

*The original of this document contains information which is subject to withholding from disclosure under 5 U.S. C. § 552. Such material has been deleted from this copy and replaced with XXXXXX's.

**United States Department of Energy
Office of Hearings and Appeals**

In the Matter of: Personnel Security Hearing)
)
Filing Date: June 29, 2021) Case No.: PSH-21-0077
)
)
_____)

Issued: October 21, 2021

Administrative Judge Decision

Kristin L. Martin, Administrative Judge:

This Decision concerns the eligibility XXXX XXXXX (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 not be granted.

I. BACKGROUND

The Individual is employed by a DOE Contractor in a position which requires that she hold a security clearance. During an investigation into the Individual’s background, derogatory information was discovered regarding the Individual’s drug involvement and her candor regarding that issue. The Local Security Office (LSO) began the present administrative review proceeding by issuing a Notification Letter to the Individual informing her that she was entitled to a hearing before an Administrative Judge in order to resolve the substantial doubt regarding her 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. At the hearing I convened pursuant to 10 C.F.R. § 710.25(d), (e) and (g), the Individual presented the testimony of one witness and testified on her own behalf. *See* Transcript of Hearing, Case No. PSH-21-0077 (hereinafter cited as “Tr.”). The LSO submitted nine exhibits, marked as Exhibits 1 through 9 (hereinafter cited as “Ex.”). The Individual submitted three exhibits, marked as Exhibits A through C.

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.

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 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). These 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.

Guideline H (Drug Involvement and Substance Misuse) relates to security risks arising as a result of an individual's illegal use of controlled substances, including misuse of prescription and non-prescription drugs, and use of other substances that cause physical or mental impairment or are used in a manner inconsistent with their intended purpose. 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. The conditions set forth in the Guidelines that could raise a disqualifying security concern are any substance misuse; testing positive for an illegal drug; illegal possession of a controlled substance, including cultivation, processing, manufacture, purchase, sale, or distribution; possession of drug paraphernalia; Substance Use Disorder diagnosis by a duly qualified medical or mental health professional; 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. *Id.* at ¶ 25.

Guideline E (Personal Conduct) 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. Guideline E may also be invoked when there is credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the individual may not properly safeguard classified or sensitive information. Any failure to provide truthful and candid answers during the security clearance process is of particular concern. *See* Adjudicative Guidelines ¶ 15.

The LSO alleges the following:

A. Guideline E

1. The Individual stated on two responses to Letters of Interrogatory (LOI) that she had not illegally used any controlled substances since 2011 and on her Questionnaire for National Security Positions (QNSP), the Individual certified that, as of February 2019, she had not used any controlled substance in the preceding seven years. However, during a 2012 marijuana compliance check at her home, her fiancé reported that she smoked half an ounce of marijuana per day.²
2. On her Questionnaire for National Security Positions (QNSP), the Individual certified that, as of February 2019, she had not been involved in the illegal cultivation of any drug or controlled substance. In her two LOI responses, the Individual certified that, since 2011, she had no involvement in the illegal cultivation of any drug or controlled substance. In an extended security interview in March 2019, she repeatedly denied having ever engaged in any drug cultivation. However, in a June 2019 interview, the Individual admitted that marijuana was cultivated at her residence from August 2013 to June 2019; that from 2015 to 2019, about 45 marijuana plants were cultivated at her residence; and that during a marijuana compliance check in 2012, officers counted 86 marijuana plants at her residence.
3. During the March and June 2019 interviews, the Individual initially denied having a marijuana card, but, after repeated questioning, she admitted in the June 2019 interview to having a marijuana recommendation card, which she obtained to ensure her fiancé was able to cultivate marijuana at their residence.³
4. During the June 2019 Interview, the Individual admitted that her fiancé smoked marijuana in her presence approximately twice per week.

B. Guideline H

1. During the June 2019 interview, the Individual admitted that marijuana was cultivated at her residence from August 2013 to June 2019.
2. During a marijuana compliance check in 2012, the Individual's fiancé reported that she smoked half an ounce of marijuana per day and officers counted 86 marijuana plants at her residence.

These allegations raise concerns which are squarely within the ambit of the Adjudicative Guidelines. Accordingly, the LSO's security concerns under Guidelines E and H are 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

² Limited cultivation of marijuana is legal under state law in the Individual's state of residence.

³ In the Individual's state of residence, physicians can recommend that a person use marijuana for medicinal purposes. Such a recommendation is documented by issuing the individual a marijuana recommendation card.

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 entire process is a conscientious scrutiny of a number of variables known as the "whole person concept." Adjudicative Guidelines ¶ 2(a). The protection of the national security is the paramount consideration. 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.

IV. FINDINGS OF FACT

The Individual testified that she began working for the DOE contractor in 2018 and that, prior to that, she had never worked for the government. Tr. at 10. She testified that she was not using marijuana in 2020, nor had she ever used marijuana. *Id.* at 13. She further testified that she does not want marijuana in her life and intends to avoid having it around her and her family. *Id.* at 55.

The Individual testified that, around 2012, her fiancé cultivated marijuana at their home and used it for pain management. Tr. at 16. She did not sell or use the marijuana, and the cultivation was done by her fiancé in compliance with state laws. *Id.* At that time, the Individual did not realize that marijuana cultivation was illegal under federal law. *Id.* at 17. She also testified that she never had any part of the cultivation. *Id.* at 15, 19–21, 25. After 2012, her fiancé stopped cultivating marijuana. *Id.* at 20.

