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August 8, 2003
DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Hearing Officer's Decision

Name of Case: Personnel Security Hearing
Date of Filing: January 8, 2003
Case Number: TSO-0017

This Decision concerns the eligibility of XXXXXXXX (hereinafter referred to as the "individual") to hold an access authorization ¹ under the regulations set forth at 10 C.F.R. Part 710, entitled "Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material." As set forth below, it is my decision, based on the evidence and testimony presented in this proceeding, that the individual should not be granted a security clearance.

I. Background

The individual has been employed by a DOE contractor, and that contractor requested that the individual be granted an access authorization. However, the local DOE security office initiated formal administrative review proceedings after a background investigation of the individual uncovered derogatory information. The individual participated in a Personnel Security Interview (PSI) in March 2002, but the PSI did not resolve all of the security concerns related to the derogatory information. Consequently, on September 20, 2002, the DOE sent the individual a Notification Letter advising him of his right to a hearing on the unresolved issues. The derogatory information is set forth in the Notification Letter, and is summarized below.

The Notification Letter states that the derogatory information regarding the individual falls within 10 C.F.R. § 710.8 (h) and (k). The DOE Operations Office invokes Criterion H on the basis of information that the individual has an illness or mental condition of a nature which causes, or may cause, a significant defect in his judgment or reliability. In this regard, the Notification Letter states that a licensed clinical psychologist diagnosed the individual as suffering from Substance Abuse (Cannabis) without adequate evidence of

¹/ Access authorization is defined 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). Such authorization will be referred to variously in this Decision as access authorization or security clearance.

rehabilitation or reformation. The DOE Operations Office invokes Criterion K on the basis of information that the individual has trafficked in, sold, transferred, possessed, used, or experimented with a drug or other substance listed in the Schedule of Controlled Substances Act of 1970 except as prescribed or administered by a physician licensed to dispense drugs in the practice of medicine, or as otherwise authorized by Federal law. In this regard, the Notification Letter states: (1) that the individual used marijuana in March 2002 and that he had a fairly extensive history of substance abuse, particularly involving marijuana; (2) that the individual failed two random drug tests in 1999 and 2000; (3) that the individual was involved in the possession and sale of marijuana in 1977; and (4) that the individual was arrested for the sale of marijuana in 1994.

In a letter to DOE Personnel Security, the individual exercised his right under Part 710 to request a hearing in this matter. 10 C.F.R. § 710.21(b). On January 9, 2003, I was appointed as Hearing Officer in this case. After conferring with the individual and the appointed DOE counsel, 10 C.F.R. § 710.24, I set a hearing date. At the hearing, the DOE counsel called two witnesses, the DOE consultant-psychologist (DOE psychologist) and a DOE personnel security specialist. The individual testified and also elected to call his wife, the plant psychologist, a colleague, and a licensed clinical social worker as witnesses. The transcript taken at the hearing shall be hereinafter cited as “Tr.” Various documents that were submitted by the DOE counsel during this proceeding constitute exhibits to the hearing transcript and shall be cited as “Ex.” Documents that were submitted by the individual during this proceeding are also exhibits to the hearing transcript and shall be cited as “Indiv. Ex.”

II. Analysis

The applicable regulations state that “[t]he decision as to access authorization is a comprehensive, common-sense judgment, made after consideration of all relevant information, favorable or unfavorable, as to whether the granting of access authorization would not endanger the common defense and security and would be clearly consistent with the national interest.” 10 C.F.R. § 710.7(a). Although it is impossible to predict with absolute certainty an individual’s future behavior, as the Hearing Officer I am directed to make a predictive assessment. There is a strong presumption against the granting or restoring of a security clearance. *See Department of Navy v. Egan*, 484 U.S. 518, 531 (1988) (“clearly consistent with the national interest” standard for the granting of 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).

I have thoroughly considered the record of this proceeding, including the submissions of the parties, the evidence presented and the testimony of the witnesses at the hearing convened in this matter. In resolving the question of the individual’s eligibility for access authorization, I have been guided by the applicable factors prescribed in 10 C.F.R. § 710.7(c): the nature, extent, and seriousness of the conduct; the circumstances surrounding the conduct, to include knowledgeable participation; the frequency and recency of the conduct; the age and maturity of the individual at the time of the conduct; the voluntariness of the

participation; the absence or presence of rehabilitation or reformation and other pertinent behavioral changes; the motivation for the conduct; the potential for pressure, coercion, exploitation, or duress; the likelihood of continuance or recurrence; and other relevant and material factors. After due deliberation, it is my opinion that the individual's access authorization should not be granted as I cannot conclude that such a grant would not endanger the common defense and security and would be clearly consistent with the national interest. 10 C.F.R. § 710.27(a). The specific findings that I make in support of this determination are discussed below.

