

contained THC.³ Ex. 5. The LSO subsequently retrieved the wrapper for the THC gummies, which included images of marijuana leaves on the front of the packaging and text in large print on the backside of the packaging indicating to “KEEP OUT OF REACH OF CHILDREN,” from the Individual’s workplace trash can. *See* Ex. 12 (reflecting photographs of the packaging taken by the LSO).

The LSO issued the Individual a letter of interrogatory (LOI) on June 29, 2023, concerning the incident. Ex. 6. In his response, the Individual represented that, due to his impaired vision and not having reviewed the back of the THC gummy wrapper, he had consumed the THC gummies without knowing that they contained THC. Ex. 7 at 2–4, 6.

The LSO subsequently issued the Individual a Notification Letter advising him that it possessed reliable information that created substantial doubt regarding his eligibility for access authorization. Ex. 1. In a Summary of Security Concerns (SSC) attached to the letter, the LSO explained that the derogatory information raised security concerns under Guidelines E and H of the Adjudicative Guidelines. Ex. 2.

The Individual exercised his right to request an administrative review hearing pursuant to 10 C.F.R. Part 710. Ex. 3. The Director of the Office of Hearings and Appeals (OHA) appointed me as the Administrative Judge in this matter, and I conducted an administrative hearing. The LSO submitted fourteen exhibits (Exs. 1–13).⁴ The Individual submitted seventeen exhibits (Exs. A–Q). The Individual testified on his own behalf, and offered the testimony of a character witness. Tr. at 3, 11, 21. The LSO did not call any witnesses to testify. *Id.* at 3.

II. THE NOTIFICATION LETTER AND THE ASSOCIATED SECURITY CONCERNS

The LSO cited Guideline E (Personal Conduct) of the Adjudicative Guidelines as the first basis for its substantial doubt regarding the Individual’s eligibility for access authorization. Ex. 2 at 2–4.

Conduct 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. Of special interest is any failure to cooperate or provide truthful and candid answers during national security investigative or adjudicative processes.

³ 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 Nov. 7, 2023).

⁴ The LSO submitted a document marked as “Exhibit 10a” to indicate that it should be reviewed in connection with another document marked as “Exhibit 10.” Exhibit 10a interrupted the sequential marking of the LSO’s exhibits, and thus the LSO’s exhibit numbers do not correspond to the total number of exhibits submitted by the LSO.

Adjudicative Guidelines at ¶ 15. The SSC alleged that the Individual committed a security infraction by transporting contraband into a secured area,⁵ that he consumed illegal drugs in the workplace, and that he consumed the THC gummies despite prominent indications on the packaging indicating the contents. Ex. 2 at 2–4. The LSO’s allegations that the Individual engaged in conduct that supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, or unwillingness to comply with rules and regulations and which indicates that he may not properly safeguard classified or sensitive information justifies its invocation of Guideline E. Adjudicative Guidelines at ¶ 16(c)–(d).

The LSO cited Guideline H (Drug Involvement and Substance Misuse) of the Adjudicative Guidelines as the second basis for its substantial doubt regarding the Individual’s eligibility for access authorization. Ex. 2 at 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 alleged that the Individual consumed the THC gummies in the workplace and consequently tested positive for marijuana use. Ex. 2 at 1–2. The LSO’s allegations that the Individual engaged in illegal drug use while granted access to classified information and tested positive for use of an illegal drug 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) (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.*

⁵ The Individual denied that he had brought “Illegal Drugs” into the facility in violation of the facility access policy on the basis that the gummies were a hemp product a person could lawfully possess under federal law. Tr. at 46; *see also* Ex. 10a at 11 (containing the relevant provision of the facility access policy); Tr. at 9 (reflecting the stipulation of the parties that cannabis products containing 0.3% or less THC by dry volume are hemp products declassified as illegal drugs under the 2018 Farm Bill). In light of my determination that the Individual has mitigated all of the security concerns asserted by the LSO under Guideline E, I need not address whether the Individual violated the facility access policy. *Infra* pp. 6–7.

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 first employed by DOE in 1992 and has possessed access authorization continuously since that time. Tr. at 22–23; Ex. C. The Individual also served in the U.S. Navy for several decades, during which time he received numerous medals and commendations. Ex. B at 1–3; Ex. F. In 2015, the Individual suffered a serious medical event as a result of which he experienced paralysis and was hospitalized for several months. Ex. D at 6; Ex. M at 4.

The Individual underwent a lengthy rehabilitation following the medical event, during which time he refused pain medication prescribed by his doctors due to his concerns over their side effects. Tr. at 62; *see also* Ex. D at 6 (containing a letter from one of the Individual’s doctors in which the doctor noted the Individual’s “aversion to psychotropic medications and controlled substances”). The Individual returned to work in 2016 with numerous accommodations for disabilities related to the medical event, including accommodations for vision impairment. Ex. P. As of May 2023, the Individual’s vision had been corrected via surgeries, but he used reading glasses for reading text up close. Tr. at 35–36.

