Case No. VSO-0319 (H.O. Schwartz June 14, 2000)

For full history of this case, and links to other cases, click here.

* The original of this document contains information which is subject to withholding from disclosure under 5 U.S.C. 552. Such material has been deleted from this copy and replaced with XXXXXXX's.

June 14, 2000

DEPARTMENT OF ENERGY

OFFICE OF HEARINGS AND APPEALS

Hearing Officer's Opinion

Name of Case: Personnel Security Hearing

Date of Filing: November 29, 1999

Case Number: VSO-0319

This Opinion concerns the eligibility of XXXXXXXXXX (hereinafter referred to as "the individual") to hold an access authorization (also called a security clearance). The individual's access authorization was suspended under the Department of Energy (DOE) regulations set forth at 10 C.F.R. Part 710, Subpart A, entitled "Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material." As explained below, I recommend restoring the individual's access authorization.

Background

The individual is an employee of a contractor at a DOE facility whose access authorization has been suspended. The local DOE security office (SO) issued a Notification Letter to the individual on October 29, 1999. The Notification Letter alleges under 10 C.F.R. § 710.8(f) that the individual "has deliberately misrepresented, falsified, or omitted significant information from Personnel Security Questionnaires" (PSQs). The Notification Letter also alleges under 10 C.F.R. § 710.8(l) that the individual "has engaged in unusual conduct or is subject to circumstances which tend to show that he is not honest, reliable or trustworthy; or which furnishes reason to believe that he may be subject to pressure, coercion, exploitation or duress which may cause him to act contrary to the best interests of the national security." These allegations are based on the individual's use of marijuana as late as 1980, after he had received his security clearance in 1977, his subsequent failure to list the drug use on PSQs he signed

in 1984 and 1987, and his admission of such use before undergoing a polygraph examination in 1991.

Because of these security concerns, the case was referred for administrative review. The individual filed a request for a hearing on the concerns in the Notification Letter. SO transmitted the individual's hearing request to the Office of Hearings and Appeals (OHA), the OHA Director appointed me as Hearing Officer in this case, and I convened a hearing.

At the hearing, the SO Counsel called one witness, an SO personnel security specialist. The individual testified on his own behalf, and called nine other witnesses, including his wife and current and former supervisors and co-workers at the DOE facility where he works. The SO submitted 21 written exhibits, and the individual submitted 29 written exhibits.

Standard of Review

The applicable DOE regulations state that "[t]he decision as to access authorization is a comprehensive, common-sense judgment, made after consideration of all the relevant information, favorable or unfavorable, as to whether the granting of access authorization would not endanger the common defense and security and would be clearly consistent with the national interest." 10 C.F.R. § 710.7(a). In resolving questions about the individual's eligibility for access authorization, I must consider the relevant factors and circumstances connected with the individual's conduct. These factors are set forth in § 710.7(c):

the nature, extent, and seriousness of the conduct, to include knowledgeable participation; the frequency and recency of the conduct; the voluntariness of participation; the age and maturity of the individual at the time of the conduct; 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; and the likelihood of continuation or recurrence.

A DOE administrative review proceeding under 10 C.F.R. Part 710 is authorized when the existence of derogatory information leaves unresolved questions about an individual's eligibility for access authorization. A hearing is "for the purpose of affording the individual an opportunity of supporting his eligibility for access authorization." 10 C.F.R. § 710.21(b)(6). It is incumbent upon the individual to demonstrate 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. § 710.7(a). Although it is impossible to predict with absolute certainty an individual's future behavior, as the Hearing Officer, I am directed to make a predictive assessment. After carefully considering the factors set out in § 710.7(c) and all the evidence in the record in this proceeding, I find that the individual has made the requisite showing. For the reasons discussed below, I am convinced that this individual's access authorization should be restored.

Findings of Fact and Analysis

Undisputed Facts

The individual admits the facts alleged in the Notification Letter, and the hearing focused on his assertion that mitigating circumstances warrant restoration of his access authorization. Before turning to the issue of mitigation, it would be helpful to explain the circumstances underlying the concerns in the Notification Letter.

