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**June 4, 2004**

**DEPARTMENT OF ENERGY  
OFFICE OF HEARINGS AND APPEALS**

Hearing Officer's Decision

Name of Case: Personnel Security Hearing

Date of Filing: August 15, 2003

Case Number: TSO-0065

This Decision concerns the eligibility of XXXXX (hereinafter referred to as "the individual") to hold an access authorization (also called a security clearance). The local DOE security office declined to grant the individual a clearance after determining that information in its possession created substantial doubt about the individual's eligibility for an access authorization under the Department of Energy (DOE) regulations set forth at 10 CFR Part 710, Subpart A, entitled "Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material." As explained below, I have concluded that the individual's access authorization should not be granted at this time.

**Background**

The individual works for a contractor at a DOE facility where some assignments require an access authorization. The local DOE security office issued a Notification Letter to the individual on September 17, 2002, which it amended in a revised Notification Letter issued to the individual on December 22, 2003. The hearing was based on the December 22, 2003 Notification Letter, hereinafter referred to as "the Notification Letter." The Notification Letter alleges that DOE has substantial doubt about the individual's eligibility for a clearance, based upon disqualifying criteria set forth in section 710.8, paragraphs (f), (k) and (l).

The Notification Letter refers to a security questionnaire dated August 22, 2001, and alleges that the individual deliberately misrepresented, falsified, or omitted significant information when he certified that he had not been involved in the illegal purchase, manufacture, trafficking, production, transfer, shipping, receiving, or sale of any narcotic, depressant, stimulant, hallucinogen, or cannabis for his own intended profit or that of another in the last seven years, by responding negatively to Part (C), Question 24 (emphasis added). During a Personnel Security Interview (PSI) conducted in May 2002, the individual admitted that he began purchasing marijuana in about 1992, and currently purchased an ounce every two or three months. That is the security concern based on section 710.8(f).

The Notification Letter next alleges that the individual has trafficked in, possessed, or used marijuana, a drug listed in the Schedule of Controlled Substances established pursuant to Section 202 of the Controlled Substances Act of 1970. This charge is based on the individual's admission during the May 2002 PSI that he used marijuana in 1992, smoking one joint per day, in October 1993, smoking one joint a week, and in May 2002, smoking half a joint a day, including half a joint on the night before the PSI. The Notification Letter also refers to a written psychiatric evaluation by a DOE consultant psychiatrist issued on October 23, 2003, in which the psychiatrist found that based on the Diagnostic and Statistical Manual of the American Psychiatric Association, Fourth Edition, Text Revision (DSM-IV-TR), the individual suffers from Cannabis Abuse, in Early Remission, without adequate evidence of rehabilitation or reformation. According to the psychiatric evaluation, the individual would need outpatient treatment of moderate intensity for a year, including weekly substance abuse counseling, and abstinence from marijuana, to show adequate evidence of rehabilitation and reformation. The Notification Letter also alleges that in 1975, the individual received an Article 15 [Commanding Officer's Non-Judicial Punishment] under the Uniform Code of Military Justice for possessing marijuana, and his security clearance was revoked. These are the bases for the security concern under section 710.8(k).

The Notification Letter also alleges that the individual 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 he may be subject to pressure, coercion, exploitation, or duress which may cause him to act contrary to the best interests of the national security. This charge is based on the following four incidents: on May 19, 1995, the individual was arrested for inflicting corporal punishment on a spouse; on December 15, 1994, the police were called to investigate a domestic dispute involving the individual; in November 1993, the individual was accused of sexual harassment in the workplace, and on December 22, 1992, a petition was filed alleging that the individual and his spouse were unfit parents, and all five of their children were removed from their home. This is the basis for the security concern under section 710.8(l).

Because of these security concerns, the case was referred for administrative review. The individual filed a request for a hearing. The local DOE security office transmitted the hearing request to the Office of Hearings and Appeals (OHA), and the Director appointed me as Hearing Officer in this case. At the hearing I convened, the DOE Counsel called two witnesses: the DOE psychiatrist, and the individual's supervisor. The individual, who represented himself, testified on his own behalf, and called six other witnesses: his wife, and five current co-workers who also know the individual socially. The DOE submitted eight written exhibits. The individual submitted a written answer to some of the charges in the Notification Letter, and three written exhibits, including a progress report on his treatment by an Employee Assistance Program (EAP) counselor at the DOE facility.

