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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: May 19, 2022)	Case No.: PSH-22-0088
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Issued: September 6, 2022

Administrative Judge Decision

Janet R. H. Fishman, Administrative Judge:

This Decision concerns the eligibility of XXXXX XXXXX (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 security clearance should not be granted.

I. BACKGROUND

The DOE employs the Individual in a position that requires him to hold a security clearance. The Individual submitted a Questionnaire for National Security Positions (QNSP) on August 25, 2021. Exhibit (Ex.) 6. He disclosed on the QNSP that he used illegal drugs between September 2014 and April 2021. Ex. 6 at 43-48. Following his submission of the QNSP, the Office of Personnel Management (OPM) interviewed the Individual on November 20, 2021. The Local Security Office (LSO) subsequently issued a Letter of Interrogatory (LOI) to the Individual seeking greater detail about his illegal drug use, and the Individual responded in writing on December 21, 2021. Ex. 5.

The LSO informed the Individual, in a letter dated March 29, 2022 (Notification Letter), that it possessed reliable information that created substantial doubt regarding the Individual’s eligibility to hold a security clearance. In an attachment to the letter entitled Summary of Security Concerns (SSC), the LSO explained that the derogatory information raised security concerns under the Bond

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.

Amendment, codified at 50 U.S.C. § 3343(b), and Guideline H of the Adjudicative Guidelines. Ex. 1.

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 three friends. *See* Transcript of Hearing, Case No. PSH-21-0031 (hereinafter cited as "Tr."). The LSO submitted seven exhibits, marked as Exhibits 1 through 7 and presented no witnesses. The Individual did not submit any exhibits.

II. THE NOTIFICATION LETTER AND THE ASSOCIATED SECURITY CONCERNS

The Bond Amendment provides that Federal agencies "may not grant or renew a security clearance for a covered person who is an unlawful user of a controlled substance or an addict."² 50 U.S.C § 3343(b). In support of its invocation of this amendment, the LSO cites the Individual's disclosures from his QNSP and in his December 21, 2021, LOI response, that he used marijuana between September 2014 and November 2021 and used cocaine between September 2019 and November 2021. Ex. 5 at 2; Ex. 6 at 43, 45.

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. Conditions that could raise a security concern include "any substance misuse." *Id.* at ¶ 25(a). "Substance misuse" is defined as the illegal use of controlled substances. *Id.* at ¶ 24. The LSO's reliance on the Individual's admitted illegal drug use justifies the invocation of Guideline H.

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 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*,

² "Controlled substance" is defined in the Bond Amendment as any substance listed as a controlled substance by 21 U.S.C. § 802.

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 her 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

The Individual self-reported on his 2021 QNSP his drug use of marijuana, cocaine, methylenedioxy-methamphetamine (MDMA)/Molly, and lysergic acid diethylamide (LSD)/mushrooms that occurred during his high school and college years, approximately September 2014 through April 2021. Ex. 6 at 43-45. During the Enhanced Subject Interview (ESI) conducted by the OPM, the Individual also admitted that he had tried Ketamine one time in approximately late 2019. Ex. 7 at 74; *see also*, Ex. 5 at 1. After the ESI, the LSO sent the Individual an LOI in response to which he admitted that, in addition to the usage listed on his QNSP, he used Ketamine one time in March 2020. The Individual maintained that one-time usage but changed the date he reported to the OPM in the ESI from November 2019 to the date in the LOI response of March 2020. Ex. 5 at 1; *see also*, Ex. 7 at 74. He also informed the LSO that he had used marijuana and cocaine one time in November 2021, while employed by the DOE. Ex. 5 at 2. The Individual testified, and was supported by his witnesses, that most of his drug use prior to November 2021 was during high school or college. Tr. at 12, 22, 36, 39, 43-45, 47.

