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**United States Department of Energy
Office of Hearings and Appeals**

In the Matter of: Personnel Security Hearing)
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Filing Date: August 9, 2021) Case No.: PSH-21-0095
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Issued: October 29, 2021

Administrative Judge Decision

Janet R. H. Fishman, Administrative Judge:

This Decision concerns the eligibility of XXXX XXXX (the Individual) to hold an access authorization under the United States Department of Energy's (DOE) regulations, set forth at 10 C.F.R. Part 710, "Procedures for Determining Eligibility for Access to Classified Matter and Special Nuclear Material."¹ As discussed below, after carefully considering the record before me in light of the relevant regulations and the *National Security Adjudicative Guidelines for Determining Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position* (June 8, 2017) (Adjudicative Guidelines), I conclude that the Individual's access authorization should be restored.

I. Background

A DOE Contractor employs the Individual in a position that requires him to hold an access authorization. As a term of his employment, which he began on May 20, 2019, the Individual was required to undergo a randomized drug screen on October 24, 2019. (Exhibits are hereinafter cited as "Ex.") Ex. 6 at 1; Ex. C at 1. On October 30, 2019, the Individual's urinalysis drug screen "came back positive for the marijuana metabolite above the allowable limit[.]" Ex. 6 at 1; Ex. 3; Ex. 4 at 6; Ex. C at 1. Accordingly, the Individual "was placed on a Security Site Access Restriction on October 31, 2019." Ex. 6 at 1; Ex. 5 at 3; Ex. C at 1.

The Individual was subsequently interviewed by an investigator assigned to the matter on November 6, 2019, and on November 7, 2019, an Employee Relations Investigation Report (ERIR) was issued. Ex. 6; Ex. C. The ERIR notes that the Individual denied the use of any illicit substance, and that he stated his belief that his use of cannabidiol (CBD), which he began using in 2018 to treat chronic pain, resulted in the positive test. Ex. 6 at 1; Ex. C a 1. The Individual confirmed the fact that he had "read and signed the training for [the]... 'Workplace Substance Abuse Program,'" Ex. 6 at 1; Ex. C at 1.

¹ The regulations define access authorization as "an administrative determination that an individual is eligible for access to classified matter or is eligible for access to, or control over, special nuclear material." 10 C.F.R. § 710.5(a). This Decision will refer to such authorization as access authorization or security clearance.

on June 6, 2019, but “stated that he did not see or read the all-employee communication on September 16, 2019[,]” which informed employees that CBD oils can result in positive drug tests. Ex. 6 at 2; Ex. 10; Ex. 11; Ex. 14; Ex. C at 2.² After noting the Individual felt there was “no issue” with taking CBD oil because he tested negative for the marijuana metabolite at “the initial employment drug screen...in October 2018[,]” the ERIR concluded that the most likely reason the Individual failed the drug test was trace amounts of Tetrahydrocannabinol (THC), the main psychoactive compound in marijuana, in the CBD oil. Ex. 6 at 2; Ex. C at 2.³

From December 17, 2019, to December 8, 2020, the Individual was tested for illegal substances on ten different occasions and was negative for the marijuana metabolite each time. Ex. 6a; Ex. 6c; Ex. A. The Individual was recommended for return to work on January 7, 2020, after he participated in his employer’s Employee Assistance Program (EAP) and underwent medical evaluations. Ex. 7 at 1; Ex. B at 6.

Based on the information provided, the Local Security Office (LSO) asked the Individual to complete a Letter of Interrogatory (LOI), which he submitted on January 31, 2020. Ex. 9. In the LOI, the Individual stated that he had been using CBD oil, which he obtained from what he believed was a reputable seller, for approximately two years at the time he tested positive. Ex. 9 at 1. He indicated that he believed THC had accumulated in his system over time, which explained why he had passed two previous drug tests. Ex. 9 at 1.

Due to unresolved security concerns, the LSO began the present administrative review proceeding by issuing a Notification Letter to the Individual. The Notification Letter informed the Individual that he was entitled to a hearing before an Administrative Judge to resolve the substantial doubt regarding his eligibility to hold a security clearance. *See* 10 C.F.R. § 710.21. The Individual requested a hearing, and the LSO forwarded the Individual’s request to the Office of Hearings and Appeals (OHA). The Director of OHA appointed me as the Administrative Judge in this matter. At the hearing I convened pursuant to 10 C.F.R. § 710.25(d), (e), and (g), the Individual testified on his own behalf, presented the testimony of two other witnesses, and submitted five exhibits, marked as Exhibits A through E. *See* Transcript of Hearing, Case No. PSH-21-0095 (hereinafter cited as “Tr.”). The DOE Counsel presented the testimony of one witness and submitted nineteen exhibits marked as Exhibits 1 through 19.