The Individual testified that she had a card, referred to as a recommendation, permitting the use of marijuana, in 2012 but did not use it. *Id.* at 23–24. She further testified that she got a marijuana recommendation at her fiancé's suggestion because she resided in a home where marijuana was being cultivated. *Id.* at 23–24. She also testified that, in her 2019 interview, she did not deny having ever had a marijuana recommendation, but had perhaps initially answered that she did not have one at the time. *Id.* at 34. The Individual submitted Exhibit D after the hearing, in which she stated that she had contacted the office that issued her marijuana recommendation and they told her that the recommendation was issued in July 2018 and expired July 2019. Ex. D at 1. In that exhibit, the

Individual stated that, at the time of the interview, she did not believe the recommendation was still valid. *Id.*

The Individual testified that she must have been confused when she told the investigator that marijuana was cultivated at her home in 2019. Tr. at 27. She stated that she had not lived in a residence where marijuana was cultivated since 2012. *Id.* at 29. She testified that her fiancé did not like cultivation and no longer wanted to do it, so he stopped. *Id.* at 20. The Individual testified that she did not report the cultivation, even though it was within the previous seven years, because she was not directly involved in it and was not sure of the start and end dates of the cultivation. *Id.* at 21. She reiterated that no marijuana was being cultivated at her residence after 2012 and that she had been confused by the interviewer's questions when she stated that cultivation was occurring in 2019. *Id.* at 28–29.

The Individual testified that she had never used half an ounce of marijuana daily and that her fiancé had misunderstood the question when, in 2012, he told the compliance officer she used that amount. Tr. at 29–30. She submitted Exhibit B, which contained a letter from her fiancé that stated that he had incorrectly described the Individual's marijuana use to the compliance officer in 2012. Ex. B. In the letter, the fiancé stated that the officer asked if he and the Individual smoked half an ounce of marijuana per day and he said yes because he did not know how much marijuana half an ounce was. *Id.* The letter also stated that the fiancé had never seen the Individual smoke marijuana. *Id.*

The Individual's fiancé testified that they had lived together for about 10 years. He further testified that he cultivated marijuana about 10 years ago for a few months. Tr. at 42. On the advice of a compliance officer, he destroyed all but two of his plants and once the growing cycle for those plants was complete, he did not continue cultivating marijuana. *Id.* at 42–43. He testified that, during the 2012 compliance check, a compliance officer asked him, "So how much do you and [the Individual] smoke, about half an ounce a day?" *Id.* at 46. He further testified that, in response, he said, "Yeah, okay. I guess," because he did not know how much that quantity of marijuana was and because he did not realize that his answer would be interpreted to indicate that the Individual smoked any marijuana at all. *Id.* The fiancé testified that the Individual was not involved in his cultivation in any way and that he had never seen her use marijuana or any other drug. *Id.* at 45–46. The fiancé testified that he intends to abstain, permanently, from using or cultivating marijuana. *Id.* at 50–51, 53–54.

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 commonsense 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 or restoring security clearances, I must deny access authorization 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

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).

Regarding the LSO’s Guideline H concern that the Individual used half an ounce of marijuana daily in 2012, there is sufficient evidence to conclude that the statement upon which that concern is based was made in error. The fiancé, who made the statement, testified that he did not realize he was saying that the Individual was using marijuana and testified that he has never seen her use marijuana. The LSO’s concern was based on that statement alone, and the new evidence presented at the hearing has clarified the statement such that it should not be considered to refer to the Individual. It is clear that if an Individual can show that the substance of an allegation is not applicable, the allegation can no longer be considered a risk to the national security. Accordingly, I find that the Individual has mitigated this Guideline H concern by providing evidence sufficient to show that the LSO’s concern was based on a statement now known to be erroneous.

Regarding the LSO’s Guideline H concern that marijuana was cultivated at the Individual’s home, mitigating criterion (1) applies in this case. The incident happened nearly ten years ago and the Individual’s participation was limited to residing on the same property where the cultivation occurred. She has repeatedly expressed a commitment to avoid similar situations in the future. The 2012 cultivation incident was so long ago and the Individual’s involvement so minor that it no longer casts doubt on her current reliability, trustworthiness, or judgment. Accordingly, I find that the Individual has mitigated this Guideline H concern.

B. 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).

In response to the LSO's allegations that she intentionally withheld information regarding her history with marijuana, the Individual repeatedly asserted that she was confused by the questions and had not intentionally withheld anything. Her testimony was somewhat clarifying, and it is possible that she truly misunderstood what was being asked of her. However, Guideline E is not simply about an Individual's trustworthiness in terms of willingness to comply with rules. It also includes questions of an Individual's reliability in terms of ability to comply with rules. The Individual completed a QNSP, two LOIs, and two extended security interviews, but it was not until the hearing that the government was able to obtain a complete, accurate picture of the Individual's history as it relates to marijuana use and cultivation. The government must be able to rely upon the statements of those who hold security clearances. The Individual's testimony did not show that she can reliably ensure the accuracy of her statements. Unfortunately, for that reason I cannot find that she has mitigated the LSO's concerns under Guideline E at this time.

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 Guidelines E and H of the Adjudicative Guidelines. I further find that the Individual has not succeeded in fully resolving the Guideline E concerns. Therefore, I cannot 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 not 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.

Kristin L. Martin
Administrative Judge
Office of Hearings and Appeals