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**March 25, 2004**  
DEPARTMENT OF ENERGY  
OFFICE OF HEARINGS AND APPEALS

*Hearing Officer's Decision*

Name of Case: Personnel Security Hearing

Date of Filing: October 23, 2003

Case Number: TSO-0068

This Decision concerns the eligibility of XXXXXXXXXXXXXXXX (hereinafter "the individual") for continued access authorization. The regulations governing the individual's eligibility are set forth at 10 C.F.R. Part 710, "Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material." This Decision will consider whether, based on the testimony and other evidence presented in this proceeding, the individual's suspended access authorization should be restored. For the reasons detailed below, it is my opinion that the individual's access authorization should be restored.

**I. BACKGROUND**

In April 2003, the Manager of Personnel Security for a Department of Energy (DOE) Operations Office issued a Notification Letter to the individual, stating that the DOE was in possession of derogatory information that created a substantial doubt concerning his continued eligibility for access authorization.

In the Notification Letter, the Manager finds that the individual has raised security concerns under Sections 710.8(k), (f) and (l) of the regulations governing eligibility for access to classified material (Criteria (k), (f), and (l)). With respect to Criterion (f), the Notification Letter states that the individual may have "deliberately misrepresented, falsified, or omitted significant information" from two Questionnaires for Sensitive Positions (QNSPs) which he completed on May 12, 1989 (the 1989 QNSP) and April 9, 2002 (the 2002 QNSP). This information concerned his past use of marijuana.

Second, the notification letter cites certain information as indicating that the individual used an illegal drug, *i.e.*, marijuana, which constitutes a security concern under Criterion K of

Part 710.8. The information raising a concern in this area consists of the statements concerning marijuana use contained on his 2002 QNSP and at his July 2002 Personnel Security Interview (2002 PSI).

Third, the notification letter cites certain information as indicating that the individual engaged in unusual conduct tending to show he is not honest, reliable or trustworthy, or which furnishes reason to believe that he may be subject to pressure, coercion, exploitation or duress. This constitutes a security concern under Criterion L of Subpart 710.8. In this regard, the Notification Letter states that the individual used marijuana while possessing DOE access authorization although he signed security acknowledgments on April 9, 2002 and May 20, 1994, which advised that using illegal drugs could result in the loss of access authorization.

The DOE also informed the individual that he was entitled to a hearing before a Hearing Officer in order to respond to the information contained in the Notification Letter. The individual then requested a hearing in this matter and the Operations Office forwarded this request to the Office of Hearings and Appeals. I was appointed to serve as the Hearing Officer. In accordance with 10 C.F.R. § 710.25(e) and (g), I convened a hearing in this matter (the Hearing) in February 2004.

At the Hearing, the individual testified on his own behalf. He also presented the testimony of a friend from graduate school; his brother; his wife; and the group leader from his place of employment (the group leader). Following the Hearing, I convened a conference call to hear the testimony of his former wife, who was not available to testify at the Hearing. This testimony is included in the hearing transcript. These individuals testified concerning their knowledge of information cited above as raising security concerns, and concerning their opinion of the individual's truthfulness, and his honesty, reliability and trustworthiness. The DOE counsel in this proceeding presented the testimony of the DOE security specialist who interviewed the individual at his 2002 PSI. The DOE Counsel also presented that testimony of the Associate Program Director from the individual's place of employment, who testified concerning the individual's need for a security clearance and his exceptional contribution to the program area.

## **II. *REGULATORY STANDARD***

In order to frame my analysis, I believe that it will be useful to discuss briefly the respective requirements imposed by 10 C.F.R. Part 710 upon the individual and the Hearing Officer. As discussed below, Part 710 clearly places upon the individual the responsibility to bring forth persuasive evidence concerning his eligibility for access authorization, and requires the

Hearing Officer to base all findings relevant to this eligibility upon a convincing level of evidence. 10 C.F.R. §§ 710.21(b)(6) and 710.27(b), (c) and (d).

