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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: November 8, 2022) Case No.: PSH-23-0026
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Issued: March 28, 2023

Administrative Judge Decision

Phillip Harmonick, Administrative Judge:

This Decision concerns the eligibility of XXXXXXXXXXXXX (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

The Individual was granted access authorization in 2017. Exhibit (Ex.) 7 at 57. On February 10, 2022, the Individual signed and submitted a Questionnaire for National Security Positions (QNSP) in connection with seeking continued access authorization. *Id.* at 62. The Individual was interviewed by an investigator (Investigator) on May 3, 2022, as part of a background investigation into the Individual’s eligibility for access authorization. *Id.* at 69. On May 13, 2022, the Individual contacted the Investigator and disclosed that he had consumed approximately fifteen candies containing marijuana from March to April 2022 to manage anxiety and help him sleep. *Id.* at 74–75.

On May 18, 2022, the local security office (LSO) received a personnel security information report detailing the Individual’s marijuana use. Ex. 5. The LSO subsequently issued the Individual a letter of interrogatory (LOI) concerning his illegal drug use. Ex. 6. In his response, the Individual

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.

confirmed his use of marijuana and represented that he had last used marijuana products on April 25, 2022. *Id.* at 1.

The local security office (LSO) issued the Individual a letter notifying him that it possessed reliable information that created substantial doubt regarding his 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 Guideline H (Drug Involvement and Substance Misuse) of the Adjudicative Guidelines, and prohibited the LSO from granting or renewing the Individual's security clearance under 50 U.S.C. § 3343(b) (Bond Amendment). 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 seven exhibits (Exs. 1–7). The Individual submitted three exhibits (Exs. A–C). The Individual testified on his own behalf and offered the testimony of his wife. Hearing Transcript (Tr.) at 3, 9, 16. 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) (Revised Bond Amendment Policy). An addict is “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).

Tetrahydrocannabinols (THC) are controlled substances.² 21 U.S.C. § 812. The SSC cited the Individual's admission to having consumed candies containing THC approximately fifteen times from March to April 2022 while possessing access authorization in support of its invocation of the Bond Amendment. Ex. 1.

² 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 Feb. 28, 2023).

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 Individual’s admission to having purchased candies containing THC and using them approximately fifteen times from March to April 2022 while possessing access authorization. Ex. 1. The LSO’s allegation that the Individual purchased THC products and used them fifteen times in early 2022 while holding access authorization justifies its invocation of Guideline H. Adjudicative Guidelines at ¶ 25(a), (c), (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) (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 or 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. *Id.* at § 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 granted access authorization in 2017. Ex. 7 at 57. Beginning in 2018, the Individual experienced difficulty sleeping as a side effect of a medication he was prescribed. *Id.* at 74; Ex. 5 at 1. On February 3, 2022, following a consultation with a medical doctor, the Individual was granted a state-issued medical marijuana card allowing him to purchase marijuana for medicinal purposes. Ex. 7 at 74; Tr. at 40–41.

On February 10, 2022, the Individual completed and signed the QNSP. Ex. 7 at 62. The Individual checked boxes marked “No” on the QNSP in response to questions concerning whether he had used or purchased illegal drugs in the seven years prior to completing the QNSP or had ever used illegal drugs while possessing a security clearance. *Id.* at 55.

In mid-March 2022, the Individual purchased marijuana-infused candies from a local dispensary. *Id.* at 74; Ex. 5 at 1; Ex. 6 at 1. The Individual purchased additional marijuana candies in April 2022. Ex. 7 at 74. The Individual consumed approximately fifteen marijuana candies from mid-March to April 25, 2022. *Id.* at 75; Ex. 5 at 1; Ex. 6 at 1. The Individual “microdosed” one to two milligrams of marijuana per sitting to manage his symptoms without producing psychedelic effects. Tr. at 34, 42–43; *see also* Tr. at 10, 12 (reflecting the testimony of the Individual’s wife that she had never observed the Individual’s demeanor or behavior change after he consumed the candies).

In late April, the Individual read a news article concerning differences in the regulation of marijuana at the Federal and state levels, and concluded that his marijuana use was contrary to his employer’s policy. Ex. 7 at 75; Tr. at 19, 25. After he concluded that his use of the marijuana candies was unlawful, the Individual immediately disposed of the unused marijuana candies in the trash. Ex. 7 at 75; Ex. 5 at 1; Tr. at 25; *see also* Tr. at 10 (reflecting the testimony of the Individual’s wife that the Individual stopped using the marijuana candies “right away” after learning that it was unlawful to purchase or possess them under Federal law).

