

for Determining Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position, effective June 8, 2017 (Adjudicative Guidelines).

Upon receipt of the Notification Letter, the individual filed a request for a hearing. The LSO transmitted the individual's hearing request to the Office of Hearings and Appeals (OHA), and the OHA Director appointed me as the Administrative Judge in this case. At the hearing that I convened, the individual presented her own testimony and that of four witnesses. The DOE Counsel did not call any witnesses. Both the DOE and the individual submitted a number of written exhibits (Ex.) prior to the hearing.

II. Regulatory Standard

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 regulations require 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 denial"); *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 her 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 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 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 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 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 in favor of the national security. *Id.*

III. The Notification Letter and the Security Concerns at Issue

As previously noted, there are various security concerns under Guideline D, Sexual Behavior, and Guideline E, Personal Conduct. To support Guideline D, the LSO cites a 2016 Investigative Report which revealed significant background information including information related to the individual's sexual behavior. The LSO also cites a March 2017 PSI in which the individual admitted to voluntarily making a video of a sexual nature and sending inappropriate pictures to a boyfriend. As for Guideline E, the LSO cites the individual's pattern of risky sexual conduct as well as a number of instances believed to represent a history and pattern of poor decision-making regarding relationships. *See* Ex. 1.

I find that the information set forth above constitutes derogatory information that raises questions about the individual's behavior under both Guidelines D and E. First, with respect to Guideline D, sexual behavior that involves a criminal offense, reflects lack of judgment or discretion, or may subject the individual to undue influence or coercion, exploitation, or duress can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. *See* Guideline D. Second, with respect to Guideline E, which addresses conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations, this behavior can also raise questions of a similar nature. *See* Guideline E.

IV. Findings of Fact

On December 22, 2016, the LSO received an Investigative Report that concerned allegations of Workplace Violence related to the individual. The report indicated that the individual and a boyfriend moved in together on November 2, 2016, after dating for several months. It further indicated that the relationship ended on November 12, 2016, and that both the individual and the boyfriend filed Civil Protection Orders against the other. *See* Ex. 1 at 1. During the course of the investigation, significant background information was revealed including information that the individual's boyfriend threatened to expose intimate video of the two of them. *Id.* In addition, several violations of laboratory policy by the individual were found and documented, including the individual's use of her government Google account to conduct chats with the boyfriend (another employee) that were sexual in nature. Also, the individual used her personal cell phone to take a partially nude photo in the second floor restroom of her office building during work hours, and sent the photo to the boyfriend. *Id.*

In a March 2017 PSI, the individual admitted that she voluntarily made a video revealing her and her boyfriend being intimate. *Id.* According to the individual, she made the video because it seemed important to her boyfriend at the time. She further stated that she never initiated making the video, and that it made her feel uncomfortable. *Id.* The individual also admitted that she sent inappropriate pictures to previous boyfriends via her phone. *Id.* She acknowledged that she was naïve and trusting and did not consider the possibility that the boyfriends could use the pictures to place her in a compromising position.

During the course of her PSI, the individual also revealed information showing a history and pattern of poor decision-making regarding her relationships. *Id.* at 2. She admitted that she began cohabitating with a boyfriend after dating only a few months. In this particular relationship, the

individual stated that, after checking the boyfriend's court records, she discovered various complaints and charges including Assault and Attempted Strangulation. The individual admitted that she has had issues with moving too fast in relationships and has had the tendency to be "blinded by love." *Id.* In another relationship with someone with a criminal record, the individual admitted that she allowed this boyfriend to spank her kids because she was "stressed and overwhelmed and just looking for a little protection from [her] ex-husband's constant attacks." *Id.* at 3. In an October 2016 PSI, she acknowledged that she had a brief marriage with another individual although she knew that he had a history of drug and alcohol abuse. *Id.*

V. Analysis

I have thoroughly considered the record in 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)² and the Adjudicative Guidelines. After due deliberation, I have determined that the individual's access authorization should be restored. Based on the facts in this record, 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 D: Sexual Behavior