A. Findings of Fact

The facts in this case are uncontested. The individual has been employed by a DOE contractor and that contractor has requested that the individual be granted a security clearance. Tr. at 172. During a background investigation, DOE learned that the individual had used marijuana extensively in the past. Ex. 1. He used marijuana weekly in college, and then began using marijuana three to four times a week after entering the military. Ex. 9 (PSI) at 26-29. In 1977, the individual was charged with the sale and possession of marijuana while in the armed forces. Ex. 3. He was restricted to the base and his pay was reduced, but he was honorably discharged from the service in 1981. *Id.*; PSI at 60. The individual continued to use marijuana three to four times a week, and in 1994, he was arrested for the sale of marijuana. PSI at 54-56. He was fined \$2,400, placed on one-year probation, and ordered to complete 100 hours of community service. Ex. 1. In November 1999, the individual failed a random drug test at his previous employer when evidence of marijuana was found in his urine. Individ. Ex. 2. He failed a subsequent urine test in March 2000 when evidence of marijuana was again found in his urine. Individ. Ex. 3. At that time, the individual told his employer that the positive results were caused by inhaling secondhand smoke. PSI at 46. That company terminated the individual in December 2000 because of "careless and sub-standard work." Individ. Ex. 1.

The individual was hired by his current employer in January 2001, and that employer applied for a clearance for the individual. Tr. at 172. During the background investigation for the clearance, the individual participated in a PSI in March 2002. Ex. 8-9. The individual stated that he stopped using marijuana in January 2001, but then admitted that he had smoked a marijuana cigarette two weeks prior to the PSI while attending a party. PSI at 38-41. The individual consented to an evaluation by a DOE psychologist. PSI at 82.

The DOE psychologist evaluated the individual in May 2002. Ex. 7. He performed a clinical interview, reviewed the individual's personnel security file, performed psychological testing, and had an independent laboratory administer a random drug screen. Ex. 7. The psychologist noted several areas of concern regarding the individual's behavior -- his 25 year history of marijuana abuse, an arrest in 1994 for the sale of marijuana and a legal infraction in 1977 for possession of marijuana, failure of two drug screens in one year, and the lack of professional or lay help in addressing his substance abuse. Ex. 7. The report expressed concern because the individual told the psychologist that he had never had a problem with drugs and that he could quit "cold turkey". Ex. 7 at 6. The psychologist wrote that "[t]his kind of statement is

often made by those who express denial of the impact of substance abuse on their lives.” *Id.* He concluded that the individual met the criteria for a diagnosis of Cannabis Abuse, ² as defined in the *Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition (DSM-IV)*. Tr. at 122-124. The psychologist found that in order to demonstrate rehabilitation the individual should remain abstinent for a minimum of two years, and participate in professional substance abuse counseling with documented weekly attendance for at least one year of that time period. Ex. 7. In the alternative, the individual could demonstrate reformation by proving 30 months of abstinence with random drug screening four times per year. *Id.* at 7.

On September 20, 2002, the manager of the DOE Operations Office notified the individual that the DOE was in possession of reliable information that created substantial doubt concerning his eligibility for access authorization. Ex. 2-6. The individual requested a hearing on October 9, 2002. That month, the plant psychologist referred the individual to a licensed clinical social worker with experience in substance abuse counseling. Tr. at 132-133. The individual began sessions with the social worker in October 2002. In addition, the individual attended six Narcotics Anonymous (NA) meetings between October 2002 and November 2002, but stopped attending because he did not feel that the sessions were worthwhile. Tr. at 86-87.

B. Testimony at the Hearing

1. The DOE Personnel Security Specialist

The DOE Personnel Security Specialist testified at the hearing that DOE Security considers the use of illegal drugs a security concern because it demonstrates a disregard for the laws that prohibit their use. Tr. at 22-23. DOE Security is also concerned that if an individual has a mental condition that may cause a significant defect in the individual’s judgment and reliability, DOE cannot assure that the individual will adequately protect classified information. *Id.*

2. The Individual

As evidence of his rehabilitation and reformation, the individual testified under oath at the hearing about several factors he considered mitigating. First, he corrected a portion of the psychologist’s evaluation report that incorrectly stated that the individual had been terminated from a job due to drug use. Tr. at 76.

