

Upon receipt of the Notification Letter, the Individual exercised his right to request an administrative review hearing pursuant to 10 C.F.R. Part 710. The LSO forwarded the Individual's request to the Office of Hearings and Appeals (OHA). On December 11, 2019, the Director of OHA appointed me as the Administrative Judge in this matter. Prior to the hearing, DOE submitted 20 exhibits, marked as Exhibits 1 through 20 (cited as "Ex."). The Individual submitted 28 exhibits, marked as Exhibits A1 through V. At the hearing, the Individual presented his own testimony.

II. THE NOTIFICATION LETTER AND THE ASSOCIATED SECURITY CONCERNS

As indicated above, the Notification Letter informed the Individual that information in the possession of the DOE created a substantial doubt concerning his eligibility for a security clearance. The LSO cited Guideline H (Drug Involvement and Substance Misuse) as the basis for denying the Individual a security clearance. Guideline H addresses "[t]he illegal use of controlled substances, to include the misuse of . . . non-prescription drugs, and the use of other substances that cause physical or mental impairment or are used in a manner inconsistent with their intended purpose" 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. Concerning behavior includes "[t]esting positive for an illegal drug" or "[a]ny illegal drug use while granted access to classified information or holding a sensitive position." *Id.* at ¶ 24(b), (g). The undisputed fact that the Individual tested positive for marijuana while holding a security clearance justifies 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 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) (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 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. 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.

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

There is no dispute the Individual tested positive for marijuana during a random drug test. Ex. 2. The record before me documents the explanations the Individual provided for the cause of his positive drug test. In his second response to the LOI, the Individual explained that his positive test resulted from his use of Cannabidiol (CBD) oil that contained less than 0.3% THC per recommended dose, and the product therefore fell within the “federally legal limit according to the 2018 Farm Act.” Ex. 8b at 1. He also explained that he used it as recommended by his doctor for joint pain and anxiety, and he only used half of the manufacturer-recommended dose. *Id.*

The record also indicates that the Individual contacted his employer’s medical clinic and his manager to discuss his intentions to use CBD oil prior to consuming it. *Id.* The Individual explained that he was aware that CBD oil contained THC, and he consulted with the site’s medical clinic “in an attempt to get more informed about the official company policy regarding CBD usage and the current drug testing policy.” Ex. 8c at 1. The Individual reported that during his research, the Unit Manager of Personnel Security in the Security Department (“Unit Manager”) informed the Individual that by taking CBD oil he would be at risk for failing a drug test for Tetrahydrocannabinol (THC), an active compound contained in marijuana. *Id.*; Ex. D.

The Individual explained that on June 21, 2019, he reviewed his employer’s new substance abuse policy, which stated that his employer would consider the medical history, biomedical information, and medications of an employee in order to determine whether a positive drug test resulted from a legitimate medical explanation. *Id.* at 2. He therefore thought that because he would be using CBD oil for medical purposes with his doctor’s consent, the legitimate medical explanation policy provision would apply to his situation, and a failed drug test would be positively adjudicated through his employer. *Id.* Consequently, he started using CBD oil, and five days later he was randomly selected for the drug test that precipitated this case. *Id.* Upon learning of his selection for random testing, he notified his manager of his use of CBD and his interaction with his doctor, the medical clinic, and personnel security. *Id.*

According to the positive drug test report, the Individual’s specimen tested positive for marijuana metabolite, 11-COOH-THC or Delta-9-carboxy THC, in the amount of 22 ng/mL. Ex. 11 at 6; Ex. 19 at 3. According to the Individual’s LOI response, after he learned of his failed drug test, he stopped taking the CBD oil. Ex. 8c at 2. He later learned that the above substance abuse policy was not intended to apply to THC and that THC is prohibited regardless of its source. *Id.* The record contains a declaration from the Unit Manager, who stated that he told the Individual several times that a positive test result would be treated as a positive test under the workplace substance abuse policy, and that the Individual acknowledged that he understood the risk. *Id.*

The record also contains two expert reports.² Both experts had the benefit of the Individual's self-reported use and an independent lab analysis of the CBD oil provided by the Individual, which confirmed the CBD oil analyzed contains .159% THC.³ Both experts also confirmed that the labeling of the CBD oil provided by the Individual did not disclose the presence of THC. Ex. 19 at 3. The first report was provided by the Individual's expert, who holds degrees in molecular biology and biomedical sciences and currently operates an applied science firm that designs and evaluates cannabis products and provides marijuana industry-related consultation services. Ex. V1. After reviewing the information provided by the Individual and reviewing the testing protocol, the Individual's expert "concluded with scientific certainty" that the Individual's "consumption of hemp extract containing 0.159% THC for an interval of four (4) days preceding a random urinalysis test[,] . . . together with the use of a procedure unsuited for extraction of THC metabolites in the presence of CBD metabolites, caused his test score to be 22 ng/mL of 11-COOH-THC" Ex. V1 at 3.

