

*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: May 19, 2022)	Case No.: PSH-22-0084
)	
_____)	

Issued: October 3, 2022

Administrative Judge Decision

Phillip Harmonick, 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 access authorization should not be restored.

I. BACKGROUND

The Individual is employed by a DOE contractor and was first granted access authorization in approximately 2008. Hearing Transcript (Tr.) at 54–55. On November 8, 2021, the Individual was selected for a random drug test, the results of which were positive for marijuana metabolite. Exhibit (Ex.) 5 at 1, 8.² When notified of the results of the drug test, the Individual denied having used marijuana and noted that he used cannabidiol (CBD) oil for lower back pain. *Id.* at 7. The Individual requested a retest of the sample he provided, the results of which reconfirmed that the sample was positive for marijuana metabolite. *Id.* at 2–7.

The local security office (LSO) suspended the Individual's access authorization and issued him a letter notifying him that it possessed reliable information that created substantial doubt regarding

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.

² The pagination of numerous exhibits submitted by the local security office does not correspond to the order in which the pages appear. This Decision cites to pages in the order in which they appear without regard for their internal pagination.

his eligibility for access authorization. *See* Ex. 3 (summarizing the LSO’s review of the Individual’s eligibility for access authorization). In a Summary of Security Concerns (SSC) attached to the letter, the LSO explained that the derogatory information raised security concerns under 50 U.S.C. § 3343(b) (Bond Amendment) and Guideline H (Drug Involvement and Substance Misuse) of the Adjudicative Guidelines. Ex. 1.

The Individual exercised his right to request an administrative review hearing pursuant to 10 C.F.R. Part 710. Ex. 2. 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 hearing. The LSO submitted six exhibits (Ex. 1–6). The Individual submitted one exhibit (Ex. A).³ The Individual testified on his own behalf. Tr. at 3, 10. The LSO did not call any witnesses to testify.

II. THE NOTIFICATION LETTER AND THE ASSOCIATED SECURITY CONCERNS

The LSO cited the Bond Amendment as the first basis for its determination that the Individual was ineligible for access authorization. Ex. 1. Pursuant to the Bond Amendment, “a Federal agency may not grant or renew a security clearance for a [] person who is an unlawful user of a controlled substance or an addict.” 50 U.S.C. § 3343(b). According to DOE policy, “[a]n 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.” Memorandum from David M. Turk, Deputy Sec’y. of Energy, to Kathleen Hogan, Acting Under Sec’y. for Sci. & Energy, et al., Revision of DOE Policy Regarding Application of the Bond Amendment at 6 (April 23, 2021). Tetrahydrocannabinols (THC) are controlled substances.⁴ 21 U.S.C. § 812. The SSC cited the results of the Individual’s random drug test, which was positive for marijuana metabolites. Ex. 1. The LSO’s allegation that the Individual is a user of a controlled substance based on the results of the random drug test justify its invocation of the Bond Amendment. 50 U.S.C. § 3343(b).

The LSO cited Guideline H (Drug Involvement and Substance Misuse) as the other basis for its determination that the Individual was ineligible for access authorization. Ex. 1. “The 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. The SSC cited the results of the Individual’s random drug test, which was positive for marijuana metabolites. Ex. 1. The LSO’s allegations that the Individual

³ The Individual marked each page of his submission as a separate exhibit. For ease of reference, the parties agreed that the Individual’s entire submission should be designated Exhibit A. Tr. at 6–7.

⁴ 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 Sep. 6, 2022).

tested positive for marijuana metabolite while holding a DOE Q clearance justify its invocation of Guideline H. Adjudicative Guidelines at ¶ 25(b), (f).

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).

An 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). An 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.

IV. FINDINGS OF FACT

The Individual was first granted access authorization in approximately 2008. Tr. at 54–55; *see also* Ex. 6 at 51–52 (reflecting that the Individual was investigated for and granted access authorization in 2013). Since being granted access authorization the Individual underwent annual training concerning his obligations as a clearance holder. Tr. at 55. The Individual understood from this training that he was prohibited from using illegal drugs, including THC. *Id.*

The Individual experienced several back injuries, most recently in August 2021, which caused him to suffer from chronic back pain. *Id.* at 13–16, 41–42; Ex. A at 4. The Individual was prescribed opioid pain medications after the August 2021 injury. Tr. at 15–16, 43. The Individual's pain caused him to change his role with the DOE contractor to a less physically demanding one and receive temporary disability while out of work for several months. *Id.* at 14–15; Ex. A at 3. While out of work on temporary disability, the Individual began researching alternative pain management regimens due to fear of addiction to opioids. Tr. at 16–17. The Individual's chiropractor introduced him to CBD products, but the Individual decided not to purchase them from the chiropractor due to their high costs. *Id.*

