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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 24, 2022) Case No.: PSH-22-0135
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Issued: November 30, 2022

Administrative Judge Decision

Noorassa A. Rahimzadeh, 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."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

A DOE Contractor employs the Individual in a position for which she holds a security clearance. In March 2022, the Individual self-reported to the Local Security Office (LSO) that she ingested one pill of her child's prescription pain medication to relieve severe pain in her hip. Ex. 3. As a result of this disclosure, the LSO requested that the Individual complete a Letter of Interrogatory (LOI), which the Individual signed and submitted on May 20, 2022. Ex. 4.

Due to unresolved security concerns related to the Individual's conduct, the LSO began the present administrative review proceeding by issuing a letter (Notification Letter) to the Individual in which it notified her that it possessed reliable information that created substantial doubt regarding her eligibility to hold a security clearance and that her clearance had been suspended. 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 and the Bond Amendment, codified at 50 U.S.C. § 3343(b). Ex. 1. The Notification Letter also informed the Individual that she was entitled to a hearing before an

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.

Administrative Judge to resolve the substantial doubt regarding her 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 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 her own behalf and presented the testimony of two other witnesses, her husband and a friend. *See* Transcript of Hearing, Case No. PSH-22-0135 (hereinafter cited as "Tr."). The Individual also submitted six exhibits, marked as Exhibits A through F. The DOE Counsel submitted five exhibits marked as Exhibits 1 through 5 and did not call any witnesses.

II. Notification Letter and Associated Concerns

As indicated above, the Notification Letter informed the Individual that information in the possession of the DOE raised security concerns under the Bond Amendment and Guideline H of the Adjudicative Guidelines. Ex. 1.

The Bond Amendment provides that 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."² 50 U.S.C. § 3343(b).

In invoking the Bond Amendment, the LSO alleged that on March 21, 2022, the Individual "illegally ingested one of her [child's] prescribed Oxycodone pills, a Schedule II controlled substance."³ Ex. 1 at 1.

Under Guideline H (Drug Involvement and Substance Misuse) of the Adjudicative Guidelines,

[i]llegal 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. Conditions that could raise a concern under Guideline H include "any substance misuse," such as the misuse of prescription drugs. *Id.* at ¶ 25(a).

² "Controlled substance" is defined in the Bond Amendment as any substance listed as a controlled substance by 21 U.S.C. § 802. "The term 'addict' means any individual who habitually uses any narcotic drug so as to endanger the public morals, health, safety, or welfare, or who is so far addicted to the use of narcotic drugs as to have lost the power of self-control with reference to his addiction." 21 U.S.C. § 802(1).

³ A Schedule II controlled substance is one that "has a high potential for abuse," "has a currently accepted medical use in treatment in the United States or a currently accepted medical use with severe restrictions," and where "[a]buse of the drug or other substances may lead to severe psychological or physical dependence." 21 U.S.C. § 812(b)(2).

In invoking Guideline H, the LSO alleged that on March 21, 2022, the Individual ingested one Oxycodone pill prescribed to her child while she held an active clearance. Ex. 1 at 1. Based on the foregoing, the LSO's invocation of security concerns under Guideline H is 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 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 their 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 and Hearing Testimony

The Individual self-reported to the LSO and stated in her response to the LOI that on the day of the incident, she woke up "in severe hip pain"⁴ and was unable to walk or sit up. Ex. 3. at 1-2; Ex. 4 at 1. In her testimony, the Individual stated that the pain was also in her lower back, and that as a result, her child assisted her with attending to personal hygiene needs and helped her place a heating pad on the affected area. Tr. at 36. The Individual indicated that her child had a "pain pill" left over from a prior surgical procedure and offered it to the Individual. Ex. 3 at 2; Ex. 4 at 1; Tr. at 26. The Individual accepted the medication and ingested it to relieve the pain in her hip and back. Ex. 3 at 2; Tr. at 36-37. The Individual indicated that she slept the remainder of the day and that by the next day, she could walk with the aid of crutches and sit up. Ex. 3 at 2; Ex. 4 at 1; Tr. at 37. Two days after the initial onset of pain, the Individual "was able to walk on [her] own[]" and accordingly, she returned to work. Ex. 3 at 2; Tr. at 37. The Individual also reported that when she ingested the pill, she did not know "it was an issue," but after discussing the incident in casual

⁴ At the hearing, the Individual indicated that her pain level was "really bad[]" but that on this day it "was just a severe case." Tr. at 47. She stated that she is usually mobile during these attacks of pain. Tr. at 47.

conversation with her manager, she “found out that this was a mistake and to report it.”⁵ Ex. 3 at 2; Tr. at 37-38, 42.

