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October 9, 2003
DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Hearing Officer's Decision

Name of Case: Personnel Security Hearing

Date of Filing: May 6, 2003

Case Number: TSO-0044

This Decision concerns the eligibility of XXXXXXXX (the individual) to hold an access authorization¹ 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 explained below, based on the record before me, I am of the opinion that the individual should not be granted access authorization at this time.

I. Background

The individual has been an employee of a contractor at a DOE facility since October 2001, and has not yet been granted a security clearance. After the individual indicated on a Questionnaire for National Security Positions (QNSP) in November 2001 that she had used marijuana from April 1980 to June 1999, the local DOE security office conducted Personnel Security Interviews (PSIs) with the individual on June 7 and August 15, 2002. In the PSIs, the individual revealed that she had again used marijuana since completing the QNSP. The local security office ultimately determined that the derogatory information concerning the individual created a substantial doubt about her eligibility for an access authorization, in part because of discrepancies in information provided in the two PSIs as to her most recent use of marijuana, and that the doubt could not be resolved in a manner favorable to the individual. Accordingly, the manager of the local DOE office obtained authority from the Director of the Office of Security to initiate an administrative review proceeding.

The administrative review proceeding began with the issuance of a Notification Letter to the individual. See 10 C.F.R. § 710.21. That letter informed the individual that information in the possession of the DOE created a substantial doubt concerning her eligibility for access authorization.

¹Access 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.

The Notification Letter included a statement of that derogatory information and informed the individual that she was entitled to a hearing before a Hearing Officer in order to resolve the substantial doubt regarding her eligibility for access authorization. The individual requested a hearing, and the local DOE office forwarded the individual's request to the Office of Hearings and Appeals (OHA). The Director of OHA appointed me as the Hearing Officer in this matter.

At the hearing convened pursuant to 10 C.F.R. § 710.25(e) and (g), I took testimony from the individual, the two DOE personnel security specialists who had conducted PSIs with the individual, a psychotherapist from whom she had received counseling, a supervisor and a colleague of the individual in her current job, a neighbor whose children the individual cared for in her home day care facility, and the individual's husband. Counsel for the DOE and the individual submitted exhibits. I closed the record upon receiving the transcript of the hearing.

I have reviewed and carefully considered the evidence in the record. I have considered the evidence that raises a concern about the individual's eligibility to hold a DOE access authorization. I have also considered the evidence that mitigates that concern. I conclude, based on the evidence before me and for the reasons explained below, that the legitimate security concerns raised have not been resolved, and that the individual should not be granted access authorization.

II. Analysis

A. The Basis for the DOE's Security Concern

As indicated above, the Notification Letter issued to the individual included a statement of the derogatory information in the possession of the DOE that created a substantial doubt regarding the individual's eligibility for access authorization. In the Notification Letter, the DOE characterized this information as indicating that the individual

- (1) "has deliberately misrepresented, falsified, or omitted significant information from a Questionnaire for National Security Positions (QNSP), a Personnel Qualification Statement, a personnel security interview, written or oral statements made in response to official inquiry on a matter that is relevant to a determination regarding eligibility for DOE access authorization, or proceedings conducted pursuant to Sections 710.20 through 710.30" of the Part 710 regulations. *See* 10 C.F.R. § 710.8(f) [hereinafter Criterion F].
- (2) "trafficked in, sold, transferred, possessed, used, or experimented with a drug or other substance listed in the Schedule of Controlled Substances established pursuant to section 202 of the Controlled Substances Act of 1970 (such as marijuana, cocaine, amphetamines, barbiturates, narcotics, etc.) except as prescribed or administered by a physician licensed to dispense drugs in the practice of medicine." *See* 10 C.F.R. § 710.8(k) [hereinafter Criterion K].
- (3) "has engaged in unusual conduct or is subject to circumstances which tend to show that he is not honest, reliable, or trustworthy; or which furnishes reason to believe that he may be subject to

pressure, coercion, exploitation or duress which may cause him to act contrary to the best interests of national security.” See 10 C.F.R. § 710.8(l) [hereinafter Criterion L].