II. Notification Letter and the Associated Security Concerns

² The DOE also submitted: (1) an October 12, 2018, Clearance Criteria Statement signed by the Individual, which indicates the Individual understands that derogatory information includes, but is not limited to, the use of illicit or controlled substances. Ex. 12; (2) a Confirmation of Receipt of Drug-Free Workplace Policy and Agreement to Comply with the Terms, which was signed by the Individual on May 6, 2019. Ex. 13; (3) a July 25, 2019, Memorandum from the Substance Abuse and Mental Health Services Administration and an October 8, 2019, DOECAST, which both state that CBD products may result in a positive drug test, placing the employee’s clearance in jeopardy. Ex 16; Ex. 17.

³ A July 11, 2019, Policy Clarification from the Office of Personnel and Facility Clearances and Classification, Office of Defense of Nuclear Security, indicates that although CBD products are “legal under federal law as long as they contain no more than 0.3 percent...[THC,]” the Food and Drug Administration does not certify [the accuracy of the labeling of] these products. Ex. 15 at 3. Accordingly, a CBD product may contain more than the 0.3 percent THC. Ex. 15 at 3.

Under Guideline H (Drug Involvement), “[t]he illegal use of controlled substances, to include the misuse of prescription and non-prescription drugs, and the use of other substances that cause physical or mental impairment or are used in a manner inconsistent with their intended purpose 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. Under Guideline H, the LSO alleged that: (1) the Individual was chosen for a random drug screen on October 24, 2019, which was positive for a marijuana metabolite above the allowable limit; (2) the Individual attributed his positive drug test to the use of use CBD oil products, which he began taking in mid-2018 to treat his chronic pain; (3) the Individual participated in a “Workplace Substance Abuse Program” on June 6, 2019, and reviewed and signed a document acknowledging his completion of the training; (4) the Individual admitted “that he did not see or read the all-employee communication sent on September 16, 2019, indicating that CBD oils could result in a positive drug test; (5) the responses provided in the January 21, 2020, LOI indicated that the Individual had used CBD oil for over two years prior to testing positive, but that “he had passed two previous drug tests while taking [the] CBD isolate oil.” Ex. 2 at 1-2.

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) (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 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. Hearing Testimony

The Individual’s supervisor, who observed the Individual in both professional and social settings, testified to the Individual’s good work performance and “high character at work[,]” and confirmed his belief that the Individual is a reliable employee. Tr. at 13-14. Further, he observed the Individual behaving in only a respectful manner in social settings and had never observed the

Individual in an impaired state. Tr. at 14. The Individual made his supervisor aware of his CBD oil use immediately after learning that the test results were positive for the marijuana metabolite, and further, the Individual's supervisor was aware that the Individual was subject to random monthly drug testing and received counseling via their employer's EAP. Tr. at 16-18, 23, 25-28.⁴ The Individual continued to work for approximately one year after testing positive for the marijuana metabolite, and during this time, the Individual's performance improved. Tr. at 19-20.

The Individual's father confirmed that the Individual suffered sports-related injuries in his youth, requiring medical treatment, which included prescription opioids. Tr. at 37-40. He also testified that he discussed with the individual the use of CBD oil as an alternative analgesic to opioids. Tr. at 41. He stated that the Individual conducted his own research into the use of CBD oil, and after the Individual began using the product, the Individual stated, "Dad, I think this is working." Tr. at 41-42, 45-46. The witness confirmed that he had never known the Individual to have a "substance abuse problem." Tr. at 53. The Individual's father also testified that their family takes a "very serious, serious approach[]" toward marijuana use, stating "marijuana use is not something to be taken lightly, especially today." Tr. at 48-51. He continued that, even though their home state legalized marijuana, he had a discussion with his children emphasizing that marijuana still had its same effects on a person. Tr. at 49.

The Individual began his testimony by denying the use of marijuana at any time, despite its legalization in the Individual's home state. Tr. at 61. He began the daily consumption of CBD oil pursuant to the recommended amount on the tincture in 2018, not only to avoid using opioids and muscle relaxants, as he found them to be "mind altering," but to treat his ongoing pain and nerve dysfunction and for its anti-inflammatory properties. Tr. at 62-64, 66, 73-75.

Prior to purchasing any CBD products, the Individual discussed other, "more natural" treatment modalities with his physician. Tr. at 73-74. His physician acknowledged that CBD "could be a good option," but could not prescribe it, as it was not a controlled substance. Tr. at 74. Knowing that he could potentially test positive for THC, the Individual conducted approximately two months of research to find a product that was, among other things, THC free. Tr. at 88-89. The Individual settled on "the purest CBD oil that [he] could find[.]" but after testing positive, he contacted the manufacturer only to learn that the product was batch tested, meaning that every batch had less than 0.3 percent THC, as opposed to every bottle. Tr. at 65, 68-70. Although the manufacturer marketed the product as containing 0.0 percent THC, the Individual learned, upon reaching out to the manufacturer after testing positive for the marijuana metabolite, that the product could contain 0.3 percent THC or less. Tr. at 73. Nearly two years after his initial use, the Individual discontinued his use of CBD oil the day after the positive test in October 2019 and discarded the remaining CBD oil tincture. Tr. at 64, 66. In addition to stating his intention to never use CBD oil again, the Individual denied any side effects or withdrawals upon discontinuing use of CBD oil. Tr. at 108, 112. He also indicated that although he still experiences ongoing pain, he has found other ways to mitigate his chronic pain. Tr. at 114.

