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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: May 2, 2019) Case No.: PSH-19-0027
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Issued: August 9, 2019

Administrative Judge Decision

Kimberly Jenkins-Chapman, Administrative Judge:

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

I. BACKGROUND

The Individual is employed by a DOE Contractor in a position that requires that he hold a security clearance. During a background investigation of the Individual, investigators discovered derogatory information regarding the Individual’s alcohol use, as well as discrepancies between his criminal record as reported on his Questionnaire for National Security Positions (QNSP) and his actual criminal record. The Local Security Office (LSO) conducted a Personnel Security Interview (PSI) of the Individual, after which he was referred to a DOE Psychologist for evaluation.

The LSO began the present administrative review proceeding by issuing a Notification Letter to the Individual informing him that he was entitled to a hearing before an Administrative Judge in order to resolve the substantial doubt regarding his eligibility to continue holding a security clearance. *See* 10 C.F.R. § 710.21. The Individual requested a hearing and the LSO forwarded the Individual’s request to the Office of Hearings and Appeals (OHA). The Director of OHA appointed me as the Administrative Judge in this matter on May 2, 2019. At the hearing I convened pursuant to 10 C.F.R. § 710.25(d), (e) and (g), the Individual presented the testimony of one witness. The LSO presented the testimony of the DOE psychologist who had evaluated the Individual. *See* Transcript of Hearing, Case No. PSH-19-0027 (hereinafter cited as “Tr.”). The LSO submitted 11

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.

exhibits, marked as Exhibits 1 through 11 (hereinafter cited as “Ex.”). The Individual submitted 16 exhibits, marked as Exhibits A through P.

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 his eligibility for a security clearance. That information pertains to Guidelines E and G of the *National Security Adjudicative Guidelines for Determining Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position*, effective June 8, 2017 (Adjudicative Guidelines). These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in the adjudicative process.

Guideline E (Personal Conduct) relates to conduct involving questionable judgment, lack of candor, or unwillingness to comply with rules and regulations, which raises questions about an individual’s reliability, trustworthiness and ability to protect classified information. Any failure to provide truthful and candid answers during the security clearance process is of particular concern. *See* Adjudicative Guidelines ¶ 15. The LSO alleges that the Individual omitted his participation in alcohol counseling from his PSI; told inconsistent accounts of his 2015 purchase of cocaine; omitted his purchase of cocaine when his QNSP asked him to list any purchase of illegal drugs within the past seven years; signed QNSPs on three separate occasions certifying that he had never been charged with an alcohol-related offense, when he had actually incurred such a charge in 2007; signed QNSPs on three separate occasions certifying that he had never been charged with a drug-related offense, when he had actually incurred such a charge in 2005 or 2006; and certified on a 2012 QNSP that he had not used marijuana within the past seven years, when he had actually used marijuana twice in 2005. Accordingly, the LSO’s security concerns under Guideline E are justified.

Guideline G (Alcohol Consumption) states: “Excessive alcohol consumption often leads to the exercise of questionable judgment or the failure to control impulses, and can raise questions about an individual’s reliability and trustworthiness.” Adjudicative Guidelines at ¶ 21. The conditions set forth in the Guidelines that could raise a disqualifying security concern are alcohol-related incidents, at or away from work, regardless of the frequency of the individual’s alcohol use or whether the individual has been diagnosed with alcohol use disorder; habitual or binge consumption of alcohol to the point of impaired judgment, regardless of whether the individual is diagnosed with alcohol use disorder; Alcohol Use Disorder diagnosis by a duly qualified medical or mental health professional; failure to follow treatment advice after diagnosis; alcohol consumption that is not in accordance with treatment recommendations after a diagnosis of alcohol use disorder; and failure to follow any court order regarding alcohol education, evaluation, treatment, or abstinence. Adjudicative Guidelines at ¶ 22. The LSO alleges that the Individual was arrested and charged with Driving While Intoxicated (DWI) in 2015 after consuming two beers over three hours; was arrested and charged with Driving under the Influence of Alcohol (DUI) in 2010 after consuming one beer and one mixed drink over three hours; and was arrested and charged with Purchase or Possession of Liquor by a Minor in 2007 after consuming two beers over three hours. Notification Letter at 2–3. The LSO further alleges that the Psychologist found that the Individual met the criteria for Alcohol Use Disorder without adequate evidence of rehabilitation or

reformation and that the Individual habitually used alcohol to the point of impairment. *Id.* at 2. Accordingly, the LSO's security concerns under Guideline G are justified.

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 entire process is a conscientious scrutiny of a number of variables known as the "whole person concept." Adjudicative Guidelines ¶ 2(a). The protection of the national security is the paramount consideration. 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.

The discussion below reflects my application of these factors to the testimony and exhibits presented by both sides in this case.

IV. FINDINGS OF FACT

At the hearing, the Individual testified that he had not had any alcohol-related incidents since his 2015 DWI. Tr. at 26. He had reviewed the Psychologist's report, and the recommendations contained therein, in April 2019. *Id.* at 27. By that time, he had been attending an outpatient alcohol treatment program, part of which included a relapse prevention program, for several weeks. *Id.* at 28–29. He testified that he was currently attending the program. *Id.* He also testified that he had attended two Alcoholics Anonymous (AA) meetings. *Id.* at 29–30, 50. He intended to continue attending both programs. *Id.* at 30. He last consumed alcohol in June 2018 and does not intend to consume alcohol in the future. *Id.* The Individual testified that he knew he needed treatment in 2016, however he did not seek treatment until early 2019, over six months after his meeting with the Psychologist. *Id.* at 27, 46–47, 115–16; Ex. 5 at 2. He had not begun working the 12 steps of AA. Tr. at 50.

