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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: July 21, 2021) Case No.: PSH-21-0086
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Issued: January 4, 2022

Administrative Judge Decision

Kristin L. Martin, Administrative Judge:

This Decision concerns the eligibility of XXXXXXXXXXXXXXXXXXXX (hereinafter referred to as “the Individual”) for access authorization under the Department of Energy’s (DOE) regulations set forth at 10 C.F.R. Part 710, entitled, “Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material.”¹ For the reasons set forth below, I conclude that the Individual’s security clearance should be granted.

I. BACKGROUND

The Individual is employed by a DOE Contractor in a position 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. At the hearing I convened pursuant to 10 C.F.R. § 710.25(d), (e) and (g), the Individual testified on his own behalf. See Transcript of Hearing (hereinafter cited as “Tr.”). The LSO submitted six exhibits, marked as Exhibits 1 through 6 (hereinafter cited as “Ex.”). The Individual submitted 10 exhibits, marked as Exhibits A through J.

II. THE NOTIFICATION LETTER AND THE ASSOCIATED SECURITY CONCERNS

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.

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 Guideline E 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 LSO alleges that the Individual admitted that his spouse smokes marijuana in his presence two to three times per year, that the Individual had accompanied his spouse to a dispensary to purchase marijuana, and that the Individual contributes \$50 per year toward his wife's marijuana purchases annually. Accordingly, the LSO's security concerns under Guideline E 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), 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.

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 lives in a state in which the purchase and use of marijuana for recreational purposes has been legalized. Ex. A. At the time of his wife's marijuana purchase and use, the Individual and his wife believed that her activities were legal.² Ex. E at 3. The Individual submitted written testimony stating that his financial involvement with his wife's marijuana use was her use of about \$50 per year from a joint checking account to which he was the primary contributor. Ex. E at 4. The Individual stated that he had never purchased marijuana for his wife and that she had only purchased marijuana at dispensaries. *Id.*

At the hearing, the Individual testified that, to his knowledge, the dispensary from which his wife's marijuana was purchased was licensed by the state. Tr. at 11–12. The Individual self-reported the situation and did not attempt to hide his involvement. *Id.* at 13–14; Ex. E at 2. After learning that her marijuana use affected the Individual's career, the Individual's wife stopped using completely and committed to abstaining indefinitely. Tr. at 13, 15. The Individual testified that he does not use marijuana and does not intend to use it in the future. *Id.* at 14. Neither he nor his spouse has purchased marijuana since receiving the Notification Letter and he testified that they do not intend to do so in the future. *Id.* at 14–15. In support of his testimony, the Individual submitted the results of drug tests he and his wife had taken; both tests produced negative results. Ex. B; Ex. C.

The Individual testified that he understood the concerns of the government regarding his proximity to use of a controlled substance. Tr. at 16. He knew that if someone attempted to blackmail him, he needed report the attempt to DOE and testified that he would do so. *Id.* at 17. He also stated that he has a plan to seek advice and clarification in the event that he is unsure about how to comply with any rule or law in the future. *Id.* at 19. The Individual committed to following all rules in the future, and stated that he takes the responsibilities of holding a security clearance seriously. *Id.*; Ex. E at 5.

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

² The Individual submitted a guidance on his state's marijuana legalization policy issued by the state's court system. Ex. A. The guidance makes no mention of federal law or policy prohibiting marijuana purchase, possession, or use.

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.

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).

Mitigating factors (2), (3), and (4) are applicable in this case. The Individual's wife purchased and used small amounts marijuana on rare occasions, and did so under the impression that such use was completely legal. The Individual also believed at the time that these activities were legal. This indicates that the Individual did not demonstrate an unwillingness to comply with rules and, therefore, these minor, infrequent offenses do not cast doubt on his judgment, reliability, or trustworthiness. Moreover, upon learning that marijuana remains illegal under federal law, the Individual and his wife immediately changed their behavior toward the drug and have committed to abstinence and staying away from others' use. Finally, the Individual's association with criminal activity was unwitting in that he was unaware that state legalization did not change the criminality of marijuana under federal law. His association with such activities has ceased and he has committed to avoiding such association in the future. He has a plan for addressing this issue as it may arise in his personal life and for ensuring his compliance with rules and laws in the future.

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

VI. CONCLUSION

Upon consideration of the entire record in this case, I find that there was evidence that raised concerns regarding the Individual's eligibility for a security clearance under Guideline E of the Adjudicative Guidelines. I further find that the Individual has succeeded in fully resolving those concerns. Therefore, I conclude that granting DOE access authorization to the Individual "will not endanger the common defense and security and is clearly consistent with the national interest." 10 C.F.R. § 710.7(a). Accordingly, I find that the DOE should grant access authorization to the Individual at this time.

The parties may seek review of this Decision by an Appeal Panel, under the regulation set forth at 10 C.F.R. § 710.28.

Kristin L. Martin
Administrative Judge
Office of Hearings and Appeals