

and Guidelines E and H of the Adjudicative Guidelines for Determining Eligibility for Access to Classified Information (December 29, 2005) (the Guidelines).

Upon his receipt of the Notification Letter, the individual exercised his right under the Part 710 regulations by requesting an administrative review hearing. The Director of the Office of Hearings and Appeals (OHA) appointed me the Administrative Judge in the case, and I subsequently conducted an administrative hearing in the matter. At the hearing, the individual presented the testimony of one witness and testified on his own behalf. The DOE Counsel did not present any witnesses. The LSO submitted seven exhibits into the record; the individual tendered two exhibits. The DOE's exhibits will be cited in the Decision as "Ex." followed by a numeric designation and the individual's exhibits will be cited as "Ex." followed by an alphabetic designation. The hearing transcript in the case will be cited as "Tr." followed by the relevant page numbers.²

II. Regulatory Standards

A. Individual's Burden

A DOE administrative review proceeding under Part 710 is not a criminal matter, where the government has the burden of proving the defendant guilty beyond a reasonable doubt. Rather, the standard in this proceeding places the burden on the individual because it is designed to protect national security interests. This is not an easy burden for the individual to sustain. 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 restoring his 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.

B. Basis for the Administrative Judge's Decision

In personnel security cases arising under Part 710, it is my role 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

² OHA decisions are available on the OHA website at www.energy.gov. A decision may be accessed by entering the case number in the search engine at www.oha.gov/search.htm.

security and is clearly consistent with the national interest. 10 C.F.R. § 710.7(a). I am instructed by the regulations to resolve any doubt as to a person's access authorization eligibility in favor of the national security. *Id.*

III. The Notification Letter and the Associated Security Concerns

As previously mentioned, the Notification Letter included a statement of derogatory information that raised concerns about the individual's continued eligibility for access authorization. The information in the letter specifically cites the Bond Amendment and Guidelines E and H.

The Bond Amendment provides, in pertinent part, that 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). As support of its invocation of this amendment, the Notification Letter cites the results of the individual's random drug test, in which he tested positive for cocaine, and the individual's admission that he snorted two piles of cocaine on October 2, 2016.

Guideline E addresses "[c]onduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations," as this "can raise questions about an individual's reliability, trustworthiness and ability to protect classified information." Guideline E at ¶ 15. Among the 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). The Guidelines note that this can include "engaging in activities which, if known, may affect the person's personal, professional, or community standing[.]" Guideline E at ¶ 16 (e)(1). As a basis for invoking Guideline E, the Notification letter cites the individual's decision to snort two piles of cocaine.

Guideline H concerns, in pertinent part, the illegal use of controlled substances. Guideline H at ¶ 24. The illegal use of controlled substances "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." *Id.* Among the conditions set forth in the Guidelines that could raise disqualifying security concerns are "testing positive for illegal drug use" and "any illegal drug use after being granted a security clearance." Guideline H at ¶ 25 (b) and (g). The Notification Letter supports the use of Guideline H, citing the individual's random drug analysis, which tested positive for cocaine, and the individual's admissions during the PSI that he ingested cocaine and knew, that as a clearance holder, cocaine use was a violation of DOE policy.

IV. Findings of Fact

On October 5, 2016, the individual was randomly selected for drug and alcohol testing. Ex. 5 at 3. On October 10, 2016, the individual was notified that his urine sample tested positive for cocaine. Ex. 6 at 1. As a result of the positive drug test, the individual was suspended from work for 30 days and required to complete a drug treatment program. Ex. 6 at 1. The individual

successfully completed an outpatient treatment program and additionally attended 14 group support meetings. Ex. 5 at 6-7; Ex. A.

In December 2016, the individual participated in a PSI. During the PSI, the individual admitted to snorting two piles of cocaine offered to him at a party three days prior to his random testing. Ex. 7 at 20. The individual claimed he had never before used cocaine or any other illegal drug. Ex. 7 at 24, 46-53. Additionally, the individual stated that he had not shared the events surrounding the cocaine use or drug test with his wife. Ex. 7 at 60.

V. 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 security clearance should not be restored. I cannot 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 H: Drug Use and the Bond Amendment

At the hearing, the individual did not dispute the allegations in the Notification Letter pertaining to his drug use. Tr. at 44. Instead, he attempted to demonstrate, through his testimony and that of his witness, that this incident was a single lapse of judgment and would not occur again. *Id.* at 43.

