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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: February 12, 2018	)	Case No.: PSH-18-0025
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	)	

Issued: July 2, 2018

Administrative Judge Decision

Richard A. Cronin, Jr., Administrative Judge:

This Decision concerns the eligibility of XXXXXXXXXXXXX (hereinafter referred to as "the Individual") to retain an access authorization under the Department of Energy's (DOE) regulations set forth at 10 C.F.R. Part 710, entitled, "Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material."[1] For the reasons set forth 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) (Guidelines), I conclude that the Individual's security clearance should not be restored.

I. BACKGROUND

The Individual is currently employed by DOE and possessed a DOE security clearance. In 1988, prior to commencing his employment with DOE, the Individual signed a certification committing not to use illegal drugs. DOE Ex 13; *see also* Transcript of Hearing (Tr.) at 47–48. On November 28, 2017, DOE subjected the Individual to a random screening for illegal drug use. *See* DOE Ex. 4 at 3; *see also* Tr. at 57–58. The Individual tested positive for marijuana use. Individual Ex. 13; *see also* DOE Ex. 12 at 1. On December 7, 2017, the local security office (LSO) conducted a Personnel Security Interview (PSI) with the Individual concerning the results of the random drug screening. DOE Ex. 11 at 3.

In February 2018, the LSO sent the Individual a letter (Notification Letter) advising him that his security clearance was suspended and that DOE possessed reliable derogatory information that created substantial doubt regarding his eligibility to retain an access authorization. In 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.

attachment to the Notification Letter, the LSO explained that the derogatory information fell within the purview of Guidelines H (Drug Involvement) and E (Personal Conduct). DOE Ex. 4 at 3. The Individual requested a hearing and the LSO forwarded the Individual's request to DOE's Office of Hearings and Appeals (OHA).

The Director of OHA appointed me as the Administrative Judge in this matter. I convened the hearing pursuant to 10 C.F.R. § 710.25(d), (e) and (g), at which time I took testimony from the Individual and two (2) witnesses offered by the Individual. The LSO submitted thirteen (13) numbered exhibits (hereinafter cited as "DOE Ex." followed by the applicable exhibit number). The Individual submitted thirteen (13) numbered exhibits (hereinafter cited as "Individual Ex." followed by the applicable exhibit number) and a cover letter (Individual Ex. Cover Letter).

II. THE NOTIFICATION LETTER AND THE ASSOCIATED SECURITY CONCERNS

The LSO alleged, under Guideline H (Drug Involvement), that the Individual tested positive for marijuana during a random drug screening, admitted to testing positive for marijuana, and used an illegal drug while possessing a security clearance. DOE Ex. 4 at 3. Use of an illegal drug can raise questions about an individual's reliability and trustworthiness, both because it may impair judgment and because it raises questions about a person's ability or willingness to comply with laws, rules, and regulations. Guideline H at ¶ 24. Marijuana is an illegal drug under the Guidelines. *Id.* at ¶ 24(a)(1). Therefore, the Individual's admission to testing positive for marijuana use justifies the LSO's invocation of Guideline H.

In the Notification Letter, the LSO also alleged under Guideline E (Personal Conduct) that the Individual admitted to testing positive for marijuana use, despite having signed a DOE drug certification pursuant to which he agreed not to use illegal drugs while employed at DOE. DOE Ex. 4 at 3. 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 information. Guideline E at ¶ 15. Violation of a written commitment made by the Individual to his employer as a condition of employment justifies the LSO's invocation of Guideline E. *Id.* at ¶ 16(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 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), cert. denied, 499 U.S. 905 (1991) (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 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 ANALYSIS

The Individual does not dispute the facts set forth in the Notification Letter. *See* Individual Ex. Cover Letter. The Individual was arrested in connection with an incident involving marijuana use in the early 1980s. *See* Tr. at 46–47. In 1988, prior to beginning his employment with DOE, the Individual was required to execute a DOE drug certification pursuant to which he agreed not to use illegal drugs while employed by DOE. DOE Ex. 13; *see also* Tr. at 47–48. The Individual tested positive for marijuana use in a random drug screening conducted in November 2017. Individual Ex. 13. The Individual introduced evidence and testimony to try to establish that he unknowingly consumed the marijuana in baked goods at a party, and that the Individual would never knowingly use illegal drugs in the future.

I have thoroughly considered the record of this proceeding, including the exhibits and the testimony presented at the hearing. In resolving the question of the Individual's eligibility for access authorization, I have been guided by the applicable factors prescribed in 10 C.F.R. § 710.7(c) and the Guidelines. The security concerns at issue center on the Individual's testing positive for marijuana during a random drug screening, despite having executed a DOE drug certification committing not to use illegal drugs. The Individual presented evidence to try to establish that his consumption of marijuana was a one-time accident, and that he would not knowingly consume illegal drugs. After due deliberation, I find that the Individual's DOE security clearance should not be restored. Specifically, I cannot find that restoring the Individual's security clearance would not endanger the common defense and security, and would be clearly consistent with the national interest. 10 C.F.R. § 710.27(a). The relevant evidence and my specific findings in support of this decision are discussed below.