The Individual conducted personal research which led him to conclude that combinations of CBD and THC were more effective for pain management than CBD alone. *Id.* at 18, 61–62; *see also* Ex. A at 10 (reflecting an example of the research that led the Individual to conclude that a combination

of CBD and THC would be effective for managing pain). The Individual's wife suggested that he use a transdermal compound containing THC which she used for her own pain management. Tr. at 18–19; Ex. A at 11 (picturing the product, including a label indicating that the product “contains cannabis, a Schedule I Controlled Substance”). Despite having reviewed the label at the time that he first began using the transdermal compound, the Individual used the product for several months.⁵ Tr. at 56, 58. The Individual also used vape pens containing various ratios of CBD to THC, ranging from 20:1 to 1:1, three to four times daily. *Id.* at 19, 35–36; Ex. A at 13.⁶ The Individual also used a tincture containing CBD, THC, or both, provided by his wife which he discontinued after one or two uses because it was ineffective in managing his pain. Tr. at 33–34. The Individual believed that using these products would not produce a positive drug test if he was tested. *Id.* at 19, 22, 62–63.

On November 8, 2021, the Individual was selected for a random drug test. Ex. 5 at 1, 8. The results of the drug test were positive for marijuana metabolite. *Id.* at 8. When he was notified of the results of the drug test, the Individual denied that he had used marijuana but noted that he used CBD oil for lower back pain. *Id.* at 7. At the Individual's request, the sample he provided for the drug test was retested and the presence of marijuana metabolite in the sample was confirmed. *Id.* at 2–7.

After receiving the second positive test result, the Individual conducted additional research which led him to conclude that the THC products he had used caused him to test positive on the drug test. Tr. at 20. The Individual also consulted with a therapist through the DOE contractor's employee assistance program who, after one meeting with the Individual, determined that he did not require therapy for drug addiction or misuse.⁷ *Id.* at 11–13; Ex. A at 1–2. The Individual testified at the hearing that he would not use CBD or THC products in the future to manage his pain.⁸ Tr. at 23. However, he still maintains at least one THC product in his house which he indicated his wife might use in the future. *Id.* at 56–57. The Individual testified that he is a highly experienced and competent employee, and that reinstating his access authorization is in the interests of national security in light of his reliability and trustworthiness in the workplace. *Id.* at 24–26.

V. ANALYSIS

⁵ The Individual testified that he “didn't think [he] was going to have an issue” with the transdermal compound causing him to test positive for THC, despite the label indicating that the product contained “cannabis, a Schedule I Controlled Substance,” because “it didn't scream like [sic] weed all over it” and “CBD oil does come from the cannabis plant.” Tr. at 58–59. I find the Individual's professed beliefs unreasonable and indicative of a lack of credibility on his part in light of the clear and conspicuous labeling of the product as containing a controlled substance.

⁶ The Individual testified that the photos of vape pens included in Exhibit A were examples that he found online of the brand of vape pen that he used, but were not the specific formulations that he used. Tr. at 19, 35.

⁷ The Individual continued to meet with the therapist following the initial consultation to address stressors in his life unrelated to drug use. Tr. at 46–49.

⁸ The Individual did not identify the last date on which he used any THC product. His testimony concerning the last date on which he used the transdermal compound was inconsistent and ranged from several months prior to the random drug test to possibly as recently as March 2022. *Compare* Tr. at 34 (testifying at the hearing that he had not used the transdermal compound in “over six months” *with* Tr. at 56 (testifying that he last used the transdermal compound in “probably the end of September, early October” of 2021).

A. Bond Amendment

Pursuant to the Bond Amendment, “a Federal agency 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). Thus, if the Individual is an unlawful user of marijuana or an addict, his access authorization may not be restored based on a meritorious waiver or mitigation of the security concerns associated with his drug use. Adjudicative Guidelines at app. B, ¶ 1.

The Individual bears the heavy burden of proof to overcome the presumption against restoring his access authorization by showing that doing so “would not endanger the common defense and security and would be clearly consistent with the national interest.” 10 C.F.R. § 710.27(a); *Dep’t of Navy v. Egan*, 484 U.S. at 531. The Individual’s testimony that he no longer uses THC products, unsupported by drug testing or other corroborating evidence, is insufficient to meet this burden. Additionally, the Individual did not definitively testify as to the last date on which he claims to have used any THC product, and I did not find his testimony as to when he last used specific products, such as the transdermal compound, credible because it was vague and contradictory. *Supra* note 8, at 4. The Individual’s credibility on the subject of his use of THC products was further undermined by his convoluted reasoning as to why he did not believe that his use of the transdermal compound constituted prohibited drug use despite clear and conspicuous labeling of the product as a controlled substance. *Supra* note 5, at 4. Yet further, the Individual continued to possess the transdermal compound in his home as of the date of the hearing despite DOE’s concerns about his illegal drug use. Thus, I am not persuaded that the Individual has abstained from using THC products since the positive drug test. Finally, even if I credited the Individual’s testimony that he has not used THC products in over six months, his illegal drug use would still have been more frequent and recent than that of persons OHA has determined were not disqualified from holding access authorization under Bond Amendment.⁹

In light of the frequency of the Individual’s use of products containing THC, and the lack of certainty as to when he last used such products, I find that he has not met his burden to establish that he is not a user of a controlled substance or an addict. Therefore, I conclude that the Individual is prohibited from holding access authorization under the Bond Amendment.

