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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 27, 2021 ) Case No.: PSH-21-0114  
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Issued: November 9, 2021

**Administrative Judge Decision**

*Steven L. Fine, Administrative Judge:*

This Decision concerns the eligibility of XXXX XXXXX (hereinafter referred to as “the Individual”) for access authorization under the Department of Energy’s (DOE) regulations set forth at 10 C.F.R. Part 710, entitled, “Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material.”<sup>1</sup> For the reasons set forth below, I conclude that the Individual’s security clearance should not be restored.

**I. BACKGROUND**

On January 25, 2021, the Individual, whose occupation required him to hold a Commercial Driver’s License (CDL) was required to provide a urine specimen to be screened for illegal drug use, in accordance with the United States Department of Transportation’s Drug and Alcohol Testing Regulations.<sup>2</sup> Ex. 4 at 2; Ex. H at 1. On February 1, 2021, a Medical Review Officer (MRO)

<sup>1</sup> Under the regulations, “Access authorization” means 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). Such authorization will also be referred to in this Decision as a security clearance.

<sup>2</sup> As part of the testing process, the Individual was required to sign a Forensic Testing Custody and Control Form (the CCF), which stated: “I certify that I provided my urine specimen to the collector; that I have not adulterated it in any manner; each specimen bottle used was sealed with a tamper-evident seal in my presence; and that the information provided in this form and on the label affixed to each specimen bottle is correct.” Ex. 4 at 2. The signature block of the CCF further stated:

After the Medical Review Officer receives the test results for the specimen identified by this form, he/she may contact you to ask about prescriptions and over-the-counter medications you may have taken. Therefore, you may want to make a list of those medications for your own records. **THIS LIST IS NOT NECESSARY.** If you choose to make a list, do so either on a separate piece of paper or on the back of your copy (Copy 5). – **DO NOT PROVIDE THIS INFORMATION ON THE BACK OF ANY OTHER COPY OF THE FORM. TAKE COPY 5 WITH YOU.**

Ex. 4 at 2 (emphasis in the original).

certified the initial screening test of the Individual's January 25, 2021, urine sample as positive for amphetamine and methamphetamine. Ex. 4 at 2. On February 10, 2021, the MRO certified the confirmation test of the Individual's January 25, 2021, urine sample as positive for amphetamine and methamphetamine. Ex. 4 at 2.

On March 21, 2021, the LSO began the present administrative review proceeding by issuing a Notification Letter to the Individual informing him 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), I took testimony from the Individual. *See* Transcript of Hearing, Case No. PSH-21-0114 (hereinafter cited as "Tr."). The LSO submitted five exhibits, marked as Exhibits 1 through 5 (hereinafter cited as "Ex."). The Individual submitted eight exhibits, marked as Exhibits A through H.

In his hearing request, the Individual stated:

I have had a Q clearance and HRP for about 11 or 12 years. In all that time I have had probably 60 random drug tests and never had a problem with one. I do not do drugs and am embarrassed at what this has done to me. It was a CDL random drug/alcohol test that was given that day. Due to it being that, I had to enroll with a (SAP) substance abuse professional for counseling and 40 hours of classes on abuse. In that time with her I had told her the only thing I had taken was Sudafed and she told me that could have given me a false/positive result that I got. Sudafed is an over the counter sinus medicine and I had no idea this could happen.

Request for Hearing at 1.

Five of the Individual's exhibits are character references from the Individual's co-workers and supervisor indicating that he is an exemplary employee. Exs. A, D, E, F, and G. Two of the Individual's exhibits are 121 CCF's showing that 41 urine drug screening tests had been administered to the Individual from August 9, 2006, to September 23, 2021.<sup>3</sup> Exs. B and C. The Individual also submitted 13 laboratory reports, from August 16, 2018, to September 23, 2021, indicating that the results of 13 urine drug screening tests were negative. Ex. B.

The other exhibit submitted by the Individual is an assessment of the Individual conducted by a Certified Alcohol and Drug Counselor (the Counselor).<sup>4</sup> In this assessment, the Counselor reported that she had assessed the Individual on February 3, 2021. Ex. H at 1. In her assessment, the Counselor stated: "[The Individual] reports he was taking over-the-counter cold and decongestion medication and then was positive for methamphetamine on a random drug test. He denies any experimentation or history of illegal methamphetamine use in his life." Ex. H at 1. The Counselor further stated:

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<sup>3</sup> Although the Individual submitted 134 CCFs, many of the CCFs submitted by the Individual were duplicates.

<sup>4</sup> In addition to being a Certified Alcohol and Drug Counselor, the Counselor is also a "National Certified Addictions Counselor I" and a "Substance Abuse Professional." Ex. H at 1.