The individual was first granted a security clearance in 1977. In 1984 and 1987, he completed PSQs that included the following question: "Are you now, or have you ever been, a user of any narcotic, hallucinogen, stimulant, depressant, or cannabis (to include marijuana and/or hashish), except as prescribed by a licensed physician?" On both forms, the individual replied that he had not.

In 1991, before taking a polygraph examination, he admitted to the examiner that he had in fact used marijuana from roughly 1971 through roughly 1980. In 1992, the individual signed a drug certification form, in which he promised to refrain from drug use for as long as he holds a security clearance. Later that same year, he completed a Supplemental Personnel Security Questionnaire that contained the following question: "Have you ever used any narcotic, depressant, stimulant, hallucinogen (to include LSD or PCP), or cannabis (to include marijuana and/or hashish) except as prescribed by a licensed physician?" On this form, he replied that he had, and he provided details in an attached drug use questionnaire, on which he indicated that he had acknowledged "this use in association with security processing that occurred in Aug[ust] [19]91."

In 1993, the individual completed a Questionnaire for Sensitive Positions that contained the following question: "In the past 5 years, have you used, possessed, supplied, or manufactured any illegal drugs [defined to include marijuana]?" On this form, he replied that he had not.

In 1998, the individual completed a Questionnaire for National Security Positions that contained the following question: "Have you ever illegally used a controlled substance [defined to include marijuana] while employed as a law enforcement officer, prosecutor, or courtroom official; while possessing a security clearance; or while in a position directly and immediately affecting the public safety?" On this form, he replied that he had, provided details regarding his use during the years 1971 through 1980, and further stated that this information had been "disclosed in an earlier clearance update."

In 1999, SO conducted a Personnel Security Interview (PSI) with the individual. On the basis of the individual's responses elicited during the PSI, SO determined that he had lied on the 1984 and 1987 PSQs because he believed he had already lied and needed to remain consistent in his answers, and he believed that he might lose his job if he told the truth. SO also determined that the individual admitted using marijuana because he believed that he would not be able to pass the polygraph test otherwise. Finally, SO determined that the individual was aware of his employer's policy against drug use, but that he nevertheless used drugs while employed (but not while on the job) and while holding a security clearance.

There is no question in this case that SO had a valid basis to issue the Notification

Letter to the individual, suspending his clearance.

Analysis of Mitigating Evidence

Although falsifying information on a DOE form that is relevant to an individual's eligibility for access authorization is a very serious matter, this individual has convinced me that circumstances exist in his case that are sufficient to mitigate those security concerns. I will discuss the mitigating factors mentioned in 10 C.F.R. § 710.7(c), first with respect to the concern under Criterion F, and then with respect to the concerns under Criterion L.

Criterion F–Failure to List Marijuana Use on the 1984 and 1987 PSQs

When faced with questions concerning marijuana use on PSQs that he filled out in 1984 and 1987, the individual falsified his answers by responding in the negative. Falsification, particularly on a document that on which DOE depends in making a determination of eligibility for access authorization, raises serious concerns about the honesty and trustworthiness of an individual.

I believe that the individual has been straightforward in explaining to SO why he falsified his responses on the 1984 and 1987 PSQs. Both during his 1999 PSI and at the hearing, he stated that he believed he had denied any use of marijuana when he first filed for access authorization in 1977. Transcript of Personnel Security Interview (PSI Tr.) at 26-28, 32-33; Transcript of Hearing (Tr.) at 24-25. Having denied marijuana use once, he felt obligated for more than the next decade to continue the deception on the subsequent PSQs.

