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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: December 23, 2016) Case No.: PSH-16-0093
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Issued: April 12, 2017

Administrative Judge Decision

Janet R. H. Fishman, Administrative Judge:

This Decision concerns the eligibility of XXXXXXXXXXXXXXXX (“the Individual”) for access authorization under the Department of Energy’s (DOE) regulations set forth at 10 C.F.R. Part 710, Subpart A, entitled, “Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material.”¹ For the reasons set forth below, I conclude that the Individual’s access authorization should not be restored at this time.

I. Background

The Individual is employed by the DOE in a position that requires her to hold a DOE security clearance. The Local Security Office (LSO) received potentially derogatory information regarding the Individual’s past arrests and her failure to list one of those arrests on her Questionnaire for National Security Positions (QNSP). In order to address those concerns, the LSO summoned the Individual for an interview with a personnel security specialist in March 2016. Following the March 2016 interview, the LSO sent the Individual for an evaluation with a DOE psychiatrist. DOE Ex. 3.

On November 23, 2016, the LSO sent a letter (Notification Letter) to the Individual advising her that it possessed reliable information that created a substantial doubt regarding her eligibility to hold a security clearance. *See* 10 C.F.R. § 710.21. After receipt of the Notification Letter, the Individual exercised her right under the Part 710 regulations to request an administrative review hearing. The LSO forwarded this request to the Office of Hearings and Appeals (OHA), and the OHA Director appointed me as the Administrative Judge. At a hearing convened pursuant to

¹ Access authorization, also known as a security clearance, is an administrative determination that an individual is eligible for access to classified matter or special nuclear material. 10 C.F.R. § 710.5.

10 C.F.R. § 710.25 (d), (e), and (g), I took testimony from the Individual and the DOE psychiatrist. *See* Transcript of Hearing, Case No. PSH-16-0093 (Tr.). The LSO submitted 15 exhibits marked as DOE exhibits (DOE Ex.) 1 through 15. The Individual submitted 12 exhibits marked as Individual's Exhibits (Ind. Ex.) A through L.

II. Regulatory Standard

The criteria for determining eligibility for security clearances set forth at 10 C.F.R. Part 710 dictates that, in these proceedings, an Administrative Judge must undertake a careful review of all of the relevant facts and circumstances, and make a “common-sense judgment . . . after consideration of all relevant information.” 10 C.F.R. § 710.7(a). I must therefore consider all information, favorable and unfavorable, that has a bearing on the question of whether granting or restoring a security clearance would compromise national security concerns. Specifically, the regulations compel me to consider the nature, extent, and seriousness of the Individual's conduct; the circumstances surrounding the conduct; the frequency and recency of the conduct; the age and maturity of the Individual at the time of the conduct; the absence or presence of rehabilitation or reformation and other pertinent behavioral changes; the likelihood of continuation or recurrence of the conduct; and any other relevant and material factors. 10 C.F.R. § 710.7(c).

A DOE administrative proceeding under 10 C.F.R. Part 710 is “for the purpose of affording the individual an opportunity of supporting his [or her] eligibility for access authorization.” 10 C.F.R. § 710.21(b)(6). Once the DOE has made a showing of derogatory information raising security concerns, the burden is on the Individual to produce evidence sufficient 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). This standard implies that there is a presumption against granting or restoring a security clearance. The regulations further instruct me to resolve any doubts concerning the Individual's eligibility for access authorization in favor of the national security. 10 C.F.R. § 710.7(a); *see also Dep't of the Navy v. Egan*, 484 U.S. 518, 531 (1988) (“clearly consistent with the national interest” standard indicates “that security determinations should err, if they must, on the side of denials”).

III. Notification Letter and 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 her eligibility for a security clearance. That information pertains to Guidelines E and I of the *Revised Adjudicative Guidelines for Determining Eligibility for Access to Classified Information, The White House* (December 19, 2005) (December 29, 2005) (Adjudicative Guidelines or Guidelines). Under Guideline E, the LSO alleges that the Individual has engaged in conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations. Such conduct can raise questions about an individual's reliability, trustworthiness, and ability to protect classified information. Among those conditions set forth in the Guidelines that could raise a disqualifying security concern are “deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities;” “deliberately

providing false or misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority, or other official government representative;” and “personal conduct or concealment of information about one’s conduct, that creates a vulnerability to exploitation, manipulation, or duress.” Guideline E at ¶ 16 (a), (b), and (e). As support for its security concerns under Guideline E, the LSO cites the Individual’s previous arrests, her failure to disclose her 2000 arrest on her QNSP, and her failure to be truthful with the DOE psychiatrist.

