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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: August 20, 2021) Case No.: PSH-21-0096
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Issued: December 15, 2021

Administrative Judge Decision

Kristin L. Martin, Administrative Judge:

This Decision concerns the eligibility of XXXX XXXX (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 an applicant for a position with a DOE Contractor which requires that he hold a security clearance. The Local Security Office (LSO) began the present administrative review proceeding by issuing a 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 in this matter. At the hearing I convened pursuant to 10 C.F.R. § 710.25(d), (e) and (g), the Individual called two witnesses and testified on his own behalf. *See* Transcript of Hearing (hereinafter cited as “Tr.”). The LSO submitted eight exhibits, marked as Exhibits 1 through 8 (hereinafter cited as “Ex.”).² The Individual submitted four exhibits, marked as Exhibits A, A1, B, and 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.

² The LSO’s exhibits were combined and submitted in a single, 158-page PDF workbook. Many of the exhibits are marked with page numbering that is inconsistent with their location in the combined workbook. This Decision will cite to the LSO’s exhibits by reference to the exhibit and page number within the combined workbook where the information is located as opposed to the page number that may be located on the page itself.

II. THE NOTIFICATION LETTER AND THE ASSOCIATED SECURITY CONCERNS

As indicated above, the Notification Letter informed the Individual that information in the possession of the DOE created a substantial doubt concerning his eligibility for a security clearance. That information pertains to 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 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. Any failure to provide truthful and candid answers during the security clearance process is of particular concern. *See* Adjudicative Guidelines ¶ 15. The Guidelines set forth conditions that could raise a disqualifying security concern, including:

- 1) Deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine national security eligibility or trustworthiness, or award fiduciary responsibilities; and
- 2) Deliberately providing false or misleading information; or concealing or omitting information, concerning relevant facts to an employer, investigator, security official, competent medical or mental health professional involved in making a recommendation relevant to a national security eligibility determination, or other official government representative.

Id. at ¶ 16.

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:

- (1) Any substance misuse;
- (2) Testing positive for an illegal drug;
- (3) Illegal possession of a controlled substance, including cultivation, processing, manufacture, purchase, sale, or distribution;
- (4) Possession of drug paraphernalia;
- (5) Substance Use Disorder diagnosis by a duly qualified medical or mental health professional;

- (6) Failure to successfully complete a drug treatment program prescribed by a duly qualified medical or mental health professional;
- (7) Any illegal drug use while granted access to classified information or holding a sensitive position; and
- (8) Expressed intent to continue drug involvement and substance misuse, or failure to clearly and convincingly commit to discontinue such misuse.

The LSO alleges that the Individual stated on his Questionnaire for National Security Positions (QNSP) that he had not used any illegal drug in the preceding seven years, but in a subsequent Enhanced Subject Interview (ESI) admitted to having used marijuana one month prior to certifying his QNSP answers. The LSO further alleges that the Individual stated in response to a Letter of Interrogatory (LOI) that he had forgotten about the marijuana use until asked about it by the investigator. Finally, the LSO alleges that the Individual continues to associate with the cousin he was visiting when he used marijuana. 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 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) (strong presumption against the issuance of a security clearance).

The Individual must come forward at the hearing with evidence to convince the DOE that granting or restoring access authorization "will not endanger the common defense and security and will be clearly consistent with the national interest." 10 C.F.R. § 710.27(d). The Individual is afforded a full opportunity to present evidence supporting his eligibility for an access authorization. The Part 710 regulations are drafted so as to permit the introduction of a very broad range of evidence at personnel security hearings. Even appropriate hearsay evidence may be admitted. 10 C.F.R. § 710.26(h). Hence, an individual is afforded the utmost latitude in the presentation of evidence to mitigate the security concerns at issue.

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

IV. FINDINGS OF FACT

The Individual signed a Questionnaire for National Security Positions (QNSP) on June 28, 2019, in which he certified that in the preceding seven years he had not illegally used any drugs or

controlled substances. Ex. 4 at 47, 57. Later, on October 11, 2019, the Individual participated in an Enhanced Subject Interview (ESI) with an Office of Personnel Management investigator (“Investigator”) during which he admitted that he smoked marijuana when he was at his cousin’s residence on May 27, 2019. Ex. 5 at 62, 65. He told the Investigator that the marijuana had no effect on him when he smoked it and that he had not used marijuana or any other illegal drug since that date. *Id.*

The Individual completed and signed his response to an LOI on January 17, 2020, in which he answered questions regarding his omission of drug use in his QNSP. Ex. 7. In response to an LOI question asking him “what effect did ...the drug(s) produce when you ...used it[.]” the Individual stated, “It calmed my emotions.” *Id.* at 71.