The statements were based on the individual’s use of marijuana (Criteria K and L) and the discrepancies between her June 7 and August 15, 2002 PSIs as to the date of her most recent use of marijuana (Criterion F).

When reliable information reasonably tends to “establish the validity and significance” of substantially derogatory information about an individual, a question is created as to the individual’s eligibility for an access authorization. 10 C.F.R. § 710.9(a). The individual must then resolve that question by convincing the DOE that granting her access authorization “would not endanger the common defense and security and would be clearly consistent with the national interest.” 10 C.F.R. § 710.27(d).

1. Marijuana Use (Criteria K and L)

Other than with regard to the dates of the individual’s use of marijuana since her completion of a QNSP in November 2001, the history of the individual’s marijuana use is not in dispute. From 1976 to 1999, the individual’s marijuana use appears to have been sporadic. At the August 2002 PSI, she stated that might have smoked marijuana once or twice in a given month, but on average used the drug only once or twice every three or four months, and that there were “many, many months” in which she “didn’t partake at all.” DOE Exhibit 6 at 9-11. After she completed the November 2001 QNSP, the individual used marijuana at least twice. At a party in May 2002, the individual ate brownies that contained marijuana. She states that she did not know the brownies contained marijuana until after she had consumed “just a little bit that was left in the pan, it wasn’t even a full portion.” *Id.* at 17, 18. Finally, the individual admits that she smoked marijuana with her estranged husband in 2001 or 2002, though she has given varying accounts as to when this usage occurred. Compare DOE Exhibit 7 at 16, 17 (states in the June 17, 2002 PSI that the last use was “three or four” weeks prior to the interview) with DOE Exhibit 6 at 15 (states in the August 15, 2002 PSI that she last smoked marijuana in “December [2001] or January [2002] . . . it might have even been in February”).

From a security standpoint, an individual’s involvement with illegal drugs presents a problem because it demonstrates both poor judgment and a disregard for laws prohibiting their use. In addition, an individual who uses illegal drugs opens herself to blackmail or other forms of coercion, because she may want to conceal her usage. Moreover, even if the individual is only an occasional user, while she is under the influence of drugs her judgment is likely to be impaired, rendering her more susceptible to pressure, coercion, or exploitation. See Tr. at 29-30 (testimony of personnel security specialist).

2. *Falsification (Criterion F)*

As noted above, there is a striking discrepancy between the June 17, 2002 and August 15, 2002 PSIs as to the date of the individual's most recent (voluntary) use of marijuana. In the June 2002 PSI, the individual stated that she had smoked marijuana "within the last couple of weeks, what was it, about four or so" DOE Exhibit 7 at 16. However, in her August 2002 PSI, the individual stated that she last smoked marijuana in "December [2001] or January [2002] . . . it might have even been in February, . . ." DOE Exhibit 6 at 15.

Criterion F describes a concern raised when a person "has *deliberately* misrepresented, falsified, or omitted significant information from . . . a personnel security interview . . ." 10 C.F.R. § 710.8(f) (emphasis added). The individual argues that her August 2002 account was truthful, i.e., that the June 2002 account is inaccurate, but that the discrepancy between her accounts in the two PSIs "was not one of deliberate misrepresentation and falsification." Transcript of Hearing (Tr.) at 8. For a number of reasons, this contention is not credible. Instead, the evidence points to a conclusion that the accurate account of her recent marijuana usage was given by the individual in the June 2002 PSI. As I discuss further below, the implications of this conclusion are troubling, given that the individual has continued to the present to insist that the responses given in her August 2002 PSI were truthful.