B. Guideline H

⁹ OHA has previously found that a person who used illegal drugs or misused controlled substances was not disqualified from holding a security clearance under the Bond Amendment when the person’s drug use occurred in isolated instances or had not reoccurred for several years. *See* Personnel Security Hearing, OHA Case No. PSH-21-0124 at 6 (2021) (determining that a person was not disqualified from holding access authorization under the Bond Amendment based on his self-disclosure that he had consumed a cookie he did know at the time contained THC on a single occasion); Personnel Security Hearing, OHA Case No. PSH-21-0057 at 5 (2021) (concluding that a person was not an unlawful user of a controlled substance or an addict based on self-disclosed use of Adderall without a prescription on two or three occasions more than two years prior to the hearing); Personnel Security Hearing, OHA Case No. PSH-21-0031 at 8 (2021) (determining that a person’s self-disclosed use of marijuana on two occasions more than three years prior to the hearing did not disqualify her from holding access authorization under the Bond Amendment). Decisions issued by OHA are available on the OHA website located at <http://www.energy.gov/OHA>.

The Individual's positive drug test while granted access authorization justifies the LSO's invocation of Guideline H. Adjudicative Guidelines at ¶ 25(a), (f). Conditions that may 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.

Id. at ¶ 26(a)–(d).

The Individual used products containing THC and tested positive for marijuana metabolite within the past year, and he has not produced drug testing to corroborate that he has abstained from illegal drug use since the positive November 2021 drug test. Therefore, I cannot conclude that the behavior happened so long ago as to mitigate the security concerns. The Individual acknowledged that he used products containing THC products on a daily basis for several months, and therefore his use of the products was not so infrequent as to mitigate the security concerns.

The Individual argued that his illegal drug use occurred under unusual circumstances because he did not understand that the products he was using contained sufficient quantities of THC for him to test positive for marijuana metabolites and that the conduct was unlikely to recur because of the information that he learned subsequent to the positive drug test. I do not find these assertions convincing. First, the transdermal compound the Individual used was clearly and conspicuously labeled as containing a Schedule I Controlled Substance. Moreover, the website for the company that produces the vape pens that the Individual used indicates that its products formulated at a 1:1 ratio of CBD to THC, a potency which the Individual testified at the hearing to having used, are “designed for experienced cannabis users who can tolerate more THC for a balanced feeling with some psychoactivity.” *Care By Design 1:1*, CARE BY DESIGN, cbd.org/products/1:1 (last visited September 2, 2022). I do not find it credible that the Individual could have failed to understand that using marijuana-derived products labeled as controlled substances, and that were sufficiently potent to produce intoxicating effects, constituted prohibited drug use. If the Individual was genuinely unaware that use of such products constituted prohibited drug use, such an unreasonable belief, in the face of obvious evidence to the contrary, would call into question his reliability and

ability to comply with rules and regulations. For these reasons, I find the first mitigating condition under Guideline H inapplicable. Adjudicative Guidelines at ¶ 26(a).

The Individual has acknowledged his use of THC products and expressed the intention not to use them in the future. However, he has not established a pattern of abstinence from THC products, such as through drug testing. Moreover, he maintained THC products in his home as of the date of the hearing and did not provide a signed statement acknowledging that any future drug involvement or substance misuse is grounds for revocation of his access authorization. Thus, the second mitigating condition under Guideline H is inapplicable. *Id.* at ¶ 26(b).

The third mitigating condition is irrelevant to this matter because the LSO has not alleged that the Individual abused prescription drugs, and the Individual was never prescribed THC products. *Id.* at ¶ 26(c). The final mitigating condition is not applicable because the Individual has not participated in a drug treatment program. *Id.* at ¶ 26(d).

For the aforementioned reasons, none of the mitigating conditions under Guideline H are applicable to the facts of this case. Accordingly, the Individual has not resolved the security concerns asserted by the LSO.

VI. CONCLUSION

In the above analysis, I found that there was sufficient derogatory information in the possession of DOE to raise security concerns under the Bond Amendment and 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 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. This Decision may be appealed in accordance with the procedures set forth at 10 C.F.R. § 710.28.

Phillip Harmonick
Administrative Judge
Office of Hearings and Appeals