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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: December 22, 2021	)	Case No.:	PSH-22-0037
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Issued: March 28, 2022

**Administrative Judge Decision**

Phillip Harmonick, Administrative Judge:

This Decision concerns the eligibility of XXXXXXXXXXXX (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."<sup>1</sup> 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 not be restored.

**I. BACKGROUND**

The Individual is employed by a DOE contractor in a position that requires him to hold a security clearance. On August 12, 2021, the Individual was selected for a random drug screening. The results of the test were positive for marijuana metabolites. Ex. 11, Att. 1.

The local security office (LSO) issued the Individual a letter in which it notified him that it possessed reliable information that created substantial doubt regarding his eligibility to hold a security clearance. In a Summary of Security Concerns (SSC) attached to the letter, the LSO explained that the derogatory information raised security concerns under Guideline H (Drug Involvement and Substance Misuse) of the Adjudicative Guidelines. Ex. 2.

The Individual exercised his right to request an administrative review hearing pursuant to 10 C.F.R. Part 710. Ex. 6. The Director of the Office of Hearings and Appeals (OHA) appointed me as the Administrative Judge in this matter, and I subsequently conducted an administrative

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<sup>1</sup> 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.

hearing. The LSO submitted eleven exhibits (Ex. 1–11). The Individual submitted three exhibits (Ex. A–C). The Individual testified on his own behalf. Hearing Transcript (Tr.) at 6–7. The LSO did not call any witnesses.

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

The LSO cited Guideline H (Drug Involvement and Substance Misuse) as the basis for its determination that the Individual was ineligible for access authorization. Ex. 2 at 2. “The 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. The SSC cited the results of the Individual’s workplace drug screening which was positive for marijuana metabolites. Ex. 2 at 2. The LSO’s allegations that the Individual engaged in substance misuse and tested positive for an illegal drug justify the LSO’s invocation of Guideline H. Adjudicative Guidelines at ¶ 25(a)–(b).

## **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 Dep’t 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.

## **V. FINDINGS OF FACT**

The Individual has held a DOE security clearance continuously since 2004. Tr. at 14. The Individual was selected for a random workplace drug screening and tested positive for marijuana metabolites in August 2021. Ex. 11, Att. 1. The Individual denied having ever used illegal drugs and attributed the results of the August 2021 drug test to a topical lotion containing hemp that he used for pain. Tr. at 7–8.

According to the Individual, his daughter provided him with a lotion which she recommended he use for pain caused by his exercise regimen. *Id.* at 17–19. The Individual testified to having used the lotion on a near daily basis for at least a week before he read the ingredients on the bottle and learned that the lotion contained hemp.<sup>2</sup> *Id.* at 19, 23. The Individual represented that he last used the lotion two or three days prior to the drug screening. *Id.* at 19. The Individual denied recollection of the name of the lotion. *Id.* at 18–19. Because the lotion contained hemp, the Individual believed that “it could have had THC (tetrahydrocannabinol) in [it].”<sup>3</sup> *Id.* at 25. There is no evidence in the record establishing that the topical application of a lotion containing hemp could have caused the Individual’s positive drug test.<sup>4</sup>

The Individual testified that he “would never put himself in a position like [this] again.” *Id.* at 21. He also identified consequences he had experienced due to the positive drug test, including that his employer suspended him from work for ten days without pay and required him to take a marijuana awareness class. *Id.* at 8; *see also* Ex. B (reflecting the Individual’s completion of a four-hour marijuana awareness class). The Individual was drug tested monthly following his positive drug test in August 2021, and each test was negative for traces of controlled substances. Tr. at 8; *see also* Ex. C (showing that the Individual provided samples for monthly drug screenings from September 2021 through January 2022, each of which was negative for traces of controlled substances).

The Individual denied ever having illegally used a controlled substance, including marijuana. Tr. at 16. A co-worker of the Individual, who is his personal friend outside of work, authored a letter in which he indicated that the Individual was an excellent employee, a positive member of the community, and had never displayed signs of using illegal drugs. Ex. A. The Individual testified that he intended to never use illegal drugs in the future. Tr. at 21.

## VI. ANALYSIS

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<sup>2</sup> DOE has issued guidance cautioning personnel against the use of hemp and CBD products. DEPARTMENT OF ENERGY, FREQUENTLY ASKED QUESTIONS ON CANNABIDIOL (CBD), MARIJUANA AND HEMP (2019), available at <https://hcnet.doe.gov/documents/faqs-cbd-marijuana-and-hemp> (last visited Feb. 18, 2022). The Individual testified that he is unaware of this guidance. Tr. at 25.