At the hearing, the Individual presented the testimony of his friend and his father, and testified on his own behalf.

The Individual’s friend testified that he interacted with the Individual regularly, including frequent social outings, and had not seen the Individual use illegal drugs. Tr. at 14–16. He testified that the Individual had told him about his previous marijuana use after he reported it to the Investigator and that he believed this incident was the only time the Individual had used an illegal drug. *Id.* at 19, 25. In addition, the friend had observed the Individual successfully cope with stress by confiding in his family and in the friend. *Id.* at 15. He described the Individual as reliable and trustworthy. *Id.* at 16–17, 21.

The Individual’s father testified that he raised the Individual to be a good person who is trustworthy, and he described the Individual as hardworking, very honest, and open. Tr. at 30. The father testified that their house rules prohibit any drug use and that he was not present at the cousin’s house when the Individual used marijuana. *Id.* at 48, 52. The father further testified that the Individual told him about his marijuana use right after his interview with the Investigator, including the date of the incident and the details of how it occurred. *Id.* at 51, 53. He stated that the Individual told him that he had completely forgotten about his marijuana use until the Investigator asked him if he had ever used drugs. *Id.* at 43. The father’s understanding was that the Individual took a small sample of marijuana, but he did not like it and did not want to do it again. *Id.* at 42.

The father testified that he thought the Individual’s marijuana use was “definitely a one-off ...unique situation.” Tr. at 33. Additionally, he asserted that he has never seen the Individual showing signs of any drug use nor has he seen any evidence of the Individual being involved in drug-related activities such as drug purchasing, transport, or trafficking. *Id.* at 33, 44. He testified that since the time of the incident, the Individual has obtained two new jobs and has passed all drug tests given to him by those employers. *Id.* at 42–43.

The father testified that the Individual did not appear stressed on a routine basis and that when the Individual did experience stress, he coped with it by confiding in his parents, lying down to relax, or using deep breathing exercises. Tr. at 31. He testified that the Individual would proactively self-report if he broke house rules or made a mistake at home. *Id.* at 53–54. The father believed that the Individual did not tell him about the incident until after his interview with the Investigator because he had forgotten about it. *Id.* at 54–55. The father testified that he thought the Individual forgot

about his marijuana use because he had been consuming alcohol at the time of the incident and had only used a small amount of the drug. *Id.* at 42, 55.

The father described the Individual as extremely reliable. Tr. at 35. He asserted that the Individual was very trustworthy and had demonstrated his trustworthiness to the father consistently. *Id.* at 38, 43. The father further testified that the Individual had good judgment, was very attentive to detail, and followed the guidelines and rules when working with machinery. *Id.* at 38–39. He testified that the Individual was willing and able to comply with rules and regulations. *Id.* at 40 He added that he was “very rule-oriented as a father” and the Individual followed his rules “to the letter.” *Id.*

The Individual testified that at the time of incident, he was at his cousin’s house for a birthday party. Tr. at 68. He was in the basement with some relatives and his ex-fiancée (hereinafter “fiancée”) when he observed that his fiancée tried using marijuana. *Id.* at 68–70. He asserted that when he saw her using marijuana, he did not want her to “feel left out” so he decided to try using marijuana, too. *Id.* at 70. He acknowledged that his decision was his own personal mistake. *Id.*

The Individual testified that, at the time he used marijuana, he had been experiencing stress because he was starting a new job and was going to have to take two weeks of leave, which caused him anxiety about his job security. Tr. at 82–83; Ex. C at 1. He admitted that part of the reason he used marijuana was to deal with the stress and anxiety of starting his new job, and he acknowledged his LOI response that the marijuana he used calmed his emotions. *Id.* at 84–85; Ex. 7 at 71.

