



## II. THE NOTIFICATION LETTER AND THE ASSOCIATED SECURITY CONCERNS

As indicated above, the Notification Letter informed the Individual that information in the possession of the DOE created a substantial doubt concerning his eligibility for a security clearance. That information pertains to Guideline H of the Adjudicative Guidelines. Ex. 4 at 4. Under Guideline H (Drug Involvement and Substance Misuse), “illegal use of controlled substances . . . can raise questions about an individual’s reliability and trustworthiness, both because such behavior may lead to physical or psychological impairment and because it raises questions about a person’s ability or willingness to comply with laws, rules, and regulations.” Adjudicative Guidelines at ¶ 24. Concerning behavior includes “[t]esting positive for an illegal drug” or “[a]ny illegal drug use while granted access to classified information or holding a sensitive position.”<sup>2</sup> Adjudicative Guidelines at ¶ 24(b), (f). With respect to Guideline H, the LSO cites that the Individual underwent a post-accident drug screen administered on January 24, 2020. On January 30, 2020, the Medical Review Officer (MRO) determined the results were positive for marijuana. Ex. 4 at 4. The LSO further cited that the Individual has held a security clearance since March 22, 2001, and was found to have used an illegal drug while holding a sensitive position or while being granted access to classified information. In light of these facts, the LSO’s invocation of security concerns under Guideline H is justified.

## III. REGULATORY STANDARDS

A DOE administrative review proceeding under Part 710 requires me, as the Administrative Judge, to issue a Decision that reflects my comprehensive, common-sense judgment, made after consideration of all of the relevant evidence, favorable and unfavorable, as to whether the granting or continuation of a person’s 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). 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 granting 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).

The individual must come forward at the hearing with evidence to convince the DOE that granting or restoring 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). The individual is afforded a full opportunity to present evidence supporting his eligibility for an access authorization. The Part 710 regulations 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). Hence, an individual is afforded the utmost latitude in the presentation of evidence to mitigate the security concerns at issue.

## IV. FINDINGS OF FACT

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<sup>2</sup> Marijuana falls within the Adjudicative Guidelines’ definition of controlled substance. Adjudicative Guidelines at ¶ 24.

An Incident Report from the Individual's employer dated March 12, 2020, stated that the Individual underwent a post-accident drug test that was administered on January 24, 2020. Ex. 10 at 1. On January 30, 2020, the Medical Review Officer (MRO) determined that the Individual's drug test results were positive for marijuana, as evidenced in the MRO Report.<sup>3</sup> Ex. 10 at 2. A second sample was also tested. As reflected on the Medical Review Officer Report dated February 6, 2020, the second sample reconfirmed a positive test result for THC (*i.e.*, one of the chemical constituents of marijuana). Ex. 10 at 3.

At the hearing, the Individual did not dispute the allegations in the Notification Letter. He testified that he has held a security clearance since February 2001, that he is subject to random drug testing as required by his position as a DOE contractor employee, and that prior to his drug test in January 2020 has never had a positive drug test result. Tr. at 9–10. At the hearing, he testified that during his employment with the DOE contractor, he has probably taken at least 20 random drug tests. *Id.* at 17. He continued that he usually has a random drug test once a year, although sometimes it is more frequent. *Id.* The Individual further testified that on January 24, 2020, he was involved in an accident at his job site, and underwent a post-accident drug test on that same date. *Id.* at 10, 12. Afterwards, he underwent a drug test. *Id.* at 12–13. While he did not dispute the allegations in the SSC, he asserted at multiple times during the hearing that he has only used marijuana on one occasion, the weekend before his January 24, 2020, drug test. *Id.* at 13–14. He testified, “The weekend before I had tried some [marijuana] Sunday... That has been the only time I’ve tried it.” *Id.* at 13. The DOE Counsel then asked him how often he used marijuana prior to his worksite accident and positive drug test, and the Individual replied, “None. Never.” *Id.* at 14. The Individual also denied any current use of marijuana and stated that the Sunday prior to his accident was his only marijuana use. *Id.* at 13–15.