The Individual stated that most of his drug use occurred during high school and college. Ex. 5 at 1-2; Ex. 6 at 43-47. He graduated from college in December 2020 but continued to live in his college town after graduation until July 2021 while he was looking for employment. Tr. at 49. He moved to his current location to start his work with the DOE. Tr. at 30, 50. His new location is a far from his hometown and college town, and at the time he relocated, he did not know many people there. Tr. at 56. Regarding the Individual’s November 2021 marijuana and cocaine use, he stated that he was at a party with an acquaintance when someone offered him both drugs. Tr. at 56-57. Although he still sees the acquaintance who took him to the party, he has not seen the person who offered him the drugs since that night. Tr. at 57-58. He stated in the LOI response that “in a lapse of judgement” he used both the cocaine and marijuana. Ex. 5 at 2. At the hearing, the Individual testified, “I have no intention of using drugs. I have no plans of using drugs. My intentions are to abstain and to make it clear to those around me that those are my intentions.” Tr. at 51. He avowed that he has not sought any specific treatment for drug use but is trying to live a healthier lifestyle by working out more, getting a good night’s sleep and eating healthier meals. Tr. at 47. In his response to the Notification Letter, the Individual provided a signed statement indicating that he does not intend to use illegal drugs again. Ex. 2 at 1.

The Individual's ex-girlfriend, his high school/college friend, and his current friend all testified regarding the Individual's illegal drug use. Tr. at 10-17, 19-29, 33-40. They all stated that his drug use was related to the "college environment." Tr. at 12, 22, 36, 39. The ex-girlfriend met him during her freshman year in college, at which time he was a sophomore. Tr. at 19. They started dating during her sophomore year and stayed in a relationship while she completed college until April 2022. Tr. at 29-30. His ex-girlfriend explained that during college he lived in a "frat house" type situation, that was not the cleanest. Tr. at 28. She continued that he has matured and now lives in a house by himself that is organized and clean. Tr. at 28. She stated that he has "really organized his life, and he's really, really effective at managing himself and his emotions and taking care of himself." Tr. at 29. She asserted that the Individual has never undergone any counseling or treatment program for his use of controlled substances. Tr. at 24.

The current friend, who also knew the Individual in college and currently socializes with him weekly, confirmed that the Individual has moved from an "environment where drug use was more prevalent, whereas today . . . he lives alone, and he does not participate in any recreational drug use." Tr. at 33, 39. The Individual's current friend stated that she has seen a lot of change in the Individual from college to the current time. Tr. at 35. She claimed that she has seen him make "specific decisions in order to commit to sobriety." Tr. at 35. The current friend asserted that the Individual is committed to abstaining from using controlled substances. Tr. at 36. She continued that she has seen him decline recreational drugs on multiple occasions and explain why it is important to him to remain abstinent. Tr. at 36. She also asserted that the Individual has not undertaken any treatment program in regard to his drug use. Tr. at 37.

The Individual's high school/college friend, who testified that they had been friends for ten years because they met during high school and also attended the same college, stated that they communicate by text or telephone regularly and see each other approximately five times a year now. Tr. at 10. They last saw each other in March 2022, when the friend visited the Individual in his current location. Tr. at 11. The friend indicated that the Individual is not putting himself in "situations that would be conducive to drug use, not spending time around people that he knows may be in a position where . . . they may use drugs or there may be drugs present." Tr. at 10, 14. The friend continued that the Individual has "taken steps to . . . live a healthier lifestyle, more exercise, more time outdoors . . . eating healthier, prioritizing . . . mental and physical wellbeing, rather than prioritizing sort of . . . a party atmosphere." Tr. at 15. The high school/college friend testified that he is not aware of the Individual attending any drug treatment program. Tr. at 15.

V. ANALYSIS

A. Bond Amendment

The Bond Amendment provides that Federal agencies "may not grant or renew a security clearance for a covered person who is an unlawful user of a controlled substance or an addict." 50 U.S.C § 3343(b). On April 23, 2021, the Deputy Secretary of Energy issued a memorandum, the purpose of which was "to revise the Department's current policy regarding the application of the Bond Amendment to the processing of access authorizations (security clearances)." Memorandum from David Turk, "Revision of DOE Policy Regarding Application of the Bond Amendment," to Kathleen Hogan, Acting Under Secretary for Science and Energy, and Charles P. Verdon, Acting

Under Secretary for Nuclear Security Administration at 1 (April 23, 2021) (hereinafter “Memorandum”). The Memorandum stated that the DOE’s new policy on the application of the Bond Amendment (hereinafter “DOE’s new policy”) was effective immediately, and it rescinded the DOE’s former policy on its application of the Bond Amendment. Memorandum at 1.

