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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: June 27, 2023) Case No.: PSH-23-0100
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Issued: October 20, 2023

Administrative Judge Decision

Janet R. H. Fishman, 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 that requires him to hold an access authorization. In April 2019, the Individual signed a DOE Security Acknowledgment, in which he acknowledged that any “involvement with any illegal drug, could result in the loss of [his] DOE access authorization.” Exhibit (Ex.) 5 at 128. In a May 2019 Questionnaire for National Security Positions (QNSP), the Individual reported that, between 2001 and 2013, he consumed the drug tetrahydrocannabinol (THC) socially and stated that he did not intend to use “the drug” in the future. Ex. 4 at 51–52. In January 2023, after having been directed to report for a random drug test, the Individual admitted to his manager that he consumed “chocolate laced with marijuana” (an “edible”). Ex. 6. The Individual’s employer found that the Individual’s ingestion of an edible violated his employer’s workplace substance abuse program, and the Individual was suspended for three days without pay. *Id.* at 133.

In March 2023, the Local Security Office (LSO) issued a Letter of Interrogatory (LOI) to the Individual, which sought additional information related to the Individual’s drug use. Ex. 9. In his

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.

response to the LOI, the Individual reported that, on January 14, 2023, he ingested “Edible Marijuana Chocolate.” *Id.* at 138. The Individual also reported that he did not initially report his ingestion of the edible to the DOE because he feared he would lose his job and his ability to provide for his family. *Id.* at 138. He further stated that this was “a stupid decision and a lapse of judgment that I very much regret and absolutely will not repeat.” *Id.*

Due to unresolved security concerns, the LSO informed the Individual, in a Notification Letter, that it possessed reliable information that created substantial doubt regarding his eligibility to hold a security clearance. Ex. 1. In a Summary of Security Concerns (SSC) attached to the Notification Letter, the LSO explained that the derogatory information raised security concerns under Guideline E (Personal Conduct) and Guideline H (Drug Involvement and Substance Abuse) of the Adjudicative Guidelines. *Id.*

In June 2023, the Individual requested an administrative 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), I took testimony from three witnesses called by the Individual, including the Individual himself. *See* Transcript of Hearing, Case No. PSH-23-0100 (Tr.). The Individual submitted two exhibits, marked as Exhibit A and Exhibit B. Counsel for the DOE submitted nine exhibits, marked as Exhibits 1 through 9 and did not present any witnesses.

II. The Summary of Security Concerns

As previously mentioned, the Notification Letter included the SSC, which sets forth the derogatory information that raised concerns about the Individual’s eligibility for access authorization. The SSC specifically cites Guidelines E and H of the Adjudicative Guidelines. Ex. 1.

Guideline E provides that “[c]onduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual’s reliability, trustworthiness, and ability to protect classified or sensitive information.” Adjudicative Guidelines at ¶ 15. In citing Guideline E, the LSO relied upon the Individual’s admissions that he used THC from 2001 to 2013 and that he “willingly” ingested an edible in January 2023, after representing to the DOE in his May 2019 QNSP that he had no intention of using illegal drugs after 2019. Ex. 2 at 4–5. The LSO also cited the Individual’s suspension from employment for violating his employer’s workplace substance abuse program and the admission that he failed to report his drug use because he feared losing his job. *Id.*

Guideline H provides that the illegal use of controlled substances² “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

² According to the Adjudicative Guidelines, a “controlled substance” is “a drug or other substance, or immediate precursor, included in scheduled I, II, III, IV, or V of part B” of title 21 U.S.C. § 812. 21 U.S.C. § 802(6); Adjudicative Guidelines at ¶ 24. THC, a “hallucinogenic substance,” and marijuana are “Schedule I” controlled substances, which includes drugs that have “a high potential for abuse,” that have “no currently accepted medical use in treatment in the United States,” and for which “[t]here is a lack of accepted safety for use of the drug or other substance under medical supervision.” 21 U.S.C. § 812(b)(1).

to comply with laws, rules, and regulations.” Adjudicative Guidelines at ¶ 24. In citing Guideline H, the LSO relied upon the Individual’s history of illegal use of THC and marijuana, from October 2001 to June 2013, and in January 2023. Ex. 2 at 5–6. Based on the above-referenced conduct, I find the LSO’s security concerns under Guidelines E and H are 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 his eligibility for an access authorization. The Part 710 regulations are drafted to permit the introduction of a very broad range of evidence at personnel security hearings. Even appropriate hearsay evidence may be admitted. *Id.* § 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