On May 8, 2023, while working at his desk in a DOE facility, the Individual fell ill and requested that his coworkers call for an ambulance. Ex. 4 at 1. An ambulance transported the Individual to a hospital where he tested positive for marijuana use. Ex. 9 at 3. The Individual’s wife received the results of the positive drug test while the Individual was at the hospital and spoke with the Individual’s daughter, at which time they discovered that a package of the daughter’s THC gummies was missing. Tr. at 41. Later that same day, the Individual disclosed to a supervisor in his chain of command that he had consumed the THC gummies without knowing their contents and that the wrapper for the gummies was in his workplace trash can. *Id.* at 26; Ex. 4 at 1.

The next day, the Individual submitted the PSIR to the LSO disclosing the positive drug test. Ex. 5. In the PSIR, the Individual represented that his daughter had returned home from college on May 7, 2023, and that snacks that his daughter had brought with her had been placed in the kitchen for consumption by the family. *Id.* at 4. According to the Individual, he brought several of these snacks to work with him on May 8, 2023, including the THC gummies. *Id.* The Individual indicated that he ate all of the gummies in the package as a morning snack. *Id.*; *see also* Ex. 12 at 3 (showing a warning on the packaging that first-time users of the gummies should consume no more than one half of one gummy). The Individual reported that he only learned that the gummies contained THC from his wife after his admission to the hospital. Ex. 5 at 4.

Following receipt of the PSIR, the LSO recovered the THC gummy wrapper from the Individual’s workplace trash can and photographed the front and back of the wrapper. Ex. 12. The front of the wrapper included images of marijuana leaves in the background of the upper portion of the packaging and indicated that the contents were 10 “Mango Madness” gummies with “15MG each.” *Id.* at 1. The front of the packaging did not include any warning labels or text explicitly identifying the contents as containing THC. *Id.* The backside of the wrapper included a large text warning to “KEEP OUT OF REACH OF CHILDREN” and smaller text noting that the product contained

THC, the dosage should be limited to one half of one gummy for first time users, and use of the gummies impairs one's ability to operate machinery. *Id.* at 2–3. In June 2023, the Individual was counseled to verify the contents of his food and drink in the future and a formal letter documenting the security infraction and counseling was included in his personnel file. Ex. 4 at 3.

On July 7, 2023, the Individual submitted his response to the LOI. Ex. 7. In his response to the LOI, the Individual represented that he had consumed the gummies without having noted any of the information on the wrapper besides the “Mango Madness” flavor. *Id.* at 2. The Individual attributed his failure to observe indicia on the wrapper that the gummies contained THC to his visual impairment and not having looked at the backside of the packaging. *Id.* at 2, 6. The Individual denied having ever intentionally used illegal drugs and noted that he had never tested positive for illegal drug use in his career with the U.S. Navy or DOE prior to the May 2023 incident. *Id.* at 6–7.

On September 5, 2023, the Individual voluntarily provided a hair sample for drug testing. Ex. H. The results of the testing were negative for traces of illegal drug use, including marijuana. *Id.* On September 25, 2023, the Individual completed an online four-hour drug and alcohol awareness class. Ex. I; Tr. at 51. On September 28, 2023, the Individual completed an online four-hour marijuana education class. Ex. J; Tr. at 51. The Individual also executed a statement of intent in which he declared his intention to abstain from illegal drug use in the future and agreed that any future illegal drug use on his part would be grounds for revocation of his access authorization. Ex. L.

The Individual contracted with a psychologist (Individual's Psychologist) for a psychological evaluation in advance of the hearing concerning this matter, and, on October 13, 2023, he met with the Individual's Psychologist for the evaluation. Ex. M at 1. The Individual's Psychologist conducted a clinical interview of the Individual, administered a personality and psychopathology test, and reviewed documentation provided by the Individual concerning the May 2023 incident. *Id.* at 2, 5. Based on the clinical interview, psychological testing, and documentation provided by the Individual, the Individual's Psychologist concluded that the Individual did “not meet criteria for any substance use or mental health condition . . . [and that] [h]is psychological profile [was] not consistent with a person who will exhibit chronic personal conduct problems.” *Id.* at 6.

The Individual testified at the hearing that he had never used illegal drugs or committed a security infraction prior to the incident giving rise to the hearing. Tr. at 25–26, 42. The Individual indicated that he had directed his daughter not to bring items that could affect his access authorization status, including illegal drugs, into the family home again. *Id.* at 42–43. He also testified that he had exercised greater care in examining items before he consumes them since the incident, and that he had no intention of ever using illegal drugs in the future. *Id.* at 43, 47. The Individual indicated that he did not observe the marijuana leaf pattern on the front of the packaging of the THC gummies, speculating that he might not have been wearing his reading glasses when he was selecting snacks to bring to work, he did not look at the back of the packaging before consuming the THC gummies, and he would not have consumed the gummies if he had known that they contained THC. *Id.* at 46, 63, 70.

