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September 10, 2004

DEPARTMENT OF ENERGY  
OFFICE OF HEARINGS AND APPEALS

Hearing Officer's Decision

Name of Case: Personnel Security Hearing

Date of Filing: April 22, 2004

Case Number: TSO-0103

This Decision concerns the eligibility of XXXXXXXXXXXXXXXX (hereinafter "the individual") to hold an access authorization.<sup>1</sup> 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. As discussed below, I find that restoration is warranted in this case.

I. BACKGROUND

This administrative review proceeding began with the issuance of a Notification Letter by a Department of Energy (DOE) Office, informing the individual that information in the possession of the DOE created substantial doubt pertaining to his eligibility for an access authorization in connection with his work. In accordance with 10 C.F.R. § 710.21, the Notification Letter included a statement of the derogatory information causing the security concern.

The security concern cited in the Letter involves information that the individual used marijuana several times in 2001, a time when he was the holder of an access authorization. The information came to the attention of the DOE when the individual revealed that use in

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1/ An access authorization (or security clearance) is an administrative determination that an individual is eligible for access to classified matter or special nuclear material. 10 C.F.R. § 710.5.

his response to a question in a May 2003 Questionnaire for National Security Positions (QNSP), regarding whether he had used any illegal drugs in the previous seven years. In the QNSP, the individual also indicated that this usage came during a time when he "possessed a security clearance." DOE Exhibit 3 at page 8. According to the Notification Letter, this constitutes derogatory information under 10 C.F.R. § 710.8(k) (Criterion K).<sup>2</sup> The Letter further states that in January 1998, the individual signed a statement acknowledging that any involvement with illegal drugs could result in the loss of his security clearance. According to the Letter, his use of marijuana after having signed the "acknowledgment" represents a security concern under 10 C.F.R. § 710.8(l) (hereinafter Criterion L).<sup>3</sup>

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

At the hearing, the individual was represented by an attorney. The individual testified on his own behalf, and presented the testimony of his drug therapist (therapist), the staff psychologist (psychologist) at the site where the individual works, his housemate/partner and five friends/colleagues. The DOE counsel did not present any witnesses.

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2/ Criterion K includes information that the individual has "used. . . a drug. . . listed in the Schedule of Controlled Substances established pursuant to section 202 of the Controlled Substances Act of 1970 (such as marijuana. . . ) except as prescribed or administered by a physician licensed to dispense drugs in the practice of medicine or as otherwise authorized by Federal law."

3/ Criterion L includes information that an individual engaged in "any unusual conduct or is subject to any circumstances which tend to show that an individual is not honest, reliable or trustworthy; or which furnishes reason to believe that the individual may be subject to pressure, coercion, exploitation or duress which may cause the individual to act contrary to the best interests of the national security."

## II. Hearing Testimony

### A. The Individual

The individual testified that in 2001 he was taking a yoga class, and that on two or three occasions after class he used some marijuana as it was being passed around the room. He stated that he never used it either before or after those occasions. He also testified that he intends never to use marijuana again. Transcript of Hearing (Tr.) at 91-92. The individual characterized this use as "stupid" and "ignorant." Tr. at 91. He said that the incidents took place at a time when his mother was very ill and he was under great personal stress. He did not give this as an excuse, but rather as some insight for his admitted lapse in judgment. Tr. at 98. He testified that he received drug awareness therapy, which he found to be useful because it gave him a heightened understanding of drug-related issues. He is now more vigilant about the risks of illegal drugs. He stated that if he were ever in the situation again where he was experiencing great personal stress, he now knows he could immediately seek help from his partner, or the Employee Assistance Program (EAP) at his work site. Tr. at 99-100.

### B. The Therapist

The therapist testified that she is a licensed clinical social worker and a licensed alcohol and drug abuse counselor. She stated that she met with the individual once a week for five weeks during the period March through April 2004. She determined that he was not chemically dependent and not a chemical abuser, but that he had in fact used marijuana. She believed that he did not need drug abuse treatment, but rather drug education. Accordingly, she provided the individual with videos on the subject of marijuana use, relapse and recovery.<sup>4</sup> She assigned the individual to write a summary of each video. Tr. at 78-81. The therapist found him to be very conscientious and meticulous in his completion of the assignments. In fact, she stated that she "could use his summaries almost as a teaching tool in doing groups because it was so efficient. . . ." Tr. at 82. She testified that "the way he was conscientious about his appointments and the way he followed through on his assignments was very impressive." Tr. at 83.