### **Standard of Review**

The applicable DOE regulations state that “[t]he decision as to access authorization is a comprehensive, common-sense judgment, made after consideration of all the 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 CFR § 710.7(a). In resolving questions about the individual’s eligibility for access authorization, I must consider the relevant factors and circumstances connected with the individual’s conduct. These factors are set out in section 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 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.

A DOE administrative review proceeding under 10 CFR Part 710 is authorized when the existence of derogatory information leaves unresolved questions about an individual’s eligibility for access authorization. A hearing is “for the purpose of affording the individual an opportunity of supporting his eligibility for access authorization.” 10 CFR § 710.21(b)(6). Once DOE has presented derogatory information affecting an individual’s eligibility for access authorization, the individual must come forward with evidence to convince DOE that restoring his or her access authorization “would not endanger the common defense and security and would be clearly consistent with the national interest.” See, e.g., *Personnel Security Hearing*, Case No. VSO-0013, 24 DOE ¶ 82,752 at 85,511 (1995), and cases cited therein. The DOE regulations were amended in 2001 to state that any doubt regarding an individual’s eligibility for access authorization shall be resolved in favor of the national security. 10 CFR § 710.7(a). For the reasons discussed below, it is my opinion that the individual has still not resolved one of the concerns in the Notification Letter, and therefore he should not be granted access authorization at this time.

### **Findings of Fact**

The facts are not in dispute. The individual admits the 1975 incident when he was disciplined by the military for marijuana possession, and he admits smoking marijuana from 1993 until he quit using the drug in August 2003 when the present administrative review hearing process began. In the May 2002 PSI, the individual stated that he began using marijuana regularly in 1993 when he began experiencing chronic back pain. In November 2003, after his interview with the DOE psychiatrist, the individual sought treatment for cannabis abuse at the DOE facility’s employee assistance program. Since he enrolled in treatment, four months before the hearing, the individual has met weekly with an EAP counselor.

At the hearing, the individual submitted a letter from the EAP counselor, who did not testify in person. March 15, 2004 letter from EAP counselor (Individual's Exhibit A). The EAP counselor agreed with the DOE psychiatrist's evaluation and recommendation that the individual would need outpatient treatment of moderate intensity for a year, including weekly substance abuse counseling, and abstinence from marijuana, to show adequate evidence of rehabilitation and reformation. On a positive note, the EAP counselor reported that

[the individual]'s life style has changed and is changing with age. He is highly motivated to be able to work in the field he is in. I have met with [the individual] in counseling 14 times. Our sessions are scheduled weekly. [The individual] has a positive attitude and is committed to fulfilling the requirement established to demonstrate his trustworthiness to receive a ... clearance.

*Id.* The counselor also recommended that in view of the individual's history of marijuana use and chronic back pain, he should abstain from drinking alcohol. The counselor noted that since "[the individual's] current use is very minimal this should not pose a problem." *Id.*

The individual addressed the falsification charge in his written response to the Notification Letter, and in his hearing testimony. He pointed out that he had already admitted using marijuana in his response to the first part of the question about drug use, but that when he read the third part of the question, he focused on the phrase "for your own intended profit or that of another," and answered in the negative because he has never sold drugs for profit. The individual maintains he answered the question honestly, based on his interpretation of its literal language, thinking that the phrase in question was intended to modify the word "sale."

### **Testimony of the Witnesses at the Hearing**

#### **The Individual's Wife**

The individual's wife has no personal knowledge of the falsification charge. She testified that she has never seen her husband with a large quantity of marijuana, and has never known him to be a dealer. Hearing Transcript ("Tr.") at 33-34. She admitted knowing the individual purchased marijuana for his own use, and generally corroborated the individual's account of when he began using the drug after back surgery in the early 1990s, his manner of use ("a closet smoker" who used it "privately and sort of secretly"), and his decision to quit in August 2003. *Id.* at 13-16, 33-34. After prompting, she also acknowledged the individual's treatment with the EAP counselor, and did not notice any difference in his behavior since he quit smoking marijuana. *Id.* at 20. According to the individual's wife, his marijuana use never caused any problems in their marriage. *Id.* at 29.

