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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: January 31, 2023)	Case No.: PSH-23-0054
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_____)	

Issued: May 16, 2023

Administrative Judge Decision

Richard A. Cronin, Jr., 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 granted.

I. BACKGROUND

The Individual is employed by a contractor at a DOE facility and is required to possess a security clearance. Transcript of Hearing (Tr.) at 46–47. When selected for a random urine drug test in March 2022, the Individual tested positive for marijuana. Exhibit (Ex.) 10 at 1 (urine drug test results).

The local security office (LSO) issued the Individual a letter notifying him that it possessed reliable information that created substantial doubt regarding his eligibility to possess an 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. Ex. 3.

The Individual exercised his right to request an administrative review hearing pursuant to 10 C.F.R. Part 710. Ex. 5. The Director of the Office of Hearings and Appeals (OHA) appointed

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.

me as the Administrative Judge in this matter, and I subsequently conducted an administrative hearing. The LSO submitted ten exhibits (Exs. 1–10). The Individual submitted seven exhibits (Exs. A–G).² The Individual testified on his own behalf and offered the testimony of a friend (Friend) and his spouse. Tr. at 30, 77.

II. THE NOTIFICATION LETTER AND THE ASSOCIATED SECURITY CONCERNS

The LSO cited Guideline H of the Adjudicative Guidelines as the basis for its suspension of the Individual’s access authorization. Ex. 1. “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 Individual’s positive urine test result for marijuana as Guideline H derogatory information. Given this test result, the LSO’s invocation of Guideline H was justified. *Id.*

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 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

² The Individual submitted these exhibits designating them as Exhibits Nos. 1–6 and Exhibit G. For purposes of this Decision, I have redesignated them as Exhibits A–G.

The Individual has been employed by DOE contractors at the DOE site since 1996 and has possessed a security clearance during his entire employment.³ Tr. at 46–47. At the hearing, the Individual testified that in 2019 he was playing basketball with several of his relatives and fell. *Id.* at 11. It was determined that the Individual had fractured his heel and required surgery to insert surgical screws to repair the injury. *Id.* After the Individual’s surgeon had removed a cast from the Individual’s heel, a soft cast was placed on his heel, and he was given a scooter for mobility. *Id.* at 12. Shortly thereafter, the Individual was going to the bathroom and fell, reinjuring his heel. *Id.* This new injury required additional surgery and physical therapy. *Id.*

Because of these injuries, the Individual experienced significant amounts of pain such that the pain would cause him trouble with sleeping. *Id.* The Individual had been prescribed pain killing narcotic medication, but the Individual did not want to overuse these drugs and, as a result, researched other ways of relieving his pain. *Id.* at 49. His research indicated that CBD oil could relieve pain.⁴ *Id.* Other individuals advised him to use only CBD oil derived from hemp plants since it did not have significant amounts of the active (and illegal) substance of tetrahydrocannabinol (THC) found in marijuana. *Id.* Consequently, the Individual purchased products that were hemp based. *Id.* at 50, 59.

The Individual further testified that around December 2021, the Individual began to use topical CBD oil to reduce the pain in his injured heel. *Id.* at 12. In purchasing the CBD oil, he would look for brands that were derived from hemp and had less than two percent THC. *Id.* at 47. He purchased the CBD oil from a health food store or from various gas stations. *Id.* at 47. Over the following three months the Individual would use the CBD oil in the evenings to reduce his pain and would apply it approximately three times in an evening before going to bed. *Id.* at 48–49. Typically, he would use the CBD oil when he would get back home from work and would reapply it after showering. *Id.* at 48. The Individual testified that he would use the CBD oil “quite a bit” because the CBD oil made several activities less painful. *Id.* at 48.

In March 2022, he was selected for a random urine drug test. Ex. 10 at 1. A few days after taking the test, the Individual was informed that he had tested positive for marijuana. *Id.* The Individual testified that, upon receiving the test result, he stopped using the CBD oil. Tr. at 48. The Individual then personally paid for another urine drug test on April 1, 2022, by another laboratory. *Id.*; Ex. F at 4. The results of this test were negative for marijuana. Ex. F at 4. Another urine drug test required by the DOE facility where he worked was collected on April 21, 2022, and was negative for marijuana. *Id.* at 3. The Individual submitted into the record a report, produced by the drug testing laboratory at the DOE facility, which confirmed that but for the March 2022 test, the Individual had tested negative for all drugs during the period June 2018 to March 2023. *Id.* During the period before the March 2022 positive test for marijuana, the Individual was randomly tested once every two years. Ex. 6 at 3. After the positive test, the Individual was tested once a month. *Id.*

³ Because the Individual was placed on unpaid administrative leave by his employer for a period of six months because of his positive urine test, the DOE terminated his clearance. Tr. at 14. The Individual was subsequently rehired but had to reapply for a clearance, which is the subject of this Decision. *See infra; Id.* at 14–15.