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<sup>4/</sup> She also gave him some videos on alcohol abuse, which she believed has some elements related to drug abuse.

### C. The Psychologist

This witness testified that he has a Ph.D. in clinical psychology and is the staff psychologist at the site where the individual works. He stated that he saw the individual on two occasions, once in an initial interview, during which he recommended an educational therapy program, and again at the conclusion of the individual's education program with the therapist. He believed that the individual experienced a lapse in judgment, and for this reason referred him to the therapist for some education. Tr. at 59-61. He saw no signs of either substance abuse or a pattern of bad judgment in this individual. He believed that it was unlikely that the individual would abuse drugs in the future, because he now has a heightened awareness of these issues. Tr. at 62.<sup>5</sup> He testified that the level of counseling the individual received from the therapist was sufficient. He believed that the individual did not need drug abuse therapy, but rather some education about the factors that may have caused him to experience the lapse in judgment. The psychologist testified that the individual had accomplished this, and that he is fit to return to full access authorization. Tr. at 71-72.

### D. Friends and Co-workers

The individual also brought forth testimony from his housemate/partner and five friends and co-workers.

The individual's housemate/partner stated that he and the individual have been living together for nearly 20 years, and that they spend a great deal of time together. He has never seen the individual use marijuana, and believes he will never use it again. He also indicated that marijuana has never been in their home. He has never known the individual to use illegal drugs of any kind. He testified that the individual is honest, reliable and trustworthy. Tr. at 8-14.

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<sup>5</sup>/ There was some question at the hearing regarding whether the individual told the psychologist that he used marijuana only once, whereas the individual told the DOE and others that he used it two or three times. Tr. at 64-70. After the hearing, the psychologist referred to his original clinical notes regarding this individual and confirmed that the individual did indeed tell him that he used marijuana on two or three occasions. See July 27, 2004 E-mail.

The individual's co-workers and friends all knew him for a number of years. Several friends had known him for as many as 17 years. Others knew him for 5 years. Tr. at 17, 30, 48, 53. His supervisor testified that he was a trustworthy and dependable employee with astute judgment. Tr. at 37. His friends also found him to be a trustworthy individual with a good character. Tr. at 19, 31, 50, 55, 57. They all saw the individual on a regular basis and on some occasions dropped in at his home with little or no warning. Tr. at 18, 33, 49, 54, 56. None of these witnesses had ever seen the individual use illegal drugs. Tr. at 18, 20, 25, 30, 50, 54. They did not believe that the individual would use illegal drugs in the future. Tr. at 25, 32, 40, 50, 56.

### III. Applicable Standards

A DOE administrative review proceeding under 10 C.F.R. Part 710 is not a criminal case, in which the burden is on the government to prove the defendant guilty beyond a reasonable doubt. In this type of case, we apply a different standard, which is designed to protect national security interests. A 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 burden is on the individual to come forward at the hearing with evidence to convince the DOE that granting or 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).

This standard implies that there is a strong presumption against the granting or restoring of a security clearance. See Dep't of Navy v. Egan, 484 U.S. 518, 531 (1988) ("the clearly consistent with the interests of the national security test" for the granting of security clearances indicates "that security-clearance determinations should err, if they must, on the side of denials"); Dorfmont v. Brown, 913 F.2d 1399, 1403 (9th Cir. 1990)(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. Personnel Security Hearing (Case No. VSO-0002), 24 DOE ¶ 82,752 at 85,511 (1995).

Once a security concern has been found to exist, the individual has the burden of going forward with evidence to rebut, refute, explain, extenuate or mitigate the allegations. Personnel Security Hearing (VSO-0005), 24 DOE ¶ 82,753 (1995), aff'd, 25 DOE ¶ 83,013 (1995). See also 10 C.F.R. § 710.7(c).

#### IV. Analysis

##### Criterion K

There is no question that this individual used marijuana in 2001 while he had a security clearance, and that this behavior raises a Criterion K security concern. However, as discussed below, I find the individual has resolved the concern.

