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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: July 11, 2018	)	Case No.: PSH-18-0052
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Issued: September 14, 2018

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**Administrative Judge Decision**

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Kimberly Jenkins-Chapman, Administrative Judge:

This Decision concerns the eligibility of XXXXXXXXXX (hereinafter referred to as “the Individual”) to hold an access authorization under the United States 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 discussed below, after carefully considering the record before me in light of the relevant regulations and the *National Security Adjudicative Guidelines for Determining Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position* (June 8, 2017) (the Guidelines), I conclude that the Individual’s access authorization should not be restored.

**I. BACKGROUND**

A DOE contractor employs the Individual in a position that requires him to hold a security clearance. In January 2018, the Individual informed the Local Security Office (LSO) that a Bench Warrant had been issued for his arrest because he had failed to appear for a criminal court proceeding. Based on the record developed by the Individual’s previous Personnel Security Interviews (PSI) with Office of Personnel Management investigators and other information contained in his file, the LSO determined that the record raised unresolved security concerns. Therefore, the LSO informed the Individual, in a Notification Letter dated May 18, 2018 (“Notification Letter”), that it possessed reliable information that created substantial doubt regarding the Individual’s eligibility to hold a security clearance. In an attachment to the Notification Letter, the LSO explained that the derogatory information raised security concerns under “Guideline J, Criminal Conduct.”

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<sup>1</sup> The regulations define access authorization 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). This Decision will refer to such authorization as access authorization or security clearance.

The Individual exercised his right to request an administrative review hearing pursuant to 10 C.F.R. Part 710. The Director of the Office of Hearings and Appeals (OHA) appointed me as the Administrative Judge in the case, and I subsequently conducted an administrative hearing in the matter. At the hearing, the DOE introduced nineteen numbered exhibits (Exs. 1–19). The Individual introduced five exhibits (Exs. A-E) into the record and presented his own testimony. The hearing transcript will be cited as “Tr.” followed by the relevant page number.

## **II. THE NOTIFICATION LETTER AND THE ASSOCIATED SECURITY CONCERNS**

The LSO cited Guideline J as the basis for denying the Individual a security clearance. Under Guideline J, “[c]riminal activity creates doubt about a person’s judgment, reliability, and trustworthiness. By its very nature, it calls into question a person’s ability or willingness to comply with laws, rules, and regulations.” *Id.* at ¶ 30. The Notification Letter asserted that: (1) in 2018, the Individual received a bench warrant for failure to appear (FTA) at a scheduled court date; (2) in 2016, the Individual was arrested for, and later charged with, Aggravated Battery Against a Household Member (Great Bodily Harm) and Battery Against a Household Member (collectively “Felony Battery”); (3) between 2015 and 2016, the Individual was cited for speeding four times; (4) in 2012, the Individual was charged with Domestic Violence and Battery of a Household Member; (5) in 2004, the Individual was charged with Battery Against a Household Member and received a warrant for FTA; (6) in 1999, the Individual was charged with Possession of Marijuana; and (7) the Individual used cocaine daily, and marijuana daily and monthly, from 1999 to 2006. Ex. 1. These allegations support the invocation of Guideline J, and they raise serious security concerns. Guideline J at ¶ 31(b).

## **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), 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 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 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.

#### IV. FINDINGS OF FACT

The Individual has been alleged to have conducted several acts of domestic violence and has twice received a bench warrant for failing to appear at his scheduled court hearings. The events that resulted in his most recent criminal charge of Felony Battery occurred in 2016. On the date of the incident, the Individual was in a physical altercation with his now-former girlfriend at their residence. Ex. 12 at 3. His former girlfriend punched him several times, eventually scratching his face; he punched her once in response, which cut her face, and then physically removed her from the residence. Ex. 18 at 225-27. The Individual believed that the responding officer exaggerated the damage to his former girlfriend's face by characterizing it as lacerated with heavy bleeding. *Id.* at 229. As a result of the incident, the Individual was arrested and initially charged with misdemeanor Battery Against a Household Member. Ex. 12 at 3. However, the case was later dismissed and re-charged as Felony Battery. Ex. 8 at 7. The Individual was scheduled to be at a preliminary hearing on the Felony Battery charge, but failed to appear. Ex. 8 at 7. Consequently, the court issued a Bench Warrant for his arrest. *Id.* The Felony Battery charge is still pending.