Legal amphetamines are available in the form of tablets or capsules. Additionally, methamphetamine is available in non-psychoactive form in medications. Unfortunately, it is these same over-the-counter medications that are used to manufacture illegal or street methamphetamine. Therefore, it is important to know that methamphetamine may test positive on drug tests when there is use of common non-prescription nasal inhalers and tablets specifically for decongestion. **It is possible to distinguish between illicit methamphetamine positives and legal nonprescription use by ordering a lab test called a d/l isomerization test before verifying a *methamphetamine*-positive result.**

Ex. H at 1. (emphasis supplied).

The Department of Health and Human Services' Substance Abuse and Mental Health Services Administration's Center for Substance Abuse Prevention's *Medical Review Officer Guidance Manual for Federal Workplace Drug Testing Programs, (revised 2018)* (MRO Manual) recognizes that: "Some non-prescription products contain sympathomimetic amines that can cause a positive result on an initial immunoassay test." MRO Manual at § 5.1.3. However, the MRO Manual further recognizes that: "The confirmatory test is specific for methamphetamine and amphetamine. Specimens containing sympathomimetic amines will not be reported positive by the laboratory after conducting the confirmatory test." MRO Manual at § 5.1.3. The MRO further acknowledges that some over-the-counter (OTC) products can cause a false positive result for methamphetamine and that enantiomer analysis could be used to determine whether a positive test resulted from an OTC product. MRO at § 5.1.3. It is important to note, that the MRO does not recognize the necessity to use enantiomer analysis to validate positive test results for amphetamines. In fact, the MRO states:

[M]ethamphetamine metabolizes to amphetamine. This occurs quickly, via a simple demethylation reaction. Because the sympathomimetic amines are not converted to amphetamine, the presence of amphetamine is supporting evidence for methamphetamine use.

MRO at § 5.1.

## **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, citing the Bond Amendment and Guideline H of the *National Security Adjudicative Guidelines for Determining Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position*, effective June 8, 2017 (Adjudicative Guidelines).

The LSO alleges that the Individual's urine tests indicating that he had used amphetamine and methamphetamine raise security concerns under Guideline H. This information adequately justifies the LSO's invocation of Guideline H. Guideline H (Drug Involvement and Substance Misuse) provides that "the illegal use of controlled substances to include the misuse of prescription and

non-prescription drug 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. The conditions that could raise a disqualifying security concern under Guideline H include “any substance misuse” “testing positive for an illegal drug,” and “any illegal drug use while granted access to classified information or holding a sensitive position.” Guideline H at § 25(a), (b) and (f).

As stated above, the Notification letter also cites the Bond Amendment. The Bond Amendment states, in pertinent part, that an agency may refuse to grant or renew a security clearance for an individual “who is an unlawful user of a controlled substance or an addict . . .” 50 U.S.C. § 3343(b). The LSO noted that the Individual tested positive for amphetamines and methamphetamine on a urine drug test. For purposes of applying the Bond Amendment prohibition on granting or renewing a security clearance to an unlawful user of a controlled substance or an addict, the following definitions apply:

- a. An unlawful user of a controlled substance is any person who uses a controlled substance and has lost the power of self-control with reference to the use of the controlled substance or who is a current user of the controlled substance in a manner other than as prescribed by a licensed physician. Such use is not limited to the use of drugs on a particular day, or within a matter of days or weeks before, but rather that the unlawful use occurred recently enough to indicate the individual is actively engaged in such conduct.
- b. An addict of a controlled substance is as defined in 21 U.S.C. § 802(1), which is any individual who habitually uses any narcotic drug so as to endanger the public morals, health, safety, or welfare; or is so far addicted to the use of narcotic drugs as to have lost the power of self-control with reference to his or her addiction.

April 23, 2021, Memorandum from David M. Turk, Attachment 2 at page 1. Given the Individual’s positive drug test, I find that the LSO’s concerns under the Bond Amendment are 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 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 entire process is a conscientious scrutiny of a number of variables known as the “whole person concept.” Adjudicative Guidelines § 2(a). The protection of the national security is the paramount consideration. 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 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. The discussion below reflects my application of these factors to the testimony and exhibits presented by both sides in this case.

#### **IV. THE HEARING**

The Individual was the only witness at the hearing. He denied that he ever used amphetamine or methamphetamine and testified that he was very surprised by the positive test result. Tr. at 15. The Individual further described himself as “baffled and upset” by the positive drug test. Tr. at 21. The Individual testified that he believed that he had tested positive because he had used four Sudafed pills to relieve nasal congestion on the weekend before his urine screening. Tr. at 12. Because of the positive test result, he was required to have two interviews with the Counselor and 40 hours of education. Tr. at 16. He was also tested for drugs when he met with the Counselor. Tr. at 16. This drug test was negative. Tr. at 16. The Individual testified that the Counselor informed him that Sudafed could cause a positive test result for amphetamines. Tr. at 15. The Individual asserted that he had taken three or four drug tests after the positive drug test and that each test was negative. Tr. at 19. The Individual testified that he has been able to maintain his Commercial Driver’s License after his positive test result. Tr. at 27. The Individual also testified that he had been repeatedly tested for drugs since 2006 and had never tested positive before. Tr. at 32-33. The Individual admitted that he had no evidence indicating that Sudafed could cause a false positive on the confirmation test. Tr. at 33. The Individual also admitted that none of the people who submitted character references on his behalf spend time with him outside of work. Tr. at 21.

