

***The original of this document contains information which is subject to withholding from disclosure under 5 U.S. C. § 552. Such material has been deleted from this copy and replaced with XXXXXX's.**

**United States Department of Energy
Office of Hearings and Appeals**

In the Matter of: Personnel Security Hearing)
)
Filing Date: March 21, 2024)
)
_____)

Case No.: PSH-24-0083

Issued: August 14, 2024

Administrative Judge Decision

James P. Thompson III, 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 not be restored.

I. BACKGROUND

The Individual is employed by a DOE contractor in a position that requires possession of a security clearance. On November 6, 2023, the Individual tested positive for marijuana as part of his employer's random drug test program, and the positive result was reported to the DOE Local Security Office (LSO). Afterward, the LSO informed the Individual by letter (Notification Letter) that it possessed reliable information that created substantial doubt regarding his eligibility to possess a security clearance. In an attachment to the Notification Letter, entitled Summary of Security Concerns (SSC), the LSO explained that the derogatory information implicated provisions of the Bond Amendment, 50 U.S.C. § 3343(b), and raised a security concern under Guideline H of the Adjudicative Guidelines.

The Individual exercised his right to request an administrative review hearing pursuant to 10 C.F.R. Part 710. The Director of the Office of Hearings and Appeals appointed me as the Administrative Judge in this matter, and I subsequently conducted an administrative review

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.

hearing. At the hearing, the Individual testified on his own behalf. The Individual submitted four unmarked exhibits that I have labeled Exhibits A through D. The LSO submitted five exhibits, marked Exhibits 1 through 5.² There being no objections from the parties, all exhibits were admitted into the record. Hearing Transcript, OHA Case No. PSH-24-0083 (Tr.) at 7.

II. THE NOTIFICATION LETTER AND ASSOCIATED SECURITY CONCERNS

As indicated above, the LSO cited the Bond Amendment and Guideline H (Drug Involvement and Substance Misuse) of the Adjudicative Guidelines as the bases for concern regarding the Individual's eligibility to possess a security clearance. Exhibit (Ex.) 1. The relevant Bond Amendment section provides that "the head of a Federal agency may not grant or renew a security clearance for a covered person who is an unlawful user of a controlled substance or an addict" 50 U.S.C § 3343(b). In the SSC, the LSO cited that on November 6, 2023, the Individual tested positive for marijuana, a Schedule I drug listed in the Controlled Substances Act of 1970, on an employer-conducted drug test. Ex. 1 at 5. This information justifies the LSO's invocation of the Bond Amendment.

Guideline H provides that "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. Conditions that could raise a security concern include "any substance misuse," which includes "illegal use of controlled substances," "[t]esting positive for an illegal drug," and "[a]ny illegal drug use while granted access to classified information or holding a sensitive position" *Id.* ¶ 25(a)–(b), and (f). The SSC cited the Individual's positive drug test and that the Individual tested positive while holding an active DOE security clearance. Ex. 1 at 5. The above allegations justify the LSO's invocation of Guideline H.

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

² References to the LSO exhibits are to the exhibit number and the Bates number located in the top, right corner of each exhibit page.

full opportunity to present evidence supporting his or her 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.* at § 710.26(h). Hence, an individual is afforded the utmost latitude in the presentation of evidence to mitigate the security concerns at issue.

The discussion below reflects my application of these factors to the testimony and exhibits presented by both sides in this case.

IV. FINDINGS OF FACT

The Individual was granted a security clearance in connection with his employment. Ex. 1 at 6; Ex. 3 at 12. The Individual testified that on a day in November 2023, he attended a social gathering with four of his friends from about 11:00 a.m. to 6:00 p.m. Tr. at 10–11, 28. The Individual recounted that the gathering took place in a garage that was not well ventilated, as the garage door and windows were closed. *Id.* at 10–11. According to the Individual, three of the friends smoked marijuana for a majority of the time. *Id.* at 11, 29. He denied having smoked any marijuana at the social gathering or at any other time in the recent past, testifying to last smoking marijuana approximately twenty years ago. *Id.* at 10–12. The Individual testified that he thought it was “okay” for him to be in the room because he had learned from an employer-provided training module³ that secondhand exposure to marijuana smoke should not result in a positive drug test. *Id.* at 11. However, later in the hearing, the Individual stated that it was poor judgment for him to be in the general vicinity of marijuana. *Id.* at 22. The Individual did not ask any of his friends from the social event to act as witness to corroborate his testimony that he had not smoked marijuana. *Id.* at 23–24.

On the day following the event, the Individual was called into a random drug screening by his employer in the early morning. *Id.* at 12–15; Ex. 4 at 19. Less than two hours after he was notified, the Individual appeared for the drug screening. Tr. at 18. The Individual’s sample tested positive for marijuana metabolite at 38 ng/ml and also tested positive as “dilute.” Ex. 4 at 19. The Individual testified that the doctor administering the screening interpreted the Individual’s readings to be “very low”—which the Individual believed to be consistent with secondhand exposure. Tr. at 10. He testified that he did not report his exposure to secondhand marijuana smoke at the time of his test because he was not concerned about it. *Id.* at 13.

