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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 6, 2018)	Case No.: PSH-18-0084
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_____)	

Issued: February 12, 2019

Administrative Judge Decision

Brooke A. DuBois, Administrative Judge:

This Decision concerns the eligibility of XXXXXXXXXX (hereinafter referred to as “the Individual”) to hold an access authorization under the Department of Energy’s (DOE) regulations, set forth at 10 C.F.R. Part 710, entitled, “Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material.”¹ For the reasons set forth 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) (Adjudicative Guidelines), I conclude that the Individual’s security clearance should not be restored.

I. BACKGROUND

The Individual is employed by DOE in a position that requires her to hold a security clearance. In January 2018, the Individual reported that in December 2017 she was stopped by the police and charged with misdemeanor possession of a schedule IV drug, misdemeanor possession of more than two ounces of marijuana, speeding at 77 miles per hour in a 60 miles per hour zone, and driving without a valid license. Ex. 4. Based on her self-report, the Local Security Office (LSO) conducted a personnel security interview (PSI) with the Individual in February 2018. Ex. 10.

The LSO informed the Individual, in a letter dated November 1, 2018 (Notification Letter), that it possessed reliable information that created substantial doubt regarding her eligibility to hold a security clearance. In an attachment to the Notification Letter, the LSO explained that the

¹ Under the regulations, “access authorization” means 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 also be referred to in this Decision as a security clearance.

derogatory information raised security concerns under Guideline E (Personal Conduct) and Guideline J (Criminal Conduct). Ex. 1.

The Individual requested an administrative review hearing pursuant to 10 C.F.R. Part 710. Ex. 2. The Director of the Office of Hearings and Appeals appointed me as the Administrative Judge in this matter, and I subsequently convened a hearing pursuant to 10 C.F.R. § 710.25(d), (e) and (g). The LSO submitted 15 numbered exhibits (Ex. 1-15) and the Individual submitted 16 lettered exhibits (Ex. A-P). The Individual presented only her own testimony, and the LSO presented no witnesses. *See* Transcript of Hearing, Case No. PSH-18-0084 (hereinafter cited as “Tr.”).

II. THE NOTIFICATION LETTER AND THE 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 J of the Adjudicative Guidelines. Ex. 1.

Guideline E concerns information that an Individual has engaged in “conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations [which] can raise questions about an individual’s reliability, trustworthiness and ability to protect classified or sensitive information.” Guideline E at ¶ 15. In invoking Guideline E, the LSO cited the Individual’s failure to timely report the December 2017 incident to DOE within five working days and the Individual’s admission that she was present while an individual used marijuana despite signing a DOE Drug Certification form in April 2009 certifying that she would not “knowingly [be] in the presence of others who are in the possession of these illegal drugs.” Ex. 1 at ¶ II. The Individual’s failure to timely report her charges and association with a drug user despite signing the drug certification justifies the LSO’s invocation of Guideline E. Guideline E at ¶ 16(f)-(g).

The LSO also cited Guideline J in suspending the Individual’s security clearance. Criminal activity creates doubt about a person’s judgment, reliability, and trustworthiness. Guideline J at ¶ 30. By its very nature, it calls into question a person’s ability or willingness to comply with laws, rules and regulations. *Id.* As the basis for invoking Guideline J, the LSO cites (1) the December 2017 charges for misdemeanor possession of a schedule IV drug, misdemeanor possession of more than two ounces of marijuana, speeding at 77 miles per hour in a 60 miles per hour zone, and driving without a license; (2) the Individual’s November 2016 arrest for Driving Under the Influence (DUI); and (3) a January 2015 domestic disturbance in which the Individual admitted to slapping her then husband across the face resulting in her being charged with “Assault: on a family member.” Ex. 1 at ¶ I. These criminal charges justify the invocation of Guideline J. Guideline J at ¶ 31(a)-(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