Under Guideline I, the LSO alleges that the Individual is suffering from a condition which can impair judgment, reliability, or trustworthiness. Among the conditions set forth in the Guidelines that could raise a disqualifying security concern are “an opinion by a duly qualified mental health professional that the individual has a condition not covered under any other guideline that may impair judgment, reliability, or trustworthiness” and the fact that “the individual has failed to follow treatment advice related to a diagnosed emotional, mental, or personality condition, *e.g.* failure to take prescribed medication.” Guideline I at ¶ 28 (b) and (c). As support for its security concerns under Guideline I, the LSO cites the Individual’s history of mental health issues, including her hospitalization for depression and suicide watch; the DOE psychiatrist’s opinion that the Individual is suffering from recurrent depression and needs to be in long-term counseling; and his opinion that she is noncompliant with treatment recommendations in the past,

I find that there is derogatory information in the possession of the DOE sufficient to raise serious security concerns under Guidelines E and I.

IV. Hearing Testimony and Evidence

The DOE psychiatrist testified that the Individual is suffering from recurrent depression, for which she is not being treated. Tr. at 19. In his opinion, she needs long-term therapy and counseling. Tr. at 29, 30. In addition, he opined that she was not forthcoming during their interview. Tr. at 20. He stated that she denied attempting suicide, having suicidal thoughts, and being hospitalized, and that she misrepresented the number of times she had been arrested. Tr. at 15; DOE Ex. 3 at 2. Finally, the Individual indicated to him that she had been married only one time when, in fact, she had been married twice. *Id.* He opined that he was unsure that he could trust anything that the Individual said. Tr. at 20.

The Individual does not dispute the factual elements in the Notification Letter. However, she did dispute her motivations for not listing the information on her QNSP or being dishonest with the DOE psychiatrist. Tr. at 40, 48. She stated that she thought the question on the QNSP regarding arrests was asking for any arrests which occurred in the seven years prior to her completing the QNSP, or which were felonies. Tr. at 40. Her arrest for Cruelty to Children and Terroristic Threats occurred in 2000. Tr. at 44. Further, she stated that she thought that arrests that had been expunged should not be listed on her QNSP, nor should the arrests that were misdemeanors. Tr. at 40. She did not address why she downplayed the number of arrests to the DOE psychiatrist.

The Individual tried to rebut the DOE psychiatrist’s claim that she was not truthful during their interview by claiming that she did not remember him asking about various things, including how many times she had been married and how many times she had attempted suicide. Tr. at 33, 48.

The Individual testified that her 1996 arrest for Assault was over 21 years ago, when she was 17 years old. Tr. at 41. Her second arrest, which was for Cruelty to Children and Terroristic Threats, occurred in 2000. Tr. at 44. The Individual stated that she did not list that arrest on her QNSP because it was over 17 years old and, she thought, a misdemeanor. Tr. at 40. In 2008, she was arrested for Disorderly Conduct and Criminal Trespass. These arrests occurred eight years prior to the hearing. Tr. at 46-47.

In response to the DOE psychiatrist's opinion that the Individual had not followed past recommended treatment suggestions, the Individual stated that she had been told that she should seek counseling as she needed it, which she did. Tr. at 51, 56. She admitted that she forgot about one follow-up appointment but stated that she called the counselor after missing the appointment. Tr. at 57. She stated that, after a discussion, the counselor told her that she did not need another consultation. *Id.* She alleges that, when she consulted a counselor in December 2016, after her father died, the counselor suggested three additional counseling sessions, which she attended. Tr. at 53.

After finding out that her job was in jeopardy because of this hearing process, the Individual consulted another doctor, who opined that the Individual had no issue at the time, and did not need any medication or counseling. Ind. Ex. L. The Individual testified that the doctor suggested an "app," which she consults occasionally. Tr. at 59. She completed her testimony by testifying that she has been able to recognize when she needed treatment in the past, and was willing to comply with the current suggested treatment recommendations. Tr. at 56. She also pointed out that her work performance and her attendance at work are good. Tr. 57.