That deception ended nearly ten years ago. For reasons discussed more fully in the section concerning Criterion L, below, the individual came forward in 1991 to correct his false statements about marijuana use. The evidence is uncontroverted that since that admission in 1991, the individual has been completely straightforward in his responses regarding marijuana use, and SO concedes that it has no information that the individual has actively falsified in any manner since the 1987 PSQ. Tr. at 227. This constitutes a powerful mitigating factor. (1)

SO contends that the individual's falsifications on his 1984 and 1987 PSQs demonstrate a pattern of dishonesty that lasted for 14 years, from 1977, when he was first granted a security clearance, until 1991, when he revealed his falsifications. Tr. at 36 (testimony of personnel security specialist). There is no evidence, and SO does not contend, that the individual has engaged in any falsifications since 1991.(2) What distinguishes this case from more typical situations in which DOE's security concerns fall under Criterion F is that a great deal of time has passed since the falsifications took place. Cf. Personnel Security Hearing, Case No. VSO-0289, 27 DOE ¶ 82,823 (1999) (19 months since last falsification); Personnel Security Review, Case No. VSA-0255, 27 DOE ¶ 83,022 (1999) (one year of truthfulness after long-term pattern of lying). The most recent falsification that triggered SO's concern occurred 13 years ago. Moreover, although SO only recently learned about it, the individual affirmatively and voluntarily corrected his falsifications nine years ago. The passage of time is a significant factor in the context within which I must now consider the weight of both SO's concerns and the individual's evidence of mitigation.

As stated in section 710.7(a) of the pertinent regulations, I must make a comprehensive, common- sense judgment with respect to an individual's eligibility for a security clearance, while considering a number of factors set forth in section 710.7(c). The nature and extent of the derogatory information related to Criterion F concerns is indeed serious, as recognized by all involved parties: falsification on the very forms that supply the information on which security clearance is granted subverts the integrity of the clearance authorization process. In this case, the individual falsified two documents knowingly and voluntarily, and at ages beyond which I can excuse actions as youthful indiscretion. The DOE security program is based on trust, and once an individual has breached that trust, a serious question arises as to whether that individual can be trusted to comply with the security regulations. Personnel Security Hearing, Case No. VSO-0013, 25 DOE ¶ 82,752 at 85,515 (1995), affirmed OSA, May 22, 1995. On the other hand, the most recent of the falsifications that caused SO's concern now occurred 13 years ago. Any security concern that those falsifications raised when they were disclosed in 1991 were resolved in the individual's favor by DOE's sister agency that investigated him after the revelation. Furthermore, the great weight of the evidence demonstrates his reputation for honesty, reliability, and trustworthiness. See, e.g., Tr. at 161-63, 176-77, 203, 215 (testimony of co-workers that individual has instructed and guided others in security matters and his performance has earned him respect of the security community within and without the agency). Most important, as described more fully in the Criterion L section below, the individual stepped forward in 1991 to uncover his deceit. Ever since he made that decision nine years ago, he has consistently told the truth about the one issue where he had previously falsified information.

The individual's behavior surrounding the reporting of his marijuana use renders any recommendation a close call. Prior hearing officer opinions in the area of Criterion F offer some guidance, however. All acknowledge the serious nature of falsifying documents. Beyond that, whether the individual came forward voluntarily to renounce his falsifications appears to be a critical factor. Compare Personnel Security Hearing, Case No. VSO-0037, 25 DOE ¶ 82,778 (1995), affirmed (OSA Feb. 22, 1996) (voluntary disclosure by the individual), with Personnel Security Hearing, Case No. VSO-0327 (April 20, 2000), appeal filed (falsification discovered by DOE security). Another important consideration is the timing of the falsification: the length of time the falsehood was maintained, whether a pattern of falsification is evident, and the amount of time that has transpired since the individual's admission. See Personnel Security Hearing, Case No. VSO- 0327 (April 20, 2000), appeal filed (less than a year of truthfulness insufficient to overcome long history of misstating professional credentials). See also Personnel Security Hearing, Case No. VSO- 0289, 27 DOE ¶ 82,823 (1999) (19 months since last falsification not sufficient evidence of reformation from falsifying by denying drug use).