The individual's wife next testified about the four incidents in the early 1990s that form the basis for the unusual conduct concern in the Notification Letter. She began by describing the 1995 incident when the individual was arrested for inflicting corporal punishment on a spouse. The individual's wife became upset when she found evidence that her husband had spent a weekend with another woman. The individual was asleep at the time; his wife awakened him angrily, and struck him in the face. He struck out blindly and hit his wife in the face with an open hand. She recalls that the individual paid a fine, and agreed to participate in domestic violence prevention classes. After completing a year of domestic violence classes and two years of probation, the charges against the individual were dismissed. *Id.* at 17-23; 30-32.

The individual's wife first indicated that she does not recall anything about an incident in December 1994, when the police were called to their house regarding a domestic dispute. *Id.* at 18. Later in the hearing, however, she remembered that an incident did occur when the police came to the house in response to a loud father-daughter argument (and left without taking any action), but she was unsure of the date. *Id.* at 36. The individual's wife heard about the sexual harassment incident at the individual's workplace in November 1993, but she has no personal knowledge of what happened, and "did not think it was any big deal." *Id.* at 19, 24.

The individual's wife maintains that an unknown person wrongly accused her and her husband in December 1992, when a petition was filed alleging they were unfit parents, and all five of their children were removed from their home. She described the experience as "a total terror." *Id.* at 26-27. According to the individual's wife, they had attended parenting classes, and have never gotten into trouble with the family authorities since the charges were dropped and their children were released back into their custody in early 1993. *Id.* at 28.

### **The Individual**

The individual insists that he did not deliberately falsify his response to part of the drug use question on the security questionnaire. He maintains that he innocently misinterpreted the third part of the question, which he characterized as "misleading." *Id.* at 40; DOE Exhibit 6. The first part of the question asked if he had ever used illegal drugs, to which the individual answered yes. The third part of the question asked if he was involved in the "illegal purchase, manufacture, trafficking, production, transfer, shipping, receiving, or sale of any narcotic, depressant, stimulant, hallucinogen, or cannabis for your own intended profit or that of another." According to the individual, he read the phrase "for your own intended profit" to be asking "have I ever dealt in any type of drugs before, and in that aspect, I put down no. As you notice, right [above] it, I did put down that I had used marijuana, so it wasn't something that I was trying to hide. It was just a misunderstanding of the question." *Tr.* at 40. Under cross-examination, the individual maintained, "if the last three words wouldn't have been there, I would have probably marked it yes, that I did purchase marijuana. They do not give it away. For your own intended profit, I took as meaning am I dealing." *Id.* at 42. The individual

absolutely denies trying to split hairs, be tricky, or mislead DOE in any way. *Id.* at 62-64.

The individual testified that he stopped using marijuana in August 2003, about two months before he saw the DOE psychiatrist in late October. *Id.* at 43. The DOE psychiatrist administered a drug test to the individual at the interview, which yielded a negative result, and according to the DOE psychiatrist, corroborates the individual's claim that he quit in August. *Id.* at 132-133. The individual maintains that he does not intend to use marijuana again. *Id.* at 44. The individual understands that illegal drug use is against the law, and it violates his employer's policy and the policy at the DOE facility where he works. *Id.* at 47. The individual recounted how he sought treatment with the EAP counselor before Thanksgiving in November 2003, shortly after his interview with the DOE psychiatrist, and introduced the letter from the counselor described above. Individual's Exhibit A.

The individual answered the unusual conduct charge by discussing the circumstances of the incidents enumerated in the Notification Letter, explaining that the last of them occurred nine years ago. Regarding the most recent incident, the May 1995 arrest for inflicting corporal punishment on a spouse, the individual stated that he learned his lesson from this experience. He points out that he voluntarily pled guilty to the charge, paid a fine, and took domestic violence prevention classes for a year. The charge was dismissed after he completed the classes. *Tr.* at 22-23. Both the individual and his wife believe that the classes taught him how to get along without resorting to any kind of physical actions. The individual, who is now a 50-year old grandfather, has not been involved in any domestic violence since that time. *Id.* at 32.