**A. *The Individual's Burden of Proof***

It is important to bear in mind that a DOE administrative review proceeding under this Part is not a criminal matter, where the government would have the burden of proving the defendant guilty beyond a reasonable doubt. The standard in this proceeding places the burden of proof on the individual. It is designed to protect national security interests. The hearing is "for the purpose of affording the individual an opportunity of supporting his eligibility for access authorization." 10 C.F.R. § 710.21(b)(6). The individual must come forward at the hearing with evidence to convince the DOE that restoring his 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). *Personnel Security Review (Case No. VSA-0087)*, 26 DOE ¶ 83,001 (1996); *Personnel Security Hearing (Case No. VSO-0061)*, 25 DOE ¶ 82,791 (1996), *aff'd*, *Personnel Security Review (Case No. VSA-0061)*, 25 DOE ¶ 83,015 (1996). The individual therefore is afforded a full opportunity to present evidence supporting his eligibility for an access authorization. The regulations at Part 710 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). Thus, by regulation and through our own case law, an individual is afforded the utmost latitude in the presentation of evidence which could mitigate security concerns.

Nevertheless, the evidentiary burden for the individual is not an easy one to sustain. 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 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). Consequently, it is necessary and appropriate to place the burden of persuasion on the individual in cases involving national security issues. In addition to his own testimony, we generally expect the individual in these cases to bring forward witness testimony and/or other evidence which, taken together, is sufficient to persuade the Hearing Officer that restoring access authorization is clearly consistent with the national interest. *Personnel Security Hearing (Case No. VSO-0002)*, 24 DOE ¶ 82,752 (1995); *Personnel Security Hearing (Case No. VSO-0038)*, 25 DOE ¶ 82,769 (1995) (individual failed to meet his burden of coming forward with evidence to show that he was rehabilitated and reformed from alcohol dependence).

### ***B. Basis for the Hearing Officer's Decision***

In personnel security cases under Part 710, it is my role as the Hearing Officer to issue a decision as to whether granting an 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(a). Part 710 generally provides that "[t]he 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." 10 C.F.R. § 710.7(a). I must examine the evidence in light of these requirements, and assess the credibility and demeanor of the witnesses who gave testimony at the hearing.

### ***III. CRITERION F CONCERNS***

The DOE's Criterion F concern that the individual may have "deliberately misrepresented, falsified, or omitted significant information" from his 1989 and 2002 QNSPs arises from its finding that the individual admitted to marijuana use in his 2002 PSI that contradicts the statements in his earlier QNSPs. When he applied for a DOE security clearance in 1989, the individual stated in his QNSP that he had not "used or supplied" marijuana or other illegal drugs within the past five years. 1989 QNSP at 7. In a QNSP completed in April 2002, he reported that he had used marijuana three times in the last seven years, and that these instances of usage all took place during the period from July through September, 2000. 2002 QNSP at 8. As a result of reporting this use of marijuana on his 2002 QNSP, DOE security conducted a PSI with the individual in July 2002. The individual made statements concerning his use of marijuana during that interview that contradicted the statements contained in his two QNSP's. Specifically, the Notification Letter finds that at the 2002 PSI, the individual stated that he used marijuana in 1985, which contradicts the statement in his 1989 QNSP that he had not used marijuana in the last five years. The Notification letter also finds that at this PSI, he stated that he used marijuana occasionally with his brother, over the last five to seven years, contradicting the statement concerning usage contained in his 2002 QNSP. *See* Appendix to Notification Letter at 1.

In his May 2003 request for a hearing in this matter, the individual explained that the statements that he made at the PSI that contradicted those made in his earlier QNSPs were the result of a lack of preparation and confusion on his part at the PSI.

I came to the interview ill prepared, soon became nervous and confused and unfortunately, did not accurately recount some of the events in response to the questioning.