The second report was provided by the DOE's expert, who is retained as an expert in Forensic Toxicology for a major metropolitan city and is also an associate director of Toxicology for the occupational testing service of the company that produced the Individual's original drug test results. Ex. 20 at 2. The DOE's expert reviewed the record, including the Individual's expert's report. Ex. 19 at 1. The DOE's expert concluded that "[i]t is possible that the tincture allegedly ingested by [the Individual] several days prior to his urinalysis, reportedly containing 0.159% Delta-9-THC, as reported by the [analyzing lab][,] could be responsible for the 22 ng/mL 11-COOH-THC found in [the Individual's] . . . urine." Ex. 19 at 4. However, the DOE's expert also opined that "[i]t is also possible that the reported finding was a result of ingestion or exposure to another Delta-9-THC containing substance, including 'marijuana.'" *Id.* The DOE's expert stated that, based on the evidence in the record, "it is not possible to state with a reasonable degree of scientific certainty whether the tincture ingested was the cause of the positive result or if it was from some other Delta-9-THC containing product." *Id.* at 6.

The record also contained three affidavits from character references for the Individual. All three provided positive recommendations regarding his honesty and good character. Two affidavits reference discussions with the Individual regarding his use of CBD oil. Ex. A1; Ex. A3. These same character references also state that they have never observed the Individual use drugs or appear under the influence of drugs. *Id.*

Finally, the record indicates that the Individual is on administrative leave without pay pending the resolution of the present administrative hearing. Ex. D. The record also includes evidence that the Individual passed two additional drug tests. One negative test occurred one month prior to the test at issue in this case. Ex. D; *see also* Tr. at 32. The second negative test occurred the month after the test at issue.⁴ Finally, the Individual confirmed in his response to the LOI that he did not

² The parties stipulated to the admission of both expert reports without the need to call the respective experts to testify at the hearing.

³ The record also contains the CBD oil manufacturer's certificate of analysis, which states that the product contains "less than 0.3% THC per hemp regulation." Ex. L3.

⁴ The latter test was not included in the DOE's twenty exhibits. However, it was submitted by the DOE much earlier along with a number of other exhibits, some which were included in the twenty hearing exhibits. Thus, I am including the test in the record and referencing it as the July 24, 2019, employer drug screen.

consume any other marijuana or marijuana-derived product in the years prior to the positive drug test or subsequent to the drug test. Ex. 8b.

At the hearing, the Individual provided the following testimony. On June 21, 2019, the Individual read his employer's Workforce Drug Abuse policy, which indicated that after a positive test, employees would be given the opportunity to report over-the-counter medication in an attempt to substantiate the legality of the product. Tr. at 25-26. He also confirmed that he was aware CBD oil contained trace amounts of THC, which is why he began reaching out to his employer to obtain more information regarding the risk of using CBD oil. Tr. at 22-24.

The Individual initially spoke with a nurse at the laboratory's medical clinic, who suggested he reach out to the site's Medical Review Officer (MRO). Tr. at 21. The MRO directed the Individual to the Unit Manager. Tr. at 21. The Individual testified that the Unit Manager "recommended that if [he] chose to try the CBD oil, that [he] should definitely wait until June 21, 2019[,]" the expected issue date of the new Workforce Drug Abuse Policy. Tr. at 23. The Individual had also previously contacted his doctor and discussed his interest in using CBD oil to treat anxiety and joint pain while avoiding side effects. Tr. at 24. His doctor stated it would be worth trying a reputable over-the-counter product. Tr. at 24-25. Upon receiving his doctor's approval, the Individual spoke with his manager about CBD oil. Tr. at 25. He stated that his manager did not provide an opinion. Tr. at 25.

The Individual took the CBD oil, at half the recommended dose, for five days, including the morning before he took the drug test. Tr. at 30. His rationale for taking half the recommended dose was to be conservative and thereby avoid any potential side effects, limit his exposure to THC, and extend the life of the relatively expensive product. Tr. at 30. The Individual also testified that he has since learned that "CBD oil was, in fact, not an acceptable reason for a failed drug test due to TCH [sic]." Tr. at 28. Rather, he came to learn that there are "two very specific medications that are prescriptions [which] are the only valid reasons for failed drug tests due to THC." Tr. at 26.

He also testified that, if given the chance again, he would not use the CBD oil because of the consequences he has suffered: the impact on his "good job" and his ability to support his family (including two young children), and pay his mortgage. *See* Tr. at 27-28; 43. He stated his decision is based on his understanding that "there are only two acceptable reasons to fail a drug test due to THC." Tr. at 43. Given his current understanding, he "would not have taken CBD because that would have been a very imprudent risk on [his] part." Tr. at 28.