During the hearing, the individual testified about her inappropriate behavior, her personal conduct, and a history of poor judgment. She acknowledged that she has not used good judgment in entering a number of previous relationships. Transcript of Hearing (Tr.) at 118-129. The individual testified that with respect to the video she made with a previous boyfriend, she believed at the time that it would be private and not distributed in any way. *Id.* at 129. She testified that the video is no longer in existence, and does not believe that it can be used to manipulate her in any way. *Id.* at 130. The individual also acknowledged that she took a photo, with one breast exposed, on her personal cell phone after work hours in an office bathroom. *Id.* at 132. She further acknowledged during the hearing that she sent this photo to a boyfriend and believed at the time that it was a private, discreet act between the two of them. *Id.* The individual admitted that she has had a number of poor relationships, but testified that these were isolated incidences. *Id.* at 135. She further testified that she has been involved in far more healthy, good relationships than poor relationships. *Id.* During the hearing, the individual acknowledged that she did not use her best judgment in using her Google account to chat with a boyfriend at work, but stated that she was not aware that it was against her employer's policy. *Id.* at 145.

² 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 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.

The individual testified that she has taken a number of positive steps to address her decision-making process as it relates to her personal relationships. *Id.* at 138. She stated that she realized she needed to seek professional help in guiding her to “make better decisions, for self-improvement, and ... to have a happier life in general.” *Id.* The individual stated that she engaged in counseling with the Employee Assistance Program (EAP) for about three months. *Id.* She testified that the counseling sessions were productive and gave her tools and suggestions for handling various situations, including her personal relationships. *Id.* at 139. According to the individual, her counseling sessions revealed a great deal of past trauma in her life that needed to be addressed. *Id.* at 140. She testified that she was referred to another counselor whom she met with regularly from March through July 2017, to work on addressing the trauma directly. *Id.* at 141. The individual testified that she learned how her past trauma has affected her emotions and how to separate those emotions from her past trauma. *Id.* She further testified that she had stressors in her life causing anxiety which could have led to her making bad decisions. *Id.* at 146. The individual stated that she learned the importance of fulfilling her own needs instead of looking for outside sources to fulfill those needs. *Id.* Finally, the individual testified that since participating in counseling, she feels calmer and her thinking is clearer. *Id.* at 147. She testified that she now understands the inappropriateness of her behavior in the workplace, and does not intend to engage in this behavior in the future. *Id.* at 175-176.

The individual presented the testimony of four witnesses, including her EAP counselor, a mental health counselor, her current boyfriend and her manager. Her boyfriend testified that he has been in a trusting relationship with the individual since December 30, 2016, over a year. *Id.* at 20. He stated that the individual disclosed that she had some issues at work, but that he has found her to be honest and trustworthy throughout their relationship. *Id.* at 22. According to the individual’s boyfriend, the individual has never taken inappropriate photos or made inappropriate videos during the course of their relationship. *Id.* at 25. He believes that the individual is not easily manipulated and exercises good judgment. *Id.* at 28. The individual’s supervisor testified that she issued a verbal warning to the individual on December 6, 2016, regarding her use of government equipment to use Google chat with communications that are sexual in nature, and taking a partially nude photo in the workplace and sending it to another employee. *Id.* at 89; Ex. A. The supervisor testified that the individual was embarrassed and remorseful for her behavior and believes the individual’s behavior was a one-time incident. *Id.* at 91. She testified that she considers the individual to be reliable and trustworthy. *Id.* at 94.