2/ The individual does not dispute the factual findings underlying the DOE psychologist’s diagnosis of substance abuse. I therefore find that there is ample evidence in support of the allegations set forth in the Notification Letter under Criterion H and Criterion K. *See also Personnel Security Hearing*, Case No. TSO-0008, 28 DOE ¶ ____ (2003) (stating the security concerns related to the use of illegal drugs); *Personnel Security Hearing*, Case No. VSO-0359, 28 DOE ¶ 82,756 (2000) (explaining that even a casual user is likely to suffer from impaired judgment if he is under the influence of drugs, rendering him more susceptible to pressure, coercion, or exploitation).

The individual entered into evidence a letter from his then employer acknowledging his termination due to careless and sloppy work. Tr. at 76; Indiv. Ex. 1. The individual also testified that he had passed four random drug tests since failing two in 1999 and 2000. Tr. at 80. He further argued that he was a responsible person even while using drugs, because he put his household obligations first and did not purchase marijuana until his bills were paid. Tr. at 80.³ In addition, the individual presented evidence of his honesty (volunteering information on his relapse during his PSI) and willingness to seek treatment (meeting with the DOE psychologist, attending eight sessions with a social worker, and attending six NA meetings in October-November 2002) as mitigating the charges against him. Tr. at 86; Indiv Ex. 5-6.

The individual explained that he stopped attending NA because he felt that he was more qualified to be a sponsor than the sponsors he met at the meetings. Tr. at 81. He testified that the tone of the meetings was negative and he “was not getting out of it what I thought I was going to get out of it. . . [I]t didn’t seem to help me personally. So I chose to maintain with my faith.” Tr. at 88. According to the individual’s testimony at the hearing, he relies on his faith and weekly attendance at church to maintain abstinence, and believes that his faith is more helpful in this regard than NA meetings. Tr. at 89, 92, 97.

3. The Individual’s Witnesses

In support of the individual’s testimony, his wife testified at the hearing that the individual stopped smoking marijuana in January 2001, and that he had never put his marijuana smoking ahead of his household obligations. Tr. at 67. She indicated that she had no problem with him smoking in the past because it was not a habit and he could “take it or leave it.” Tr. at 69. She stated that her husband’s marijuana use has been “blown out of proportion” by DOE because he was only a casual marijuana user and because he had disclosed his relapse to DOE voluntarily. Tr. at 70-71.

The individual also presented the testimony of a licensed clinical social worker who had counseled him regarding his drug use in eight sessions between October 2002 and February 2003. Tr. at 46-50. During those sessions, the individual would watch an assigned marijuana education video and then converse with the social worker. *Id.* The social worker discontinued the sessions in February 2003 because she considered the individual to be stabilized, with a good relapse prevention plan and “. . . [a] sober support system and mostly in the form of [his] church and [his] Christian friends.” Tr. at 47. When asked to comment on the individual’s level of rehabilitation and reformation, the social worker testified that the individual “made a conscious decision that [he is] not going to use marijuana again.” Tr. at 46. She went on to explain that the individual has developed safeguards to prevent relapse by either avoiding exposure to people or places where marijuana may be present, or by leaving the premises immediately if drug use occurs. Tr. at 46. The social worker testified that regular church attendance, a close relationship with his pastor, and participation in church activities were very important components of the individual’s treatment program. Tr. at 55.

^{3/} The individual also testified that completion of 100 hours of court-ordered community service in 10 months demonstrated his responsibility. Tr. at 80.

The plant psychologist testified that he first met with the individual, at the individual's request, in order to review the DOE psychologist's evaluation. Tr. at 131-132. After discussing the evaluation, the plant psychologist referred the individual to the social worker mentioned previously. Tr. at 132. The plant psychologist testified at the hearing that he found the individual defensive initially, but agreed that the individual had come some "positive distance" since their first meeting in October 2002. Tr. at 136. The plant psychologist also explained that he had not performed a psychological evaluation of the individual and concluded that despite "partial mitigation" of the security concerns, he could not disagree with the recommendations of the DOE psychologist. Tr. at 138-139.

A co-worker testified that he had known the individual for two years. Tr. at 33. He testified as to the individual's good character and work ethic. *Id.* He had never seen the individual use drugs or become intoxicated. Tr. at 36.