The individual explained the 1994 incident occurred when some neighbors apparently called the police when they heard a noisy argument between him and his daughter, whom he described as "a teenager at the time, and little on the high-strung side, and she was just butting noses with me." *Id.* at 35. According to the individual, when the police saw the daughter crying, and the individual apologized for the noise, the police realized what happened and left without taking further action. *Id.* at 36-37.

The individual characterized the alleged sexual harassment in 1993 as "a joke gone awry:"

It was inappropriate. If I may say what I said? A contract lady walked into my department and was looking for a computer to work on. She was a technician. I asked her if she was single. She said, "Yes." I asked her if she drank. She said, "Yes." Then I asked her if she'd like to try to drink me pretty. That was the extent of what I told her.

She took it the wrong way and reported it as sexual harassment to her boss. HR contacted my boss, and I was instructed...to sign a piece of paper stating that I would not have any other contact with this lady.

*Id.* at 52-53. The individual maintains that he was just trying to be friendly at the time, and attributes the remark to his outgoing personality. He denies intending to make any kind of sexual overture, stating “I could see it as sexual harassment now at my age. It’s something I do not do anymore. It was very inappropriate, and I was very apologetic.” *Id.* The individual points out that he volunteered this information, he has learned his lesson, and nothing like this has occurred since. *Id.* at 55.

During his testimony, the individual had nothing to add to the colloquy with his wife about the 1992 incident when his children were removed from their home. Since the individual was not represented by counsel, and he asked questions of his wife to bring out the facts, the DOE Counsel and I permitted him to make statements about this incident that are recounted above in the discussion of his wife’s testimony. It bears repeating that the individual denies engaging in any child abuse, and claimed the initial complaint was based on a third party’s mistaken impressions of their family life. *Id.* at 28-29.

The individual maintains that he learned his lesson from this series of incidents in his past, benefited from the training and counseling he was required to take, and has broken the pattern of using poor judgment. He denies that he would be subject to pressure, coercion of blackmail if someone said, “I know you were arrested for domestic violence.” He states that while he is not proud of these incidents, he has never tried to hide them, and he would report any attempt to pressure him to the local authorities or the FBI. *Id.* at 60-61.

### **The Individual’s Supervisor**

The individual’s supervisor described where the individual fit into the overall scheme of their organization. He noted that the individual is presently working on unclassified business, which can continue for at least the current fiscal year. He noted, however, that if the individual were able to get his clearance, it would give him more flexibility to work on classified assignments if the group’s funding profile changes in the future. *Id.* at 112-118. The supervisor characterized the individual as one of his better employees, “an extremely hard worker, prolific in the amount of work he can put out, creative in his...solutions.” *Id.* at 118. The supervisor testified that neither he nor anyone in his group has ever noticed any evidence that the individual was using illegal drugs. *Id.* at 122. Nor has the supervisor ever known the individual to engage in violent behavior, or dishonesty. *Id.* at 122-124.

### **The Individual’s Coworkers**

The individual called five character witnesses who worked at the DOE facility and played on the same softball team with him. These witnesses all have current security clearances. They have all known the individual for three to five years. To a man, they believe the individual is very honest. One witness believes the individual made an honest mistake on his security questionnaire “because he has no reason to lie to me.” *Id.* at 98-99. None of the five coworkers has ever seen the individual use marijuana, or appear to be under the influence of marijuana. One witness indicated he knows the individual “couldn’t get a

clearance because he smoked pot.” *Id.* at 82. This witness also testified that the individual quit using marijuana without any problems, and sought treatment that he was actively pursuing. *Id.* at 82-87. These witnesses all commented on the individual’s positive demeanor. For example, one found the individual was a non-violent person, a good team player with a good sense of humor that he has used “to settle things down a little bit.” *Id.* at 75. Other coworkers described the individual as “jovial, outgoing,” “friendly,” and “very nice person.” *Id.* at 95-108.