Individual's May 2003 letter to the DOE Security Specialist. With respect to his use of marijuana before 1989, he asserted that the statement on his 1989 QNSP was accurate because he stopped using marijuana in 1982 rather than in 1985.

I have thought back carefully on this and am certain, that 1982 was the last year that I used marijuana prior to employment at [the DOE facility]. I am certain of this, because I can tie these events to the year that I met my former wife. We married in 1983 and I ceased marijuana use after participating in a marijuana study conducted by [the university I attended] in 1982, before we were engaged. I was a graduate student at [this university] from 1980 until 1986 and learned of the study from a fellow graduate student in 1982. This last usage before employment at [the DOE facility] occurred 7 years prior to the QNSP that I completed in 1989. Unfortunately, during the interview, I had, without careful reflection, guessed that this had occurred in 1985.

*Id.* Similarly, he explained that his statement at the PSI that he had used marijuana occasionally with his brother over the last five or seven years was inaccurate.

I did use marijuana while on vacation in 2000 and indicated this on the QNSP form that I filled out in 2002. During the last 5 or 6 years there were other occasions that I recall when I had been in the presence of marijuana, but I did not actively smoke on those occasions. During the interview, I was thinking back to all the times that I had been in the presence of marijuana and not distinguishing the times that I had not used the drug.

*Id.*

Prior to the Hearing in this matter, I advised the individual both orally and in writing that the testimony of knowledgeable witnesses concerning his use of marijuana would be crucial to mitigating the concerns raised by his contradictory statements to the DOE concerning marijuana use.

As I stated in our December 23 conversation, I strongly urge [the individual] to consider supplementing his witness list with the testimony of additional relatives or close friends who are knowledgeable concerning the issue of his marijuana use, and who are able to corroborate the number of occasions and the circumstances in which this use occurred. Such corroborative testimony

appears to be crucial if [the individual] seeks to mitigate the concerns raised in the Notification Letter by showing that his use of marijuana has been less frequent than the Notification Letter indicates.

*Id.*

January 2, 2004 letter from the Hearing Officer to the individual and the DOE Counsel. As discussed below, I find that the individual presented sufficient witness testimony to corroborate that the statements concerning marijuana use contained in his 1989 and 2002 QNSPs were essentially truthful and accurate. 1/

#### A. *Testimony*

The following persons testified about the individual's past use of marijuana.

##### 1. *The individual.*

The individual testified that the last time that he used marijuana was in April or May of 2002, shortly after he completed the 2002 QNSP. He testified that he used marijuana with an acquaintance after giving him a ride to his home. He stated that two years earlier, he used marijuana on two occasions with this same person and others who were taking a break from dance lessons.

I met some people, and we chatted, and they invited me to go out to take a break from the room, this facility where the dance was held, and go out to their truck. I didn't anticipate what was going to happen under those circumstances. I was actually a bit naive, as I later learned. All these people knew each other for many years, and I was a fresh face. A marijuana cigarette was pulled out and passed around, and I partook, and that happened on two different Sundays during that time period.

Hearing Transcript (TR) at 29. He reported these earlier usages, which occurred in 2000, on his 2002 QNSP.

The individual stated that the only other use of marijuana since the 1980's that he can now recall occurred when he was vacationing with his brother. After speaking to his brother, he now believes that this incident of usage took place in the summer of 1999 rather than in the

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1/ As discussed below, the individual now believes that he used marijuana on one occasion in the presence of his brother during a vacation in 1999 rather than in 2000.

July through September 2000 time frame reported on his QNSP. Hearing Transcript (TR) at 27-28. He described the incident as follows:

It was a one-time usage. Again, this was late in the evening, when [the individual and his brother] were walking out on the beach. There were people gathered around. We ran into some people that he knew, and in this circumstance, again, a joint was passed around, and I partook.