First, the individual testified at the hearing that she was "most definitely" more nervous "about going to" the June 2002 PSI than she was the interview in August 2002, implying that it was this nervousness that caused her in the June PSI to erroneously report when she last smoked marijuana. Tr. at 156; *see also* Tr. at 87 (testimony of psychotherapist that the individual's "narrative style, like other clients I've seen, is this kind of roundabout, difficult to get a handle on chronology, and I think that her tendency to do that increases with stress and the amount of distress that she's in at the time"). I have listened several times to the audio tapes made of both of these interviews. Whether or not the individual was more nervous *prior to* the June interview, my perception from the audio tapes is that she was as emotional, and possibly more so, in the August 2002 PSI, crying at precisely the times that the relevant questions are being asked. DOE Exhibit 6 at 13; *see also* Tr. at 22 (testimony of personnel security specialist that individual's "emotional stature changed when we began talking about her last use of marijuana"); Tr. at 105 (based upon reading of the PSI transcripts, psychotherapist unable to conclude that one PSI was more stressful than the other).

Moreover, in the August 2002 PSI, the individual appears to hedge her answers. When asked whether it was possible that she smoked marijuana more recently than the previous December or January, the individual qualified her answer with the following explanation:

[Personnel Security Specialist] Okay, could it have been later than that?

[The individual] Um, not t -- to the best of my recollection, no, I don't, I don -- I, it was, uh, tr -- I'm sorry, I just, I just put my dog down on Monday, that's why I didn't return your phone call on Monday.

[PSS] Oh, okay.

[The individual] And, um, my t -- literally my time frame on some things has gotten a little skewed --

[PSS] Uh-huh.

[The individual] -- um, with my mother who's in a, uh, Alzheimer care facility and everything --

[PSS] Uh-huh.

[The individual] -- and it just, I, I had such a better time frame, you know, of, or track of time, say the, even a year ago, and, uh, things are just, e -- with school and everything and I'm just trying to keep focused and on course and it, to the best that I remember it was December or January.

[PSS] Okay.

[The individual] Because that was the time frame that we [the individual and her estranged husband] were, it might have even been in February, but that was the time frame that we were looking at, of and talking about --

[PSS] Uh-huh.

[The individual] -- possibly getting back together.

DOE Exhibit 6 at 14-15.

By contrast, although the individual was emotional at times during the June 2002 PSI, she sounded calm, composed, and candid when she stated that "within the last couple of weeks, what was it, about four or so wer -- he would m - I was over there with him and he and some other friends were s -- smoking and I went ahead and I did, I had some too." DOE Exhibit 7 at 16. Moreover, in the June PSI, she expressed no equivocation or qualifications such as "to the best of my recollection" and "to the best that I remember," as she did in the August PSI. DOE Exhibit 6 at 14, 15.

I have also considered the possibility that the individual misspoke at the June 2002 PSI by saying, for example, "weeks" when she meant to say "months." However, if she had smoked marijuana between two and four months (rather than two to four weeks) prior to her June interview, the most recent incident would have taken place in the range of February to April 2002, a chronology still inconsistent with what she claims is the accurate account given in her August interview. Such a

mistake is also very unlikely considering that the individual confirmed the recency of her use in response to further questioning by the personnel security specialist.

[Personnel Security Specialist] And before the [last use], *the four weeks ago* do you know the last time?

[The individual] *Three about three or four.* Was the magic brownies at that potluck.

[PSS] Do you recall when that was?

[The individual] It was about two weeks before that and I am just amazed that this is, I'm finding myself in this situation where I put myself at risk.

DOE Exhibit 7 at 17 (emphasis added). A similar exchange occurs later in the interview, when the personnel security specialist asked the individual why she initially used marijuana.

[The individual] Uh, to be one of the crowd. It was peer pressure.

[PSS] 'Kay. And again this, you indicated *four we -- three to four weeks ago* you felt, uh, peer pressure.

[The individual] It was with, it was a situation with my husband, trying to get back together with him and it just, uh, he's basically played my feelings against a woman that he's been seeing.

DOE Exhibit 7 at 21 (emphasis added).

In addition, I note that in the June 2002 PSI, the individual states, "I'm afraid at a point right now it [marijuana], you know, may still be something that would show up in my system because it was not that long ago . . ." *Id.* at 17. This, at the very least, indicates that the individual had given more than passing thought to the length of time since her last use, making it that much less likely that she would have unintentionally provided an inaccurate account of when her last use occurred.