In the present case, as explained below, I am convinced that the individual's admission of his falsifications was voluntary. Regarding the timing of his behavior that gave rise to serious Criterion F concerns, I find that the individual falsified twice, in 1984 and 1987, thereby maintaining a falsehood for some 14 years. However, I find that the individual is reformed in a very significant manner. He affirmatively and voluntarily corrected the falsifications nine years ago. Moreover, there is no evidence in the record of any falsifications since 1987, and SO has reinvestigated the individual twice since then, in 1993 and in 1998. DOE Exhibits at Tab 3, Exhibits 1 and 2. This to me indicates that he

has reformed his behavior in the sole area of SO's concern under Criterion F. His motivation for the falsifications, to cover up what he believed was an earlier falsification, though cause for legitimate concern, ceased to exist once he came forward with the truth in 1991. Similarly, any potential for pressure, coercion, exploitation or duress regarding those falsifications was resolved at the same moment. It would be highly speculative to conclude from his previous falsifications, so infrequent and now so far in the past, that the individual still has the motivation to falsify in the future regarding other issues and is therefore likely to engage in such actions. In addition, testimony at the hearing regarding his irreproachable behavior with respect to security matters during the last nine years supports reaching an opinion that the individual no longer presents a concern that he will engage in further falsification. See, e.g., Tr. at 136, 146-47, 167, 195, 204 (testimony of co-workers concerning how he addressed the suspension of his security clearance), 162-65, 171, 176, 194, 197- 198, 215 (testimony of co-workers concerning his treatment of sensitive information). Although the individual did maintain a falsehood for a very long time, which required his falsifying on two security forms, he disclosed those falsifications under voluntary circumstances, and has acted truthfully and responsibly regarding those issues for the past nine years. On balance, it is my opinion that the evidence presented in this proceeding has mitigated SO's security concerns under Criterion F.

Criterion L–Admission Only Under Duress, and Using Drugs While Holding a Security Clearance

In its Notification Letter, SO enumerated two additional security concerns that have arisen from the individual's use of marijuana and his belated reporting of it. These two concerns are not based on the individual's falsifications but nevertheless relate to the individual's honesty, reliability and trustworthiness, as contemplated in Criterion L of the regulations. First, SO contends that the individual admitted to marijuana use immediately before taking a polygraph test in 1991 only under duress, because he felt he could not pass the test otherwise. Second, SO contends that the individual used illegal drugs while holding a security clearance, in deliberate violation of his employer's corporate anti-drug policy. I have considered each of these concerns and, on the basis of the facts I find existed, as outlined below, I have reached the opinion that neither constitutes a disqualifying security concern at this time.

SO was justified in finding a security concern in the circumstances under which the individual admitted that he had used marijuana in the past, despite his earlier denials. On the basis of statements he made during the 1999 PSI, SO determined that the individual "came clean" in 1991 only under the duress of an impending polygraph examination. In particular, the individual stated, "There's not a chance in the world that I was gonna work my way through a polygraph test." PSI Tr. at 16. SO reasonably interpreted this statement to mean that "he did not think that he could pass the polygraph test." Notification Letter; Tr. at 38-39.

At the hearing, however, the individual explained what he meant by his 1999 statement and fully described the circumstances surrounding the 1991 polygraph test. In 1990 a representative of his organization was needed at a meeting being held in a foreign country. The person selected for the trip would have his security clearances lifted before the trip, and have them reinstated upon his return. If the individual attended the meeting, a polygraph examination would be necessary for the reinstatement of one of his

clearances. The individual testified that he subjected himself to the polygraph examination voluntarily and on purpose. See generally Tr. at 87-90. Contrary to the assumption that SO made regarding the mandatory nature of the polygraph examination, the individual testified that he did not have to be the organization's representative to the meeting. Tr. at 87. At the hearing, a co-worker verified that the individual was not required to attend the meeting as a duty of his position. Tr. at 196-197. Therefore, he could have easily avoided being faced with a polygraph upon his return from the trip by not taking the trip in the first place. Moreover, the individual testified that he no longer needed reinstatement of the one clearance for which the polygraph was required. Tr. at 89-90. Two co-workers confirmed that, due to a promotion, the individual no longer needed that clearance. Tr. at 136, 197. Therefore, even if he had attended the meeting, he could have elected to avoid facing a polygraph examination after the trip.