In applying the Bond Amendment prohibition on granting or renewing a security clearance, the DOE’s new policy defines the terms “unlawful user of a controlled substance” and “addict” as follows:

- 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.

Memorandum at Attachment 2-Adjudicative Considerations Related to Bond Amendment Requirement (hereinafter “Revised Policy on the Bond Amendment”).

The first part of the definition for an “unlawful user” is any person who uses a controlled substance and has lost the power of self-control over his use of that controlled substance. In this case, the LSO is alleging that the Individual has lost control over his use of marijuana and cocaine. Ex. 1 at 1.³ Evidence on record reflects that under the Revised Policy on the Bond Amendment, the Individual’s use of marijuana and cocaine do not make him an “unlawful user of a controlled substance.” Regarding the term “unlawful user of a controlled substance,” the Individual presented evidence including the direct observations of his witnesses. The Individual’s current friend testified that she has observed him declining illicit drugs in recent months. The Individual’s ex-girlfriend testified that he decided after college to cease using illegal drugs. The Individual testified that his November 2021 use was a lapse of judgement. On the QNSP, the Individual listed his marijuana use during the early years of college as a few times a month. Ex. 6 at 43. He claimed that he decreased the frequency of his marijuana usage during 2019 to April 2021 to once or twice every few months. *Id.* He listed his cocaine usage between the fall of 2019 and the spring of 2021 as “a few times every few months with some long gaps in between. . . . [It is] hard for me to estimate how many times, [but] I would say under 30 times.” Ex. 6 at 45. I found the Individual and his witnesses credible in their testimony. The Individual was, for the most part, in high school and college while he was using marijuana and cocaine. His witnesses testified that he has changed his lifestyle since that time, by trying to live a healthier life, no longer living in a “frat house” environment where drugs are prevalent and available, and informing people he meets that he

³ The LSO only relied on the Individual’s marijuana and cocaine usage to raise the security concern under the Bond Amendment. Ex. 1 at 1.

cannot partake in illegal substances. The Individual was open and honest on the QNSP about his past drug use. He was open with the OPM, including admitting that he had tried ketamine one time, which was not listed on the QNSP.⁴ Although the Individual has not presented any tangible evidence of abstinence other than testimony, his current friend testified that they socialize once to twice a week and she has seen him decline illegal substances. As such, I do not find the Individual to be a “person who uses a controlled substance and has lost the power of self-control over his use of that controlled substance.”

The second part of the definition for an “unlawful user” is a person who is a current user of the controlled substance other than prescribed by a licensed physician. Here, the Individual self-disclosed his prior marijuana and cocaine use. While the Revised Policy on the Bond Amendment does not limit the drug use requirement to having occurred within a matter of days or weeks, the definition of an “unlawful user” requires use that is recent enough to indicate that the Individual is actively engaged in drug use. This is a more difficult matter to assess. The Individual’s last use occurred approximately eight months prior to the hearing. The Individual’s current friend stated that she has socialized with the Individual since November 2021. She asserted that she has seen and heard him specifically decline illegal drugs on multiple occasions in recent months. Such behavior does not indicate that he is “actively engaged in such conduct.”

The evidence on the record also does not support a finding that the Individual is currently an “addict of a controlled substance.” The SSC does not contain any allegations that the Individual “uses any narcotic drug so as to endanger the public morals, health, safety, or welfare.” Moreover, there is nothing in the record that indicates that the Individual has lost the power of self-control regarding a drug addiction. He has not used marijuana or cocaine since November 2021. The majority of the Individual’s drug use was, by his own testimony, during high school and college. In my opinion, the last usage of a controlled substance eight months prior to the hearing does not show “that the unlawful use occurred recently enough to indicate the individual is actively engaged in such conduct.” Also, the LSO has not alleged that he underwent treatment for his marijuana or cocaine use and there is nothing in the record to indicate that he ever underwent such treatment. Further, the Individual and his witnesses all testified that he has not attended any type of drug treatment program. He never required substance abuse treatment to cease his use of marijuana or cocaine, and he testified that he has no craving for marijuana or cocaine. Moreover, as discussed above, the testimony and written character statements of his witnesses lends further support for the finding that the Individual is not an “addict” for purposes of the Revised Policy on the Bond Amendment.