In response to questioning by the DOE Counsel and subsequently by the Administrative Judge, the Individual provided additional details regarding his marijuana usage that produced a positive drug test result. He testified that he was by himself on the date he used marijuana. *Id.* at 14. He initially testified that he obtained the marijuana from “some buddies.” *Id.* Then, when the DOE Counsel asked him if he associates with or has friends who use marijuana or other illegal substances, he replied, “No.” *Id.* at 15. When the DOE Counsel asked him if the persons he obtained the marijuana from were friends of his, he replied, “No. I hardly ever see them.” *Id.* When the Administrative Judge asked the Individual to clarify whether he asked for the marijuana or if he was offered the marijuana by his friends, he replied, “No, they kind of offered it. Because, no, I didn’t ask for it. I didn’t request for it, but I just--just asked--I didn’t ask them for it, took it. It was very minute, a little bit... It was rolled up like a cigarette.” *Id.* at 19. He also testified, “I only smoked about half of it [marijuana cigarette], and threw the rest away.” *Id.* at 20. The

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<sup>3</sup> While unclear from the drug test report itself, federal government materials indicate that the Individual's specimen was likely a urine specimen. DOE Order 3792.3 (Drug-Free Federal Workplace Testing Implementation Program) defines a collection site as “a place...for the purpose of providing urine specimens...” DOE Order 3792.3 § 4(b). Also, the Substance Abuse and Mental Health Services Administration (SAMHSA) states, “At this time, urine is the only specimen allowed for Federal agency workplace drug testing.” Substance Abuse and Mental Health Services Administration Medical Review Officer (MRO) Manual for Federal Agency Workplace Drug Testing Programs § 3.1.2 (2018), [http://samhsa.gov/sites/default/files/workplace/mro\\_guidance\\_manual\\_508\\_final\\_march\\_2018.pdf](http://samhsa.gov/sites/default/files/workplace/mro_guidance_manual_508_final_march_2018.pdf) (MRO Manual). The MRO Manual applies to federal agency drug testing programs subject to Executive Order 12564. *Id.* at ii. DOE Order 3792.3 describes the actions taken to comply with Executive Order 12564. DOE Order 3792.3 § 2(v).

Individual admitted that “it was a very poor decision on my part. I just don’t believe in using it [marijuana].” *Id.* at 15. Regarding his future intentions concerning marijuana use, he testified that he intends not to use marijuana in the future, and intends not to use any other illegal substances in the future. *Id.* at 16.

The Individual’s co-worker, who is also the Individual’s friend, testified that he met the Individual approximately eight years prior at their place of employment and that he currently sees the Individual once every week either at the workplace or at home. *Id.* at 25–26. In describing the Individual’s work performance, he stated that the Individual is a trustworthy person, is very conscientious at work, is respected by everyone, and has excellent job knowledge. *Id.* at 26, 29–30. The Individual’s co-worker testified that he was aware that the Individual was involved in an accident at his work site. *Id.* at 28–29. When asked if he was aware that the Individual’s post-accident drug test showed that he had tested positive for marijuana, he testified that he was unaware of that fact and he was surprised to learn of the positive drug test results. *Id.* at 29. When questioned regarding his opinion concerning the Individual’s security clearance, the Individual’s co-worker testified that he would “absolutely” recommend the Individual for a security clearance. *Id.* at 30. Regarding his social interactions with the Individual, he testified that he spends time with the Individual outside of work doing activities such as deer hunting and bicycle riding. *Id.* at 27. He stated that he has no knowledge of the Individual’s use of marijuana or illegal substances. *Id.* at 28.

The Individual submitted a total of six written character statements from five colleagues including the witness who testified at the hearing and two of his prior managers, as well as a character statement from his sister. Ex. A–F. All of his character statements provided excellent references and stated the Individual was trustworthy. *Id.*

## V. ANALYSIS

The Individual’s post-accident drug test on January 24, 2020, which reflected that the Individual tested positive for marijuana, raises security concerns under Guideline H. Adjudicative Guidelines at § 25(b). An individual may mitigate security concerns under Guideline H if:

