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DEPARTMENT OF ENERGY

OFFICE OF HEARINGS AND APPEALS

Hearing Officer's Decision

Name of Case: Personnel Security Hearing

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Case Number: VSO-0512

This Decision concerns the eligibility of XXXXXXXXXX (hereinafter referred to as the "individual") to hold an access authorization 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." A Department of Energy Operations Office (DOE Operations Office) suspended the individual's access authorization under the provisions of Part 710. This Decision considers whether, on the basis of the evidence and testimony presented in this proceeding, the individual's access authorization should be restored. As set forth in the Decision, I recommend against restoring the individual's security clearance.

**I. Background**

The individual was employed by a contractor at a DOE facility, and held an access authorization. The DOE suspended the individual's access authorization as a result of derogatory information that was not resolved during a personnel security interview. That information is set forth in the Notification Letter, and is summarized below.

The individual's eligibility for access to classified matter or special nuclear material is governed by regulations found at 10 C.F.R. Part 710. The regulations set forth specific types of derogatory information that create a question as to an individual's eligibility for access authorization. The Notification Letter states that the derogatory information regarding the individual falls within 10 C.F.R. §§ 710.8(k) and (l).

The DOE Operations Office invoked Criterion K based on information in its possession that the individual has "[t]rafficked in, or sold, transferred, possessed, used, or experimented with a drug or other substance listed in the Schedule of Controlled Substances . . . such as marijuana . . . except as prescribed . . . by a physician licensed to dispense drugs in the practice of medicine . . ." 10 C.F.R. § 710.8 (k). The charges under Criterion K stem from a personnel security interview (PSI) that the individual participated in during June 2001. First, during the PSI the individual indicated that in 2000 he had purchased and possessed

marijuana while also taking a prescription drug. Second, the individual smoked marijuana three times per week while taking the prescription drug. Finally, the individual acquired a roommate in April, six weeks prior to the PSI, and the roommate smoked marijuana in the individual's home. The individual also smoked marijuana with the roommate as recently as one week prior to the PSI.

The DOE Operations Office invoked Criterion L, 10 C.F.R. § 710.8(l), on the basis of its finding that the individual has "engaged in any unusual conduct or is subject to circumstances which tend to show that the 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." In this regard, the Notification Letter alleges that during the PSI: (1) the individual indicated that he knew the DOE policy on the use of illegal drugs while possessing a security clearance; (2) the individual admitted that he remembered signing a DOE Drug Certification Form, which he signed on October 16, 1990; and (3) the individual stated that he used marijuana despite knowing the DOE policy because he believed it to be such an inoffensive substance that it could not be regarded too severely.

In a letter to DOE Personnel Security, the individual exercised his right under Part 710 to request a hearing in this matter. 10 C.F.R. § 710.21(b). On December 11, 2001, I was appointed as Hearing Officer in this case. After conferring with the individual and the appointed DOE counsel, 10 C.F.R. § 710.24, I set a hearing date. At the hearing, the DOE counsel called one witness, the DOE personnel security specialist. The individual, who was represented by counsel, testified on his own behalf and also called as witnesses four colleagues and a licensed clinical psychologist. The transcript taken at the hearing shall be hereinafter cited as "Tr." Various documents that were submitted by the individual and by DOE counsel during this proceeding constitute exhibits to the hearing transcript and shall be cited as "Ex."

## II. Analysis

The provisions of 10 C.F.R. Part 710 govern the eligibility of individuals who are employed by or are applicants for employment with DOE contractors, agents, DOE access permittees, and other persons designated by the Secretary of Energy for access to classified matter or special nuclear material. 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 or unfavorable, as to whether the granting of access authorization would not endanger the common defense and security and would be clearly consistent with the national interest." 10 C.F.R. § 710.7(a).

A DOE administrative review proceeding under 10 C.F.R. Part 710 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). Once the DOE Operations Office has made a showing of derogatory information raising security concerns, the burden is on the individual to come forward at the hearing with evidence to convince the DOE that restoring his access authorization "will not endanger the common defense and security and will 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 *Department of Navy v. Egan*, 484 U.S. 518, 531 (1988) (“clearly consistent with the national interest” standard for the granting of security clearances indicates “that security determinations should err, if they must, on the side of denials”); *Dorfmont v. Brown*, 913 F.2d 1399, 1403 (9th. Cir. 1990), *cert. denied*, 499 U.S. 905 (1991) (strong presumption against the issuance of a security clearance).