The EAP counselor testified that she met with the individual for seven sessions from December 2016 through March 2016 after the individual reached out to her for assistance. *Id.* at 40. She stated that the individual was overwhelmed with work and personal issues, and that she provided cognitive behavior therapy techniques to assist her with coping with her issues. *Id.* at 41. The EAP counselor testified that the individual’s counseling sessions were productive, noting that the individual got better with identifying her “struggles.” *Id.* at 42. She believes that, after counseling, the individual was armed to make better decisions in her relationships. *Id.* at 44. She further testified that the individual is trustworthy and has good judgment. *Id.* at 45. The individual’s second counselor, a certified mental health counselor, testified that he met with the individual during the course of four months for 17 sessions, to help her work through the emotions of past traumatic events in her life. *Id.* at 55. He testified that, based on the individual’s history, she suffered from Post-traumatic Stress Disorder (PTSD) in the past. *Id.* at 69. He noted that the

individual's trauma issues pre-dated her work-related issues and believes these issues played a role in some of the decisions she made in 2016. *Id.* at 59. The mental health counselor testified that he and the individual discussed how to identify emotions and nurture the individual's self. *Id.* at 73. He believes the individual made progress during their sessions, and feels more peace and reduced anxiety. *Id.* at 65. According to the mental health counselor, PTSD can undermine a person's confidence. He testified that as a person's anxiety heightens, they are likely to make poor decisions. *Id.* at 66. The mental health counselor believes that the individual now has the tools needed to make better decisions, and believes that since participating in counseling, her symptoms have reduced to the extent that she no longer currently meets the criteria for PTSD. *Id.* at 70.

The key issue under Guideline D is whether the individual brought forth sufficient evidence to demonstrate that she is reliable, trustworthy, and no longer vulnerable to exploitation, manipulation, or duress as a result of her conduct. Conduct involving questionable judgment can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. *See* Guideline D at ¶ 12. Under Guideline D, conditions that may mitigate security concerns include "the sexual behavior happened so long ago, so infrequently, or under such unusual circumstances, that it is unlikely to recur and does not cast doubt on the individual's current reliability, trustworthiness, or good judgment" or "the behavior no longer serves as a basis for coercion, exploitation, or duress." *Id.* at ¶ 14(b), (c).

As stated earlier, the individual testified that she now understands the inappropriateness of her behavior and will not engage in this behavior in the future. She further testified that, as a result of counseling, she now has the tools necessary to make better decisions and judgment calls. I found the individual's testimony to be credible with regard to the lessons she has learned from her behavior. I am also persuaded by the testimony of both counselors, the individual's EAP counselor and her mental health counselor, that the individual's past traumatic experiences likely influenced her poor decision-making in her relationships and that she is now equipped to make better decisions. In light of this testimony, I am convinced that the individual's behavior with respect to her inappropriate behavior in the workplace is unlikely to recur and does not cast doubt on her current reliability, trustworthiness, or good judgment. I am also convinced that the individual has been open and honest about her behavior, and thus her behavior no longer serves as a basis for coercion, exploitation, or duress. Therefore, I find that the individual has resolved the security concerns under Guideline D.

B. Guideline E: Personal Conduct

The Guideline E concern in this case involves the individual's history and pattern of making poor decision-making regarding her personal relationships. As stated under Guideline D, under Guideline E, the individual must provide sufficient evidence to demonstrate that she is reliable, trustworthy, and no longer vulnerable to exploitation, manipulation, or duress as a result of this conduct. Conditions that may mitigate security concerns under this Guideline include 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" or "the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that caused untrustworthy, unreliable, or other

inappropriate behavior, and such behavior is unlikely to recur.” *See* Guideline E at ¶ 17(c), (d). Here, the individual has acknowledged her behavior and has obtained counseling to address the issues, stressors and past trauma that led to her poor judgment and decisions. The individual convinced me that she has learned from her past behavior and has gained, through counseling, the tools needed to make better decisions in her relationships. Her current boyfriend and her counselors credibly testified that the individual is trustworthy and reliable and is in a better position to engage in healthy relationships and decision-making. For these reasons, I find that the individual has sufficiently resolved the DOE’s security concerns 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 raised serious security concerns under Guidelines D and E. 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 convincing evidence to adequately resolve the security concerns associated with Guidelines D and E. I therefore find that restoring the individual’s access authorization would not endanger the common defense and security, and would be consistent with the national interest. Accordingly, I find 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.

Kimberly Jenkins-Chapman
Administrative Judge
Officer of Hearings and Appeals

Date: January 11, 2018