These witnesses know nothing about the incidents in the early 1990s, when the individual lived in a different state. One witness said he has heard the individual having arguments with family members over the phone, but he has never known the individual to be a violent person. When asked if has ever seen any violent side to the individual, another witness said that once he saw the individual wrestling with his son at a party. He explained:

I guess there had been too much drinking, and from what got relayed to me was that [the individual’s son] was getting out of line with [the individual], and [the individual] was trying to tell him to calm down and behave, and [the son], you know, wasn’t—wasn’t calming down, wasn’t behaving, and [the individual] tried to intercede.

I think the problem happened between [the son] and another friend and [the individual] tried to intercede, and [the son], I think, got—his temper flared and that was the wrestling, but I think [the individual] was just trying to keep him from causing any harm to himself or any of his guests, and that was basically it.

*Id.* at 110.

### **The DOE Psychiatrist**

The DOE psychiatrist testified last at the hearing. The psychiatrist referred to his written evaluation, and explained the bases for his finding that the individual was suffering from Cannabis Abuse in Early Remission. According to the evaluation, “The primary clinically significant impairment caused by [the individual’s] cannabis abuse has resulted from his unwillingness or inability to stop marijuana use in order to fulfill major role obligations at work,” citing DSM-IV-TR Cannabis Abuse criterion #1. DOE Exhibit 7 at 7-8. The psychiatrist observed that although the individual had his first legal problem with marijuana when he was disciplined for possessing marijuana by the military in 1975, he later resumed using it, and continued to use it regularly for ten years from 1993 until August 2003. The psychiatrist concluded that the individual “was unwilling or unable to cut back his marijuana use,” because even after encountering work-related problems with the DOE security clearance process, he continued smoking it for an additional year and a half, until the advent of the hearing finally motivated the individual to stop using the drug, and seek treatment for rehabilitation. The psychiatrist accepted as true the individual’s statement that he stopped using marijuana in August 2003, about two months

before his psychiatric interview, at which time the individual's drug screen was negative for all substances. *Tr.* at 132-133.

The psychiatrist thought when he saw the individual in October 2003, the individual had not begun treatment, and there was not yet adequate evidence of rehabilitation or reformation. According to the psychiatrist, the individual has a number of negative prognostic factors: (1) a long period of use, (2) the persistent back pain (which the individual cited as the reason he began using the drug in the 1990s) was still present, and (3) it seemed to have taken a lot of negative consequences before he was finally able to stop the use of marijuana. *Id.* at 135-136. The psychiatrist believes that the individual needs a year of outpatient treatment, such as the weekly substance abuse counseling he is now getting, and continued abstinence from marijuana, to show rehabilitation. *Id.* at 137. In deference to the judgment of the EAP counselor, the psychiatrist recommends that the individual should "also keep a close eye on drinking during the time that he's stopping the marijuana use." *Id.* at 141. The psychiatrist thinks the individual is "on the right track," but "it would be too early to say that there is adequate evidence of rehabilitation or reformation." *Id.* at 139-140.

Finally, the psychiatrist, who had observed the entire hearing, offered his opinion on the falsification charge. He believes the question is confusing, and that the individual's interpretation of the language was reasonable and "grammatically correct." The psychiatrist thinks DOE should revise the question, and drop the phrase "for your own intended profit," which appears to modify "all of the verbs and not just the last one about sale. If it did modify only sale, then it would seem to imply that the DOE is implying that it's okay to sell drugs as long as it's not for your intended profit, and which is obviously not their intent." *Id.* at 140.

### **Analysis**

Falsification of relevant and material facts on a security questionnaire could indicate that a person is dishonest, untrustworthy, and may not properly safeguard classified information. Illegal involvement with drugs raises concerns regarding a person's willingness or ability to protect classified information, and drug abuse may impair social or occupational functioning, increasing the risk of an unauthorized disclosure of classified information. A history or pattern of criminal activity creates doubt about a person's judgment, reliability and trustworthiness. These types of conduct may also increase a person's vulnerability to coercion or blackmail. In the present case, I find that the individual has mitigated all of the concerns in the Notification Letter, except that he has not yet shown adequate evidence of rehabilitation or reformation from his Cannabis Abuse.