During the hearing, the Individual recalled that the doctor both mentioned the positive dilution result and remarked that the sample appeared “tampered with.” Tr. at 17. The Individual testified to drinking a normal amount of water the day prior to and the morning of the drug test, that he took no substances to try and dilute the urine, that he had no health condition that would have affected the dilution levels, and that nothing appeared out of the ordinary when he took his test. *Id.* at 15–19. The Individual testified to having no explanation for the positive dilution result but opined that the drug test was perhaps “inaccurate” and that “the test results . . . might have been not a hundred percent.” *Id.* at 17–18. The Individual testified to offering to provide a new sample, but the doctor

³ The Individual explained that the module was a mandatory, yearly training that is online and informs employees on drug and alcohol usage that might affect their clearance and employment. Tr. at 14, 31.

proceeded with a retest of the same sample. *Id.* at 17. A retest of the same urine sample reconfirmed the presence of marijuana metabolite. Ex. 4 at 23.

During the hearing, the Individual testified that he continues to associate with the friends who had been at the November 2023 social event. Tr. at 22. The group had been friends for over twenty years. *Id.* at 30. The Individual indicated that, after the positive drug test, he intentionally lessened the frequency of in-person contact with the friends to one-to-two times per year; he also testified that, prior to the positive drug test, he saw them approximately every six months. *Id.* at 21, 26, 29. He testified that he now only sees them “with the caveat that marijuana smoke and marijuana usage . . . stay[s] a good ways away.” *Id.* at 22. In the eight months since the November 2023 social event, the Individual testified, he had seen his friends twice, during which no marijuana was used. *Id.* at 23.

The Individual submitted as Exhibit A, a letter of recommendation from a psychologist (Psychologist) employed through the Individual’s employer. Ex. A; Tr. at 24. After the Individual’s positive drug test, the Individual was required to participate in his employer’s Substance Use Program with the Psychologist, which includes ongoing meetings with the Psychologist, regular drug testing, and education on substance use and misuse. Ex. A; Tr. at 25. The Individual also had to sign a document acknowledging that he would refrain from illegal drug use and that failing to do so would result in his termination and revocation of his clearance. Tr. at 30–31. The Individual testified to having been tested every two-to-three weeks since his positive marijuana test. *Id.* at 19–20. According to the Individual’s testimony and the Psychologist’s letter, the Individual has continued to test negative for marijuana use. *Id.* at 24; Ex. A. The Psychologist, via letter, stated that the Individual had changed his social contacts in response to the positive drug test and observed that the Individual had reported no prior history of drug or alcohol incidents, abuse, or treatment. Ex. A. The Psychologist opined that “[his] assessment and interactions with [the Individual] support that his positive drug test was due to exposure, instead of problematic misuse of marijuana.” *Id.*

The Individual also submitted three academic articles as Exhibits B, C, and D. Each concerned a study on the effects of secondhand cannabis smoke on nonsmokers and concluded that under specific conditions, such as the absence of ventilation, one might test positive for marijuana due to exposure to secondhand smoke. Ex. B; Ex. C; Ex. D.

V. ANALYSIS

A. Bond Amendment

The Bond Amendment provides that federal agencies “may not grant or renew a security clearance for a covered person who is an unlawful user of a controlled substance or an addict.” 50 U.S.C. § 3343(b); *see also* DOE Order 472.2A, Personnel Security, Appendix C: Adjudicative Considerations Related to Statutory Requirements and Departmental Requirements (June 10, 2022). DOE defines “an unlawful user of a controlled substance” and an “addict” as follows:

- a. An unlawful user of a controlled substance is any person who uses a controlled substance and has lost the power of self-control with reference to the use of the

controlled substance or who is a current user of the controlled substance in a manner other than as prescribed by a licensed physician. Such use if not limited to the use of drugs on a particular day, or within a matter of days or weeks before, but rather that the unlawful use occurred recently enough to indicate the individual is actively engaged in such conduct.

- b. An addict of a controlled substance is as defined in 21 U.S.C § 802(1), which is any individual who habitually uses any narcotic drug so as to endanger the public morals, health, safety, or welfare; or is so far addicted to the use of narcotic drugs as to have lost the power of self-control with reference to his or her addiction.

DOE Order 472.2A, Appendix C at ¶ 2 (citing the Bond Amendment).

I conclude that the Individual does not meet the above definition of an unlawful user or addict. As confirmed by the Psychologist, the Individual has not tested positive for marijuana use since his November 2023 test—which evinces an approximate eight-month period of non-use. There is therefore no evidence that he is a current user of marijuana or that he ever lost the power of self-control with regard to marijuana. The same evidence demonstrates that the Individual does not meet the definition of an addict. Accordingly, the Bond Amendment is not a bar to the Individual holding a security clearance.

