

\*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: February 2, 2017	)	Case No.: PSH-17-0007
	)	
_____	)	

Issued: May 16, 2017

\_\_\_\_\_  
**Administrative Judge Decision**  
\_\_\_\_\_

Janet R. H. Fishman, Administrative Judge:

This Decision concerns the eligibility of XXXXXXXXXXXXXXXXXXXX (“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, “General Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material.”<sup>1</sup> As fully discussed below, I conclude that the Individual’s access authorization should be restored.

**I. Background**

The Individual is employed by a DOE contractor in a position that requires him to hold a DOE security clearance. In October 2014, the Individual was arrested for Aggravated Menacing and Using Weapons While Intoxicated, which resulted in the Local Security Office (LSO) conducting a personnel security interview (PSI) with him in December 2014. On October 20, 2016, the LSO sent a letter (Notification Letter) to the Individual advising him that it possessed reliable information that created a substantial doubt regarding his eligibility to hold a security clearance. *See* 10 C.F.R. § 710.21.

After receipt of the Notification Letter, the Individual exercised his 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

\_\_\_\_\_  
<sup>1</sup> Access authorization is defined 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). Such authorization will be referred to variously in this Decision as access authorization or security clearance.

Judge. At a hearing convened pursuant to 10 C.F.R. § 710.25(d), (e), and (g), I took testimony from the Individual and four witnesses. *See* Transcript of Hearing, Case No. PSH-17-0007 (Tr.). The DOE presented 14 exhibits marked as DOE exhibits (DOE Ex.) 1 through 14; the Individual submitted six exhibits marked Individual's Exhibits (Ind. Ex.) A through F.

## **II. Regulatory Standard**

The procedures 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. The Notification Letter and the Security Concerns at Issue**

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. That information pertains to Guidelines E and J of the *Revised Adjudicative Guidelines for Determining Eligibility for Access to Classified Information, The White House* (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 is "personal conduct or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress."

Guideline E at ¶ 16 (e). As support for its security concerns under Guidelines E, the LSO cites the Individual's arrest record and the involvement of alcohol in his most recent arrest.

Under Guideline J, the LSO alleges that the Individual has engaged in a history or pattern of criminal activity, which creates a doubt about his judgment, reliability, and trustworthiness. Among the conditions set forth in the Guidelines that could raise a disqualifying security concern are "allegations or admissions of criminal conduct, regardless of whether the person was formally charged" or "a single serious crime or multiple lesser offense." Guideline J at ¶ 31 (a) and (c). As support for its security concerns under Guidelines J, the LSO cites the Individual's three arrests and two guilty pleas.

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

#### **IV. Hearing Testimony and Evidence**

The Individual does not dispute his arrest record and, during the hearing, he testified about the circumstances leading to these arrests.

In January 1997, the Individual was arrested for Domestic Violence after an incident involving his now ex-wife. DOE Ex. 4 at ¶ 17. During the hearing, the Individual testified that after 20 years, he does not exactly remember what happened, but stated that his ex-wife attempted to prevent him from leaving her father's house by scratching, slapping, and kicking him in the shins. Tr. at 95. The Individual stated that, in response, he pushed her backwards into a chair. *Id.* He testified that he does not remember if he actually slapped her, but during his December 2014 PSI, he stated that he did. *Id.*; *see also* DOE Ex. 9 at 34. When the police arrived, they arrested both the Individual and his ex-wife for Domestic Violence. Tr. at 96. The Individual stated that he did not believe any alcohol he had that night contributed to the incident itself. Tr. at 97. The Individual's current wife of 19 years testified during the hearing that she was aware of his previous domestic violence arrest and that he has never mistreated her or their five children. Tr. at 16-18.

In September 1998, the Individual was arrested for Assault and Disorderly Conduct. DOE Ex. 4 at ¶ 16. He later pled guilty to the Disorderly Conduct charge and the court dismissed the Assault charge. *Id.* During his December 2014 PSI, the Individual stated that he was attempting to break up a fight between his son and another boy, when a police officer restrained and arrested him. DOE Ex. 9 at 33. At the hearing, the Individual testified that he was charged with Assault because the other boy involved reported to the police that the Individual kicked him in the face, which the Individual denies. Tr. at 24-25. The police later dropped the Assault charge. *Id.* Additionally, the Individual testified that the police charged him with Disorderly Conduct for not complying the first time the officer asked him to step aside during the fight between the two boys. Tr. at 25. The Individual stated that he pled guilty to the Disorderly Conduct charge in order to protect his son. Tr. at 23. The Individual also submitted a letter from the attorney who represented him at this time, confirming that the Individual pled guilty so his son would not face any charges. Ind. Ex. D.

In October 2014, the Individual was arrested for Aggravated Menacing and Using Weapons While Intoxicated. DOE Ex. 4. During his December 2014 PSI, the Individual stated that he went to a motorcycle event with his cousin and consumed approximately five to six (10-12 ounce) cups of beer. DOE Ex. 9 at 5. During the event, the Individual made a “squeezing motion” towards a woman’s butt, which led to a confrontation with a man who knew the woman. *Id.* at 6. At some point during the confrontation, the Individual raised his shirt up to reveal his firearm. *Id.* The Individual then stated that as he was leaving the event, the man with whom he got into the confrontation approached the police and told them the Individual had “pulled a gun” on him. *Id.* at 7. The Individual maintains that he did not pull out his gun, only showed it to the man. *Id.* The Individual admitted to the police that he drank during the event, but refused to submit to an optional breathalyzer test. *Id.* at 9.