The Individual stated that at the time he filled out the QNSP, he had little to no knowledge of the security process. *Id.* at 62. He testified that he “completely forgot” about his drug use, and “[i]t just escaped [his] mind...” *Id.* at 63–64. The Individual testified that when completing his QNSP, he double-checked the form to help him focus and understand the questions, and he made sure to answer all the questions before submitting his QNSP. *Id.* at 67. Under questioning by DOE Counsel, the Individual acknowledged that Section 23 of the QNSP contained a question asking if, in the last seven years, he had illegally used and drugs or controlled substances. *Id.* at 78. He acknowledged that the words, “In the last seven (7) years,” was written in bold type and admitted that the bold type would particularly draw his attention to those words. Tr. at 78–79; Ex. 4 at 48. The Individual admitted that the date he used marijuana was approximately one month prior to the date he certified his QNSP, and he agreed that a one-month timeframe is significantly shorter than the seven years he was asked to look back upon in the QNSP. Tr. at 79–80.

The Individual testified that he first remembered his marijuana use during the ESI with the Investigator. Tr. at 63–64, 67–68, 89. He testified that once the Investigator began interviewing him, he recognized that the security process was serious, which led him to think he might be given a hair follicle test to determine if he had used drugs. *Id.* at 64, 80. His understanding was that a hair follicle test could detect drug use at least as far back as one year, even for just one-time drug use. *Id.* at 81. Under questioning by DOE Counsel, the Individual admitted that the reason he disclosed his marijuana use to the Investigator was because he feared that a hair follicle test could result in a positive drug test, thereby revealing his prior drug use.³ *Id.* at 81–82, 89.

³ The transcript contains a typographical error in stating “Yes, he did.” Tr. at 82, line 5. It should state, “Yes, I did” because the Individual was answering a question about himself and his self-reporting of his drug use to the Investigator.

The Individual disclosed the incident to his friends and family and told them how he recognized the error of his past actions. Tr. at 72–73. He asserted that when visiting his relatives recently, he only spent time in one room of the house with his youngest cousins and made sure not to enter any other rooms of the house to avoid the possibility of encountering relatives who may be using marijuana. *Id.* He had also changed his social group, and if he encountered a person that used or offered him drugs, he refused and removed himself from the situation. *Id.* at 74–75. The Individual asserted that his past decision to try using marijuana in order to cope with stress was a one-time incident. *Id.* at 86. He asserted that after the incident, he successfully coped with stress by employing the stress management techniques his father had described during his testimony. *Id.* at 87–88. Additionally, he testified that he regularly surrounded himself with a support system of family and friends because they were effective in helping him successfully cope with stressful situations. *Id.* at 87. The Individual asserted that this was his only instance of drug use and the first time he used marijuana. *Id.* at 75. He intended to abstain from all drug use in the future. *Id.* at 75–76, 85.

The Individual testified that trying marijuana was “a big deal” for him, and he felt “kind of ashamed about mentioning said use to other family member[s] and friends because [he tried to] uphold high expectations and ... be the best [he could] be.” Tr. at 90. He expressed remorse regarding his QNSP omission, and he asserted that he would proactively self-report any derogatory incidents that might occur in the future. *Id.* at 91–92, 97. He also asserted that in order to learn and internalize all the rules he will be required to know and follow as a security clearance holder, he will ask for pamphlets on the rules, and indicated he would review all rules and regulations and seek guidance to make sure he is following the rules correctly. *Id.* at 95.

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 provides that the following conditions, in relevant part, may mitigate security concerns arising from drug involvement and substance misuse:

- (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; and
- (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.⁴

Adjudicative Guidelines at ¶ 26(a), (b). Both of these mitigating factors apply in this case.

The Individual testified that he has not used marijuana since May 2019, and that this is the only time he used drugs. His assertions of abstinence are supported by his father's testimony that since the incident occurred, the Individual has passed all drug tests given to him by his employers. The record convincingly demonstrates that the Individual's past drug use was limited to a single incident, indicating that it is unlikely to recur, and does not cast doubt on his current reliability, trustworthiness, or good judgment.

The Individual acknowledged his prior marijuana use and expressed remorse for his action. He provided evidence of actions to maintain abstinence and convincingly testified that he has adopted patterns of change by disassociating with drug-using associates. He also places restrictions on himself when he visits his cousins so that he will not encounter relatives who may be using marijuana. Further, as discussed above, the testimony of the Individual's father bolsters his assertions of established abstinence as evidenced by his maintaining negative drug test results when tested by employers.

For the foregoing reasons, I find that the Individual has mitigated the Guideline H security concerns.