TR at 33. He also stated that someone other than himself or his brother provided the marijuana cigarette on this occasion. *Id.*

At the 2002 PSI, the individual had testified that on about half of his recent family summer vacations, he and his brother had, on one or two nights, gone down to the beach and shared a marijuana cigarette. 2002 PSI at 14-15. At the Hearing, the individual testified that following the PSI he realized that any marijuana use by him during a family vacation had to have occurred in 1999, 2000 or 2001 when he was not with his former wife or his fiancé. He said that he personally remained uncertain about whether he used marijuana on one or more occasions with his brother, and was relying on his brother's recollection.

I remain uncertain in my own thinking whether or not there was an event that occurred once or twice, over one year or over more than one year, and I went and asked my brother. I still have a gray area -- I don't have a good enough recollection to remember that very well. He's convinced that it was just one time, and I don't feel like I'm in a position to challenge that, because I've been so confused on these dates. . . . By my own recollection, I can't be certain that there was an occurrence more than one time, but it had to be limited to this three-year time frame, and that's what I think I confused in the PSI interview. I'm still not able to resolve this today.

TR at 140. He stated that he may have used marijuana with one of his other brothers during this three year period, noting that "I have not tried to trace down other family members and to attempt to sort this out." *Id.*

With respect to his use of marijuana in the 1980's, he testified that he smoked marijuana in 1981 to 1982, but that he could date this period of use in relation to his marriage to his former wife, which occurred in September 1983.

We became separated in May or June 1999. Never during the period of our marriage did I smoke marijuana, and when you hear the testimony of [my former wife], she will corroborate that fact.

TR at 34. He stated that in 1982, he used marijuana on approximately a monthly basis and that he also participated in a university sponsored study that paid him to use marijuana and provide urine samples afterward.

In the PSI that was conducted in July of 2002, I had mistakenly recalled the dates of both the study and of my recreational use that was associated with this time period, and had mistakenly said that this occurred as late as 1985, which was a grave error on my part, and I'm setting the record correct and straight here right now.

TR at 37. As corroboration for this study, he submitted a letter from the Director of the Office of Human Research Ethics of the university, who states that many studies such as the one described by the individual were conducted at the university focusing on the pharmacologic and physiologic effects of marijuana and other illegal drugs. Individual's Hearing Exhibit E. The individual testified that it was his understanding that the marijuana for his study was grown at a federal facility in Louisiana and that the study had the approval of the Drug Enforcement Administration. TR at 41. He testified that he knew that his recreational use of marijuana in 1981 and 1982 had been illegal.

I understood that [the recreational use] was illegal, and it was a mistake in judgment on my part as a graduate student. I recognize that, although I'd like to add that I have never purchased marijuana or sold marijuana or been in possession of quantities of marijuana, other than when someone has handed me a joint.

TR at 42. As support for his testimony that his recreational use of marijuana in the early 1980's was occasional and ended with his marriage in 1983, he introduced the written summary of a statement that an Assistant Professor of Pathology at the university had given to an Office of Personnel Management investigator in 1990. The Assistant Professor commented that if the individual "did recreationally use or experiment with marijuana, it stopped before he was married." Individual's Hearing Exhibit C.

The individual testified that his first use of marijuana was as a college undergraduate and that "it's always been a rare circumstance, and there were just a few times in college." TR at 43.

## ***2. The individual's friend from graduate school.***

The individual's friend from graduate school testified that he knew the individual beginning in August of 1981. He stated that he also was a participant along with the individual in the university sponsored marijuana study and that this study took place in 1982. He testified that

he moved away from the university in December 1982. TR at 63-65. In 1981 and 1982, he estimated that the individual used marijuana recreationally in his presence “no more than once a month.” He also never saw him purchase marijuana or possess any quantities of marijuana other than a marijuana cigarette. TR at 66. Although he returned to the university in the years after 1982 for brief periods, the individual’s friend had no recollection of seeing the individual use marijuana after 1982. He testified that in his opinion the individual was honest and trustworthy, and recommended him “without question” to a national security position. TR at 66-67.