In December 2017, the Individual was driving herself and a friend in a rental car when a police officer pulled her over for speeding. Ex. 10 at 10. After running the Individual's driver's license, the police officer told the Individual that her license was not valid, stating that the search also revealed multiple prior marijuana offenses, and asked to search her vehicle. *Id.* While maintaining that she had never been arrested for marijuana possession, the Individual allowed the police officer to search her car. *Id.* During the search, the police officer discovered marijuana in the Individual's friend's backpack and a pill bottle in the Individual's purse. *Id.* at 10, 37. According to the Individual, the police officer stated that he could not read the label on the medication and that he did not believe it was a valid prescription. *Id.* at 34. The police officer gave the Individual a citation for speeding, driving without a valid license, possession of a Schedule IV substance, and possession of marijuana², but did not arrest her. *Id.* at 13.

After this incident, the Individual stated that she immediately went to her local department of motor vehicles (DMV) to inquire about the status of her driver's license. *Id.* at 23. Because the police officer took the Individual's license after claiming it was invalid, the DMV issued the Individual a new license on that date. *Id.*; *see also* Ex. M. During her PSI, the Individual stated that, because of her 2016 DUI, she had a restricted license, but that the month before this incident, in November 2017, she was issued an unrestricted license after completing the requirements of her plea agreement. *Id.* at 21; Ex M at 2. Approximately a month after this incident, in January 2018, the Individual reported the four charges against her to DOE. Ex. 4.

During the PSI, the Individual stated that although she knew her friend recreationally used marijuana, she did not know until the car was searched that he had any marijuana with him. *Id.* at

² According to the Individual, both she and her friend were charged with the possession of marijuana. *Id.* at 36.

36, 38. She stated that her friend knew she did not use drugs so he did not use marijuana around her. *Id.* at 38. The Individual later admitted that approximately two months prior to the PSI she was around this same friend when he had a marijuana edible. *Id.* at 39. Around this time as well, the Individual was with this friend, when he and another person smoked marijuana. *Id.* at 40. Although she acknowledged she was aware that her friend was smoking marijuana in the house, the Individual stated that she was in another room when this occurred. *Id.*

At the hearing, the Individual testified that she was recently divorced after being in an abusive marriage for approximately eight years. Tr. at 10; *see also* Ex. N. The Individual testified that in 2015, during a physical assault by her husband, she slapped him then left, which led to her being arrested on a warrant for assault with the charge later being dismissed. Tr. at 20. She further stated that, in November 2016, she was in the process of separating from her husband, when she went out to drink with her brother and, on her drive home, was arrested for DUI. Tr. at 18. She testified that because she was arrested in both instances, she understood that she had to report them to DOE and did so in a timely manner. Tr. at 29-30.

When asked why she waited a month to report the December 2017 incident, the Individual testified that because she was not arrested, she did not believe she had to report. Tr. at 20-21. The Individual further testified that she began to doubt whether this incident was reportable when she went to court and the charges were not immediately dismissed. Tr. at 35. She then raised the question to security personnel and subsequently reported the incident. Tr. at 30-31. The Individual stated that she eventually pled guilty to speeding with the other charges being dismissed because the marijuana was in her friend's possession and she provided proof of her valid prescription and the previous reinstatement of her unrestricted driver's license. Tr. 17, 26, 28.

The Individual reiterated during the hearing that although she knew her friend used marijuana, she was not aware that her friend had marijuana in his backpack on this particular day in December 2017. Tr. at 22, 31-32. She testified that the only time she was around this friend when he used marijuana was at a party with approximately 50 people and that she was not in the same room as him while he used the drug. Tr. at 22-23, 32. The Individual stated that since the December 2017 incident, she no longer associates with this friend. Tr. at 32-33.

During the hearing, the Individual acknowledged signing the DOE Drug Certification in 2009 and justified her continued friendship with a known drug user by stating that, except for one time, she did not associate with him when he was actively using drugs. Tr. at 33. The Individual submitted as exhibits three signed "Statements of Intent" declaring, among other things, her intention to not use illegal drugs or be around anyone who engages in illegal drug use. Ex. E. When questioned why this Statement of Intent should be given more consideration than the 2009 DOE Drug Certification, the Individual stated that she has matured since 2009 and that she no longer associates with the same people. Tr. at 36.