On January 18, 2023, the Individual was notified by his employer that he was selected for a random drug test. Ex. 7 at 133. Before taking the test, the Individual admitted to his manager that he “ate a piece of an edible.” *Id.* The Individual’s employer investigated the incident and concluded the Individual “willingly ate a piece of [an edible] while celebrating his birthday with friends.” *Id.* The Individual’s employer also concluded the edible was “brought to the gathering by a friend and offered to [the Individual].” *Id.* He did not disclose his ingestion of the drug to his employer until approximately ten calendar days after it occurred.³ *Id.* The Individual was “given a three-day suspension without pay, for violating [his employer’s] workplace substance abuse program.” *Id.* The Individual’s employer was troubled that the Individual did not immediately disclose his drug use, but permitted the Individual to return to work because the employer was not aware of “any outstanding security concerns.” *Id.* at 134. The Individual returned to work on March 21, 2023. *Id.*

In his March 2023, LOI, the Individual reported that, in January 2023, he ate “Edible Marijuana Chocolate,” contained in a chocolate bar he received from a friend. Ex. 9 at 138. He stated that eating the edible made him feel “relaxed and happy.” *Id.* He stated that he never purchased,

³ The results of the Individual’s January 2023 drug test were negative for illegal drugs. Ex. 6 at 132.

cultivated, or sold the drug, and he did not intend on using illegal drugs, “even those legalized in certain jurisdictions,” in the future. *Id.*

During the hearing, the Individual’s partner testified that she has known the Individual for seven years, and she and the Individual moved in together a couple of months prior to the hearing. Tr. at 13–14, 26. His partner stated that she observes the Individual in social settings, during game nights with friends, at concerts, and at family gatherings. *Id.* at 14–15. His partner stated that, in these social settings, she has not observed the Individual engage in drug use. *Id.* at 15. His partner also stated that she and the Individual have discussed marijuana because, in the state in which they live, recreational use of marijuana is legal under state law. However, his partner clarified that neither she nor the individual use marijuana. *Id.* at 16–17. His partner also stated that she and the Individual both tried marijuana during their college years. *Id.* at 18. His partner stated that she knows the Individual needs to maintain his clearance for work and the requirements for that. *Id.* at 19. His partner explained that she was not present at the party in January 2023, but from what the Individual told her, she knew that he was hanging out with some friends. *Id.* at 19–20. According to her testimony, one of his friends, who was from out of state, legally purchased the edible and offered it at the party. *Id.* at 20. His partner stated that she understood the Individual’s use of the drug to be a “spur of the moment” thing, in a party atmosphere. *Id.* His partner said that, based on her observations, she has no concerns the Individual will use marijuana in the future. *Id.* at 21. His partner said the suspension of the Individual’s access authorization has been difficult for the family to deal with; he is concerned about his job and being a good partner to her. *Id.* at 21–22. His partner said this is not a situation the Individual wants to put his loved ones in again. *Id.*

The Individual’s partner also testified that the Individual has seen a counselor and has attended Alcoholics Anonymous (AA) and Narcotics Anonymous (NA) meetings. Tr. at 22. She stated that she works full time, so depending on the time of the meetings, she will see him attend the meetings virtually. *Id.* at 27–28. His partner said the Individual takes his meetings in a separate room, so he has privacy. *Id.* at 28. His partner stated that the Individual told her that seeing how drug use has affected the lives of those at the meetings helped drive home the importance of making the right decisions for his family. *Id.* at 23. His partner said the Individual still attends meetings periodically, and he attends virtually. *Id.* His partner stated she thinks the Individual has learned to use the meetings as an opportunity to learn other ways to improve himself and his life. *Id.* at 24. His partner said that, in their immediate circle of friends, no one uses marijuana. *Id.* She said the friend who provided the Individual with the drug during the party is not someone they associate with anymore, and that was the Individual’s decision. *Id.* at 24–25. His partner stated that she has no reservations about the Individual’s trustworthiness, and she can rely on him. *Id.* at 25–26.