The Individual was also charged with domestic violence in 2012 and 2004 for altercations he had with his ex-wife. In 2012, the Individual and his ex-wife were separated, and the Individual went to their home in an attempt to reconcile. Ex. 18 at 160. During the visit, his ex-wife left with their children, and the Individual remained in the residence alone. *Id.* While alone, the Individual walked around the home while smoking and drinking, and at some point realized that a fire had started from the ash of his cigarette. *Id.* at 160-61, 167. The Individual was able to extinguish the flames, but the police and the fire department responded and conducted an investigation. *Id.* at 162. The Individual's ex-wife wanted to obtain a restraining order, and she told the investigating detective that the Individual had pushed her before she left him alone in the home. *Id.* at 163. The Individual believes that the detective told her to say he assaulted her in order to obtain a restraining order. *Id.* at 163-64. After the fire investigation was completed, the investigator believed that the Individual was the source of the fire, but the Individual was never charged due to a lack of evidence. Ex. 18 at 171. The Individual was charged with Domestic Violence and Battery on a Household Member as a result of the incident. Ex. 17 at 17-19.<sup>2</sup> The charges were later dismissed. *Id.* at 18.

In 2004, the Individual was charged with Battery Against a Household Member after he and his ex-wife got into an argument over dinner. Ex. 18 at 184. The Individual came home after work, realized dinner was not finished as promised, and called her "worthless." Ex. 18 at 180. He stated that his ex-wife became very upset after that statement, attacked him and slapped him in the face. *Id.* at 177. In response, he hit her on the cheek trying to push her away. *Id.* at 177. The Individual was charged, and he subsequently failed to appear for a court hearing because he was afraid of going to jail. *Id.* at 182. The court issued a warrant, and the warrant remained outstanding for three years before he turned himself in and served ten days for the FTA as a result. *Id.* at 183-84. The

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<sup>2</sup> In the 2016 PSI, the Individual stated that he was never charged as a result of the incident that occurred in 2012. Ex. 18 at 172.

Individual also participated in domestic violence intervention group counseling. *Id.* at 181. The 2004 battery charge was dismissed. *Id.* at 184.

At the hearing, the Individual asserted that in each above incident, he was not the aggressor and applied force in order to repel attacks. *See e.g.* Tr. at 15, 22, 27, 31, 32, 49. As a result of the 2004 incident, he participated in a six month intervention program in which he talked about anger management and received group therapy; however, he felt that he did not belong in the group therapy because he merely pushed his former girlfriend to avoid her attacks. *Id.* at 20. Furthermore, the Individual explained that he and his ex-wife remain friends and share joint custody of their children. *Id.* at 46.

With respect to the 2016 incident, the Individual explained that he participated in five sessions of counseling where he learned how to identify red flags in potential romantic partners. *Id.* at 49. He also learned how to avoid verbal and physical altercations and realized that, in the past, he “pushed people’s buttons.” *Id.* Since these incidents, he has focused on his family and he avoids problems by spending his free time with his children. *Id.* at 62.

With respect to the 2018 FTA, the Individual explained that he missed the scheduled hearing because neither he nor his attorney received notice. *Id.* at 41. He has since fired his attorney, and he checks online to make sure he does not miss any future hearings. *Id.* at 43. And while his Felony Battery case is still active, he is not aware of any pending hearings or trial dates. *Id.* at 45.

The Individual also engaged in criminal conduct separate from allegations of domestic violence. Between 2015 and 2016, the Individual was cited for speeding on four separate occasions. Ex. 17 at 20-21. Also, in 1999, the Individual was charged with Possession of Marijuana. Ex. 15 at 37. Notwithstanding the possession charge, the Individual continued to use marijuana daily or monthly until 2006. Ex. 14 at 4. He also used cocaine daily during the same period, and he estimated that he used both substances 2,555 times. Ex. 16 at 43.

