that the Individual has used any illicit substances since 2015. The Individual argues that the marijuana consumption took place so long ago and under such circumstances that it is unlikely to recur. The Individual indicated that he no longer drinks to intoxication, which he blamed for his 2015 decision to consume marijuana. He also stated that his family will be a support to prevent him from doing the same. However, I do not thereby conclude he has mitigated the related security concerns. As stated in the preceding section, I have concerns related to his credibility.

Further, the issue at hand is not whether the Individual engaged in illicit drug use, standing alone, but rather that he used marijuana when he was under a direct obligation not to because he possessed a security clearance. There is evidence that the Individual's 2015 marijuana use while possessing a security clearance is not an isolated incident. Although the Individual is adamant that his self-expressed timeline of marijuana usage actually excluded the period while he possessed a security clearance in 1982, my concern regarding his credibility prevents me from giving his testimony on this issue full weight. Even if I were to disregard that evidence, there is no doubt that he used marijuana while he possessed a security clearance in 2015 after previously signing a Drug Certification with DOE. Furthermore, he asked his supervisor to grant him vacation in order to avoid being caught, while expecting her not to report his conduct and thereby assist him in avoiding the consequences of his actions. Further, he only contacted his supervisor after confirming that he would in fact test positive by using a home drug test kit. All of this occurred after he knew that he had been selected by his employer to take a drug test prior to leaving for vacation. While five years is not an insignificant passage of time, the evidence presented during the hearing has not convinced me that he has mitigated the serious concerns related to his conduct. I continue to have doubts regarding the Individual's reliability, trustworthiness, and good judgment. Given the above, I find that he has not mitigated the Guideline H concerns.

VII. CONCLUSION

For the reasons set forth above, I conclude that the LSO properly invoked Guidelines E and H. After considering all of the evidence, both favorable and unfavorable, in a common sense manner, I find that the Individual has not mitigated the security concerns raised under each of these Guidelines. 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 should not be granted a security clearance. The parties may seek review of this Decision by an Appeal Panel under the procedures set forth at 10 C.F.R. § 710.28.

James P. Thompson III
Administrative Judge
Office of Hearings and Appeals