The Individual’s father testified that he never discussed drugs or alcohol with his family because the issue never presented itself. Tr. at 36. He stated that he also held a security clearance as part of his employment, so he tried to set a good example for all his children. *Id.* at 33, 36–37. He stated that when the Individual was in college, he chose to live in a “substance free” dormitory, which meant no alcohol or other types of substances were allowed. *Id.* at 40–41. He stated that the Individual told him about the drug he consumed at the party, after his drug test. *Id.* at 46–47. He stated that he believed the Individual thought it was best to make someone at his job aware of his ingestion of the drug before the test. *Id.* at 48. He stated the Individual told him that, after the drug test, he had to go to meetings and take courses online. *Id.* at 48–49. He also stated that he knew

the Individual would make every effort to do what was required of him, and he does not have any concerns about the Individual's reliability. *Id.* at 49.

The Individual testified that, in January 2023, he was at a party with friends. *Id.* at 66. He declared that:

And then we went to another friend's house where there were a few people, a handful of friends, and maybe a half dozen. And we were having pizza and having a few beers and stuff like that. I had had a few drinks. And it was one of those things where I don't know why I did [it]. It was a lapse in judgment. It was wrong. I know it was wrong. It was not just wrong. It was stupid.

Id. at 66-67. He said that at the party, a friend, who no longer lived in the area but was visiting at the time, had a normal-looking chocolate bar that contained marijuana. *Id.* at 68. The Individual said he knew the person who provided the edible and convinced him to try it. *Id.* at 69. The Individual claimed that he thought to himself that one piece "wouldn't hurt." *Id.* He stated that it was not something he typically does with friends, but he had a lapse in judgment. *Id.* at 66-67. He could not give a reason for why he ingested the edible; he said it was wrong and stupid. *Id.* at 67. He said that, after the fact, he immediately regretted it. *Id.* He said that, approximately a week after the party, he was selected for a random drug test at work. *Id.* at 70-71, 74. He stated that notification of the drug test prompted him to report his drug use to his manager by stating that he was worried he would not pass the test. *Id.* at 71. He stated that the results of the drug test were negative. *Id.* at 76.

The Individual testified that his employer required him to seek treatment with a substance abuse professional (SAP). *Id.* at 79-80. He stated that he was required to meet with the SAP multiple times per week, for a month, and he was also required to attend AA or NA meetings every week. *Id.* at 80-81. The Individual submitted a July 30, 2023, letter from the SAP, which indicated that the SAP met with the Individual for six sessions, from February 18, 2023, to March 14, 2023. Ex. A. In the letter, the SAP stated that, after meeting with the Individual for six sessions, she did not detect that the Individual "had any issues with illegal substances nor alcohol." *Id.* at 2. The letter also indicated that the SAP recommended the Individual "remain abstinent from all substances; including alcohol, attend 2 AA/NA meetings per week and keep an AA/NA journal." *Id.* The letter also indicated that the Individual followed the SAP's recommendations, claiming that he "remained abstinent, completed his journal thoroughly and attended all six sessions with me without fail." *Id.*

The Individual also submitted evidence showing that he attended eight AA meetings, which consisted of screenshots of the virtual meetings and journal entries for each meeting. Ex. B. The Individual stated he did not obtain specific attendance records because there is a separate process for people to obtain those records, and he did not use that process because the SAP did not require it. Tr. at 92-93. The Individual asserted that he attended more meetings than what was reflected in the screenshots and journal entries he submitted. *Id.* at 85. He stated he attended additional sessions after March, every couple of weeks. *Id.* He also stated the SAP suggested to him that he continue attending meetings if, for example, he was having a rough day and would find the meetings

beneficial. *Id.* at 86. The Individual found the AA/NA classes helpful in lieu of seeing an expensive traditional therapist. *Id.* at 91.

When asked about his prior drug use, the Individual stated that between 2001 and 2013, he used marijuana “socially and infrequently,” and that he believed he used the drug “less than five” times during that period. *Id.* at 62. He also stated:

The person that I did associate with when this happened, they live out of state and they visited one or twice. That is a person that I am removing from my life. I am not going to associate with them. And I think that given that they are not, like, routinely around or frequency in my circle of friends, I think that’s something that’s possible for me to do. And it’s important to me, and that’s something that – a step that I am taking.

Id. at 94–95. He also said that he has never had any legal problems, except a speeding ticket, and has tried to make good choices in his life. *Id.* at 95.