The Individual testified, and her husband confirmed, that when she experiences severe back pain, she usually utilizes over-the-counter (OTC) medication and a heating pad to relieve the pain. Tr. at 20-22, 39-40, 48. She admitted during the hearing that although heat helps relieve her pain, the OTC medication is less effective. Tr. at 40, 48. While the Individual did not receive medical treatment for her back pain, because it occurs “so infrequent[ly,]”⁶ she did see a chiropractor and receive massage therapy. Tr. at 17, 38-39, 47. The Individual’s husband, who confirmed the Individual’s version of events on the day of the incident, described the Individual’s back pain as one that is “off and on[.]” and “not often[.]” Tr. at 12-14, 16. He estimated that the Individual has endured such pain for the past ten years, and the last time she experienced this pain, she called him home from work, as she was “stuck in the shower[.]”⁷ Tr. at 16, 39. The Individual testified that she first began experiencing this sort of pain over thirty years ago and that this pain occurs “[m]aybe once or twice a year[.]” Tr. at 39, 47. In her testimony, she indicated that the next time she experiences such pain, she will “[j]ust deal with it the same way [she] always ha[s], but say no if somebody offers [her] a prescription drug.” Tr. at 46.

Although the Individual’s husband stated that the couple’s adult child no longer has the prescription medication that was given to the Individual and that the child “[had not] been prescribed anymore since[.]” he could not definitely state what happened to the remainder of the medication. Tr. at 18. He also denied having ever seen or becoming aware of the Individual using any illicit substances and confirmed that she has never been and is not addicted to substances, either prescription or illicit. Tr. at 18-19. He also denied having ever been made aware that the Individual used prescription medication that was not prescribed to her outside of the March 2022 incident. Tr. at 17-18. The Individual’s friend of over a decade, who also worked with the Individual for a time, stated much the same, indicating that she was aware of the Individual’s struggles with pain and confirming that she has no knowledge of the Individual having ever used illicit substances or another person’s prescription medication outside of the March 2022 incident. Tr. at 25-30. Neither the Individual’s husband nor her friend had any concerns regarding her character for reliability, trustworthiness, and honesty.⁸ Tr. at 19, 30. Further, neither the Individual’s husband nor her friend felt that the Individual was likely to repeat her conduct of March 2022, as she has “learned from [the] experience[.]” Tr. at 19, 31-32. The Individual’s husband also stated that “it just so happened that [the couple’s child] had...pain medicine,” and

⁵ At the hearing, the Individual admitted that despite receiving annual training regarding her responsibilities as a clearance holder, she did not “remember these things,” but insisted that she “will never ever...forget it now.” Tr. at 38. The manager to whom the incident was disclosed wrote a letter addressed to me, the Administrative Judge, indicating that the Individual mentioned the fact that she had taken an Oxycodone pill prescribed to a family member during casual conversation, and that the manager advised the Individual that this was a reportable act. Ex. A.

⁶ When asked if she ever mentioned the pain to a medical provider, she stated that she was “not sure” but “[p]robably so.” Tr. at 47.

⁷ The Individual’s husband testified that this particular incident took place “over ten years[.]” ago. Tr. at 22.

⁸ The Individual’s friend, who also has an access authorization, indicated that when they did work together, the Individual was diligent about adhering to applicable security protocol. Tr. at 31.

that the Individual “otherwise...would have just dealt with the pain and used the heating pad and the aspirins.” Tr. at 22. The Individual testified that such medication is “rarely available to [her]” and that “it just so happened that her [child] had some left[.]” Tr. at 40. She went on to state that as far as she is aware, there are no more “drugs of any type” in her home, save for the medication she takes as prescribed for her migraines. Tr. at 40, 49.

The Individual denied having ever sought to purchase prescription medication and stated that she “[does not] believe” she ever took someone else’s prescription medication prior to obtaining her clearance, as she “[does not] like how they make you feel.” Tr. at 48-49. The Individual also denied having used any illicit substances.⁹ Tr. at 45-46. In her response to the LOI, when asked if anyone had ever expressed concern to her about the “misuse/illegal use of prescription drugs[,]” the Individual indicated that they had not. Ex. 4 at 2. She also indicated that the use of such drugs has not negatively affected her mental and/or emotional state, work performance or attendance, or relationships with family or friends. Ex. 4 at 2. The Individual also stated “no” in response to a question regarding whether she had “ever voluntarily sought counseling or treatment as a result of [her] use of a drug or controlled substance” and whether she had been “ordered, advised, or asked to seek counseling or treatment” because of the illegal use of drugs or controlled substances. Ex. 4 at 2. The Individual indicated that she has not “illegally used any other drugs or controlled substances” in the last seven years, does not intend to use such drugs in the future, and does not intend to “engage in the illegal purchase, manufacture, cultivation, trafficking, production, transfer, shipping, receiving, handling, or sale” of such drugs in the future. Ex. 4 at 2.