As an initial matter, I am convinced that the marijuana use was minimal and confined to a short period during 2001. The individual testified persuasively on this point. All of the individual's personal witnesses confirmed that they did not know him ever to use marijuana. His partner testified that it was not part of their lifestyle. His friends, even those who visited him unannounced, stated that they never saw him use marijuana or suspected that he had been using it. The psychologist and the therapist believed that the use was limited to the few occasions he identified.

Moreover, I am convinced that the individual has not used marijuana since that time in 2001. Again, his testimony and that of his witnesses was fully persuasive. More than two and one half years have passed since the marijuana use, and this is sufficient to allow me to conclude that it was an isolated, aberrant episode in his life that is now well behind him.

In addition, I believe that this type of lapse of judgment is not likely to recur. The individual sought the assistance of the site psychologist and, based on his recommendation, received some counseling. The therapist testified that the individual took his counseling sessions very seriously. The individual stated that through his therapy he learned some negative effects of marijuana about which he had not been previously aware. In this regard, the therapist testified that the individual told her that just as he would not use tobacco because it has adverse health effects, for the same reason he would never use marijuana again. Tr. at 82. This thoughtful observation by the individual adds support for his testimony that he will not turn to marijuana use again. The therapist was impressed by the individual's commitment to this therapy, and the conscientious way in which he approached this program.

Further, the individual recognizes that he used bad judgment and takes full responsibility for his actions that are at issue here. I do note that at the time the individual used the marijuana, his

mother was ill. While not maintaining that this excused his actions, the individual explained that he felt vulnerable and perhaps his judgment was impaired. See *Personnel Security Hearing* (Case No. VSO-0045), 25 DOE ¶ 82,774 (1995). The psychologist and the therapist both believed that this difficult time in the individual's life might well have been a factor in contributing to his lapse in judgment. They testified that the individual's therapy helped him to learn coping skills for any future occasions during which he might experience stress. The individual also testified persuasively that he has learned a great deal from his therapy about how to cope with stress, and has learned how to seek help and support should he need it. I believe that the individual's judgment is now sound. I am also persuaded that through his therapy he has gained heightened self awareness and is unlikely to suffer from this type of lapse of judgment in the future. The site psychologist testified that the individual is fit to return to full access authorization.

The individual submitted into the record a recent drug screen report showing a negative result. Individual's Hearing Exhibit #1. See also, Tr. at 101-02. Further, he stated he would be willing to sign a DOE drug certification.<sup>6</sup> Tr. at 101. These are additional factors in his favor.

In view of the foregoing, I find that the individual has fully resolved the Criterion K security concerns in this case.

#### Criterion L

The Notification Letter finds that the following behavior by the individual raises a Criterion L concern: (i) he used marijuana even though he knew it was illegal and (ii) he used marijuana even though he knew that illegal drug use is against DOE policy, and even though he had signed a statement acknowledging that he could lose his access authorization if he was involved with illegal drugs.

As stated above, the record in this case indicates that the individual informed the DOE about his use of marijuana when filing his 2003 QNSP. Thus, the individual was candid with the DOE when he was asked to indicate any illegal drug use for the previous seven years. Overall, I therefore do not find that the individual has engaged in unreliable or untrustworthy behavior, apart from the bad judgment involved in using the marijuana. As discussed above,

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<sup>6/</sup> In signing a DOE drug certification, an employee promises not to use illegal drugs while holding an access authorization.

that lapse is now well in the past and the individual has had some training on how to cope with stressful times, when exercise of good judgment could become an important issue. Although it is true that he might have been subject to pressure or coercion during the period prior to the time he informed the DOE about his illegal drug use, this concern, too, is now well in the past.

I believe that the individual is now aware of the Criterion L security concerns created by use of illegal drugs, and these concerns are not likely to resurface. For these reasons and those discussed above with respect to Criterion K, I find that the Criterion L concerns have been resolved.

#### V. CONCLUSION

As the foregoing indicates, I am persuaded that the individual has resolved the Criteria K and L security concerns cited in the Notification Letter. It is therefore my decision that his 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.

Virginia A. Lipton  
Hearing Officer  
Office of Hearings and Appeals

Date: September 10, 2004