Finally, in the June 2002 PSI, the individual states that she last smoked marijuana "about two weeks" *after* the party at which she ate "magic brownies." *Id.* at 21. And the individual has consistently stated that the party took place in the spring of 2002. DOE Exhibit 6 at 17-18. Again, this indicates that the individual was well aware of the timeline that she was relating in the June 2002 PSI, and undermines the individual's contention that the account she gave in that PSI was unintentionally inaccurate.

In support of her current version of events, the individual presented the testimony of her estranged husband, who testified that he smoked marijuana with the individual "around Christmas a couple of

years ago” and did not do so in the spring of 2002.² Tr. at 114. However, I found the husband’s testimony to be less than credible. First, he testified at the hearing that he used marijuana on “average over the years, maybe every -- once every three months or so.” Tr. at 122. When asked how often his wife smoked marijuana, he responded, “God, those are rare occasions. I don't know. We've known each other for 27 years. Once, twice a year maybe. I mean, there was a few years go by, and I'd say, ‘Well, she must have given it up.’” Tr. at 123. While not radically at odds with the individual’s statements in the August 2002 PSI, her husband’s testimony appears at the very least to be an attempt to minimize the extent of the individual’s use. *See* DOE Exhibit 6 at 9-11 (individual reports use of marijuana once or twice every three or four months).

Second, both the individual and her husband contend that, over many years of using marijuana, they never once purchased it. *See, e.g.*, Tr. at 127, DOE Exhibit 7 at 15. However, it is difficult to reconcile this contention with the individual’s admission that, during a period around 1986, she used the substance “alone” and, at least during one two-week time period, “daily.” DOE Exhibit 7 at 19-21. Moreover, if the husband’s testimony is to be believed, he had the remarkable fortune of being a regular recipient of gifts of the substance. When asked where he was “getting the marijuana that you were using,” the husband stated that “it was brought along by my friends.” Tr at 122-23.

Q. You indicated that when you smoked marijuana that it was when you'd go out with some friends and they'd bring out beers and some of them might have brought some pot.

Did you ever buy any to keep for yourself around the house?

A. No, no. I saw that, you know, it was being handed -- it was being handed to me, and I thought, "Why buy it if they're going to give it for free," and smoke it right there and not go home and smoke it, then there was no need.

Q. But the last time you smoked with [the individual] around the holidays, it was just the two of you by yourself?

A. At that particular moment, yeah.

Q. And where did the marijuana in that instance come from?

A. It had been left by a friend, just left there, "Here, enjoy." "Okay. Well, thanks." I took off and [the individual] was -- you know, [the individual] came over, and we had words, and that's how I offered it.

Q. Out of a pipe?

A. Uh-huh.

Q. Your pipe?

A. Uh-huh.

²Certain statements in the testimony of the individual’s psychotherapist also appear to corroborate the account that the individual smoked marijuana with her husband during the holidays. Tr. at 98, 108. However, the psychotherapist made these statements in response to more general questions on cross-examination, and it is not at all clear from that testimony whether the individual related her version to the psychotherapist contemporaneously or not. I can only assume that if the psychotherapist received contemporaneous reports from the individual corroborating her version of events, the individual’s counsel would have elicited this in the psychotherapist’s direct testimony. *See* Tr. at 96 (testimony of psychotherapist that from “time to time, I would perhaps check in what was happening with marijuana use, but it was really a nonissue, and I don't have any indication that she was using after the period when she had quit.”).

Tr. at 127. The husband's testimony just does not ring true, particularly in light of the fact that he owned a pipe. Thus, on the issue of the extent of his and his wife's involvement with marijuana, and more specifically as to when their most recent use together occurred, I do not find the husband's testimony to be credible.

All of the factors discussed above lead me to conclude that the individual provided an accurate account in the June 2002 PSI of her use of marijuana just weeks prior, and that therefore the account given in the August 2002 PSI (that she last smoked marijuana in December, January, or February) was false. Moreover, it is difficult to conclude that the false statements in the August 2002 PSI were unintentional, given that the individual continues to stand by the account given in that PSI.