### ***3. The individual’s former wife.***

The individual’s former wife testified that she works at the same DOE facility as the individual as a team leader in Safeguards and Security. She stated that she and the individual started dating in 1982 and married in September 1983. She stated that she and the individual separated in June 1999 and later divorced. She testified that she knew that the individual used marijuana “when we were first dating.” She stated that she did not believe that the individual used marijuana at any time during the period of their marriage. She also stated that she would recommend the individual for a position of trust involving work critical to the national security. TR at 157-158. She testified that the individual’s difficulty in his 2002 QNSP and at the 2002 PSI in accurately remembering the dates of his marijuana use was genuine, and reflected his natural personality.

My understanding in this case is that there’s been some confusion with dates, and I just wanted to say that [the individual] has always been, at least when we were married, kind of the absent-minded professor, so I’m not surprised if there was confusion on dates, give or take a couple of years. Details are not his strong point.

TR at 158.

### ***4. The individual’s brother.***

The individual’s brother testified that during the period of the individual’s marriage to his former wife, from September 1983 until their separation in June 1999, he saw the individual “about two times every three years”. He stated that he was not aware that the individual used marijuana during this period and “I’d be really surprised that you would have.” TR at 104. The individual’s brother stated that he recalled one instance in which the individual used marijuana. This occurred in approximately July of 1999 when the individual visited with family members at a beach resort on the Atlantic coast. He described the incident as follows:

We were down at [the beach resort], and, actually it was [the individual] with his kids and myself with mine, and we had gone out that evening, we had a sitter with the kids, actually, and had gone up and down the beach and hitting a few bars, et cetera, and we were outside, ran into a few friends, a bunch of people kind of out on the beach sort of drinking, and someone had casually passed [a marijuana cigarette] over to [the individual]. That was the only time I really recalled it.

TR at 106. The brother testified that this was unusual behavior for the individual, and may have been triggered by his recent separation from his wife.

[The individual] never really actively looked to do things like that. I know that during that time period, it was a stressful time period for him, going through the separation with his wife, and we were out -- we did carouse a little bit, we did go out drinking a little bit, smoked a few cigars, et cetera, but that was more in terms of what happened there, the casual incident thing in a social setting, and I didn't really pay that much attention, I didn't feel comfortable in staying there, and we didn't stay there very long.

TR at 107. When asked why the individual would have stated at his PSI that he used marijuana "occasionally" with his brother on family vacations (2002 PSI at 9), the brother suggested that the individual was mistaken.

In terms of his talking about multiple occasions, I don't understand that, other than the fact that [the individual], unless it's regarding work, [the individual] is pretty absent-minded about things. . . .

TR at 108. He also stated that the individual's ability to recall specific dates and time frames without assistance was not good.

I'm just saying that . . . if you're going through asking [the individual] detailed questions about what happened in specific years, et cetera, once he had a chance to go back and was looking at his records to figure it, I wouldn't be surprised if he was off by a year or two.

TR at 109.

**5. *The individual's wife.***

The individual's wife testified that she met the individual in January 2001, they became engaged in February 2003, and were married in October 2003. She stated that she had never witnessed the individual use marijuana, but that there was one incident of marijuana use that the individual told her about "during the time that we were dating." TR at 75. She stated that the individual had told her that it was a "spur of the moment kind of thing, and they offered it to him, and he did smoke." TR at 83. She testified that this use occurred before the individual's 2002 PSI.

I remember that clearly, because he was very shaken and frazzled by [the PSI] -- by the way that interview went, and he . . . knew this was very serious business. I am dead certain that any time after [the PSI] he would never have smoked marijuana, but I can't tell you how far before that [the 2002 incident of usage occurred].

TR at 84. She stated that she is certain that the individual has a strong intention never to use marijuana in the future. *Id.* She testified that the DOE should trust the individual with a security clearance because he is truthful and responsible.