⁴ CBD oil is an oil containing cannabidiol (CBD), an active ingredient in marijuana. It can also be found in another plant, hemp. Tr. at 49.

As a result of his positive test for marijuana, his employer placed the Individual on unpaid administrative leave for six months so that he could resolve his suspended clearance. Tr. at 14. Because the Individual did not have need for a security clearance for six months the LSO terminated his security clearance. *Id.* at 15. Nonetheless, his employer placed him in a different position in April 2022, and he was informed by the LSO that he would have to reapply for a security clearance. *Id.*

As a requirement to continue at work after being reinstated, the Individual was required to complete a drug abuse assessment. Ex. E at 1. The treatment facility that conducted the assessment found that the Individual was a “high functioning, responsible and trustworthy employee” who did not meet any of the criteria for a diagnosis of substance abuse or addiction. *Id.* The treatment facility recommended that the Individual be allowed to return to work immediately and complete three individual psychoeducation hours on pain management techniques within 60 days of his return to work.⁵ *Id.* The Individual successfully completed the pain management techniques educational program in the required time period. Ex. G at 1. The Individual also testified that he has never been arrested or used any illegal drugs or medication not prescribed for him. *Id.* at 62.

The Individual testified that when he had to “look [his spouse] in the eye” and inform her about his losing his security clearance, she became concerned about possible financial problems that could result if he lost his job. *Id.* at 56. He also felt compelled to tell his son about the situation so that he might learn from the Individual’s mistake. *Id.* at 57. The Individual feels that he alone is responsible and accountable for the loss of his security clearance. *Id.* at 57–58. The Individual has learned from this experience and now knows he should have consulted with the facility’s medical department or the Medical Review Officer (MRO) for the DOE facility before using the CBD oil. *Id.* at 57.

The Individual submitted into the record a copy of an email to the Individual from the Chief Operating Officer of the firm that processes drug testing at the DOE facility. Ex. C at 1. The March 17, 2022, email quotes text from a memorandum (memo) sent from the firm’s MRO to the Individual’s employer’s human resources department. *Id.* The email quotes the memo in relevant part:

In regards to his recent [urine drug test], [the Individual] screened positive for THC with a very low level. I have interviewed [the Individual] in my capacity as the Medical Review Officer for our Federal Drug Screening program and in my capacity as the Site Medical Director. Federal Law does not allow me to convert this [test] to a negative regardless of the level/concentration or circumstance that may have created it and therefore it will remain a positive [test] for THC. However, I do wish to offer my medical opinion after closely evaluating the situation. It is my medical opinion that the [Individual’s] low level THC likely represents consumption or usage of commercially available CBD products sold over the counter at most every type of market place in this country. I do not feel he knowingly consumed THC and I do not feel he has ever represented a safety or

⁵ The treatment center’s report is dated May 6, 2022, and implies that the Individual had not yet returned to work. Ex. 5 at 1. The Individual testified that he returned to work in April 2022. I need not resolve this factual discrepancy since it has no bearing on the issue of the Individual’s suitability to hold a security clearance.

security risk. He unfortunately is a victim of a CBD industry that is not regulated well and therefore advertises CBD products to be “free or void” of THC but this is almost never the case. Therefore, they often can trigger these low level positive screens. These levels are not ever likely to be impairing and in my opinion are low risk.

Id.