Finally, he confirmed that he had not used any illegal substance within the month leading up to the drug test that contained THC. Tr. at 32. He also testified that he had not used any illegal substance since testing positive for THC. Tr. at 51. Moreover, he stated that he "would not use [CBD oil] again." Tr. at 43-44.

V. ANALYSIS

I have thoroughly considered the record of this proceeding, including the submissions tendered in this case and the testimony of the Individual. 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 Adjudicative Guidelines. After due deliberation, I have determined that the Individual's access authorization should be restored. I find that restoring the Individual's security clearance will not endanger the common defense and security, and that it is clearly consistent with the national interest. 10 C.F.R. § 710.27(a). The specific findings that I make in support of this Decision are discussed below.

As previously stated, the fact that the Individual tested positive for an illegal drug while holding a security clearance establishes a security concern under Guideline H. The conditions that can mitigate Guideline H concerns include a finding that "[t]he 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." Adjudicative Guidelines at ¶ 26(a).⁵

I find that the Individual has demonstrated that the circumstances surrounding his positive drug test are unlikely to recur. As a foundational matter, I must first reference the Substance Abuse and Mental Health Services Administration's (SAMHSA) July 24, 2019, memorandum regarding the use of CBD oils and hemp products. Ex. K2. That guidance memorandum cites to the 2018 Agricultural Improvement Act [Act] (2018 Farm Bill, PL 115-334), which removed hemp from the definition of marijuana within the Controlled Substances Act. *Id.* It explains that "the delta-9-tetrahydrocannabinol (THC) level in hemp-derived products must be no greater than 0.3 percent on a dry weight basis in order to satisfy the revised definition of 'hemp' provided in the [Act]." *Id.* In other words, hemp-derived products with THC levels at or less than 0.3 percent by dry weight are not considered marijuana. The SAMHSA further takes the position that "there is no legitimate medical explanation for a marijuana positive test result other than a verified prescription for Marino, Sativex, or generic equivalent." *Id.*

In this case, the only direct evidence for the cause of the positive drug test is the Individual's self-reported consumption of a CBD oil. The CBD oil has been laboratory tested, and it contains less than 0.3 percent THC on a dry weight basis. In other words, there is significant evidence to demonstrate the Individual consumed an unregulated hemp-derived product. Furthermore, two experts concluded that the THC in the Individual's system could have resulted from his reported use of the analyzed CBD oil. One stated that it is a scientific certainty; the other stated that it is possible.

Furthermore, the evidence demonstrates that the Individual attempted to understand the parameters around the use of CBD oil. He spoke with his doctor about the likelihood of therapeutic relief from the product, reviewed his employer's policy, and spoke with several relevant parties, including security personnel. He was certainly informed of the risk if he tested positive, but nevertheless decided to take the risk based on his understanding that even if he tested positive for THC, he would be able to provide his explanation for the positive test, and, presumably, escape any further consequences. He later discovered that, at least in the first instance, he was mistaken.

As a consequence of his action, he has been on unpaid administrative leave for a significant period of time, and he has been at risk of permanently losing his security clearance. The evidence shows

⁵ The Adjudicative Guidelines list several additional conditions that may mitigate Guideline H concerns, however the above condition most closely matches the factual circumstances in this case.

that, during the administrative process, the Individual has increased his understanding of the several policies that govern the use of hemp-derived and THC products, reflected on the impact and potential consequences for his career and family, and come to the conclusion that he misjudged the risk associated with using CBD oil. In doing so, he has demonstrated improved judgement.

There is no evidence that the Individual consumed an illegal drug or used marijuana or other products containing THC prior to the short use which resulted in the positive random drug test. He has gone to great length to prove that the CBD oil he consumed was what he believed it to be, an unregulated hemp product, and that his reported consumption of it could have produced the positive drug test result. He further testified that he had no intention of using any illegal product going forward. Further still, he stated he would not have used the CBD oil if he had known what he has learned during the administrative process. In other words, though he may be correct that his consumption of CBD oil was not illegal, it was not worth the risk of testing positive for THC and suffering the associated consequences. Finally, he does not intend to use any CBD oil or any other products containing THC in the future. Based on the circumstances in this case, I conclude that the Individual's behavior that resulted in his positive drug test happened under such circumstances that it is unlikely to recur and does not cast doubt on the Individual's current good judgment. I therefore conclude that the Individual has mitigated the Guideline H security concerns.

VI. CONCLUSION

Upon consideration of the entire record in this case, I find that there was evidence that raised concerns regarding the Individual's eligibility for a security clearance under Guideline H of the Adjudicative Guidelines. I further find that the Individual has succeeded in resolving those concerns, and I conclude that restoring the Individual'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). Accordingly, I have determined that the Individual's access authorization should be restored. Either party may seek review of this Decision by an Appeal Panel pursuant to 10 C.F.R. § 710.28.

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