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; and
- (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

⁴ Mitigating factors (3) and (4) are inapplicable to the facts of this case. Adjudicative Guidelines at ¶ 26(c)–(d). Regarding mitigating factor (3), the Individual's drug use did not involve a prescription drug. Mitigating condition (4) does apply because the Individual did not attend a drug treatment program, nor did a medical professional prescribe or recommend that he complete a drug treatment program.

that contributed to untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur.

Adjudicative Guidelines at ¶ 17(a), (c), (d). The Individual's lack of candor is centered on his failure to provide truthful and candid answers in his June 2019 QNSP concerning his prior use of marijuana that occurred in May 2019. I find that the Individual has not mitigated the concern under the factors listed above.

As an initial matter, the Individual admitted at the hearing that the reason he disclosed his drug use to the Investigator is because he feared he would have to take a hair follicle test which would reveal his prior marijuana use which he had previously omitted. This reasoning stands in marked contrast to the Individual's claim that he simply forgot about the marijuana use and indicates a continued lack of candor in the security clearance process. Because such behavior during the security clearance process is of particular concern, I give this admission particular weight when considering whether doubt remains as to the Individual's reliability, trustworthiness, and good judgment.

Regarding the first mitigating factor, the Individual did not make a prompt, good-faith effort to correct the concealment before he was confronted with the facts. While I credit the Individual for self-reporting his conduct, he did not report it until October 2019, approximately four months after he made the omission on his QNSP, and did so under circumstances that, in light of his testimony cited above, do not appear to be in good faith.

Regarding the second mitigating factor, I find that the Individual's omission is not minor in that it served to conceal significant derogatory information about his marijuana use. Moreover, the record contains unresolved inconsistencies and questions which continue to cast doubt on the Individual's reliability, trustworthiness, or good judgment. The Individual asserts that he unintentionally omitted his marijuana use on his QNSP because the one-month timeframe between his previous marijuana use and the date he certified his QNSP was sufficient to make him forget the first and only time that he used drugs. However, he also asserted that the incident was "a big deal" to him and caused him to feel shame in disclosing to it his friends and family. In light of the Individual's emotional reaction to his drug use, I find his assertions that he simply forgot about it within a month to be unconvincing. Moreover, the Individual testified that he double-checked the QNSP questions and made sure to answer all questions before submitting it to the LSO. He also acknowledged that, because the question about prior drug was written in bold type as to the seven-year reporting period, it drew his attention to those words in particular.

The record contains further inconsistencies that cast doubt on the Individual's reliability, trustworthiness, and good judgment. The Individual initially testified that he used marijuana because he observed his fiancée using it and he did not want her to feel left out. However, he then admitted, through testimony and as indicated in his Declaration, that he used marijuana because he was experiencing the stress of starting a new job. During the ESI, he told the Investigator that the marijuana had no effect on him. However, in his LOI response and in his testimony, he acknowledged that the marijuana had a calming effect on him. Even if the Individual's QNSP omission was inadvertent and due to a lapse in memory, inattention to accuracy demonstrates a lax attitude towards security reporting requirements, which casts further doubt as to his reliability and good judgment as a DOE security clearance holder. The government must be able to rely upon the statements of those who hold security clearances. *Personnel Security Hearing*, OHA Case No.

PSH-21-0077 at 7 (2021). Specifically, QNSPs are “an important tool in establishing whether an individual is fit to hold a security clearance, and accordingly, an applicant is held to a higher standard when completing such a form.” See *Personnel Security Hearing*, OHA Case No. PSH-21-0009 at 8 (2021) (citing *Personnel Security Hearing*, OHA Case No. TSO-0023 at 30-31 (2003)).

Finally, regarding the third mitigating factor, I do not find the Individual has taken sufficient positive steps to alleviate the factors that contributed to his lack of candor. He has not attended therapy or taken a course on decision-making. He has not provided consistent credible answers to questions, even after correcting his QNSP omission. Additionally, I am concerned that the Individual did not disclose his prior drug use to his friends and his family, who he states comprise his support system, until after his interview with the Investigator. The fact that his delayed disclosure was related to the shame he felt in failing to uphold his high expectations of himself indicates that he may continue to be unwilling to proactively disclose derogatory information if he feels shame about his actions. As such, I cannot conclude that the Individual’s lack of candor, including an unwillingness to comply with rules and regulations, is unlikely to recur.

For the foregoing reasons, I conclude that the Individual has not mitigated the Guideline E 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 Guidelines E and H of the Adjudicative Guidelines. I further find that the Individual has not succeeded in fully resolving those 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