V. ANALYSIS

A. Guideline E

Conditions that could mitigate security concerns under Guideline E include:

- (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.

The first two mitigating conditions are irrelevant to the facts of this case because the LSO did not allege that the Individual omitted, concealed, or falsified information or refused to cooperate. *Id.* at ¶ 17(a)–(b).

Based on the factual record, I am convinced that the Individual's illegal drug use was accidental. I find it extraordinarily improbable that the Individual would have consumed the entire bag of THC gummies – approximately 20 times the dosage recommended on the wrapper – in a single sitting if he had known its contents. Moreover, the Individual was prompt and forthcoming in disclosing the cause of his drug use. His disclosure of his consumption of the THC gummies and

the location of the THC gummy wrapper to his management mere hours after he experienced the medical incident at work demonstrated that he had no intention of hiding his mistake. The Individual's consumption of so much THC that it triggered a medical incident in the workplace and subsequent transparency and forthcomingness regarding his consumption of the THC is absolutely inconsistent with what one would expect of a drug user attempting to avoid detection.

While the Individual's drug use in the workplace presents a serious and recent security concern, I am convinced that the incident was such an isolated, out of character event for the Individual that it is unlikely to recur. The Individual has no record of security infractions or illegal drug use in his decades of public service. Moreover, although a person with unimpaired vision might have detected the indicia on the THC gummy wrapper indicating that the product contained THC more readily than the Individual, the Individual's selection of the THC gummies and other items from a selection of seemingly innocuous snacks in his home is not a context one would expect to require heightened vigilance. Under the circumstances, I find that his failure to notice the markings on the THC gummy packaging does not call into question his judgment and reliability. In light of the accidental nature of the Individual's bringing the THC gummies into a secure area and consuming them, the Individual's forthcomingness in disclosing the circumstances of the incident, and his assurances that he will exercise heightened vigilance in the future and that his daughter will not bring THC products into the family home again, I am convinced that the incident is unlikely to recur and that it does not cast doubt on the Individual's reliability, trustworthiness, or good judgment. Therefore, I find that the Individual has established the applicability of the third mitigating condition. *Id.* at ¶ 17(c).

The fourth mitigating condition is inapplicable as the Individual did not assert that he obtained counseling related to any of the LSO's allegations. *Id.* at ¶ 17(d). The fifth mitigating condition is inapplicable because the LSO did not allege that the Individual engaged in conduct that made him particularly vulnerable to exploitation, manipulation, or duress. *Id.* at ¶ 17(e). The sixth mitigating condition is irrelevant to the facts of this case because the Individual provided the information giving rise to the security concerns and the LSO did not rely on unsubstantiated or unreliable information. *Id.* at ¶ 17(f). The final mitigating condition is inapplicable because the LSO did not allege that the Individual associated with persons engaged in criminal conduct. *Id.* at ¶ 17(g).

For the reasons described above, I am convinced that the Individual's conduct was an isolated mistake that does not cast doubt on his reliability, trustworthiness, or good judgment. Accordingly, I find that the Individual has resolved the security concerns asserted by the LSO under Guideline E.

B. Guideline H

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.

As indicated above, I am convinced that the Individual's drug use was accidental, and the Individual was forthcoming and transparent with the LSO concerning his accidental drug consumption. The Individual has no record of illegal drug use preceding the incident and has undergone drug testing establishing that he has not used illegal drugs since. He has also expressed that he intends to abstain from illegal drug use in the future. In light of the Individual's credible explanation for the incident, and the isolated nature of the incident, I conclude that the Individual's drug use was an accident that is unlikely to recur. Accordingly, the first mitigating condition is applicable in this case. *Id.* at ¶ 26(a).

The Individual has acknowledged his consumption of the THC gummies and has directed his daughter not to bring such products into his home again. Moreover, he has provided a signed statement of intent to abstain from all drug involvement and acknowledged that any future drug involvement is grounds for revocation of his access authorization. Accordingly, I find that the Individual has established the applicability of the second mitigating condition. *Id.* at ¶ 26(b).

The third mitigating condition is irrelevant to the facts of this case because the LSO did not allege that the Individual abused prescription drugs. *Id.* at ¶ 26(c). The fourth mitigating condition is inapplicable because, although the Individual completed substance abuse education courses, the Individual did not participate in a drug treatment program. *Id.* at ¶ 26(d).

As noted above, I find that the Individual's consumption of the THC gummies was an isolated accident that is unlikely to recur. Accordingly, 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 Guidelines E and 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. 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