Of course, one can only speculate as to the individual's actual motive,³ and ultimately only she and her estranged husband know the truth as to whether she purposely misled the DOE, and if so, why. But the conclusions I lay out above are those that I think most logically flow from the evidence before me. And though this falsification may look relatively minor in some contexts, it nonetheless bears on a fact material to the determination of the individual's eligibility for a clearance, and therefore must be regarded as a serious matter from a security perspective. See Tr. at 32 (testimony of personnel security specialist that recency of illegal drug use a "very important" factor in determining eligibility for access authorization).

As one of the personnel security specialists testified at that hearing,

If an individual demonstrates that they are not forthright and honest, then their trust is in question. It's not an individual's right to hold a security clearance, that's a privilege. Privileges are only granted to individuals who can assure that they are honest and trustworthy. National security depends on trust, and national security would be at risk if that trust is broken.

Tr. at 29.

B. Whether the Security Concerns Have Been Resolved

A hearing under Part 708 is held "for the purpose of affording the individual an opportunity of supporting his eligibility for access authorization," i.e., "to have the substantial doubt regarding

³The most obvious motive for such a falsification would be to place her marijuana use at a less recent time, and thus mitigate the security concern. At the hearing, the individual responded "No" to the question, "Did you know in June -- or in August -- that when you smoked this marijuana with your husband that the timing would make a difference as opposed to whether or not you'd be a risk for a clearance?" Tr. at 160. However, this hearing testimony is difficult to believe. At numerous times in the June 2003 PSI, the personnel security specialist specifically mentioned that the recency of the individual's use of marijuana was a cause for concern. DOE Exhibit 7 at 18 ("because of your recent use"), 19 ("because of your recent use"), 26 (the "fact that you were influenced or pressured to use the substance recently"), 28 ("your recent drug use").

eligibility for access authorization resolved.” 10 C.F.R. § 710.21(b)(3), (6). “In resolving a question concerning an individual's eligibility for access authorization,” I must consider

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 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 continuation or recurrence; and other relevant and material factors.

10 C.F.R. § 710.7(c).

1. Illegal Drug Use (Criteria K and L)

While the individual's prior illegal drug use rightly raises a security concern, I see no evidence in the present case that the individual's disregard for drug laws was indicative of a pattern in the individual's life of disregard for other laws, for the law in general, or in particular for any laws relating to national security. On the other hand, if the individual were to use illegal drugs in the future, the concerns discussed above regarding susceptibility to coercion and effect on judgment would be raised anew. In addition, the use of illegal drugs while the individual holds a security clearance (if she were to be granted one) most certainly would not demonstrate good judgment.

I therefore must evaluate the likelihood that the individual will use illegal drugs in the future. I find this likelihood to be low. From my observation of the individual's testimony and listening to the tapes of the PSIs, I believe that the individual has been sufficiently traumatized by the personnel security process such that she has been “scared straight,” and would refrain from using illegal drugs if she were granted a security clearance. In addition, my opinion that the individual will no longer use illegal drugs is shared by the individual's psychotherapist, who articulated sound bases for her conclusion. The individual has seen the psychotherapist for one hour sessions “every one or two weeks” since May of 1999. Tr. at 80. The psychotherapist noted that there was no evidence that the individual was ever dependent on drugs, Tr. at 82, and laid out the following reasons for her optimistic prognosis:

One, I think that she has recognized the ways that marijuana use has interfered with her ability to reach goals and sort of know herself and live a healthy emotional life.

The second is that when I spoke to her about using with her husband around the holidays, her comments were along the lines of, “I didn't like the feeling, I don't have any desire to ever smoke again, I don't know -- I remember now why I stopped, and I just don't like it.”

In addition, there is the issue -- there is always this background issue of her asthma.

Tr. at 98.