At the hearing, the Individual explained that he took care of the fines associated with his speeding citations and that he has not been stopped for speeding since 2016. Tr. at 14. He also explained that his last two speeding tickets resulted from being distracted. *Id.* Regarding his past drug use, the Individual explained that he has since changed his life, and has not used drugs since 2006. *Id.* at 54. Specifically, he testified that he was going through “a phase in life” where he was hanging out with the wrong crowd. Tr. at 9. He testified that he decided that he no longer wanted “to live that life,” and “ever since then [he’s] been clean.” *Id.* He was fifteen years old at the time of the Possession of Marijuana charge. *Id.* at 9, 10. The Individual further testified that he no longer associates with the people related to his drug use. *Id.* at 11.

## V. ANALYSIS

I have thoroughly considered the record of this proceeding, including the submissions tendered in this case and the testimony of the Individual and his witnesses 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 at

this time. I cannot find that restoring the individual a 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.

Under Adjudicative Guideline J, a disqualifying concern may be raised by “[e]vidence (including, but not limited to, a credible allegation, an admission, and matters of official record) of criminal conduct, regardless of whether the individual was formally charged, prosecuted, or convicted.” Adjudicative Guidelines at ¶ 31 (b). The evidence in this case demonstrates that the Individual has been cited, charged with, and admitted to several instances of criminal conduct. Putting aside his recent speeding infractions and his past history of daily narcotic use, the Individual has failed to appear at criminal court to face serious charges and he has been involved in several physical altercations with romantic partners which, in every instance, resulted in criminal charges. In addition, the Individual is currently facing felony criminal charges in state court for which he recently failed to appear.<sup>3</sup>

Guideline J provides (in relevant part) that security concerns arising from criminal conduct can be mitigated when: “(a) [s]o much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances, that it is unlikely to recur and does not cast doubt on the individual’s reliability, trustworthiness, or good judgment”; there is “(c) no reliable evidence to support that the individual committed the offense”; and “(d) there is evidence of successful rehabilitation; including, but not limited to, the passage of time without recurrence of criminal activity . . . .” Adjudicative Guidelines at ¶ 32 (a), (c), (d). In this case, the evidence does not allow me to find that the Individual has mitigated the security concerns related to his criminal conduct based on the passage of time. The criminal charges are recent. The Individual’s behavior that resulted in Felony Battery charges occurred merely two years ago, and the charges are still pending. Furthermore, he failed to appear to a hearing less than a year ago. Additionally, the Individual’s conduct does not appear to be unusual; the Individual has been involved in at least two other similar physical incidents with romantic partners, and he has failed to appear in court once before out of fear of going to jail. Consequently, it does not appear unlikely that similar circumstances will recur.

Furthermore, I find that there is reliable evidence to support that the Individual committed the offenses. The Individual’s testimony and the credible evidence contained in the record in this case demonstrates that the Individual committed the various offenses. He admitted making statements that contributed to the cited domestic arguments which resulted in his use of physical force and subsequent criminal charges, and he admitted to failing to appear in court, once intentionally. Finally, I find that the Individual has not demonstrated successful rehabilitation. While the Individual’s illegal drug use may have occurred over a decade in the past, which is arguably mitigated by the passage of time, the recency and severity of his remaining criminal conduct preclude a finding that he is successfully rehabilitated due to the passage of time. I find that the evidence in this case establishes that the Individual has committed criminal offenses which provide a continuing basis for concern.

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<sup>3</sup> Failing to appear for a criminal proceeding is a misdemeanor in the jurisdiction in which the Individual failed to appear.

As stated above, it is the Individual's burden to come forward with evidence to convince me that restoring his access authorization "will not endanger the common defense and security and will be clearly consistent with the national interest." Based on the foregoing, I conclude that the Individual has not resolved the security concerns associated with Adjudicative Guideline J.

## **VI. CONCLUSION**

In the above analysis, I found that there was sufficient derogatory information in the possession of the DOE that raised security concerns under Guidelines J. After considering all of the relevant information, favorable and unfavorable, in a comprehensive, common-sense manner, including weighing all of the testimony and other evidence presented at the hearing, I find that the Individual has not brought forth sufficient evidence to resolve the security concerns set forth in the Notification Letter. Accordingly, I have determined that the Individual's access authorization should not be restored. Either party may seek review of this Decision by an Appeal Panel pursuant to 10 C.F.R. § 710.28.

Kimberly Jenkins-Chapman  
Administrative Judge  
Office of Hearings and Appeals