On May 3, 2022, the Individual met with the Investigator for an interview. Ex. 7 at 69. The Individual did not disclose his marijuana use during the interview. *Id.* at 69–71, 75. On May 13, 2022, the Individual contacted the Investigator again and disclosed his marijuana use. *Id.* at 74–75. The Individual told the Investigator that he had intended to disclose his marijuana use during the interview on May 3rd, but “forgot.” *Id.* at 75; *see also* Tr. at 26–29 (testifying that he became nervous during the interview, in which the Investigator asked him many questions about his foreign-born wife’s background, and forgot to disclose his marijuana use). Following his disclosure to the Investigator, the Individual disclosed his marijuana use to the LSO. Tr. at 25.

The LSO issued the Individual the LOI in August 2022. Ex. 6. In his response, the Individual reported that he had not used marijuana products since April 25, 2022, and that he did not intend to use them in the future. *Id.* at 1–2. The Individual represented that, at the time he obtained the marijuana products, he believed that “it would be okay” for him to use them, even though they were illegal under Federal law, because he possessed a medical marijuana card which entitled him to legally purchase and use marijuana for medicinal purposes in the state in which he resided. *Id.* at 2.

The Individual testified at the hearing that he had not used marijuana since he disposed of the marijuana candies in April 2022. Tr. at 35. He denied experiencing any urges to use marijuana and indicated that he did not intend to use marijuana in the future. *Id.* at 35–36. The Individual testified that he manages his sleeping difficulties by only taking his medication in the morning, so that it has the least possible impact on his sleep, and using magnesium supplements as a sleep aid. *Id.* at 39. The Individual indicated that his employer had not directed him to undergo drug testing after his disclosure but that he was willing to do so if required. *Id.* at 43–44.

V. ANALYSIS

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 testified that he had not used marijuana since April 2022 when he disposed of the marijuana candies he purchased. I found the Individual’s testimony concerning his marijuana use credible because he voluntarily disclosed his drug use, which likely would not have been discovered independently, to the Investigator, he provided a consistent account of the circumstances of his drug use from his disclosure to the Investigator up to and including the hearing, and the Individual’s wife corroborated the information he provided. As the Individual has not used marijuana products for nearly one year, and he demonstrated the self-control to stop using marijuana immediately when he perceived that doing so was impermissible, I find that he is not an unlawful user of a controlled substance. Revised Bond Amendment Policy at 6. In light of the Individual’s ability to discontinue marijuana use without relapse, and his denial of any urges to use marijuana products, I find that he is not an “addict” under the Bond Amendment.

Having concluded that the Individual is not an unlawful user of a controlled substance or an addict, I find that the Individual is not barred from holding access authorization pursuant to the Bond Amendment.

B. Guideline H

The Individual’s purchase and use of marijuana products while holding access authorization justifies the LSO’s invocation of Guideline H. Adjudicative Guidelines at ¶ 25(a), (c), (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.

The Individual obtained a medical marijuana card and used the marijuana products he consumed for a medical purpose. The Individual denied ever having consumed sufficient quantities of the marijuana products to produce intoxicating effects. He voluntarily disclosed his use of the marijuana products to the Investigator, but for which the Individual's marijuana use likely would have gone undetected, and there is no indication that the Individual has used marijuana since April 2022. The Individual has established means of addressing the side effects of his medication without resorting to marijuana, and he testified that he does not intend to use marijuana again in the future. In light of the Individual's use of the marijuana for medicinal rather than recreational purposes, prompt discontinuation of marijuana use after learning that it was prohibited, honesty in disclosing his marijuana use to the Investigator, and commitment to managing the side effects of his medication through resources other than marijuana in the future, I find that the Individual's marijuana use occurred under such circumstances that it is unlikely to recur and does not cast doubt on his current reliability, trustworthiness, and good judgment. *Id.* at ¶ 26(a).

The second mitigating condition is inapplicable in this case because the Individual did not take any actions to overcome a drug-related problem. *Id.* at ¶ 26(b). The third mitigating condition is inapplicable because the LSO did not assert that the Individual abused prescription drugs. *Id.* at ¶ 26(c). The final mitigating condition is inapplicable because the Individual did not participate in drug-related treatment. *Id.* at ¶ 26(d).

The Individual has acknowledged his inappropriate use of marijuana and exercised trustworthiness and good judgment in promptly coming forward with this information. The Individual's use of miniscule amounts of marijuana for medicinal purposes, which he believed at the time to be lawful, raises less serious security concerns than would have been the case had he used the marijuana recreationally and he has clearly stated that he intends to refrain from any marijuana use in the future. For these reasons, I find that the Individual has resolved the security concerns asserted by the LSO under Guideline H.

VI. 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 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 brought forth sufficient evidence to resolve the security concerns set forth in the Summary of Security Concerns, and to demonstrate that he is not prohibited from holding access authorization pursuant to the Bond Amendment. 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.

Phillip Harmonick
Administrative Judge
Office of Hearings and Appeals