The individual offers instead the following justification for voluntarily subjecting himself to the polygraph examination. He testified that the opportunity to attend the 1990 foreign meeting was the first event in his career to which his prior marijuana use had presented an impediment:

It was a very simple matter for me to just say, "You guys go." . . . I knew of the poly and I faced the decision would I duck the poly or not, should I go on this trip or should I forgo this trip, and I decided at that time that, you know, I'd felt bad about doing this before, and here was a case -- probably the first case where it was bumping up into . . . my career, and . . . I could easily forgo it, but it was bumping, and I thought that I just really ought to face this head on and not have this thing bumping around up here in my career, and so I made the decision at that point that I was going forward . . . [T]his is before I even left for the trip. I had made the decision in my head that I was going to not steer my career around this former lie and I was going to come forward and be honest about it.

Tr. at 88-89. SO was suspicious of this explanation of the individual's motive for recanting his denial of marijuana use, because the individual could have come forward with the truth at any time between 1977 and 1991 but chose not to. Tr. at 37. On the other hand, the individual testified that each falsification bothered him a bit more, yet he had suppressed his concerns about them. At the hearing, the following exchange took place between the SO Counsel and the individual:

Q. Is there some reason before the . . . trip that you can think of that you didn't just come and make it known that you'd made an error and needed to straighten it out?

A. No, I -- like I said earlier, when I made the very bad choice in 1984 to falsify, it was a mistake, I just didn't --

Q. But did it bother you over those years, . . . ?

A. Yes, it did.

Q. It did?

A. The ?87 form, it reminded me how much it bothered me, but by then I'd built the wall a little higher with the falsification of the earlier one.

Tr. at 125-26. However, as discussed above, when the falsification finally "bumped" into his work, he decided that he had reached the moment to set the record straight.

I recognize that a person is often unable to recall his state of mind nine years after an event. However, because his decision to "come clean" was undoubtedly a significant event in his life, he present recollection may well be accurate. Even if it is not, the totality of the circumstances surrounding the individual's recanting of his previous denials of marijuana use convinces me that he did not make his admission under duress, out of fear that he would fail a mandatory polygraph examination, because he could easily have avoided subjecting himself to the polygraph. I believe that the individual voluntarily elected to use the polygraph examination as an opportunity to step forward. It is therefore my opinion that the circumstances surrounding his 1991 admission do not raise disqualifying security concerns at this time regarding his honesty, reliability and trustworthiness.

SO was also justified in finding a security concern in the fact that the individual has admitted to using marijuana while he held a security clearance in full knowledge of his employer's anti-drug policy. Nevertheless, it is significant that the only evidence of such use is the individual's own admissions, in which he has consistently maintained that he stopped using marijuana in approximately 1980. During his PSI, he stated that he last used marijuana possibly as late as 1982. PSI Tr. at 8. At the hearing, he explained that he believed that 1980 was his "best estimate" of when he last used marijuana, but at the PSI he wanted to err on the side of caution. See Tr. at 116. In any event, there is no evidence that the individual has used marijuana since 1982, and SO has stipulated that any drug use since 1982 is not at issue in this proceeding. The illegality of marijuana use obviously raises a serious concern for SO, and the individual's participation in this activity was clearly knowledgeable and voluntary. While the individual was only in his twenties when he was using marijuana, his relative youth does not impress me as a factor favoring excusing his behavior for immaturity. Nevertheless, he testified that his use was infrequent, Tr. at 80-81 (zero to three times per year) (see also drug use questionnaire attached to 1982 Supplemental Personnel Security Questionnaire, Exhibit A), and SO has not challenged that testimony. As for the recency of the derogatory information, there is simply no evidence that SO has any concerns regarding his marijuana use in the past 18 years. With the offending activity so far in the past, the issue of reformation or rehabilitation becomes moot, as does any concern for the individual's motivation for engaging in that activity. Finally, since the last known incident of marijuana use occurred at least 18 years ago, I find it highly unlikely that the individual will begin engaging in that activity in the future. Consequently, it is my opinion that the individual's marijuana use while holding a security clearance no more recently than 18 years ago does not present evidence of dishonesty, unreliability or untrustworthiness that raises a disqualifying security concern at this time.