#### **V. ANALYSIS**

Since the Guideline H and Bond Amendment concerns arise from the same allegations, I will analyze them together. As stated above, the Bond Amendment disqualifies an individual from holding a security clearance if that individual “is an unlawful user of a controlled substance or an addict.” 50 U.S.C. § 3343(b). However, it also provides for a waiver from disqualification. 50 U.S.C. § 3343(c)(2)(B). This section provides that “[i]n a meritorious case, an exception to the disqualification...may be authorized if there are mitigating factors” authorized in accordance with the Adjudicative Guidelines. *Id.*

In the present case, the Individual has testified, without significant corroboration, that he has never used amphetamines or methamphetamines. He further testified, again without corroboration, that he had used Sudafed shortly before his drug test. The Individual’s testimony appeared sincere, and he has a long history of negative random drug tests. However, the objective evidence in the record, *i.e.*, the confirmatory test certified on February 10, 2021, indicates that the Individual had used

amphetamines and methamphetamines. While the Individual has submitted a letter from the Counselor in which she opines that the Individual's use of an OTC medication could have resulted in a false positive test for methamphetamines on the confirmatory test (unless enantiomer analysis was used) it is important to note that she did not similarly opine that the use of an OTC medication could result in a false positive test for amphetamines on the confirmatory test. Since the Individual has not presented any evidence that his use of an OTC medication could have resulted in a false positive test for amphetamines on the confirmatory test, the February 10, 2021, positive confirmation constitutes highly probative evidence that the Individual had used amphetamines and nothing in the record casts doubt on the accuracy of that test. Therefore, the evidence in the record indicates that the Individual used amphetamines and possibly methamphetamines and failed to provide accurate information concerning his amphetamine and methamphetamine use during this proceeding.

The Adjudicative Guidelines set forth four conditions which may provide mitigation of security concerns arising under Guideline H. Guideline H at § 26. The Individual has not shown that any of these conditions are present in the instant case to mitigate the security concerns raised under Guideline H.

Section 26(a) provides that security concerns raised under Guideline H can be mitigated when "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." In the present case, the Individual's apparent failure to provide accurate information concerning his drug use raises significant doubts about his current reliability, trustworthiness, or good judgment. Accordingly, I find that the mitigating condition set forth at § 26(a) is not present in the instant case.

Section 26(b) provides that security concerns raised under Guideline H can be mitigated when "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 . . . ." In the present case, the Individual has not acknowledged his substance abuse and has not taken any actions to address his abuse. Accordingly, I find that the mitigating condition set forth at § 26(b) is not present in the instant case.

Section 26(c) provides that security concerns raised under Guideline H can be mitigated when the drug abuse occurred "after a severe or prolonged illness during which these drugs were prescribed, and abuse has since ended." There is no evidence in the record indicating that the Individual had been prescribed amphetamines, therefore the mitigating condition set forth at § 26(c) is not present in the instant case.

Section 26(d) provides that security concerns raised under Guideline H can be mitigated by "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." In the present case, while the Individual has testified that he has completed an educational program, he has not shown that he has completed a treatment protocol specifically designed to address substance abuse issues. Moreover, there is no evidence in the record indicating that he has received a favorable prognosis by a duly qualified medical

professional. Accordingly, I find that the mitigating condition set forth at § 26(d) is not present in the instant case.

For the reasons set forth above, I conclude that the Individual has not mitigated or resolved the security concerns set forth in the Notification Letter under Guideline H. I additionally find that his disqualification from holding a security clearance pursuant to the Bond Amendment is not eligible for a waiver. Guideline J at ¶ 32(a), (d); 50 U.S.C. § 3343(c)(2)(B). As such, I find that the DOE should not restore access authorization to the Individual.

## **VI. CONCLUSION**

For the reasons set forth above, I conclude that the LSO properly invoked Guideline H as well as the Bond Amendment. After considering all of the evidence, both favorable and unfavorable, in a commonsense manner, I find that the Individual has not resolved the security concerns raised under Guideline H and the Bond Amendment. 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. The parties may seek review of this Decision by an Appeal Panel under the procedures set forth at 10 C.F.R. § 710.28.

Steven L. Fine  
Administrative Judge  
Office of Hearings and Appeals