The Individual’s spouse testified that she has known the Individual for 17 years, and they have been married for 11 years. Tr. at 31. Her testimony confirmed the Individual’s account regarding the facts surrounding his injury and his medical treatment. *Id.* at 32–33. She stated that she supported his decision to try CBD oil. *Id.* at 34, 38. She also testified that she found the Individual to be a “man of his word” and a “by the book” type. *Id.* at 37. She stated that the Individual, during social occasions, will only consume two beers. *Id.* at 41. The spouse also testified that she has never observed the Individual misusing prescription pain medication. *Id.* at 42. Further, she has never been aware of any issues regarding the Individual’s integrity. *Id.* The Individual has coached most of the youth teams for which their son has played. *Id.* at 39. The spouse testified that regarding the Individual’s reliability, judgment, and truthfulness, the Individual is “spot on.” *Id.* at 40.

The Friend testified that he has known the Individual for five or six years. *Id.* at 18. The Friend’s family and the Individual’s family go out to dinner together and will take trips out of town together. *Id.* During a year both will coach three youth sports teams together. *Id.* at 19. Typically, he will see the Individual on average three times a week. *Id.* The Friend trusts the Individual “100 percent” and would entrust his children to be cared for by the Individual and his spouse. *Id.* The Friend testified that he knows about the Individual’s injury and his subsequent CBD oil use. *Id.* at 20, 22. Because the Friend is a recovering alcoholic, he is aware of alcohol misuse and has not observed the Individual appear under the influence of alcohol or marijuana. *Id.* at 23, 30.

V. ANALYSIS

The Guideline H security concerns in this case center on the Individual’s one positive test for marijuana. Conditions that could mitigate a security concern 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.

In the present case, I find that mitigating factors (a) and (b) are applicable.

Regarding mitigating factor (a), I find that the Individual's absorption of THC was caused by his use of CBD oil and was inadvertent. I find convincing the MRO's statement that the inadvertent absorption of THC by use of CBD oil is the cause of the Individual's positive urine test. I also find convincing the Individual's account regarding the significant injury that prompted his use of CBD oil along with the supporting testimony of the Individual's spouse and the Friend confirming the injury. After examining the entire record, I find the Individual's injury that prompted the Individual's use of CBD oil and consequent absorption of THC happened under such circumstances that it is unlikely to recur. There is no evidence that, outside his use of CBD oil, the Individual has ever used marijuana, and this is supported by the Individual's negative urine tests from the past five years. The testimony of the spouse and the Friend supports a finding that the Individual's judgment, reliability, and trustworthiness has never been impaired. Consequently, mitigating factor (a) is applicable in this case.

As for mitigating factor (b), the Individual has openly admitted his use of CBD oil that resulted in the positive marijuana drug test. He has further convincingly established his abstinence from CBD oil/marijuana and has submitted eleven negative monthly drug tests beginning from the date of his positive test (April 2022 to March 2023) to verify his non-use of these substances and establish that he has changed the circumstances, use of CBD oil, which resulted in his positive marijuana test. Additionally, the testimony from the spouse, the Friend, and the memo from the MRO support a finding that the Individual is not a user of exogenous marijuana. Considering the record before me, I find that mitigating factor (b) applies in the present case.

Lastly, I have considered the factors described in 10 C.F.R. §710.7(c) regarding the application of the Adjudicative Guidelines: the nature, extent, and seriousness of the conduct; the circumstances surrounding the conduct, to include knowledgeable participation; the frequency and recency of the conduct; the age and maturity of the individual at the time of the conduct; the voluntariness of participation; the absence or presence of rehabilitation or reformation and other pertinent behavioral changes; the motivation for the conduct; the potential for pressure, coercion, exploitation, or duress; the likelihood of continuation or recurrence; and other relevant and material factors. In the Individual's case, as discussed above, I find that there were unusual circumstances leading to his positive test for marijuana and that he did not understand that his use of CBD oil would result in a positive marijuana test result. I also find that there is a low likelihood that the Individual will use CBD oil or otherwise consume marijuana in the future. Apart from the

spouse's and the Friend's testimony concerning the Individual's integrity, the Individual's own testimony reflects the fact that this incident has made a significant impression on him. Additionally, the Individual's history of negative urine tests supports this conclusion. These findings further convince me that the Individual has mitigated the LSO's security concerns.

In sum, based upon the evidence before me, I find that the Individual has mitigated the Guideline H security concerns raised by his positive urine test for marijuana.

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 these concerns. Accordingly, I have determined that the Individual's access authorization should be granted. This Decision may be appealed in accordance with the procedures set forth at 10 C.F.R. § 710.28.

Richard A. Cronin, Jr.
Administrative Judge
Office of Hearings and Appeals