Conclusion

Based on the entire record in this proceeding, I find that the individual has resolved the security concerns raised under 10 C.F.R. § 710.8(f) and (l). I conclude that the individual has mitigated the concern that he deliberately misrepresented, falsified, or omitted significant information from Personnel Security Questionnaires. I also find that

he has mitigated the concern that he engaged in conduct which tends to show that he is not honest, reliable or trustworthy, and that he may be subject to pressure, coercion, exploitation or duress which may cause him to act contrary to the best interests of the national security.

For the reasons explained in this Opinion, I find that the individual has shown that restoring his access authorization would not endanger the common defense and security and would be clearly consistent with the national interest. Accordingly, I recommend that the individual's access authorization be restored.

The regulations set forth at 10 C.F.R. § 710.28(a) provide that the Office of Security Affairs or the individual may file a request for review of this Hearing Officer's Opinion within 30 calendar days of receipt of the Opinion. Any such request must be filed with the Director, Office of Hearings and Appeals, 1000 Independence Ave., S.W., Washington, D.C. 20585-0107, and served on the party. If either party elects to seek review of the Opinion, that party must file a statement identifying the issues on which it wishes the OHA Director to focus. This statement must be filed within 15 calendar days after the party files its request for review. The party seeking review must serve a copy of its statement on the other party, who may file a response within 20 days of receipt of the statement. 10 C.F.R. § 710.28(b). The address to which submissions must be sent for purposes of serving them on the Office of Security Affairs is as follows:

Director

Office of Safeguards and Security, SO-21

Office of Security Affairs

U.S. Department of Energy

19901 Germantown Road

Germantown, MD 20874

William M. Schwartz

Hearing Officer

Office of Hearings and Appeals

Date: June 14, 2000

(1)SO did not learn about the individual's admitted marijuana use until 1998. Although DOE controls the basic access authorization for the individual, over the course of years, he has been granted a number of specialized clearances by other agencies. It appears from the record that although SO had in its files the PSQs from 1984 and 1987, on which the individual denied using any illegal drugs, and the 1993 Questionnaire for Sensitive Positions, which sought information about drug use only for the preceding five years, it never received any information concerning his 1991 pre-polygraph admission of marijuana use nor his 1992 drug certification form (Exhibit B) or his 1992

Supplemental Personnel Security Questionnaire with attached drug use questionnaire (Exhibit A). Therefore, SO did not learn about his marijuana use until it received his 1998 Questionnaire for National Security Positions, on which he answered the relevant question affirmatively and referred to disclosure of such use "in an earlier clearance update." On the basis of that newly acquired information, SO began the investigation that led to the 1999 PSI and, ultimately, to the hearing at which I presided.

(2)SO does not contend that the individual sought actively to conceal his involvement with marijuana at any point after he completed the 1987 PSI. To the contrary, the individual contends he believed that, once he admitted his prior use just before taking the polygraph examination in 1991, the entire personnel security community, including DOE, was aware of his admission. PSI Tr. at 22; Tr. at 101, 104-05, 107. The individual admits that he knew his polygraph results were intended for another agency, and that he submitted, as directed, his 1992 Supplemental Personnel Security Questionnaire with attached drug use questionnaire to his employer's security office. Tr. at 120-122. Nevertheless, he believed that his employer's security organization communicated fully with its counterpart at DOE and other agencies, and was surprised to learn that SO had not been informed. PSI Tr. at 21; Tr. at 107. A 1992 document provided to the individual, which described a recently enacted National Security Directive entitled "Single Scope Background Investigations," convinced him that his belief was well founded. See Exhibit DD. According to the SO personnel security specialist, neither SO nor the individual's employer was in fact aware of the 1991 and 1992 documents that concerned his various clearances, Tr. at 29, 32, even though the individual submitted those forms to his employer. Apparently, there are or were at least two distinct offices at the employment site that handled security matters, and they failed to communicate with each other. As the result of that apparent lack of communication within the security community, SO was not made aware of the individual's security matters in 1991 and 1992. There is no evidence in the record that SO's lack of knowledge was the result of any intent or action of the part of the individual, and it should not be held against him. Consequently, I am convinced that between 1991 and 1998 the individual believed that SO was fully aware of his admission of marijuana use during the 1970s and for this reason never made a direct report to SO on this matter.