

*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 XXXXXX's.

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

In the Matter of: Personnel Security Hearing)
)
Filing Date: September 29, 2021) Case No.: PSH-21-0124
)
)
_____)

Issued: December 28, 2021

Administrative Judge Decision

Steven L. Fine, Administrative Judge:

This Decision concerns the eligibility of XXXXXXXXXXXXXXXX (hereinafter referred to as “the Individual”) to hold an access authorization under the Department of Energy’s (DOE) regulations set forth at 10 C.F.R. Part 710, Subpart A, entitled “General Procedures for Determining Eligibility for Access to Classified Matter of 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

On April 26, 2021, the Individual self-reported that he had unintentionally ingested a cookie containing Tetrahydrocannabinol (THC), the main psychoactive chemical in marijuana. Ex. 6 at 3. The Individual’s employer administered a drug test to him on that date, and on May 4, 2021, the Individual’s April 26th positive test sample was confirmed as positive for a marijuana metabolite. Ex. 4 at 1-2.

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.

¹ Access to authorization is defined as “an administrative determination that an individual is eligible for access to classified mater or is eligible for access to, or control over, special nuclear material.” 10 C.F.R. § 710.5(a). Such authorization will be referred to variously in this Decision as access authorization or security clearance

§ 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 and presented the testimony of seven other witnesses, along with seven exhibits marked as Exhibits A through G (hereinafter cited as "Ex."). *See* Transcript of Hearing, Case No. PSH-21-0124 (hereinafter cited as "Tr."). The DOE submitted seven exhibits marked as Exhibit 1 through 7.

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 substantial doubt concerning his eligibility for a security clearance. That information pertains to 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 further cites the Bond Amendment, codified at 50 U.S.C. § 3343, in support of its conclusion that the Individual is ineligible for a security clearance.

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, while in possession of a DOE security clearance, the Individual tested positive for a marijuana metabolite on April 26, 2021. Ex. 1 at 1. I find that the LSO's concerns under Guideline H are justified.

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 made the same allegation, stating that the Individual tested positive for the marijuana metabolite on April 26, 2021. Ex. 1 at 1. 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 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 testified that on the day of the incident, his partner’s child was called to visit the home of her maternal aunt (his partner’s sister) so that she could give the Individual’s family food items she no longer wanted. Tr. at 16-17. The food that was given to the child included a gift bag containing cookies. Tr. at 17. After receiving the bag of cookies, the child distributed the cookies among her household members, including the Individual. Tr. at 17. The same day, his partner’s sister called the Individual’s partner to inform her not to eat the cookies she had previously given the family, at which point the Individual discovered the cookies contained THC. Tr. at 17-18. Out of concern for the minor children who had ingested the cookies, his partner’s sister came to the Individual’s home to monitor the family. Tr. at 18. The Individual denied feeling any effects from the psychoactive THC that night. Tr. at 18.

The next morning, the Individual reported to his duty station and reported the incident to his supervisor and Occupational Medicine, an act that the Individual believes demonstrates his trustworthiness and reliability, at which point he was evaluated by a doctor and subsequently cleared to return to work without any restrictions. Tr. at 18-19, 33.² The Individual was promptly drug tested, and after testing positive for THC, he was escorted off the premises and his access to the site was restricted. Tr. at 19.³ The Individual stated that his clearance was restored on April 27, 2021, after an investigation was conducted into the matter. Tr. at 20.⁴ In early May 2021, tests

² An April 26, 2021, duty disposition letter electronically signed by the examining doctor indicates the Individual may return to work without any restrictions. Ex. C.

³ Although subject to random drug testing by the terms of his employment, the Individual had not been drug tested in approximately two years prior to the incident. Tr. at 31.

⁴ An April 27, 2021, email indicates that the Individual’s access to the laboratory had been restored. Ex. E.

confirming the presence of the THC were returned, and the Individual received a suspension briefing later that month. Tr. at 20.⁵ The Individual denied any illicit drug use or the use of illicit substances by anyone in his household, and although he knew the maternal aunt's husband possessed a medical marijuana card, he denied any knowledge of whether the maternal aunt or her husband had been using illicit substances. Tr. at 21-22, 24, 29-30.⁶ The Individual also denied having any knowledge that there was THC in the cookies prior to being told as much. Tr. at 28, 38. Now, as a precaution, he refuses to consume anything if he is unable to verify its origins and will discard any confections he receives as a gift. Tr. at 35, 38.

The Individual's partner began her testimony by stating that she had never known or suspected the Individual to use any illicit substances, after which she went on to confirm the Individual's version of events, stating that her sister provided them with cookies wrapped in a gift bag and told them not to eat the cookies after they had all consumed some. Tr. at 43-45, 48.⁷ Although it was common for her to retrieve food from her sister's home, such an incident had never occurred before, and further, she had never known her sister or her sister's husband to use THC. Tr. at 50-52. She also confirmed the fact that the Individual not only desired to report the incident, but that he did report the incident the next day, an act which reflected on his good judgment and reliability. Tr. at 45, 56-57. She has discussed the incident with her sister and her husband to avoid any such event taking place again. Tr. at 53-55.

The Individual's supervisor denied suspecting any drug use on behalf of the Individual or being given any reason to suspect drug use. Further, the Individual's supervisor testimony was consistent with the version of events recounted by the Individual in his testimony. Tr. at 67-68, 70. The Individual's supervisor asserted that prior to the pandemic, random drug tests were performed with regularity, but since the pandemic, "it was very well known that there was no drug screening happening[.]" Tr. at 68.⁸ Accordingly, his supervisor believes that the Individual's motivation for

⁵ A May 25, 2021, email from the Individual's supervisor regarding the status of the Individual's clearance asks that the Individual's card access to the premises not be disabled so that the Individual can continue "work on uncleared projects." Ex. Ex. F at 1.