⁴ The Individual's supervisor found credible the Individual's explanation that he had tested positive for the marijuana metabolite by consuming CBD oil. Tr. at 26.

The Individual was asked why he failed to disclose his CBD use during a medical examination approximately two months prior to the positive drug test. Tr. at 78-79; Ex. B. The Individual stated that he was not seeking medical attention to treat the problem for which he consumed the CBD oil, and accordingly, he did not feel his CBD consumption was relevant. Tr. at 79.⁵

Further, the Individual acknowledged that he failed to examine policy-related newsletters from his employer regarding drug use, simply because he was not a drug user, and because CBD oil was not and is not a controlled substance. Tr. at 90. As a relatively new employee at the time, his work schedule was also not conducive to prioritizing such communications. Tr. at 91. The Individual acknowledged that he had not disclosed the fact that he was using CBD oil to anyone in his chain of command, to security personnel, or to medical personnel, but clarified that he felt that because he had not tested positive for the marijuana metabolite on two prior occasions, he did not feel it necessary to alert anyone to his usage. Tr. at 97-98, 102-103.

V. Analysis

The Adjudicative Guidelines provide that an Individual can 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 action 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. 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).

⁵ The Individual underwent further questioning regarding medical records from September 2018, as he had not listed CBD oil among the supplements and vitamins, he indicated he was consuming. Tr. at 80-81. Through his testimony on this matter, it was determined that the Individual likely began consuming CBD oil in fall 2018, not summer 2018. Tr. at 82-84.

As an initial matter, based on the stated conclusion in the ERIR, credible testimony presented at the hearing, and the Individual's consistent assertions regarding the matter, the evidence strongly suggests the Individual tested positive due to his consumption of CBD oil. However, THC, which can appear in CBD products, is a controlled substance under federal guidelines regardless of the legality of CBD products. DOE Counsel cites *Personnel Security Hearing*, OHA Case No. PSH-20-0020 (2020) (*PSH-20-2020*), in which the Individual, whose security clearance was restored, "approached his employer prior to his use of CBD, and long before his selection for random testing, about the ramifications of using CBD products." Tr. at 127-128; Ex. 19. DOE Counsel apparently argues that in the matter *PSH-20-0020*, the aforementioned behavior "establish[ed] the fact that the individual was actively using CBD oil, let his employer know it, and then came up positive." Tr. at 128. However, there is one crucial distinction between the matter at hand and *PSH-20-0020*. Specifically, the record in this case is clear about the fact that the Individual began using CBD oil prior to his employment with the contractor, and certainly prior to the receipt of his security clearance. Reporting his intended use of the product was, therefore, not anything the Individual considered at the time he formed his decision to use CBD oil to relieve chronic pain because he did not believe he was using an illegal or controlled substance.

Further, in *PSH-20-0020*, the Individual "produced testing from the batches that he had purchased for use," and presented expert testimony indicating it is possible that the Individual would test positive by using CBD products with a concentration of THC the lab revealed the batch contained. Tr. at 128; Ex. 19 at 4. However, based on the purchase history the Individual presented coupled with employer newsletters and policy clarifications warning employees that the use of CBD products can result in positive drug tests, it is plausible that the Individual consumed CBD oil and that his use of said product could result in a positive drug test. Ex. E; Ex. 15; Ex. 16; Ex. 17.

DOE Counsel also cites the fact that the Individual failed to read either his employer's or the agency's newsletters or policy clarifications regarding the use of CBD products, however, considering the evidence before me and the testimony provided, I find that the Individual has mitigated the stated Guideline H concerns pursuant to ¶ 26(a)-(b) of the Adjudicative Guidelines. After testing positive for the marijuana metabolite in October 2019, the Individual subsequently underwent random drug testing monthly over the span of approximately one year, testing negative for all listed substances, including the marijuana metabolite, each time. Additionally, the Individual successfully cooperated with his employer's EAP and underwent medical testing, resulting in a January 7, 2020, return to duty recommendation. The Individual credibly testified that he discontinued the use of CBD oil after the positive test, discarded the remaining CBD tincture, and repeatedly and unequivocally stated in the LOI and during his testimony that he did not intend to continue using CBD oil. This, even though he continues to suffer from chronic pain, which he stated he has endeavored to mitigate by other means.

Not only is the record unequivocal that the Individual last consumed THC, by way of CBD oil, so long ago as to indicate that it is unlikely to recur, but he has also acknowledged that he consumed THC through CBD oil and has presented evidence of action taken to overcome this problem.

I need not address the mitigating factors at Adjudicative Guidelines ¶ 26 (c) and (d), as they are not applicable in this matter.

VI. Conclusion

For the reasons set forth above, I conclude that the LSO properly invoked Guideline H of the Adjudicative Guidelines. After considering all 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 brought forth sufficient evidence to resolve the security concerns set forth in the Summary of Security Concerns. Accordingly, the Individual has 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 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