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October 25, 2002
DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Hearing Officer's Decision

Name of Case: Personnel Security Hearing

Date of Filing: June 10, 2002

Case Number: VSO-0551

This Decision concerns the eligibility of XXXXXXXXXXXX (hereinafter "the individual") to hold an access authorization. 1/ 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 do not find that restoration is appropriate 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.

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.

The Notification Letter states that information in the possession of the DOE indicates that the individual tested positive for methamphetamine in connection with a random drug screen performed by his employer. According to the Notification Letter, this constitutes derogatory information under Section 710.8(k) (hereinafter Criterion K). 2/

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 in that letter. 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 represented himself. The individual testified on his own behalf, and presented the testimony of his supervisor, his best friend and co-worker, his wife and the physician who is the medical director of the site at which the individual works (physician). The DOE counsel presented the testimony of a security specialist.

II. Hearing Testimony and Documentary Evidence

A. DOE Security Specialist

The DOE security specialist testified about the security concerns associated with the use of illegal drugs by individuals who hold a security clearance. She stated that a security concern exists in this case, because the judgment and reliability of a person who uses illegal drugs are put into question. Further, the use of illegal drugs by a person with access authorization creates the potential for pressure, coercion and exploitation. Transcript of Hearing (hereinafter Tr.) at 16.

2/ Criterion K covers derogatory information that the individual has "trafficked in, sold, transferred, possessed, used or experimented with a drug or other substance listed in the Schedule of Controlled Substances established pursuant to section 202 of the Controlled Substances Act of 1970 (such as marijuana, cocaine, amphetamines, barbiturates, narcotics, etc.) except as prescribed or administered by a physician licensed to dispense drugs in the practice of medicine or as otherwise authorized by Federal law."

B. The Individual

The individual testified that during recent years he has had a problem with weight control and has taken several "over-the-counter" pills and liquid diets in an attempt to lose weight. Tr. at 73. He presented into evidence an empty packet of one of the pills that he had taken for this purpose. The packet listed the ingredients of the pills in question. Individual's Hearing Exhibit 1. The individual believed that he came to have the positive drug test in the following way. He testified that three days before the drug test he met a trucker at a pool hall in the city where he lives, and the two played pool for several hours. He stated that he asked the trucker how he manages not to gain weight, and the trucker produced some pills that he referred to as diet pills. The pills were not in a labeled container or packet, but rather were held, unpackaged, in a sandwich bag. Tr. at 75. The individual immediately ingested two of the pills. He said he felt no side effects of the pills and did not have any reason to believe they contained any illegal substance. It was only after he had the positive drug test three days later that he came to believe that it must have been due to the pills offered by the trucker at the pool hall. He recognized that he exercised extremely poor judgment and had no other explanation for this error. Tr. at 72-77.

The Supervisor

The individual's supervisor testified that he has known the individual for 16 years, and has never known the individual to use or experiment with illegal drugs. He has never seen the individual exhibit unusual behavior that would suggest drug use. He also confirmed that the individual has been conscious about his weight. Tr. at 29-32.

D. The Co-worker/Friend

This witness testified that he has known the individual for about 18 years and has associated with the individual both on and off the job. He stated that they see each other about once a week and socialize at each other's homes. He testified that he has never known the individual to use illegal drugs, and confirmed that the individual is weight conscious. Tr. at 37-42.

E. The Wife

The individual's wife stated that she has been married to the individual for 18 years, that he has never used illegal drugs, and

that he does not tolerate illegal drug use by his children. She also confirmed that the individual is weight conscious and that he has taken numerous diet pills and formulas in an effort to control his weight. She did not learn of the individual's pool hall incident until after the individual had the positive drug test. Tr. at 48-56.

F. The Physician

The physician is the medical director for the site at which the individual is employed and is a certified medical review officer for the purposes of interpreting drug tests. He stated that the individual tested positive for methamphetamine at a level of 1619 nanograms per milliliter, and that this was a high level, given that the individual claimed that the methamphetamine ingestion took place three days before the drug test. Tr. at 104. He testified that the individual would probably have noticed the effect of the pills at the time he took them, because the physician believed that the individual took a "substantial" amount of methamphetamine. Tr. at 101. The types of effects that the physician cited were lack of sleep, high energy level, hyperactivity, raised blood pressure and increased appetite. Tr. at 102. ^{3/} He reviewed the ingredients listed on the packet that contained the "over-the-counter" pills that the individual took and stated that those pills could not have caused the individual's positive drug test. Tr. at 108. That packet indicated that the pills were a "diet supplement." The physician thought that the pills could be used as a stimulant, but that use as a weight loss product would be "off-label" use. Tr. at 109.