V. Administrative Judge's Findings and Analysis

I have thoroughly considered the record of this proceeding, including the submissions tendered in this case and the testimony of the witnesses 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 Adjudicative Guidelines. After due deliberation, I have determined that the Individual's access authorization should not be restored at this time. I cannot find that restoring the Individual's DOE security clearance will not endanger the common defense and security and is 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.

A. Guideline E

As an initial matter, I find that the LSO has properly raised security concerns under Guideline E.

The LSO listed the Individual's four arrests to show that she fails to follow rules, laws, and/or regulations. In addition, the LSO relied on the Individual's failure to fully disclose those arrests during the access authorization process to show that she is untruthful. Finally, the LSO raised the Individual's failure to be truthful with the DOE psychiatrist to bolster its claim that she had questionable judgement, lacks candor, is dishonest, or is unwilling to comply with rules and regulations. I find that there is sufficient evidence in the record to support these claims. The record shows that the Individual was arrested on four occasions, failed to disclose one of the arrests

on her QNSP, and lied to the DOE psychiatrist regarding a number of factors. When confronted, the Individual claims that she misread the question regarding her arrests, did not realize she needed to disclose a misdemeanor arrest that was over seven years old, and did not remember the DOE psychiatrist asking the questions which she answered falsely. However, the Individual does not dispute that she was arrested four times and failed to divulge the one arrest on her QNSP. After listening to her testimony, it is clear to me that the Individual was not being forthright when she claimed that she did not remember the DOE psychiatrist asking her the various questions that she falsely answered.

The Individual's previous arrests and failure to disclose her 2000 arrest on her QNSP adequately justify the LSO's allegation of Guideline E and raise significant security concerns. Further, the Individual's failure to be truthful with the DOE psychiatrist also justifies the LSO's assertion of Guideline E.

The Adjudicative Guidelines provide a number of potential conditions which can mitigate this type of security concern, including that "the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts." Adjudicative Guidelines ¶ 17 (a). In this case, the Individual made excuses as to why she did not disclose her arrest and why she repeatedly lied to the DOE psychiatrist, responding truthfully only after she had been confronted with her inaccurate responses. Therefore, the Individual has failed to mitigate the security concerns of the LSO, pursuant to Adjudicative Guidelines ¶ 17 (a).

The second mitigating condition is that "the refusal or failure to cooperate, omission, or concealment was caused or significantly contributed to by improper or inadequate advice of authorized personnel or legal counsel advising or instructing the individual specifically concerning the security clearance process...." Adjudicative Guidelines ¶ 17 (b). At no time during this process has the Individual claimed that anyone suggested that she conceal her arrests or lie to the DOE psychiatrist. Therefore, the Individual has failed to mitigate the security concerns of the LSO, pursuant to Adjudicative Guidelines ¶ 17 (b).

The third possible mitigating factor is that "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." Adjudicative Guidelines ¶ 17 (c). While a significant amount of time has passed since the Individual's arrests, three of these arrests (Assault, Cruelty to Children and Terroristic Threats, and Disorderly Conduct) are not minor offenses. Although the Individual did provide evidence that the Assault and Cruelty to Children and Terroristic Threats Charges have been expunged, and she testified that the Disorderly Conduct charge was dismissed, that is not at issue here. None of these arrests were shown to have happened under such unique circumstances that they are unlikely to recur. Therefore, the Individual has failed to mitigate the security concerns of the LSO, pursuant to Adjudicative Guidelines ¶ 17 (c).

The Adjudicative Guidelines also provide for mitigation where "the individual has acknowledged the behavior and obtained counseling to change the behavior," *id.* at ¶ 17 (d), or where "the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation or duress." *Id.* at ¶ 17 (e). For the reasons set forth herein, I find that the Individual

has failed to mitigate the security concerns of the LSO, pursuant to Adjudicative Guidelines ¶ 17 (d) or (e).

B. Guideline I

With respect to Guideline I, the LSO's allegation of security concerns is justified by the Individual's history of mental health issues, including her hospitalization for depression and suicide watch; the DOE psychiatrist's opinion that the Individual is suffering from recurrent depression and needs to be in long-term counseling; and the DOE psychiatrist's opinion that the Individual was noncompliant with past treatment recommendations. Such mental health conditions can impair judgement, reliability, or trustworthiness.