⁶ The maternal aunt's husband, who suffers from back pain and obtained a medical marijuana card from his doctor, testified that it is "very rare" that he ingests any marijuana himself, and that he intended to discard the cookies. Tr. at 124-25, 133. The Individual's partner did not learn that her brother-in-law possessed such a card until after she consumed one of the cookies. Tr. at 52.

⁷ The Individual's partner's supervisor also testified, stating that he has never suspected or known the Individual's partner to use illicit substances. Tr. at 92-93.

⁸ The Contractor's personnel security employee confirmed in her testimony that random drug testing "was being conducted on a much smaller scale." Tr. at 98, 104. She stated the Individual was given a reasonable suspicion test and underwent a medical examination because of reporting that he had accidentally ingested an illicit substance. Tr. at 97-98. Although the Individual notified his supervisor that he had accidentally ingested THC, the incident had not been reported to "clearance possessing[.]" Tr. at 102. The employee stated that they should have informed the Individual of his mistake so that he could correct the matter, as there was no indication that the Individual was seeking to conceal the incident. Tr. at 102. Accordingly, the same employee wrote an August 25, 2021, memorandum to the DOE, stating that the Individual had reported an incident for which he was drug tested. Ex. B. The test came back as a presumptive positive for THC, after which they were able to corroborate the Individual's version of events, allowing

self-reporting was the desire to be transparent, and not the fear of a random drug test. He stated his belief that this reflects positively on the Individual's judgment. Tr. at 68, 70-72. A second supervisor, who sees the Individual approximately once a week, described the Individual as trustworthy, reliable, and honest, and stated that he was impressed with the Individual's leadership skills. Tr. at 76-77, 82. He also stated that he had no reason to believe that the Individual used drugs. Tr. at 78-79. The second supervisor confirmed that the Individual reported the incident to him on April 26, 2021, and that the Individual had no reason to believe he would be drug tested that day. Tr. at 80-81, 84. He feels the fact that the Individual reported "speaks a lot to his ethics, his honesty, reliability." Tr. at 86. He expressed surprise that the Individual's access authorization was suspended and believes the incident unfolded as the Individual recounted it. Tr. at 86-87.

The maternal aunt testified that she had been cleaning her husband's office when she discovered a bag of cookies that appeared to have been a birthday gift. Tr. at 110-11. She took the cookies home, as her husband was going to be absent for some time, and she had no reason to believe the cookies contained THC. Tr. at 111. She called her niece to retrieve the cookies as well as other food items she wanted removed from her home. Tr. at 112. Later in the evening, while she was scolding her husband for keeping cookies in his office, he informed her that the cookies contained THC, at which point she immediately contacted her sister. Tr. at 113. When she was told the family had already ingested the cookies, she left her home to aid her sister and her family. Tr. at 113-14. Although her husband has a medical marijuana card, she has never used such substances, and although she has frequently been gifted baked goods, she has not known any of them to contain THC. Tr. at 117-19. Her husband testified that he not only knows the Individual as his sister-in-law's partner, but he also spends time with the Individual in the context of his business. Tr. at 129-30. He testified that, although he infrequently consumes THC, he knew the cookies contained THC when they were gifted to him, so he placed them in his office desk, to which only he and his wife had access. Tr. 130-31, 133-34. He learned his wife had given the cookies to their niece later that day, at which point he immediately told her the cookies contained THC. Tr. at 132. He has never known the Individual to consume any illegal substances. Tr. at 132. He stated that does not consume THC in front of anyone, including his wife. Tr. at 133-34.

V. Analysis

As the Guideline H and Bond Amendment concerns arose from the same concern, I will analyze them together. As stated above, the Bond Amendment disqualifies an individual from holding a security clearance if the 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.* Additionally, among other mitigating factors, an Individual may mitigate concerns under Guideline H if "[t]he behavior happened so long ago, was so infrequent,

the Individual to return to work without any restrictions. Ex. B. Accordingly, although the drug test came back positive for THC in May 2021, the Individual remained employed, as it was an accidental ingestion. Ex. B.

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[.]” Adjudicative Guidelines at ¶ 26(a). I find that this mitigating factor is present in the instant case.

Based on the credible testimony provided by all parties involved, the evidence bears out the fact that this incident of accidental ingestion of THC happened under such circumstances that it is unlikely to recur. As an initial matter, the THC was delivered to him in an inconspicuous cookie from an individual he did not know to consume any illicit substances, and accordingly, he had no reason to believe the cookie contained any psychoactive ingredients such as THC. It was also not unheard of for the maternal aunt to provide his family with various food items she did not want in her home from time to time. Although this incident was clearly an accidental ingestion, the Individual's testimony evidenced his understanding that such an incident should not be repeated; he stated that, henceforth, he will not consume any food items if he is unable to verify their origin and will discard these items if they are gifted to him. Once the Individual learned that he had ingested THC baked into the cookie that he consumed, he reported the incident to his supervisor, despite the unlikelihood that he was going to be chosen to submit to a random drug test. This act does, in fact, show that the Individual exhibits good judgement, reliability, and trustworthiness, a sentiment echoed by witness testimony.

Accordingly, I find that the Individual has mitigated the Guideline H security concerns, and I additionally find that his disqualification from holding a security clearance pursuant to the Bond Amendment is eligible for a waiver. 50 U.S.C. § 3343(c)(2)(B).

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 the evidence, both favorable and unfavorable, in a commonsense manner, I find that the Individual has mitigated the security concerns raised under Guideline H and that waiver of the Bond Amendment is appropriate in this case. 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. 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