I have thoroughly considered the record of this proceeding, including the submissions of the parties, the evidence presented and the testimony of the witnesses at the hearing convened in this matter. In resolving the question of the individual’s eligibility for access authorization, I have been guided by the applicable factors prescribed in 10 C.F.R. § 710.7(c): the nature, extent, and seriousness of the conduct; the circumstances surrounding the conduct, to include knowledgeable participation; the frequency and recency of the conduct; the voluntariness of the participation; the absence or presence of rehabilitation or reformation and other pertinent behavioral changes; the motivation for the conduct; the potential for pressure, coercion, exploitation, or duress; the likelihood of continuance or recurrence; and other relevant and material factors. After due deliberation, I have decided that the individual’s access authorization should not be restored since I am unable to conclude that such restoration would not endanger the common defense and security or would be clearly consistent with the national interest. 10 C.F.R. § 710.27(a). The specific findings that I make in support of this determination are discussed below.

#### **A. Findings of Fact**

The facts in this case are uncontested. The individual was employed by a DOE contractor for many years in a job that required that he maintain a security clearance. Ex. 1. When the individual was interviewed during a routine reinvestigation of his security clearance in 1990, he signed a Drug Certification form stating that he would not use drugs while he held a clearance. Ex. 9. In connection with a subsequent routine reinvestigation of his clearance in 2000, the individual submitted information to the DOE that he had participated in mental health counseling for 13 years, and the DOE sent the individual a “letter of interrogatory” to request more information. Tr. at 16. As a result of the responses, which included information that the individual had taken an antidepressant for approximately 18 months, the personnel security specialist recommended that the individual undergo a psychiatric evaluation. Tr. at 17. A DOE consulting psychiatrist evaluated the individual in May 2001. Ex. 11. During the evaluation, the individual admitted that he had smoked marijuana while taking the antidepressant in 2000. Ex. 11 at 2. The DOE psychiatrist’s report of that evaluation found “no illness or diagnosable mental illness,” but did find that the individual’s use of marijuana in 2000 showed poor judgment “in this one instance.” Ex. 11 at 5. Notwithstanding that statement, the DOE psychiatrist found no information in the record or in the interview that the individual suffered “ongoing or recurring deficits in judgment.” *Id.*

Based on the individual’s admission of drug use, the personal security specialist (PSS) then interviewed the individual in June 2001, and during the interview the individual again admitted that he had smoked marijuana in 2000. Tr. at 20. By way of explanation, the individual stated that a friend with a prescription for marijuana used the marijuana to alleviate some symptoms of a serious illness, and depression was one of

those symptoms. Tr. at 112-113. The friend then gave marijuana to the individual for use in alleviating the individual's depression. PSI at 5, Tr. at 12. The individual smoked marijuana approximately ten times that year. PSI at 5. <sup>1</sup> The individual further related that in April 2001, another friend moved in with him and that friend also used marijuana. PSI at 6. The individual smoked marijuana with his roommate, as recently as the weekend prior to the PSI. *Id.* According to the individual, this was the last time that he used marijuana. *Id.* During the interview, the individual confirmed that he remembered signing a Drug Certification. PSI at 12. He was also aware of DOE's "zero tolerance" policy towards drugs. Tr. at 20. The PSS asked the individual if he knew that marijuana use was illegal and he replied "[y]es of course, so is speeding." PSI at 9. When asked why he would smoke marijuana if he was aware of both DOE's policy towards drugs and his 1990 commitment not to use drugs while holding a security clearance, the individual stated that he smoked marijuana due to his "abiding faith . . . that marijuana is such an inoffensive substance that it can't be regarded too severely." PSI at 12. The individual also stated that he did not normally smoke marijuana, was not dependent on marijuana and could stop smoking marijuana if his drug use jeopardized his job. PSI at 6, 10. Based on the information that the individual provided at his PSI about his recent drug use, the PSS recommended that the individual's clearance be suspended and that he be placed in the administrative review process. Tr. at 21. On June 6, 2001, DOE suspended the individual's clearance. Ex. 4.