The record shows that the Individual was hospitalized for depression, and was placed on a suicide watch in the past. The Individual has made two suicide attempts, and has had to consult with mental health professionals frequently, including two times in the six months preceding the hearing.

In response, the Individual claims that: she is no longer depressed; when she feels the need for counseling, she gets professional help; and she has been compliant with past treatment recommendations that she get help as needed.

There is conflicting evidence about whether the Individual is currently suffering from a mental health condition which would impair her judgment, reliability, or trustworthiness. The record reflects the DOE psychiatrist's opinion that the Individual is suffering from recurrent depression and needs to be in long-term counseling, and that she has been noncompliant with treatment recommendations in the past. However, a doctor the Individual consulted in February 2017 opined that, based on a review of her medical records and her interview, no treatment was needed. Ind. Ex. 12. In addition, a therapist the Individual consulted in December 2016 diagnosed her with Adjustment Disorder, rather than depression, and recommended three additional counseling sessions, which she attended. Ind. Exs. 9, 10, and 11.

The evidence put forth from both of the Individual's mental health professionals were in the form of exhibits, not giving the LSO or the Administrative Judge the opportunity to question them. The DOE psychiatrist, in contrast, did testify at the hearing. When presented with differing opinions between mental health experts, an Administrative Judge must decide which opinion carries greater weight. In the present case, I find that the opinion of the DOE psychiatrist is more persuasive than that of the other two medical professionals. The DOE psychiatrist's observations and diagnosis are clearly more consistent with the Individual's history of symptomatic behavior and psychiatric treatment. Therefore, I find that there is sufficient evidence in the record to support the concerns raised by the LSO under Guideline I.

In considering whether the Individual has resolved a Guideline I security concern, I must look to paragraph 29 of the Adjudicative Guidelines which provides that mitigating conditions include:

- (a) the identified condition is readily controllable with treatment, and the individual has demonstrated ongoing and consistent compliance with the treatment plan;

- (b) the individual has voluntarily entered a counseling or treatment program for a condition that is amenable to treatment, and the individual is currently receiving counseling or treatment with a favorable prognosis by a duly qualified mental health professional;
- (c) recent opinion by a duly qualified mental health professional employed by, or acceptable to and approved by the U.S. Government that an individual's previous condition is under control or in remission, and has a low probability of recurrence or exacerbation; and
- (d) the past emotional instability was a temporary condition (e.g., one caused by a death, illness, or marital breakup), the situation has been resolved, and the individual no longer shows indications of emotional instability.

Adjudicative Guidelines ¶ 29 (a), (b), (c).

Based upon the testimony of the DOE psychiatrist and other evidence previously cited herein, it is clear that the Individual: has not voluntarily entered counseling; has not demonstrated ongoing and consistent compliance with a treatment plan; has not demonstrated that there is a low probability of recurrence or exacerbation; and has not demonstrated that the emotional instability was a temporary condition that has been resolved. Therefore, I find that the Individual has failed to mitigate the security concerns of the LSO, pursuant to Adjudicative Guidelines ¶ 29 (a), (b), (c) or (d).

Finally, enumerated as a mitigating condition for Guideline I is that “there is no indication of a current problem.” Adjudicative Guidelines ¶ 29 (e). While the doctor that the Individual consulted in February 2017 opined that the Individual did not require treatment at that time, as previously determined herein, I find the testimony of the DOE psychiatrist to be more persuasive. The DOE psychiatrist stated that the Individual has a current medical condition which requires long-term therapy or counseling. Therefore, the Individual has failed to mitigate the security concerns of the LSO, pursuant to Adjudicative Guidelines ¶ 29 (e).

Based on the foregoing, I find that the Individual has not resolved the concerns raised by the LSO, pursuant to Adjudicative Guideline I.

VI. Conclusion

In the above analysis, I have found that there was derogatory information in the possession of the DOE that was sufficient to raise serious security concerns under Guidelines E and I. 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 have found that the Individual has not brought forth sufficient evidence to resolve the security concerns associated with those Guidelines. I therefore cannot find that restoring the Individual's access authorization will not endanger the common defense and is clearly consistent with the national interest. Accordingly, I have determined that the Individual's access authorization should not be restored. The parties may seek review of this Decision by an Appeal Panel under the regulations set forth at 10 C.F.R. § 710.28.

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

Date: April 12, 2017