A. Guideline H Security Concerns

The Notification Letter asserted that the Individual raised security concerns under Guideline H as a result of testing positive for marijuana use on the November 28, 2017, random drug screening. DOE Ex. 4 at 3. The Individual testified that he received the test results on December 6, 2017. Tr. at 60. The Individual also testified that he purchased a home test kit on December 6, 2017, and that the

results of the home test kit were positive for marijuana. *Id.* at 62. The Individual does not contest that he consumed marijuana. Individual Ex. Cover Letter.

The Individual testified adamantly at the hearing that he has not intentionally consumed marijuana while employed by DOE. *See id.* at 61–62. According to the Individual, his arrest for marijuana possession in the early 1980s was a "scary and [] eye-opening event" that significantly changed his life. *Id.* at 46–50. The Individual testified that consuming illegal drugs is against his personal code, that he does not allow smoking or illegal drug use in his home, and that he has called the police on drug-using parents of children who he coached in youth sports programs when he perceived the drug use to be a threat to the children. *Id.* at 50–51. The Individual also described his teachings to his children concerning the harms of drug use, that marijuana use by one of his sons had a negative impact on the son's life, and how he supported his son's abstinence from marijuana so that his son could join the U.S. Army. *Id.* at 52–55.

Prior to the hearing, the Individual arranged to take a polygraph test concerning his use of illegal drugs. The Individual submitted the credentials of the test administrator, as well as information on the test equipment and methodology, into the record. Individual Ex. 6. The polygraph test showed no intent on the part of the Individual to deceive the test administrator when he responded in the negative to questions as to whether he had used marijuana, or any recreational drugs, since he began working at DOE. *Id.* at 2. While the DOE attorney did not object to the admission of this evidence into the record, I have assigned it minimal evidentiary weight due to the well-documented limitations of polygraph testing.[2]

At the hearing, the Individual also asserted that he had advance notice of the random drug screening, and that he could have easily avoided it if he had knowingly consumed marijuana. The Individual offered into evidence an email to which he was copied, dated November 27, 2017, indicating that DOE would conduct random drug screenings on November 28th and 29th. Individual Ex. 7. The Individual testified that he read the email on November 27th, and confirmed the use of rooms for the drug screening with a scheduler. Tr. at 59. The Individual also introduced a report showing that, as of April 2018, he had accrued over one thousand (1,000) hours of sick leave. Individual Ex. 3. According to the Individual, "[i]f [he] had any idea of what lied in [his] body [], [he] could have easily called [his] supervisor and [] took a sick day []." Tr. at 60.

The Individual offered the testimony of two (2) witnesses, his best friend and a former coworker, who had both known him since the 1980s, who both testified that they had never seen the Individual consume illegal drugs and that doing so would be out of his character. *Id.* at 12, 14–16, 29–33. In addition, the Individual offered letters from some of the leading members of his community

[2] Polygraph test results are of dubious probative value. *See United States v. Scheffer*, 523 U.S. 303, 312 (1998) ("there is simply no way to know in a particular case whether a polygraph examiner's conclusion is accurate, because certain doubts and uncertainties plague even the best polygraph exams."). Moreover, OHA has assigned no weight to the results of polygraph tests in numerous prior cases. *See, e.g. Personnel Security Hearing*, OHA Case No. PSH-12-0144 at 8 (2012) ("I assign no probative value to the testimony of the polygraph technician or the results of his polygraph examination []."); *see also Personnel Security Hearing*, OHA Case No. TSO-1023 (2011) at n. 7 (explaining that, due to "reliability issues associated with polygraph examinations, I did not consider this evidence in my deliberations."). Decisions issued by OHA are available on the OHA website located at http://www.energy.gov/OHA.

concerning his upstanding character. Individual Ex. 4. The Individual also offered an affidavit from his fiancé attesting that the Individual is not a user of any illegal drugs. Individual Ex. 12.

The Individual sought to explain testing positive for marijuana use by asserting that he consumed the marijuana in snacks that he ate at a party on November 24, 2017. Tr. at 68–71. The Individual reported that he initially believed that doctor-prescribed medication he takes for several conditions may have caused the positive drug test. *Id.* at 60–61. However, a doctor with whom the Individual discussed the results of the random drug screening dismissed this possibility. *Id.* After discussing the matter with his fiancé, the Individual changed his focus to a party he attended with his fiancé to socialize with one of her coworkers. *Id.* at 62–63. The Individual recalled that he smelled marijuana at the party. *Id.* at 86–87. The Individual testified that he ate "a couple brownies, a couple cookies, [and] Chex Mix . . . ." *Id.* at 86. The Individual did not report feeling any effects of marijuana consumption after eating the aforementioned snacks, did not see any marijuana at the party, and did not hear anyone mention that marijuana was in any of the food. *Id.* at 72, 92–93. According to the Individual, after he received the results of his drug test, his fiancé called her friend who was present at the party and "her friend . . . said 'yeah, there was some stuff.'" *Id.* at 71. However, the affidavit of the Individual's fiancé made no mention of this conversation. Individual Ex. 12. The Individual did not offer any witness testimony, besides his own, or evidence supporting his claim that the snacks at the party contained marijuana.