I'd like to conclude this by saying that because he is of such high moral character, because he takes personal responsibility for his actions, and because he does not lie, [the individual] should be trusted with a security clearance of any level.

TR at 82. With respect to the individual's apparent confusion about time frames and dates at his 2002 PSI, the individual's wife stated that the individual is somewhat absent-minded in this area. She testified that she once asked him if he could remember the month they met, and his response was in error by "two full years." TR at 76.

**6. *The individual's group leader.***

The individual's group leader stated that he has worked with the individual since 1999. He stated that he sees the individual on a weekly basis at work and that he and his wife occasionally socialize with the individual and his wife. He said that he has never seen the individual use or possess marijuana. TR at 90. He characterized the individual's use of marijuana since 1999 as a "real lapse of judgment" but that he has learned from this experience.

I certainly consider [the individual] to be very honest, and I think he has high integrity. To me, it's evidenced by his self-identification of this [marijuana use].

...

I think [the individual] has recognized the importance of ensuring that this sort of thing doesn't happen again in any way, and so, in part, my opinion that I would certainly trust him and that I think he has very high integrity, in based on not only my interactions with [the individual] before the event, but also on his actions since then.

TR at 98-99.

### ***7. The Associate Program Director.***

The Associate Program Director at the individual's workplace testified at the request of DOE Counsel. He stated that the individual performed important functions at the DOE facility where he worked and that his work record has been exceptional. TR at 15-16. He stated that the individual has a strong need for a security clearance to perform the job that he's doing. TR at 16. With respect to the individual's character, he described him as extremely honest and committed to the mission of the DOE. TR at 17-18.

### ***8. The Security Specialist.***

The Security Specialist stated that she interviewed the individual at his 2002 PSI. She testified that during the PSI the individual had expressed some doubts with respect to the dates he was providing concerning his use of marijuana in the 1980's. She stated that a reasonable clarification of these dates would be acceptable to her and resolve her security concerns about this period.

Regarding his use in the early 1980's, there are no concerns if, after the interview, [the individual] was able to develop a time line the he believed was more accurate. If the clarification seems reasonable to all parties, and it did to me, I would not have any objections to having the new information entered as factual.

TR at 125-126. However, with respect to his use in the last five or six years, the Security Specialist stated that at the PSI the individual had given specific information concerning multiple uses with his brother.

On pages 14 and 15 [of the PSI], he specifically states that half of the times that he went home, he used marijuana with his brother, and that would occur

one to two nights during that vacation time, and he and his brother would usually share a joint. So for that time frame, I believe he gave very specific information which distinguished between the actual use of marijuana and the times he was just in the presence of it.

TR at 126. She therefore concluded that his assertion in the 2002 QNSP and his testimony at the Hearing that he used marijuana with his brother only once during this time period are instances of his not accurately reporting his marijuana use.

. . . once we have established that it's happened more than once, it's important for us to list anything where somebody did not report the information to us or list the information to us, because the purpose of this hearing is for him to explain why this information was not reported. We get concerned if somebody doesn't report something to us and they are trying to hide something.

TR at 133. In this instance, she was most concerned that the individual apparently had altered his account of his use with his brother in a manner that clearly contradicted his testimony at the PSI. She referred to the statement of the individual, contained in his May 2003 letter to her, that he now realized that he only used marijuana once with his brother, and had only been in the presence of marijuana use on some other occasions. The Security Specialist believes that his testimony at the PSI clearly indicated to her that he recalled using marijuana on several occasions with his brother. She stated that this sort of clear contradiction concerned her both as a falsification concern and as a Criterion L concern about the individual's honesty, trustworthiness, judgment and reliability. TR at 134-135. She also asserted that any use of marijuana while holding a security clearance indicates illegal activity and raises a Criterion L concern about his judgment and reliability. TR at 128.