## **B. Whether Security Concerns Exist**

Criterion K has been invoked because the individual illegally possessed and used a controlled substance, marijuana. Criterion L applies where an individual has "engaged in unusual conduct or is subject to any circumstances which tend to show that the individual is not honest, reliable or trustworthy; or may be subject to pressure, coercion, exploitation, or duress which might cause him to act contrary to the best interests of the national security." 10 C.F.R. § 710.8(l).

The record contains evidence, including the individual's own admissions, that the individual used marijuana while holding a security clearance. Tr. at 112. The individual's drug use is a security concern, and so are certain circumstances surrounding that activity which raise concerns about his judgment and reliability. The PSS described DOE's concerns at the hearing. First, the fact that the individual used marijuana while holding a security clearance demonstrates a lack of judgment and reliability. Tr. at 26-27. The individual showed very poor judgment by not only using the drug, but also by being closely associated with other marijuana users, including his current roommate. PSI at 10. *See Personnel Security Hearing, 25 DOE ¶ 82,761 (1995)*. Second, the individual's drug use places him at increased risk of unauthorized disclosures. Tr. at 24. Marijuana is a mood altering substance that could cause an individual to do something while under the influence of the drug that he would not normally do. The individual's use of drugs

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<sup>1/</sup> The individual testified that he used marijuana a total of 15 times in 2000 and 2001. Tr. at 116. During 2000, he smoked marijuana approximately nine times (three times a week for a period of approximately three weeks). PSI at 5. During 2001, he smoked marijuana approximately 6 times (once a week for four to six weeks). PSI at 6.

also raises questions about his willingness to protect classified information. Tr. at 24. Finally, the individual did not keep his word that he would not use drugs while holding a security clearance. Tr. at 146-147. The individual remembered signing a Drug Certification in 1990 and he was aware of DOE policy on illegal drugs, yet he smoked marijuana several times when offered the opportunity. The individual understood the significance of signing the Drug Certification. PSI at 12. “The security program is based on trust. . . . Once an individual breaches that trust . . . there will always be a question as to whether that individual can be trusted in the future.” *Personnel Security Hearing*, 25 DOE ¶ 82,752 (1995) (quoting a personnel security specialist). Based on the information in the record, I find that DOE properly invoked Criteria K and L in this case.

### **C. Mitigating Factors**

#### **1. Criterion K - Drug Use**

The individual alleges that his use of marijuana is mitigated by (1) one year of abstinence from drug use and (2) the testimonial evidence of a licensed clinical psychologist that the individual is rehabilitated and reformed from the use of marijuana.

The individual testified under oath at the hearing that he has not used marijuana for a year. Tr. at 116. He further testified that when he tried to enroll in a drug treatment program, a substance abuse psychologist employed by his health provider refused to admit him because he had been abstinent for a long time and because he was not addicted to or dependent on marijuana or any other drug. Tr. at 133. The individual met three times with the substance abuse psychologist and he testified that based on their sessions she “had a very clear view that I was unsuitable for such a program for the reason that it had been a long time since I had used marijuana and that I had no difficulty not using it. People in her program are not in that circumstance.” Tr. at 118-119. He also attended five counseling sessions with a licensed clinical psychologist referred by his health provider. Ex. EE; Tr. at 130. The psychologist testified under oath at the hearing that the individual had demonstrated adequate evidence of rehabilitation and reformation from his marijuana use and that the individual had a “very favorable prognosis.” Tr. at 139, 141. The psychologist explained that the individual’s year of abstinence was the best predictor of his future behavior, and he was also impressed with the individual’s ability to develop strategies to deal with stress at work and in his personal life. Tr. at 140. According to the psychologist, the individual acquired this ability after participating in counseling. *Id.* In summary, the psychologist testified that the one year of abstinence, counseling, and a demonstrated capacity to develop alternative methods of coping with stress are adequate evidence of the individual’s rehabilitation and reformation from marijuana use. Tr. at 141.