Accordingly, since the Individual’s prior marijuana and cocaine use does cause him to meet the definition of either an “unlawful user” or “addict” of a controlled substance, I find that under the Revised Policy on the Bond Amendment, the Bond Amendment does not act as a bar to prohibit the DOE from granting the Individual’s security clearance.

⁴ One could conclude that he lied during the ESI because he gave the interviewer a wrong date of the ketamine use. Rather, I believe that he was able to better refresh his memory prior to completing the LOI.

B. Guideline H

The Individual's prior significant use of illegal drugs raises security concerns under Guideline H. Adjudicative Guidelines at § 25(a). Conditions that could mitigate security concerns under Guideline H include:

- (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). Subparagraphs (c) and (d) do not apply in this case.

Regarding the first mitigating factor under § 26(a), the Individual provided credible testimony supported by his witnesses that the majority of his illegal drug use occurred during his high school and college years. His testimony is also supported by his admission on the QNSP, during the ESI, and during the LOI. While I do believe that his high school and college use could be mitigated because more than a year has passed since he graduated from college and he has since moved to a new city, I am concerned about his November 2021 use of marijuana and cocaine. This occurred after he relocated to begin his employment with the DOE. While he explained that he was in a new setting with a few friends which led to his November 2021 drug usage, he was aware that such use could jeopardize his ability to obtain an access authorization. Further, the testimony of his current friend indicates that the Individual is still frequently placing himself in situations where he is offered illegal drugs. Therefore, I cannot find that the behavior occurred “under such circumstances that it is unlikely to recur or does not cast doubt on the individual's current reliability, trustworthiness, or good judgment.” *Id.* Consequently, I cannot find that the Individual has satisfied the requirements to successfully demonstrate mitigation under Adjudicative Guidelines at ¶ 26(a).

Likewise with the second mitigating factor under ¶ 26(b), the Individual still visits locations where he is offered illegal drugs, as evidenced by the testimony of his current friend that even though he

refuses, he is offered illegal substances. Although he declines, I am concerned that the ready availability still exists. It is apparent to me that he has not satisfied ¶ 26(b)(2) above, which indicates that one way to mitigate the concern would be “changing or avoiding the environment where drugs were used.” *Id.* 26(b)(2). I am not convinced that an eight-month abstinence from illegal drug use is sufficient to establish a pattern of abstinence envisioned by the mitigating factors. *Id.* at § 26(b). In response to the Notification Letter, the Individual provided a signed statement that he intends to abstain from all drug involvement and misuse. Ex. 2 at 1. This statement satisfies ¶ 26(b)(3). The last element under ¶ 26(b) that should be addressed is disassociation from drug using associates and contacts. *Id.* ¶ 26(b)(1). The Individual testified that he sees the acquaintance who took him to the party where he used the cocaine and marijuana in November 2021. Further, the Individual’s current friend testified that she has seen him decline controlled substances recently. While the Individual is declining the drugs, he is still in situations where he is associating with drug using associates and contacts, so he has not satisfied this element of the mitigating factor. *Id.* ¶ 26(b)(1). On balance, despite his statement that he intends to abstain from illegal drug use, I do not find that the Individual has established a pattern of abstinence so as to mitigate the security concern under ¶ 26(b).

Accordingly, I cannot find that the Individual has successfully mitigated the security concerns under Adjudicative Guideline H.

VI. CONCLUSION

In the above analysis, I found that there was sufficient derogatory information in the possession of the DOE that raised security concerns under Guideline H of the Adjudicative Guidelines. After considering all 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 Bond Amendment does not act as a bar to granting the Individual a security clearance. I further find, however, that the Individual has not brought forth sufficient evidence to resolve the Guideline H security concerns set forth in the Summary of Security Concerns. Accordingly, I have determined that the Individual’s access authorization should not be granted. This Decision may be appealed in accordance with the procedures set forth at 10 C.F.R. § 710.28.

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