III. Analysis

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. The burden is on the individual 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).

^{3/} The physician did state that these effects would be somewhat lessened by the alcohol that the individual stated he consumed. Tr. at 103.

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) ("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* (Case No. VSO-0005), 24 DOE ¶ 82,753 (1995), *aff'd*, 25 DOE ¶ 83,013 (VSA-0005) (1995). See also 10 C.F.R. § 710.7(c). The individual is afforded an opportunity at a hearing to offer testimonial and documentary evidence supporting his eligibility for access authorization. See 10 C.F.R. § 710.21(b)(6).

As an initial matter, I note the testimony of the individual's wife, friend and supervisor to the effect that the individual is not a casual user of illegal drugs. This is certainly in his favor. While this testimony does not necessarily persuade me that the individual's use of an illegal substance was a one-time event, I believe that the individual does not use illegal drugs on a regular basis. I am also persuaded by the testimony from the individual's wife and co-workers that the individual is weight-conscious and regularly seeks out and uses weight control products.

However, this positive testimony does not resolve the overall security concern. As discussed below, I find that the individual has not met his burden to mitigate the concerns regarding his use of illegal drugs. He attempts to mitigate the concern by asserting that the drug use was inadvertent. I was simply not persuaded by the individual's version of the events leading to the positive drug test. According to his testimony, he accepted and immediately ingested unpackaged pills from a person unknown to him. He did not ask what the pills contained. He stated that he did not experience any effects from the drug use, and did not have any reason to believe that he had taken any unusual substance until he was notified of the positive drug screen.

I find inadequate the individual's overall explanation for this behavior. He ascribes it to poor judgment, which it certainly was. However, this does nothing more than restate the obvious. A lapse of judgment at this extreme level seems to me to require a more detailed explanation of how it came to pass. The individual could offer no further insight into the reasons for his behavior.

I also find the individual's description of the event itself to be inherently implausible. I find it hard to believe his account that he inadvertently consumed an illegal drug that was given to him by a stranger whose name he once knew but can no longer remember, and who he is therefore unable to locate.

There are some other aspects of the individual's account of the event that I also find unbelievable. For example, as noted above, the physician testified that the individual must have taken a fairly large dose of methamphetamine, and therefore would, in all likelihood have felt some effects of the drug. Yet, even after allowing for the fact that he mixed that substance with alcohol, the individual still maintained that he felt no effects from that large dose. Further, when I asked the individual why he took the two pills immediately, given that he had no reason to believe that taking them on the spot could possibly produce any meaningful weight loss, the individual replied: "I don't think that's the reason I took them, I think I just took them just to be part of the conversation there with him and just part of the moment. . . .I was just fitting in with him and conversing." Tr. at 85-86. This response is inconsistent with his original justification for seeking out the pills, which was to find a weight loss product. I find this lack of cohesion and consistency in his description of the event and of his motivation to significantly detract from the overall credibility of the individual's position that the drug ingestion was inadvertent.

As a final matter, the law applicable to this case is unequivocal. In personnel security cases in which an individual who has had a positive drug test seeks to overcome the security concern with an explanation that the drug use was unintentional, we expect the individual to provide corroboration of his version of the events that led to the positive drug test. *E.g.*, *Personnel Security Review* (Case No. VSA-0087), 26 DOE ¶ 83,001 (1996); *Personnel Security Hearing* (Case No. VSO-0273), 27 DOE ¶ 82,814 (1999); *Personnel Security Hearing* (Case No. VSO-0094), 26 DOE ¶ 82,753 (1996); *Personnel Security Hearing* (Case No. VSO-0163), 26 DOE ¶ 82,799 (1996). The individual's own assertions that minimize the security concern cannot themselves form a sufficient basis for

restoration of a security clearance. *Personnel Security Review* (Case No. VSA-0087), 26 DOE at 86,508.

In the present case, the individual was well aware of the necessity of providing appropriate corroboration for his assertion that his use of the methamphetamine was unintentional. In two telephone conversations with the individual and in two confirmatory letters, I pointed out the importance of providing appropriate corroboration of his version of the events at the pool hall. See Letters of June 13, 2002 and August 21, 2002; telephone memorandum of June 26, 2002.

Thus, given what I consider to be an unbelievable account of how this individual came to have a positive drug test, one that is without corroboration, I am unable to find that the individual has mitigated the Criterion K concerns associated with his positive drug test for methamphetamine. I am therefore unable to find 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 cannot recommend that his access authorization be restored.

IV. CONCLUSION

Based on the foregoing, I find that the individual has not mitigated the Criterion K security concerns cited in the Notification Letter. I therefore do not believe that his access authorization should be restored.

The individual 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: October 25, 2002