## ***B. Analysis***

I am convinced by the testimony of the individual, his former wife, his friend from graduate school, and by the documentary evidence, that the individual's use of marijuana in the 1980's was confined to the period prior to his marriage in September 1983. Accordingly, I find that the individual was truthful when he reported on his 1989 QNSP that he had not "used or supplied" marijuana or other illegal drugs in the last five years.

With respect to his more recent marijuana use, I find that the individual has established that he used marijuana on four or five occasions beginning in July 1999 and ending in April or May 2002, prior to his July 2002 PSI. All of the instances of use by the individual have been self reported, and I am convinced that he has attempted to document them to the best of his ability, first in the 2002 QNSP, then at the 2002 PSI, and finally at the Hearing. As discussed

in the testimony above, there remains some confusion as to whether he used marijuana on more than one occasion while vacationing in the summers of 1999, 2000 and 2001 with his brothers and other family members. His brother who testified at the Hearing stated that he witnessed the individual smoke marijuana on only one occasion, but both he and the individual acknowledge the possibility that the individual may have smoked marijuana on another occasion with another brother or family member during the course of these vacations. TR at 107, 140. As noted above, both the individual's wife and his former wife testified that the individual is naturally somewhat absent-minded concerning the details of his personal life. In light of all of this testimony, I conclude that the individual honestly cannot remember with certainty whether he used marijuana more than once during these vacations. I find that the varying accounts of marijuana use on these vacations that he provided to the DOE on the 2002 QNSP, at the 2002 PSI and at the Hearing were honest efforts to accurately report his usage. I therefore find that he has established that he has not deliberately misrepresented, falsified, or omitted significant information in reporting his recent marijuana use to the DOE, and that he has mitigated the concerns in this regard that are set forth in the Notification Letter.

#### **IV. CRITERION K CONCERN**

With respect to his use of marijuana, the individual has reported of his own volition that he used marijuana on four or possibly five occasions between July 1999 and June 2002. The testimony of his former wife, his wife and his brother corroborate that the individual's recent use of marijuana has been limited and confined to this period of time.

The duration and frequency of an individual's drug use are factors crucial in ascertaining the degree of rehabilitation and reformation which must be demonstrated by an individual seeking to mitigate concerns arising from drug use. For example, concerns over drug use can be mitigated even in cases of recent drug use where the usage was an isolated incident or an event infrequent enough to warrant acceptance of the individual's assurance that he/she will not be involved with drugs while holding a DOE access authorization. In contrast, where illegal drug use is not an infrequent event, a stricter standard is clearly appropriate. In such instances, at least a twelve month period of abstinence is generally required to demonstrate adequate evidence of rehabilitation and reformation. *See Personnel Security Hearing (Case No. VSO-0023)*, 25 DOE ¶ 82,761 at 85,580 (1995) (rehabilitation found where individual who used marijuana "only minimally" remained drug free for a year beyond the treatment period); *see also, Personnel Security Hearing (Case No. VSO-0103)*, 26 DOE ¶ 82,761 (1996) and cases cited therein at 85,578.

In his 2002 QNSP, at his 2002 PSI and at the Hearing, the individual has consistently maintained that his recent use of marijuana has been limited to approximately four or five

instances from July 1999 through May 2002. <sup>2/</sup> As discussed above, all of the instances of use by the individual have been self reported, and I am convinced that he has attempted to document them to the best of his ability. I also am convinced that the individual is sincere in stating his intention not to use marijuana in the future. At the 2002 PSI, the individual stated that “my intentions now would be to no longer use illegal drugs while holding a security clearance. It’s not worth it to me if it creates a concern for the Department of Energy.” 2002 PSI at 40. At the Hearing, the individual stated that the concerns expressed by the Security Specialist at the 2002 PSI convinced him to make a strong personal commitment to refrain from any use of marijuana in the future.

I realized, when I left [the PSI], the great mistake that I had made and that this would be something that would not ever happen again.