V. Analysis

A. Bond Amendment

Under the Bond Amendment, if an adjudicative agency finds an individual is an unlawful user of or is addicted to a controlled substance, the individual is prohibited, as a matter of law, from holding an access authorization. The Deputy Secretary of Energy issued a memorandum on April 23, 2021, “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 to Kathleen Hogan, Acting Under Secretary for Science and Energy, and Charles P. Verdon, Acting Under Secretary for National Security Administration, “Revision of DOE Policy Regarding Application of the Bond Amendment” (April 23, 2022) (hereinafter “Memorandum”). The new policy on the application of the Bond Amendment was effective immediately and rescinded the DOE’s former policy on its application of the Bond Amendment. Memorandum at 1.

Under the new policy, the DOE defines “unlawful user of a controlled substance” and “addict” in the following manner:

⁹ The Individual submitted five negative drug tests from July 2013 to October 28, 2022. Ex. B-F; Tr. at 43. All of these tests, with the exception of the October 2022 test, were random and administered by her employer. Tr. at 42, 44. All results indicate that the Individual was tested for a number of substances, including opiates, and the October 2022 results indicate the Individual was also specifically tested for Oxycodone/Oxymorphone. Ex. F.

- 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 Requirements.

By invoking the Bond Amendment, the LSO is alleging that the Individual is either an unlawful user of a controlled substance or that she is an addict. Starting with whether she is an unlawful user, based on the evidence before me, I do not find that the Individual has “lost the power of self-control” with reference to a controlled substance or that she is a “current user.” Based on the testimony presented at the hearing, including that of her husband of over thirty years and the Individual’s friend, I am persuaded that the Individual has not used an unprescribed controlled substance since March 2022, approximately eight months prior to the hearing. Further supporting my conclusion is the fact that the Individual tested negative for opiates in October 2022. Additionally, based on the evidence before me, I cannot conclude that the Individual is a “current user.” As indicated above, “[s]uch 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.” Again, the most recent drug test in October 2022 indicates that the Individual did not have any opiates in her system at the time. Further, as indicated above, I am persuaded that the Individual has not used medication pain-relieving drugs that were not prescribed to her at any point after March 2022. Accordingly, I do not conclude that the Individual has lost the power of self-control with regard to the use of the aforementioned prescription medication or that she “is actively engaged in such conduct.”

I also do not believe the record supports a finding that the Individual is an addict. As an initial matter, the LSO does not allege, and the record is bereft of any indication that the Individual “habitually uses any narcotic so as to endanger the public morals, health, safety, or welfare.” And further, as indicated above, I do not find that the Individual has lost the power of self-control with respect to the use of the substance in question. The last time she did use such substances was approximately eight months prior to the hearing. The LSO does not allege, and the record does not contain any indication that the Individual has had to seek treatment for the use of prescription pain relieving medication, and the testimony does not suggest that the Individual is an “addict” as described by the Revised Policy on the Bond Amendment.

Based on the foregoing, I do not find that the Individual's aforementioned use of a medication that was not prescribed to her causes her to meet the definition of either an "unlawful user" or an "addict" of a controlled substance. Accordingly, 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 restoring the Individual's access authorization.

B. Guideline H

Under Guideline H, conditions that can mitigate the security concerns include that "[t]he 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[.]"¹⁰ Adjudicative Guidelines at ¶ 26(a).

While the Individual testified that she was not aware that taking medication that was not prescribed to her would constitute a security concern, her stated lack of knowledge regarding the matter does not excuse her conduct. However, I am convinced that the Individual has successfully mitigated the security concerns pursuant to the Adjudicative Guidelines at ¶ 26(a). As stated above, the evidence I have before me indicates that the Individual has not taken prescription medication that was not prescribed to her either before or since March 2022. The Individual's assertion that she has not engaged in such behavior before or since March 2022 is buttressed by the testimony provided by the Individual's husband and friend, who both stated that they were not aware of the Individual engaging in this behavior outside of one instance in March 2022. The record also contains the negative results from five drug tests administered to the individual since July 2013, including the results from an October 2022 drug test that indicates that the Individual was negative for opiates, as well as Oxycodone/Oxymorphone. Further, the Individual acknowledged in her testimony that she now understands that taking medication that is not prescribed to her is a concern under the Adjudicative Guidelines, and she does not intend to repeat this behavior. She stated that going forward, she will continue to employ appropriate methods of pain relief and refrain from using medication that is not hers. As the record indicates that the Individual took prescription medication that was not hers on one occasion and that the Individual's misunderstanding of the concerns surrounding such behavior has been resolved, I find that this incident was so infrequent and happened under such circumstances that it is unlikely to recur and does not cast doubt on the Individual's current reliability, trustworthiness, or good judgement.

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 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 Bond Amendment does not act as a bar to restoring the Individual's access authorization. I further find that the Individual has brought forth sufficient evidence to resolve the

¹⁰ The other mitigating conditions, found at subparagraphs (b), (c), and (d), are not applicable in this case.

Guideline H security concerns set forth in the Summary of Security Concerns. Accordingly, I have determined that the Individual's access authorization should be restored. This Decision may be appealed in accordance with the procedures set forth at 10 C.F.R. § 710.28.

Noorassa A. Rahimzadeh
Administrative Judge
Office of Hearings and Appeals