After reviewing the record, I find that the individual has presented sufficient evidence to mitigate the security concern regarding Criterion K in the Notification Letter. First, the individual has abstained from drug use for one year. Our cases have required that an individual abstain from the use of drugs for at least 12 months in order to demonstrate adequate evidence of rehabilitation and reformation. *See Personnel Security Hearing*, Case No. VSO-0481, 28 DOE ¶ (2001) (counseling and five months of abstinence

insufficient for rehabilitation and reformation), and cases cited therein. He attempted to enter a formal drug treatment program but was denied admission because he was not addicted to drugs and had been abstinent for some time. Notwithstanding this obstacle, he then secured treatment by embarking on a counseling program with a psychologist who specializes in substance abuse issues, and then continued his counseling with a licensed clinical psychologist. Tr. at 129. Further, both the licensed clinical psychologist and the DOE consultant psychiatrist concluded that the individual was not addicted to or dependent on marijuana. Ex. 11; Ex. EE. The individual had not used marijuana for 11 years (from 1989 to 2000), and turned to the drug as a means of alleviating depression when a friend offered it to him. A key factor in my finding is the report completed by the DOE psychiatrist, which gave minimal mention to the individual's marijuana use. <sup>2</sup> The DOE psychiatrist evaluated the individual towards the end of his 12 month period of abstinence and found that his use of marijuana showed poor judgment, but did not find any evidence of addiction or dependency. Ex. 11. Based upon his demeanor, the evidence in the record, and the supporting testimony of his colleagues and psychologist, I am convinced that the individual has never been an habitual user of marijuana, and that he has not used marijuana since May 2001.<sup>3</sup>

Finally, the licensed clinical psychologist testified that the individual has provided the following adequate evidence of rehabilitation and reformation: (1) attendance at counseling sessions, (2) one year of abstinence from marijuana use, and (3) a demonstrated ability to find new ways to cope with stresses in his life that do not involve the use of drugs. The psychologist testified that the individual had used marijuana "periodically as a stress reliever, possibly to self-medicate some of his depression and period of anxiety. . . . I don't consider him to be addicted or dependent upon it." Tr. at 133. The psychologist further testified that the individual had demonstrated "both an ability and a commitment" to refrain from drug use in the future, and that the individual had stopped using drugs on his own, without the necessity of any program. *Id.* He explained that the individual now has the ability to generate new coping mechanisms to deal with stress in his life, and that this ability is his best long-term defense against continued marijuana use. Tr. at 135-140. I find this explanation of the individual's drug use credible, especially in light of the concurring evaluations of both professionals that the individual was not dependent on marijuana or any other drug. Based on all of the above, I find that the individual has mitigated the security concern regarding his use of marijuana.

## **2. Criterion L - Honesty, Reliability and Trustworthiness**

As an initial matter I will state that I was impressed by the individual's honesty. In fact, had he not been forthright about his use of a prescription antidepressant, this proceeding would not have occurred. First, the individual truthfully disclosed his use of a prescription antidepressant during a routine reinvestigation, even though his coworkers warned him that doing so would trigger a psychiatric evaluation. PSI at 4-5. Nonetheless, he honestly discussed his counseling and antidepressant treatment with DOE security. Tr.

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2/ The DOE consultant psychiatrist was not asked to testify at the hearing.

3/ His roommate did not testify but submitted a letter acknowledging that he had not seen the individual smoke marijuana since May 2001. Ex. B.

at 114-116. During the psychiatric evaluation, he candidly described his marijuana use to a DOE psychiatrist, and then discussed his drug use with a PSS the following month. The individual did not attempt to minimize anything about his drug use, counseling, or personal life, even when he realized that his drug use could cost him his job. As previously shown, especially in evidence surrounding the PSI and the psychiatric interview, the individual has been honest with DOE personnel security representatives regarding his marijuana use. He has similarly been honest with his colleagues and friends about his drug use. PSI at 11. In fact, several of his colleagues and supervisors testified on his behalf at the hearing. All of the witnesses described the individual as honest and trustworthy. Tr. at 53, 61, 69, 78, 88. Even the PSS testified that the individual was “forthcoming” and did not appear to be trying to hide anything. Tr. at 45. I therefore find that the potential for coercion of the individual arising from his past marijuana use is slight.