TR at 144-145.

The testimony at the February 2004 Hearing of the individual, his wife and his brother convinces me that the individual has not used marijuana since May 2002, a period of twenty-one months . I also find that the individual is sincere in his intention to refrain from using marijuana or any other illegal drugs in the future. Accordingly, I believe that the DOE security concern related to his marijuana use (Criterion K) has been mitigated.

#### ***V. CRITERION L CONCERNS***

The DOE’s security concerns under Criterion L are based on the individual’s use of marijuana while possessing a security clearance. In this regard, the Notification Letter states that the individual used marijuana while possessing DOE access authorization although he signed security acknowledgments on April 9, 2002 and May 20, 1994, which advised that using illegal drugs could result in the loss of access authorization. <sup>3/</sup> I find that the individual's irresponsible and illegal behavior in using marijuana while holding a DOE security clearance raises concerns about his honesty, reliability and trustworthiness, and that the DOE properly invoked Criterion L in suspending the individual's clearance. The DOE

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<sup>2/</sup> The 2002 QNSP does not include the individual’s 2002 usage of marijuana, which occurred after the individual completed the QNSP.

<sup>3/</sup> The Notification Letter also finds that a Criterion L concern exists because the individual used marijuana after attending his DOE facility’s mandatory substance abuse training and an annual security refresher covering DOE drug policy. At the Hearing, DOE Counsel stated that these concerns had been dropped and should not be considered by the Hearing Officer. TR at 56-57.

security program is based on trust. If an employee willfully violates the DOE's stated policy against using illegal drugs, that trust is violated. *Personnel Security Hearing, Case No. VSO-0208*, 27 DOE ¶ 82,774 at 85,655 (1998), *affirmed* (*Office of Security Affairs*, April 20, 2000). The individual clearly violated this policy when he used marijuana on several occasions from July 1999 through May 2002. He thereby knowingly placed at risk his career and access authorization.

In the present case, I find that the individual has presented sufficient evidence to resolve the serious concerns about his judgment, reliability and potential for future association with illegal drugs. My impression of the individual, formed at the hearing, is that he is an extremely competent and dedicated worker. He also has been honest in his efforts to accurately report his use of marijuana to the DOE. It is clear that he now recognizes the seriousness and the significance of his actions and is sincerely committed to avoiding future drug use. At the Hearing, he testified that the 2002 PSI and subsequent events concerning his security clearance have made him aware "in very clear terms" of the DOE's strong concerns in this area. He now believes that "I made a vow in holding this position of security that I will not use marijuana or any illegal drugs, and that is a vow that's very important to me." TR at 117.

Based on the individual's abstinence from marijuana since May 2002, his honesty in revealing his former marijuana use, and his strong conviction to adhere to the DOE's policy in the future, I find that the individual now has mitigated the security questions raised by his conscious disregard of the DOE's drug policy. I therefore find that the individual has resolved the Criterion L security concern raised in the Notification Letter. *See Personnel Security Hearing, Case No. VSO-0313*, 27 DOE ¶ 82,835 at 86,001-02 (2000) (Hearing Officer finds mitigation of concerns raised by the violation of a DOE Drug Certification based on the individual's honesty and trustworthiness in self reporting the violation and on the unlikelihood of a future violation).

## VI. *CONCLUSION*

As indicated above, I have concluded that the individual has resolved the security concerns under 10 C.F.R. § 710.8(f), (k), and (l) relating to his involvement with illegal drugs. In view of the record before me, I am persuaded that restoring the individual's access authorization would not endanger the common defense and security and would be clearly

consistent with the national interest. Accordingly, I find that the individual's access authorization should be restored. The parties may seek review of this Decision by an Appeal Panel under the regulation set forth at 10 C.F.R. § 710.28.

Kent S. Woods  
Hearing Officer  
Office of Hearings and Appeals

Date: March 25, 2004