During the hearing, the Individual testified that both he and his wife applied for concealed weapon permits for protection in 2013 after his wife bought a convenience store. Tr. at 77. He stated that he typically carries his weapon when he is helping her at the convenience store on the weekends. *Id.* On the day in question, the Individual was headed to her store, carrying his weapon, when his cousin invited him to the motorcycle event. *Id.* He stated he was unaware that he would be drinking that day, but after the race, he was offered beers, which he drank. Tr. at 85. During the hearing, there was some confusion as to how much the Individual actually drank during the event, with the Individual stating he was just guessing when he said he had five to six, 10 to 12 ounce beers during his December 2014 PSI. Tr. at 81. He testified that during the event he did not remember specifically thinking, “Oh, I’ve got my gun, I better take that back to the car.” Tr. at 84. The Individual agreed that drinking probably caused him to be more “jokeative,” leading to him making the squeezing motion towards the woman and then joking about it with a nearby man. Tr. at 91. The Individual also testified that he did not refuse the breathalyzer test because he was intoxicated, but rather because the police officer told him it was not required and that he would be charged regardless. Tr. at 70. He further stated that he pled guilty to the reduced charge of Disorderly Conduct because he believed that he had been disorderly by making the mistake of “having a drink when he shouldn’t have” (while carrying his weapon). Tr. at 71. The Individual’s first-line supervisor at the time of his arrest also testified during the hearing that the Individual reported his arrest to him his first day back at work after the incident and immediately notified the appropriate security office. Tr. at 63.

## **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)<sup>2</sup> and the Adjudicative Guidelines. After due deliberation, I have

---

<sup>2</sup> Those factors include the following: the nature, extent, and seriousness of the conduct, the circumstances surrounding the conduct, to include knowledgeable participation, the frequency and recency of the conduct, the age and maturity at the time of the conduct, the voluntariness of his participation, the absence or presence of rehabilitation or

determined that the Individual's access authorization should be restored. I find that restoring the individual's DOE security clearance will not endanger the common defense and security and 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.

### **A. Guideline E**

As an initial matter, I find that there is sufficient evidence in the record to support the LSO's claims that the Individual's arrest record and the involvement of alcohol in some of these incidents raise concerns under Guidelines E. The record shows that the Individual admitted to consuming alcohol prior to at least two of the incidents that led to his arrest.

The Adjudicative Guidelines provide a number of potential conditions, which can mitigate security concerns under Guideline E, including that "...so much time has passed...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). In this case, the Individual's two previous arrests are almost 20 years old. Additionally, both situations, which led to the arrests, were fairly unique involving an argument with his ex-wife and an incident where he was attempting to protect his teenage son. The facts that the Individual has been remarried to a different woman for 19 years with no alleged domestic violence incidents and that his son is now an adult indicate to me that these circumstances are unlikely to recur. Therefore, the Individual has sufficiently mitigated the security concerns of the LSO relating to his 1997 and 1998 arrests, pursuant to Adjudicative Guidelines ¶ 17 (c).

With regard to all three arrest incidents, another mitigating factor is that the individual "has acknowledged the behavior and obtained counseling to change the behavior...." Adjudicative Guidelines ¶ 17 (d). During the hearing, the Individual acknowledged his behavior in all the incidents that led to his arrest. The Individual also acknowledged the role alcohol may have played in his most recent 2014 arrest at the motorcycle event. Additionally, as part of the sentence for his reduced Disorderly Conduct charge, the Individual completed a comprehensive alcohol assessment which found that he did not meet the criteria for treatment. Ind. Ex. E at 4. The Individual has completed his probation for this offense and received back his concealed weapon permit. *Id.* at 5-6. Considering these facts, I find that the Individual has resolved the security concerns of the LSO pursuant to Adjudicative Guidelines ¶ 17 (d).

### **B. Guideline J**

With respect to Guideline J, the LSO cites the Individual's most recent arrest for Aggravated Menacing and Using Weapons While Intoxicated, and his two previous arrests for Domestic Violence, Assault, and Disorderly Conduct. The Individual does not deny these arrests; therefore

---

reformation and other pertinent behavioral changes, the motivation for the conduct, the potential for pressure, coercion, exploitation, or duress, the likelihood of continuation or recurrence, and other relevant and material factors.

I find that there is sufficient evidence in the record to support the concerns raised by the LSO under Guideline J.

Similarly to Guideline E, the Individual has resolved this security concern under Guideline J due to the fact that “so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances that it is unlikely to recur or does not cast doubt on the individual’s reliability, trustworthiness, or good judgment.” Adjudicative Guidelines ¶ 32 (a). There is also no indication that the Individual’s criminal history demonstrates a pattern of behavior given the uniqueness of each incident and the lapse of time between the first two arrests and the most recent arrest. Additionally, the Individual has resolved the concerns because “there is evidence of successful rehabilitation; including but not limited to the passage of time without recurrence of criminal activity.” Adjudicative Guidelines ¶ 32 (d). The record shows that it has been almost 20 years since the Individual’s first two arrests. Furthermore, the Individual’s most recent arrest was in 2014, and the record reflects that he has not been involved in any other criminal conduct since then. The record also indicates that the Individual has completed all requirements of his sentence for his last offense and is no longer on probation. Ind. Ex. E.

Based on the foregoing, I find that the Individual has resolved the concerns raised by the LSO pursuant to Adjudicative Guideline J.

## **V. 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 J. 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 brought forth sufficient evidence to resolve the security concerns associated with those Guidelines. I therefore 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 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: May 16, 2017