- (a) the behavior happened so long ago, was so infrequent, or happened under such circumstances that it is unlikely to recur or does not cast doubt on the individual’s current reliability, trustworthiness, or good judgment;
- (b) the individual acknowledges his or her drug involvement and substance misuse, provides evidence of actions taken to overcome this problem, and has established a pattern of abstinence, including, but not limited to:
  - (1) disassociation from drug-using associates and contacts;
  - (2) changing or avoiding the environment where drugs were used;
  - and
  - (3) providing a signed statement of intent to abstain from all drug involvement and substance misuse, acknowledging that any future

involvement or misuse is grounds for revocation of national security eligibility;

(c) abuse of prescription drugs was after a severe or prolonged illness during which these drugs were prescribed, and abuse has since ended; and

(d) satisfactory completion of a prescribed drug treatment program, including, but not limited to, rehabilitation and aftercare requirements, without recurrence of abuse, and a favorable prognosis by a duly qualified medical professional.

Adjudicative Guidelines at § 26(a)–(d).

The mitigating conditions described by Guideline H at § 26(a) are not present in this case. At the hearing, the Individual claimed that he smoked half a marijuana cigarette on only one occasion, the Sunday prior to his work accident. In addition, he asserted that he passed at least 20 prior drug tests during his 20 years of employment. There is no corroborating evidence in the record concerning the Individual's frequency and/or duration of his marijuana use. The Individual's testimony appears to be an attempt to claim that his use was infrequent and minimal, or happened under such circumstances that it is unlikely to recur. Adjudicative Guidelines at § 26(a).

I did not find the Individual's testimony to be credible for a number of reasons. For example, the Individual made inconsistent statements regarding how he obtained the marijuana. At one point during the hearing, he claimed he got the marijuana from "some buddies," but another time, he claimed that he "hardly ever see[s] them." I find the first claim, that people that the Individual "hardly ever see[s]" would just give him marijuana, incredible. I also find it incredible that he would ask someone he hardly ever sees for marijuana. It is more likely that the people that provided the marijuana were "buddies," but his waffling on the matter of who gave him the drug, and how he got it, leads me to find that his testimony was improbable.

The Individual's one character witness who testified at the hearing cannot corroborate his claimed one-time marijuana use. In fact, the witness had no knowledge about why the Individual's clearance had been suspended. In addition, while the Individual's written character statements from his colleagues stated that the Individual was trustworthy, none of those written statements addressed the Individual's marijuana use. Thus, the written character statements cannot corroborate the Individual's claim of one-time marijuana use. In light of all of the evidence discussed above, I am not convinced of the Individual's assertion that his use of marijuana was limited to only one occasion, nor am I convinced that his marijuana use happened under such circumstances that it is unlikely to occur.

Further, none of the other mitigating conditions are applicable in this case. The mitigating conditions described by Guideline H at § 26(b) do not present in this case. The Individual provided no testimony stating that he has affirmatively disassociated from drug-using associates and contacts. He also provided no testimony stating that he has affirmatively changed or avoided the environment where drugs were used; in fact, he claimed that he was by himself on the date he used marijuana, implying that he used the marijuana at home. Finally, the Individual did not submit any evidence of a signed statement of intent to abstain from all drug involvement. The mitigation

conditions set forth in Guideline H at § 26(c) and § 26(d) are also inapplicable in this case. The Individual does not assert that he was prescribed marijuana for medicinal purposes. Therefore, § 26(c) does not apply. Moreover, Paragraph 26(d) does not apply because the Individual did not complete a drug treatment program and no medical professional recommended that the Individual needed to complete a drug treatment program. Accordingly, I conclude that the Individual has not established that the mitigating conditions described in § 26(a) are present in this case.

## **VI. CONCLUSION**

For the reasons set forth above, I conclude that the LSO properly invoked Guideline H of the Adjudicative Guidelines. After considering all of the evidence, both favorable and unfavorable, in a comprehensive, common sense manner, including weighing all the testimony and other evidence presented at the hearing, I find that the Individual has not brought forth sufficient evidence to resolve the security concerns set forth in the Summary of Security Concerns. Accordingly, the Individual has not demonstrated that restoring his security clearance would not endanger the common defense and would be clearly consistent with the national interest. Therefore, the Individual's security clearance should not be restored. Either party may seek review of this Decision by an Appeal Panel under the procedures set forth at 10 C.F.R. § 710.28.

Janet R. H. Fishman  
Administrative Judge  
Office of Hearings and Appeals