Notwithstanding the individual’s honesty, DOE regulations are clear that security clearance holders must also be reliable and exercise good judgment. *Personnel Security Hearing*, Case No. VSO-0436, 28 DOE ¶ 82,808 (2001). In the past, our office has considered the following factors in determining whether an individual has mitigated the reliability and judgment concerns: the age and maturity of the individual at the time of the violation, the frequency and recency of the offending conduct, and the likelihood that the offending conduct will recur. *See Personnel Security Hearing*, 27 DOE ¶ 82,823 (1999). In this case, although the individual has mitigated the concerns surrounding his honesty, substantial security concerns surrounding his reliability and judgment remain.

First, by signing the Drug Certification form, the individual promised in writing to the DOE during an official process that he would not use drugs while holding a security clearance. Our cases reflect the serious nature of violating a DOE Drug Certification. *See Personnel Security Hearing*, Case No. VSO-0321, 27 DOE ¶ 82,842 (2000) (citing cases where OHA has recommended against the restoration of a clearance even for self-reporting individuals who violated Drug Certifications). The individual broke that promise. His first explanation for breaking his promise to refrain from drug use is that the significance of the form had diminished in the 10 years that passed since he signed it. Tr. at 107. He also emphasized that the PSS only briefly explained the Drug Certification in his 1990 interview. Tr. at 102. However, this explanation increases rather than mitigates the concerns raised by his conduct. *See Personnel Security Hearing*, 28 DOE ¶ 82,808 (2001). Even if the individual did not flagrantly disregard his promise to DOE, his failure to recognize the importance of his actions and the significance of DOE security policies regarding illegal drug use (including the Drug Certification) demonstrates that he lacks the requisite degree of judgment to hold an access authorization. This finding is further supported by the individual’s admission that his roommate not only used marijuana, but that the individual joined him in smoking marijuana. PSI at 7. This disregard for the law and DOE regulation exacerbates concerns that the individual will not exercise care and good judgment in protecting classified material. The individual knew DOE’s zero tolerance for drug use. PSI at 11-12. He remembered signing the Drug Certification, yet despite knowing its importance, he used an illegal drug 15 times in 18 months while holding a security clearance. *Id.* at 12. Even though 10 years have passed since the individual signed the Drug Certification, he should have realized that breaking the law would have serious consequences in regards to retaining his access authorization.

Further, the fact that the individual's PSI did not dwell on the issue of drug use is not relevant to my analysis of this concern. The individual's counsel elicited testimony from the individual at the hearing that in the 1990 interview the PSS only briefly discussed the Drug Certification. Tr. at 101-103. These facts do not mitigate DOE's serious and well-founded concerns about the individual's judgment and reliability. He was a mature adult when he signed, and the transcript of the 1990 PSI confirms that the PSS directed the individual to read the Drug Certification before signing. Ex. 17 at 22, 27. Further, the Drug Certification comprises three unambiguous paragraphs—the first consisting of only one sentence: "*I have been told that the DOE does not allow the use or trafficking of illegal drugs . . . by people whose job requires [access authorization].*" Ex. 9 (emphasis added). DOE is entitled to rely on the signature of a mature adult as proof that he understood the document that he signed, even if the interview was focused on other subjects.

Finally, because the illegal drug use occurred recently, it cannot be excused as a youthful transgression. The individual is middle-aged and cannot blame his actions on youth and inexperience. Nor can the individual argue that his drug use was an isolated incident. He has admitted to smoking marijuana 15 times in 18 months. Our regulations require that I consider the likelihood that the offending conduct will reoccur. Although I believe that the individual would not use marijuana if his clearance were restored, I am not convinced that he would not thoughtlessly commit another act that could jeopardize national security. The individual's conduct demonstrates that he cannot be relied upon to fully evaluate a situation and act in a deliberated and judicious manner.

### **III. Conclusion**

As explained in this Decision, I find that the DOE Operations Office properly invoked Criteria K and L in suspending the individual's access authorization. The individual has failed to present adequate mitigating factors or circumstances to erode the factual basis for the findings under Criterion L or otherwise alleviate the legitimate security concerns of the DOE Operations Office. In view of this criterion and the record before me, I cannot find that restoring the individual's access authorization would not endanger the common defense and security and would be consistent with the national interest. Accordingly, I find that the individual's access authorization should not be restored.

Valerie Vance Adeyeye  
Hearing Officer  
Office of Hearings and Appeals

Date: August 15, 2002