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).

a. Guideline J

Under Guideline J, an individual can mitigate security concerns by demonstrating that: (1) so 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; (2) the individual was pressured or coerced into committing the act and those pressures are no longer present in the person's life; (3) there is no reliable evidence to support that the individual committed the offense; or (4) there is evidence of successful rehabilitation; including, but not limited to, the passage of time without recurrence of criminal activity, restitution, compliance with the terms of parole or probation, job training or higher education, good employment record, or constructive community involvement. Guideline J at ¶ 32(a)-(d).

In this case, the LSO lists three relatively minor criminal offenses from 2015, 2016, and 2017. In regard to the December 2017 incident, the Individual presented evidence and testimony that she did not commit at least two of the charged offenses. Ex. M, Ex. J; *see also* Tr. at 26-29. She also testified credibly that she did not know her friend had marijuana in his possession this day and that she no longer associates with this friend. Tr. at 32. Additionally, the Individual claimed that her decision to drink and drive in 2016 stemmed from the stress of the dissolution of her marriage. Tr. at 18. Because her divorce has now been finalized, that stressor is no longer present in the Individual's life. The Individual had no alcohol related incidents before this DUI, complied with all the terms of her plea agreement, and testified that since this incident, she has decreased her alcohol intake. Tr. at 27-28. Lastly, the Individual's 2015 arrest for slapping her abusive ex-husband during a domestic incident was an isolated incident almost four years ago.

Although three criminal incidents may in some circumstances be indicative of a pattern of criminal conduct, I find that there is reliable evidence that at least two of the above offenses did not occur and that the unique circumstances of each of these criminal offenses make them unlikely to recur. Guideline J at ¶ 32(a), (c). Accordingly, I find that the Individual successfully mitigated the Guideline J security concerns.

b. Guideline E

An individual can mitigate Guideline E security concerns by showing 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. Guideline E at ¶ 17(c). In this case, the Individual's testimony that she did not believe this incident was reportable since she was not arrested, although incorrect,

was reasonable. Tr. at 20-21. Her testimony is strengthened by the fact that she previously timely reported both the 2015 assault arrest and the 2016 DUI arrest. Tr. at 29-30. After going to court, the Individual realized the seriousness of her charges, she inquired about whether she needed to report the incident, and subsequently made the disclosure. Tr. at 30-31, 35.

An individual can also mitigate Guideline E security concerns by demonstrating that the association with persons involved in criminal activities was unwitting, has ceased, or occurs under circumstances that do not cast doubt upon the individual's reliability, trustworthiness, judgment or willingness to comply with rules and regulations. Guideline E at ¶ 17(g). In 2009, the Individual signed a DOE Drug Certification stating that she would not knowingly be in the presence of others who are in the possession of illegal drugs. Ex. 9. During the PSI in which she signed this form, the interviewer stated: "That includes...if you're at a party and you walk in and there's drugs there, you need to...leave." Ex. 15 at 31. During her PSI, the Individual admitted that she was around a friend while he ate a marijuana edible, and, during the hearing, the Individual testified that, during a party, she was in the same house as this friend while he was smoking marijuana. Ex. 10 at 39; Tr. 22-23, 39-40. Although the Individual's association with this person has now ceased, her previous association with him despite knowing he was a marijuana user and her presence around him while he used marijuana casts doubt upon her reliability, trustworthiness, judgment, or willingness to comply with rules and regulations.

Although I find that the Individual mitigated the Guideline E security concern as it pertains to her untimely reporting of the December 2017 incident, none of the mitigating factors applies to the security concern associated with the Individual's presence while someone used illegal drugs after signing the DOE Drug Certification form. Therefore, I cannot find that the Individual has mitigated the security concerns under Guideline E.

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 Guideline E and Guideline J of the Adjudicative Guidelines. 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 under Guideline E. 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.

Brooke A. DuBois
Administrative Judge
Office of Hearings and Appeals