Thus, I believe that the risk that the individual will use marijuana as a clearance holder is low enough to be acceptable. Nonetheless, it is still troubling that, no matter whether her last use of marijuana was as late as May 2002 or as early as December 2001, the individual smoked marijuana after she began the process of applying for a clearance and filled out a QNSP in November 2001. Because that questionnaire specifically asked her about her past drug use, it should have been obvious to her that the use of marijuana could destroy her chances of getting a clearance. Thus, there is a lingering issue as to whether the individual is fully capable of exercising sound judgment.

2. Falsification (Criterion F)

In a number of opinions, DOE hearing officers have considered the implications of past falsifications by an individual.

All acknowledge the serious nature of falsifying documents. Beyond that, whether the individual came forward voluntarily to renounce his falsifications appears to be a critical factor. *Compare Personnel Security Hearing*, Case No. VSO-0037, 25 DOE ¶ 82,778 (1995), *affirmed* (OSA Feb. 22, 1996) (voluntary disclosure by the individual), *with Personnel Security Hearing*, Case No. VSO-0327 (April 20, 2000), *appeal filed* (falsification discovered by DOE security). Another important consideration is the timing of the falsification: the length of time the falsehood was maintained, whether a pattern of falsification is evident, and the amount of time that has transpired since the individual's admission. *See Personnel Security Hearing*, Case No. VSO-0327 (April 20, 2000), *appeal filed* (less than a year of truthfulness insufficient to overcome long history of misstating professional credentials). *See also Personnel Security Hearing*, Case No. VSO-0289, 27 DOE ¶ 82,823 (1999) (19 months since last falsification not sufficient evidence of reformation from falsifying by denying drug use).

Personnel Security Hearing, Case No. VSO-0319, 27 DOE ¶ 82,851 (2000), *affirmed* (OSA July 18, 2000).

Given that I have found it likely that the individual intentionally provided false information in her August 2002 PSI and stuck by that story at the hearing, she has clearly not renounced that falsification, and there is also no issue as to the time that has passed since any admission of falsification. On the other hand, the falsification in this case is by all appearances an isolated one. More to her credit, the individual has a reputation of honesty, and she appeared at the hearing in this matter to be a person of high integrity. Tr. at 51-112 (testimony of supervisor, co-worker, and neighbor); Individual's Exhibits 2, 3, 4, 5 (performance reviews and letters of reference). Unfortunately, these factors cannot resolve the concern raised by this specific, unrecanted, and very recent incident of intentional falsification.

Even if everything to which the individual testified were true and she was completely truthful in her August 2002 PSI, there still would remain a bizarre and inexplicable account given in her June 2002 PSI that she had smoked marijuana only weeks earlier. Thus, under either version of events, there

remains an unexplained discrepancy between her accounts in the two PSIs. Because that discrepancy has not been resolved by any credible explanation, I cannot recommend that the individual be granted a security clearance. As the Part 710 regulations state,

The decision as to access authorization is a comprehensive, common-sense judgment, made after consideration of all relevant information, favorable and unfavorable, as to whether the granting or continuation of access authorization will not endanger the common defense and security and is clearly consistent with the national interest. Any doubt as to an individual's access authorization eligibility shall be resolved in favor of the national security.

10 C.F.R. § 710.7(a).

III. Conclusion

Because of (1) poor judgment demonstrated by the individual's most recent drug use, after she filled out the QNSP; (2) the likelihood that the individual intentionally provided false information to the DOE; and (3) the unresolved doubt stemming from the discrepant PSIs even if she did not intentionally lie in either interview, I agree with the local security office that there is evidence that raises a substantial doubt regarding her eligibility for a security clearance, and I do not find sufficient evidence in the record that resolves this doubt. Therefore, because I cannot conclude that granting the individual access authorization would not endanger the common defense and security and would be clearly consistent with the national interest, it is my opinion that the individual should not be granted access authorization. 10 C.F.R. § 710.27(a). The individual may seek review of this Decision by an Appeal Panel under the procedures set forth at 10 C.F.R. § 710.28.

Steven J. Goering
Hearing Officer
Office of Hearings and Appeals

Date: October 9, 2003