With respect to the falsification charge under Criterion F, I find that part (C) of Question 24, which the individual answered in the negative after answering part (A) in the positive, is poorly worded and confusing, even to "an attorney or a grammarian," as the DOE psychiatrist observed. *Id.* at 140; DOE Exhibit 6. I believe that this individual, a skilled technician but uneducated in the literary arts, whom several witnesses described as

honest, made an honest mistake on the security questionnaire. It makes no sense that he would have admitted using marijuana, then deliberately denied ever having “been involved in the illegal purchase, manufacture, trafficking, production, transfer, shipping, receiving, or sale of any narcotic, depressant, stimulant, hallucinogen, or cannabis,” if it were not for the misleading phrase “for your own intended profit or that of another.” Accordingly, I find the individual has mitigated the concern that he deliberately falsified one of his answers on the security questionnaire.

I turn next to the unusual conduct charge under Criterion L, which is based on the individual’s involvement in four separate incidents in the early 1990s. The two more serious incidents were the individual’s 1995 domestic violence arrest, and the 1992 child welfare petition that led to the temporary removal of the individual’s children from their parents’ home. The domestic violence arrest shows bad judgment and poor self-control by the individual. The reasons for the child welfare petition are unclear, but the individual and his wife strongly maintain that it was based on a misunderstanding. Nevertheless, I find the concerns about these incidents have been mitigated by several factors. First, the individual and his wife were required to take appropriate remedial training designed to prevent future parenting and domestic violence problems. Second, these incidents happened many years ago, so they have been mitigated by the passage of time. Third, nothing resembling these incidents has ever occurred in the subsequent years. The anecdote related by one witness about how the individual defused a tense situation at a party that could have resulted in a fight between his son and another guest shows the individual, whom several people described as good-natured, has learned how to avoid violence. As the individual and the EAP Counselor noted, the individual is now a grandparent in his 50s, and a more mature person than he was when those incidents occurred.

The other two incidents, the police coming to investigate a disturbance at the individual’s house in 1994, and the individual’s alleged sexual harassment of a female coworker in 1993, are relatively minor. They would not raise concern if they did not appear to be part of a pattern of behavior in which the individual showed poor judgment during a short period a decade ago. However, I find the individual has given satisfactory explanations for both incidents. The evidence shows that the loud father-daughter argument involving the individual was not serious. The police checked it out, and left without taking any action. I find that the individual learned his lesson from the alleged sexual harassment incident. He convinced me that he learned from this experience what kind of remark is appropriate to a female colleague in the contemporary workplace. He showed remorse, and has not been involved in any similar incidents since that time. Finally, the individual has convinced me that he is not vulnerable to coercion or blackmail. He volunteered all of the information about these incidents to the DOE, and stated convincingly that he would report any attempt to pressure him to the local authorities or the FBI. I therefore find the individual has mitigated the concerns under Criterion L.

I reach a different conclusion on the concern under Criterion K about the evidence of the individual’s rehabilitation or reformation from Cannabis Abuse. Based on the expert testimony of the DOE psychiatrist, corroborated by the EAP counselor, I find that the

individual has made good progress toward rehabilitation since he quit smoking marijuana in August 2003, and entered treatment in November 2003. However, I am convinced by the experts that the individual needs to complete a year of drug treatment to show rehabilitation, in view of the several negative prognostic factors described above. In my view, it is most telling that the individual continued using marijuana for another year and a half, after marijuana use surfaced as a concern that threatened his eligibility for a clearance.

### **Conclusion**

Based on the record in this proceeding, I find that the individual has resolved the security concerns under 10 CFR § 710.8(f), and (l) that were specified in the Notification Letter. However, I find that the individual has not resolved the concern under 10 CFR § 710.8 (k). For the reasons explained in this Decision, I find the individual has failed to show that granting him access authorization would not endanger the common defense and security and would be clearly consistent with the national interest. Accordingly, it is my decision that the individual's access authorization should not be granted at this time.

Thomas O. Mann  
Hearing Officer  
Office of Hearings and Appeals

Date: June 4, 2004