The individual acknowledged that he did use cocaine within a week of taking the drug test; however, he asserted that he has never used illegal drugs on any other occasion and does not knowingly associate with illegal drug users. *Id.* at 24-25, 28. According to the individual, it was merely "by chance" that he was selected for a random drug test within a week of his first use of an illegal drug. *Id.* at 29. He stated that he did not know what inspired him to use the drug indicating that it was "in the heat of the moment" at a party in celebration of his long-time friend. He explained that he had just turned fifty years old and thought of doing "something out of the norm." *Id.* at 31, 50, 52. The individual described the behavior as "boys being boys." *Id.* at 36.

While the individual asserted that this conduct was "totally out of [the] norm" for him, he did not present any witnesses who were able to speak to his normal behavior in a social setting and corroborate his testimony. *Id.* at 17, 38. However, providing credence to his assertion, there is no evidence in the record indicating that the individual has ever tested positive for drugs in the past. He testified that he has been randomly drug tested a number of times in the past four years since working for his employer, and that he has never tested positive for illegal drugs. *Id.* at 27. Furthermore, the Occupational Medicine Department at the individual's employment confirmed that the individual has been randomly drug tested on three occasions in the past three years and that the individual's drug screens were all negative. Ex. B. The individual's supervisor also testified that, in nearly four years of working with the individual, he has never suspected the

individual of drug use. *Id.* at 9-10. Finally, the individual described himself as a “special case,” as he was not diagnosed with a drug abuse disorder in the psychiatric evaluation portion of his drug treatment program, nor did he test positive on any of the random urinalysis testing administered during the program. *Id.* at 55; Ex. A. He described his experiences in the drug treatment program and the support group meetings as “eye-awakening.” *Id.* at 54.

Considering these facts, I conclude that the individual’s use of cocaine happened under an unusual circumstance that is unlikely to occur in the future; and to the extent that the behavior raised security concerns under Guideline H, I conclude that such concerns have been successfully resolved. I further conclude, for the same reasons, that the individual is not “an unlawful user of a controlled substance or an addict,” within the meaning of the Bond Amendment. *See* Guideline H; *Personnel Security Hearing*, Case No. PSH-14-0003.

B. Guideline E: Personal Conduct

Notwithstanding the conclusion that the individual resolved the security concerns under Guideline H, I must still consider whether the individual poses a risk to national security under Guideline E. The key issue under Guideline E is whether the individual brought forth sufficient evidence to demonstrate that he is reliable, trustworthy, and no longer vulnerable to exploitation, manipulation, or duress as a result of his conduct. *See* Guideline E at ¶ 15.

Under Guideline E, conditions that may mitigate security concerns include the individual making prompt and good faith efforts “to correct the omission, concealment, or falsification before being confronted with the facts,” and taking “positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress.” *Id.* at ¶ 17 (a) and (e).

During the hearing, the individual testified that, aside from his supervisor, he had not voluntarily told anyone about the incident, including his wife of twenty years or his children. Tr. at 40, 58. While the individual stated both during the PSI and at the hearing that he would eventually tell his wife, he stated that this was a “need-to-know” situation, and he did not want his family to know about the drug use or the positive drug test. *Id.* at 40, 47, 57; Ex. 7 at 64. The individual admitted that while he was suspended from work and attending the drug treatment program, he told his wife that he had suffered an injury, was unable to work, and was seeking medical treatment. *Id.* 40, 57. In spite of his lack of honesty with his wife, the individual stated that he did not believe this affected his trustworthiness, nor did he think he was susceptible to blackmail. *Id.* 41-42.

Based upon the foregoing, the individual has not met his burden to show that he is not a security risk under Guideline E. In keeping this information from his wife and family, the individual makes himself vulnerable to exploitation, manipulation, and duress. The individual did not demonstrate any evidence that he has taken any steps to reduce or eliminate his risk of exploitation and did not show any indications of planning to do so in the near future. To the contrary, the individual made it clear that he did not want anyone to know about this incident or these administrative proceedings, stating “this is between me and the people that know. And I’d like to try to keep it that way, please.” Tr. at 57. Therefore, I find that the individual has not resolved the security concern under Guideline E.

VI. Conclusion

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

Kimberly Jenkins-Chapman
Administrative Judge
Office of Hearings and Appeals

Date: May 25, 2017