V. Analysis

A. Guideline E

The Adjudicative Guidelines set forth seven factors that may mitigate security concerns under Guideline E:

- (a) The individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts;
- (b) The refusal or failure to cooperate, omission, or concealment was caused or significantly contributed to by advice of legal counsel or of a person with professional responsibilities for advising or instructing the individual specifically concerning security processes. Upon being made aware of the requirement to cooperate or provide the information, the individual cooperated fully and truthfully;
- (c) The offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual’s reliability, trustworthiness, or good judgment;
- (d) The individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that contributed to untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur;
- (e) The individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress;

- (f) The information was unsubstantiated or from a source of questionable reliability; and
- (g) Association with persons involved in criminal activities was unwitting, has ceased, or occurs under circumstances that do not cast doubt upon the individual's reliability, trustworthiness, judgment, or willingness to comply with rules and regulations.

Adjudicative Guidelines at ¶ 17.

At the outset, I note that the LSO appears to have raised the Individual's use of THC from 2001 to 2013 as part of what gives rise to the Guideline E security concern. Drug involvement and substance misuse are appropriately addressed pursuant to Guideline H. *See* Adjudicative Guidelines at ¶ 24. As such, in so far as the Individual's use of THC is concerned, I find that it was not properly cited as a basis for invoking Guideline E. Therefore, my analysis of Guideline E will focus solely on the LSO's remaining bases for invoking Guideline E: the Individual's use of marijuana in 2023 in spite of his 2019 representation to DOE that he had no future intention to use drugs, the Individual's violation of his employer's workplace substance abuse program, and his admission that he failed to report his consumption of the edible for fear of losing his job.

The Individual credibly testified that he suffered a lapse in judgment and acted in error when he consumed the edible at his birthday party. Recognizing this lapse in judgement, the Individual underwent treatment with an SAP and participated in AA/NA meetings, he made the decision to discontinue associating with the Individual who provided him the edible, and he presented sufficient credible evidence to persuade me that he is unlikely to engage in drug use going forward, as discussed in my analysis of Guideline H below. Due to the Individual's acknowledgment of his error and the positive steps he has taken to alter his behavior, I find that the Individual's violation of his employer's substance abuse program and 2019 drug certification occurred under such circumstances that they are unlikely to recur and do not cast doubt on the Individual's reliability, judgment, or trustworthiness. *Id.* at ¶ 17(c), (d). Similarly, I find that the Individual's failure to report his edible consumption is mitigated by the steps he has taken to assure his employer and DOE that his drug use was a one-time lapse in judgment that is unlikely to recur. *Id.*

B. Guideline H

The Adjudicative Guidelines set forth four factors that may mitigate security concerns under Guideline H:

- (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 or 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.

Mitigating factor (a) under Guideline H applies to the security concerns raised by the Individual's admitted use of THC between 2001 and 2013. As noted above, the Individual's use of the drug occurred ten years before the hearing, and the Individual used THC less than five times during that period. I find that the Individual's use of THC, between 2001 and 2013, occurred so long ago, and was infrequent enough, that it no longer casts doubt on his reliability, trustworthiness, or good judgment. Therefore, I find the Individual has mitigated the security concerns related to his admitted use of THC between 2001 and 2013 under ¶ 26(a) of the Adjudicative Guidelines.

Mitigating factor (a) also applies to the Individual's ingestion of an edible in January 2023. The Individual testified that his ingestion of an edible in January 2023 was a lapse in his judgment during his birthday celebration, and he stated he is not a habitual user of edible marijuana. Furthermore, as noted above, the Individual's SAP did not detect that the Individual had any issues with alcohol or substance abuse, and the Individual completed six counseling sessions with the SAP and eight AA/NA meetings to learn to alleviate any stressors that may have contributed to his drug use. Finally, the Individual testified that he no longer associates with the friend who provided the edible during his birthday party. Therefore, I find that the Individual's ingestion of an edible is not likely to recur, and the Individual has mitigated the security concerns raised by his ingestion of an edible in January 2023, under ¶ 26(a) of the Adjudicative Guidelines.⁴

VI. Conclusion

For the reasons set forth above, I conclude that the LSO properly invoked Guideline E, as it related to the Individual's 2023 drug use despite his 2019 representation to DOE that he had no future intention to use drugs, his failure to report the drug use, and the Individual's violation of his employer's workplace substance abuse program. I also find that the LSO properly invoked Guideline H of the Adjudicative Guidelines. After considering all the evidence, both favorable and

⁴ As to the remaining mitigating factors, I find factors (b), (c), and (d) do not apply to the circumstances in this case and will not be discussed.

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 Notification Letter. Accordingly, I find the Individual has demonstrated that restoring his security clearance would not endanger the common defense and would be clearly consistent with the national interest. Therefore, I find 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.

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