B. Guideline H Considerations

Conditions that can mitigate security concerns based on drug involvement and substance misuse include the following:

- (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.

I do not find that the Individual has mitigated the Guideline H security concerns. As an initial matter, the Individual has not provided sufficient evidence to persuade me that he did not use marijuana at the November 2023 gathering with his friends. To support his contention that the positive drug test resulted from secondhand exposure, the Individual (1) offered testimony that the doctor administering the screening stated that the detected marijuana in his sample was “very low”; (2) opined that his positive drug test must have been due to prolonged, secondhand exposure in a non-ventilated garage the day before; (3) offered three academic articles in support of this explanation; (4) provided a letter from the Psychologist, who opined that the positive marijuana test likely resulted from secondhand exposure; and (5) opined that the drug screening was inaccurate. For the reasons articulated below, I find none of these explanations availing.

The Individual’s testimony that the doctor commented on the “very low” levels does not undermine the accuracy or validity of the test and is self-serving hearsay. Furthermore, the credibility of the Individual’s alternative explanation for the positive test result is undermined by the fact that his sample tested positive as “dilute” and the Individual’s testimony that the doctor opined that the sample appeared to be “tampered with,” suggesting that the Individual attempted to conceal his marijuana use during the testing. The Individual provided no explanation regarding the dilution of his sample, except his unsupported speculation the test result must be wrong. As such, I have no reason to doubt the accuracy of the test results, which were positive for marijuana and dilution.

I afford little weight to the Psychologist’s letter because it offers little explanation for the determination that the positive marijuana test likely resulted from secondhand exposure, except that the Individual has altered his social interactions with his friends and has no prior history of drug abuse. That the Individual has meaningfully lessened his in-person interactions with his friends is a dubious premise, given that the Individual testified to reducing his interactions with them from “every six months” to now only one-to-two times per year. I similarly assign the academic articles little weight since they were not accompanied by expert testimony regarding the interpretation of those articles in relation to the Individual’s specific circumstances.

Lastly, despite having known his four friends for over twenty years, the Individual offered none of them as a witness to corroborate his assertion that he had not smoked marijuana. In summary, the Individual offered an alternative explanation for the positive drug test result, unsupported by any first-hand witness to corroborate that he did not smoke marijuana and lacking any expert witness opinion to support his explanation for his test results. I cannot find that he did not smoke marijuana.

In consideration of my above reasoning, I do not find that the Individual has mitigated the concerns under ¶ 26(a). Less than a year has passed since the positive drug test, which in light of the circumstances, is insufficient time to find his behavior happened so long ago it is unlikely to recur and no longer casts doubt on his judgment. The Individual testified that he last smoked marijuana twenty years ago. However, I do not find this testimony reliable, because I remain doubtful of his contention that he did not use marijuana at the November 2023 gathering, as explained above.

Thus, I find the record lacks reliable evidence regarding the frequency or circumstances of the Individual's actual marijuana use prior to the positive drug test. However, assuming that the Individual smoked marijuana with his four friends, the Individual testified that he went from seeing these friends from every six months to once-to-two times per year—demonstrating little if any meaningful change. Based on the longstanding over twenty-year relationship among the friends and his own representation that he continues to see them with the same regularity, it cannot be said that the circumstances were infrequent or unlikely to recur. Lastly, that the sample appeared to be tampered with and that the Individual maintains a suspect, alternative explanation for his positive marijuana drug result casts ongoing doubt on his reliability, trustworthiness, and judgment.

Both ¶ 26(b) and ¶ 26(c) are inapplicable as the Individual has not acknowledged any drug involvement beyond it being in his presence nor are there any allegations that he abused prescription drugs. Even if he had admitted to using marijuana with his friends, he has not dissociated from those same individuals as he still meets with them approximately twice a year—an interval consistent with their past associations.

Lastly, ¶ 26(d) does not apply to resolve the concerns. While the record reflects that the Individual is participating in the Substance Use Program at the direction of his employer, and the Psychologist's letter reflects that the Individual is required to participate in substance use and misuse education, as well as regular drug screenings, there is no evidence in the record that the Substance Use Program is a prescribed drug treatment program. Ultimately, the evidentiary burden in mitigating the security concern and in rebutting the strong presumption against the restoration of a security clearance lies with the Individual. The Individual did not provide sufficient evidence to carry his burden.

For the foregoing reasons, I find that the Individual has not mitigated the Guideline H security concerns.

VI. CONCLUSION

In the above analysis, I found that there was sufficient derogatory information in the possession of the DOE that raised security concerns under the Bond Amendment and 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 demonstrate that the Bond Amendment does not apply to these circumstances but has failed to resolve the Guideline H security concerns set forth in the SSC. Accordingly, I have determined that the Individual's access authorization should not be restored.

This Decision may be appealed in accordance with the procedures set forth at 10 C.F.R. § 710.28.

James P. Thompson III
Administrative Judge
Office of Hearings and Appeals