<sup>3</sup> THC is a chemical compound in marijuana that is responsible for the drug’s intoxicating effects. NATIONAL INSTITUTES OF HEALTH, WHAT IS MARIJUANA? (2020), available at <https://nida.nih.gov/publications/research-reports/marijuana/what-marijuana> (last visited Mar. 28, 2022).

<sup>4</sup> To the contrary, one study found that application of commercially available topical salves containing as much as 102ng/mg of THC every two to four hours for three days did not produce positive blood or urine tests for THC. C. Hess, M. Krämer, & B. Madea, *Topical application of THC containing products is not able to cause positive cannabinoid finding in blood or urine*, 272 FORENSIC SCI. INT’L 68–71 (2017), available at <https://pubmed.ncbi.nlm.nih.gov/28122323/#:~:text=blood%20or%20urine-,Topical%20application%20of%20THC%20containing%20products%20is%20not%20able%20to,finding%20in%20blood%20or%20urine> (last visited Mar. 28, 2022).

## A. Guideline H

The Individual's positive drug test justifies the LSO's invocation of Guideline H. Adjudicative Guidelines at ¶ 25(a)–(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.

*Id.* at ¶ 26(a)–(d).

The Individual denied that he has ever intentionally used illegal drugs and attributed his positive drug test to THC in a hemp lotion he used for pain relief. This explanation potentially implicates the first mitigating condition under Guideline H. The remaining mitigating conditions are not applicable to this case because the Individual denied that he intentionally used illegal drugs, the LSO has not asserted that the Individual abused prescription drugs, and the Individual has not completed a drug treatment program or received a favorable prognosis from a medical professional. *Id.* at ¶ 26(b)–(d).

I find the first mitigating condition under Guideline H inapplicable because the Individual's explanation for his positive drug test is improbable and not supported by evidence. OHA has resolved security concerns associated with an individual's positive test for marijuana metabolites under this mitigating condition where the individual identified a specific CBD oil product that he consumed, obtained a laboratory test quantifying the THC content in the CBD oil, and produced the opinion of an expert molecular biologist who confirmed that consuming the CBD oil could have caused the positive drug test. *Personnel Security Hearing*, OHA Case No. PSH-20-0020 at 4–5 (2020).<sup>5</sup> Unlike that case, the Individual has not identified the specific product that he used or proved that it contained marijuana metabolites. Furthermore, unlike edible cannabis products, there is no evidence that it is chemically possible for marijuana metabolites to have entered the Individual's blood or urine through a topical lotion and produced the Individual's positive drug test. Absent stronger evidence that events transpired as the Individual claims, and that he did not actually use marijuana, I cannot find that the positive drug test occurred because of an accident

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<sup>5</sup> Decisions issued by OHA are available on the OHA website located at <http://www.energy.gov/OHA>.

which is unlikely to recur. Although the Individual established through drug testing that he had not used illegal drugs for five months, this period is not sufficient to show that the conduct is unlikely to recur. Thus, the Individual has not carried his burden to establish the applicability of the first mitigating condition under Guideline H. Adjudicative Guidelines at ¶ 26(a).

Under the Part 710 regulations, “[a]ny doubt as to an individual’s access authorization eligibility shall be resolved in favor of the national security.” 10 C.F.R. § 710.7(a). It is admittedly unusual that the Individual tested positive for marijuana metabolites for the first time after having worked for over fifteen years at a DOE site without a positive drug test. The Individual also vehemently testified that he is not a drug user and provided a letter from a co-worker as to his good character. On the other hand, crediting the Individual’s claim that he received a hemp lotion, which he cannot now identify, from his daughter a mere two weeks before the random drug test would require me to accept an improbable coincidence. Additionally, as noted above, I lack sufficient evidence to conclude that it is possible for a topical lotion containing marijuana metabolites to have caused the Individual’s positive drug test. Accordingly, it is at least as likely that the Individual used marijuana and was dishonest about having done so both to the LSO and in the hearing as it is that a hemp lotion was responsible for the positive drug test. Confronted with such a situation, I must resolve my doubts in favor of national security and conclude that the Individual has not resolved the security concerns asserted by the LSO under Guideline H.

## **VII. CONCLUSION**

In the above analysis, I found that there was sufficient derogatory information in the possession of DOE to raise security concerns under Guideline H of the Adjudicative Guidelines. After considering all of the relevant information, 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, I have determined that the Individual’s access authorization should not be restored. Either party may seek review of this Decision by an Appeal Panel pursuant to 10 C.F.R. § 710.28.

Phillip Harmonick  
Administrative Judge  
Office of Hearings and Appeals