An individual may mitigate security concerns under Guideline H if "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." Guideline H at ¶ 26(a). In cases where individuals have cited accidental consumption of illegal drugs as a mitigating factor, OHA has restored access authorization where such individuals have come forward with compelling evidence to that effect, and has not restored access authorization on the basis of individuals' unsupported guesses as to how they consumed the illegal drugs. *Compare Personnel Security Hearing*, OHA Case No. PSH-15-0056 (2015) (restoring an individual's access authorization when the individual's son testified at the hearing that he left an unmarked bag of baked treats containing marijuana in the individual's home, and the individual testified that he ate the baked treats without knowing they contained marijuana), *with Personnel Security Hearing*, OHA Case No. TSO-0976 at 4 (2011) (denying the restoration of an individual's access authorization when the individual merely "speculate[d] that he may have accidentally ingested marijuana that could possibly have been baked into cookies at one of several 'pot-luck' parties he had attended.").

In this case, the Individual has presented character evidence to the effect that it is out of his character to consume illegal drugs and an email showing that he had advance notice of the drug screening and could have called out of work sick if he knew he had recently consumed marijuana.[3]

[3] I note that the Individual might have used the advance notice to delay the drug screening only if he both knowingly used marijuana and believed that he would test positive. The Individual testified during the hearing about his past miscalculation of how long marijuana would remain detectable in a person's body when he attempted to help his son join the U.S. Navy, stating that the Individual "went and got a drug test for him and we did one at home and he passed. And then he went to [the testing location] and they caught him on a positive before going in the Navy. He had not

However, the only evidence the Individual has offered to support his claim that he accidentally consumed the marijuana in a baked good at the party is his deduction that marijuana might have been in the baked goods because he smelled marijuana at the party and his testimony that a friend of his fiancé confirmed to his fiancé that there was "stuff" at the party. This speculation is not sufficient to establish that the Individual unknowingly consumed marijuana.

An individual may also mitigate security concerns under Guideline H by demonstrating his or her intent not to abuse any drugs in the future, including submitting "a signed statement of intent with automatic revocation of clearance for any violation." Guideline H at ¶ 26(b)(3). The Individual submitted a statement into the record stating that he used illegal drugs, that he agreed to refrain from drug use in the future, that he understood that DOE would test him for drug use in the future, and acknowledging "that action will be initiated to remove me from the Federal service if a determination is made that I have used illegal drugs after signing this form." Individual Ex. 1. This form clearly does not waive any of the Individual's rights in the event he is found to have used drugs in the future through automatic revocation of his security clearance. Further, there is no evidence that the LSO has concurred with this statement. Therefore, the Individual's signed statement does not mitigate the Individual's drug use under Guideline H.

It is possible that the Individual is the victim of an extraordinarily unlucky accident. However, his burden in a Part 710 hearing is a heavy one because "security determinations should err, if they must, on the side of denials." *Dorfmont*, 913 F.2d at 1403. For the above reasons, I find that the LSO properly asserted Guideline H based on the Individual testing positive for marijuana during a random drug screening and that none of the mitigating factors set forth under Guideline H are applicable.

B. Guideline E Security Concerns

The Guideline E security concerns arise from the Individual testing positive for marijuana use despite signing a DOE drug certification pursuant to which he agreed to refrain from illegal drug use as an employee of DOE. DOE Ex. 4 at 3. The Individual signed this agreement, albeit at the beginning of his long career, because of his prior marijuana-related arrest and "with the full knowledge and expectation that should something [] ever happen in the future [he] would be dismissed." Tr. at 47–48. The LSO properly asserted the Individual's violation of this commitment under Guideline E. Guideline E at ¶ 16(f). Despite the laudatory character letters submitted on the Individual's behalf, there is insufficient evidence in the record to conclude that the Individual unintentionally violated the terms of the DOE drug certification. Further, the breach of the DOE drug certification is recent and significant. Consequently, I find that none of the mitigating factors under Guideline E are applicable.

V. CONCLUSION

completely cleaned out. Evidently their test was a lot more thorough than the home one I bought." Tr. at 54. Moreover, the fact that the Individual reported testing positive for marijuana on a home test at least twelve (12) calendar days after he claimed to have consumed the marijuana calls into question whether he could have used sick days to adequately delay the drug screening. *See id.* at 62.

In the above analysis, I found that there was sufficient derogatory information in the possession of DOE that raised security concerns under Guidelines H and E. 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 Individual has not brought forth sufficient evidence to resolve the security concerns set forth in the Notification Letter. I therefore cannot find that restoring the Individual's access authorization would endanger the common defense and would be clearly consistent with the national interest. Accordingly, I have determined that the DOE should not restore the Individual's access authorization.

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