4. The DOE Psychologist

The DOE psychologist was present during the entire hearing. Tr. at 3, 116. At the close of the hearing, the DOE psychologist testified that, one year after his evaluation, he still had concerns about the individual's long history of substance abuse. Tr. at 116. The DOE psychologist found, in the individual's favor, that he had moved through some of his earlier denial, that he actively sought counseling and that he has a supportive family. Tr. at 116, 124. However, the psychologist also opined that the individual did not attend NA long enough. Tr. at 117. According to the psychologist, the individual's relapse in March 2002 after 13 months of abstinence was an indication that his recovery was incomplete. Tr. at 114. The psychologist expressed concern that the individual continued to demonstrate denial in rejecting NA as unhelpful to him. Tr. at 117. The psychologist also concluded that the individual's religious faith and church attendance was "not a viable alternative" to professional help for his drug problem, but should be used together with counseling to achieve abstinence. Tr. at 118. The psychologist explained that church attendance alone was not sufficient because the individual's church activities did not specifically focus on his marijuana abuse. *Id.* In addition, the individual did not participate in any independent random drug testing, an activity the psychologist stressed was an important part of a treatment program. Tr. at 118-120. The psychologist voiced some concern that the wife may have participated in marijuana smoking in the past, although at the hearing she seemed to disapprove of drug use. Tr. at 121. Her attitude toward the DOE proceeding was somewhat troubling, since it could adversely affect the individual's commitment to a recovery program. Tr. at 121-122.

After listening to the testimony presented to mitigate the charges, the psychologist concluded that it was a "marginal proposition" that the individual has shown adequate rehabilitation and reformation. Tr. at 124. He testified that rehabilitation would require that the individual demonstrate two years of abstinence, with counseling or NA attendance for one year of that time. Tr. at 125. The individual's 13 months of abstinence at the time of the hearing was not sufficient to demonstrate rehabilitation or reformation from marijuana use. Tr. at 125.

III. Conclusion

I conclude that the individual has not submitted adequate evidence of rehabilitation and reformation from marijuana abuse. I found the testimony of the DOE psychologist to be persuasive, and his conclusions were supported by evidence in the record. The plant psychologist did not offer any evidence that would contradict the diagnosis and conclusions of the DOE psychologist. Moreover, I did not find the testimony of the licensed clinical social worker to be persuasive. Her belief in the individual's rehabilitation relied heavily on her assumption that, as part of his treatment program, the individual attended church regularly, participated in church activities in addition to weekly services, and had a very close relationship with his pastor. However, during the hearing, the individual revealed that he has been attending a different church for some time, that he does not know his pastor, and that he does not participate in any church activities outside of weekly attendance at Sunday services. Tr. at 89-94. In fact, the individual has not had a close relationship with a pastor since 1994. *Id.* In addition, the individual has not fulfilled the guidelines that the DOE psychologist established to demonstrate adequate rehabilitation and reformation in this case – he has attended only four months of counseling and one month of NA meetings, far shorter than the one year of counseling recommended by the DOE psychologist.

I therefore conclude that the individual's present period of abstinence, combined with the absence of a treatment program, cannot mitigate the security concerns attached to his past marijuana use. The individual has abstained from marijuana use for only 13 months, not the two years recommended by the DOE psychologist. In the past, the individual has relapsed after 13 months of abstinence, and there is no evidence in the record to show that another relapse is unlikely. PSI at 38-39. ⁴ See *Personnel Security Hearing*, Case No. VSO-0350, 28 DOE ¶ 82,756 (2000), and cases cited therein (stating that OHA cases involving marijuana abuse consistently find that DOE security concerns may be mitigated by evidence of successful completion of a viable drug treatment program combined with abstinence from illegal substances).

As explained above, I find that the DOE Operations Office properly invoked 10 C.F.R. § 710.8 (h) and (k) in suspending the individual's access authorization. The individual has not presented adequate mitigating factors that alleviate the legitimate security concerns of the DOE Operations Office. In view of these criteria and the record before me, I cannot find that granting the individual's access authorization

^{4/} Because of the individual's honesty during his PSI in coming forward with information about his relapse in March 2002, I believe his statement that he has been abstinent since March 2002.

would not endanger the common defense and security and would be consistent with the national interest. Accordingly, I find that the individual's access authorization should not be granted.

Valerie Vance Adeyeye
Hearing Officer
Office of Hearings and Appeals

Date: August 8, 2003