The Individual testified that he was evaluated by another substance abuse counselor and that she had not diagnosed him with an Alcohol Use Disorder. Tr. at 31–32. He took an alcohol and drug

education course and testified that he learned a lot from it. *Id.* at 32–33. He testified that he has a strong support system in place that includes family, friends, and his church community. *Id.* at 33–34.

The Individual testified that, when completing his QNSP, he forgot about his 2007 underage drinking ticket and that he believed he did not have to report his 2010 DWI because it was expunged. Tr. at 35–36. He testified that he did not disclose his cocaine purchase on the advice of a criminal attorney representing him in his 2015 DWI case. *Id.* at 36–38. However, he also testified that the attorney did not instruct him to be untruthful on his QNSP. *Id.* at 70, 75. He testified that he did not disclose his 2005 marijuana use on his 2012 QNSP because he thought it was outside the reporting period. *Id.* at 54. The Individual further testified that he did not intend to mislead the government in making these omissions, nor did he intend to gain an advantage in the security process. *Id.* at 40.

The Individual's substance abuse evaluator testified that the Individual scored very low on each of his alcohol use evaluations, indicating a low probability of problems with alcohol use. *Id.* at 82–83. Her recommendations included continuing individual and group therapy, as well as AA attendance, and going through the 12 steps of AA. *Id.* at 84–85. She testified that while she would not change her diagnosis after hearing the Individual's testimony, she would strongly encourage him to vigorously pursue AA and the 12 steps. *Id.* at 85. She testified that the Individual's prognosis was good, particularly because he had been abstinent for one year. *Id.* at 89. She further testified that the Individual reported his alcohol use from 2016 to 2018 as being about three beers, two to four times per month. *Id.* at 107–08. This report was inconsistent with the Individual's statements to an OPM investigator on multiple occasions in 2017 that he had not consumed alcohol since early 2016. Ex. 11 at 66, 80. The Psychologist testified that he would extend his treatment recommendations based on the Individual's testimony, including an additional six months of active treatment and greater participation in a group recovery program like AA. Tr. at 115, 117. He was concerned that the Individual waited for several months after his initial meeting with the Psychologist to engage in treatment. *Id.* at 115–16. He was also concerned that the Individual does not view himself as an alcoholic and yet introduces himself as an alcoholic at AA. *Id.* at 116. He expressed concern that the Individual has not had the necessary treatment to support his abstinence. *Id.* The Psychologist testified that he did not find the Individual to be rehabilitated or reformed. *Id.* at 118. His prognosis was guarded. *Id.* at 119.

V. ANALYSIS

A person who seeks access to classified information enters into a fiduciary relationship with the government predicated upon trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours. The government reposes a high degree of trust and confidence in individuals to whom it grants access authorization. Decisions include, by necessity, consideration of the possible risk that the applicant may deliberately or inadvertently fail to protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information.

The issue before me is whether the Individual, at the time of the hearing, presents an unacceptable risk to national security and the common defense. I must consider all the evidence, both favorable and unfavorable, in a common sense manner. “Any doubt concerning personnel being considered

for access for national security eligibility will be resolved in favor of the national security.” Adjudicative Guidelines ¶ 2(b). In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record. Because of the strong presumption against granting security clearances, I must deny the grant of the clearance if I am not convinced that the LSO’s security concerns have been mitigated such that granting the Individual’s clearance is not an unacceptable risk to national security.

A. Guideline E

Guideline E provides that the following conditions (in relevant part) may mitigate Personal Conduct security concerns: (1) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts; (2) 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; (3) 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 contributed to untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur; and (4) 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. Adjudicative Guidelines at ¶ 17(a), (c), (d), (g).

The Individual did come forward with the truth about his drug involvement and criminal record, however he only did so after being confronted with derogatory information in his PSI. Were it not for the PSI, I find it unlikely that the Individual would have corrected his QNSP answers voluntarily. There were multiple instances of lack of candor, some as simple as checking a box, others as deliberate as composing and entering false statements. The Individual has not obtained counseling for his lack of candor and a cloud of doubt still remains over the question of his judgment, trustworthiness, and reliability.

I note that the Individual had difficulty recollecting details about many portions of his life, both current and past. While such memory lapses may have contributed to inadvertent omissions on certain parts of the Individual’s QNSP, these difficulties have not been addressed medically or psychologically. While such difficulties remain untreated, even statements that the Individual believes at the time to be true lack full credibility.

Finally, I find that the advice of the Individual’s criminal attorney does not mitigate the Individual’s lack of candor. The attorney advised the Individual not to admit to crimes for which he was not charged. However, the QNSP deliberately asks about behavior in addition to convictions, because the Government is concerned with all actions of an individual, not just those an individual is caught doing. The attorney did not instruct the Individual to be untruthful, and yet, by indicating on his QNSP that his answers were correct, the Individual did just that. Furthermore, the Individual readily discarded his attorney’s advice when facing the scrutiny of the PSI.

The Individual did display rigorous honesty when confronted with derogatory information regarding his eligibility to hold a security clearance, providing information that investigators had not already uncovered. Such behavior is commendable. However, the Individual’s decision not to

correct his QNSP until confronted weighs heavily against his later candor. On balance, the evidence suggests that doubt remains as to the Individual's trustworthiness, judgment, and reliability. Accordingly, I find that the Individual has not mitigated the DOE's concerns under Guideline E.

B. Guideline G

Guideline G provides that security concerns arising from alcohol consumption can be mitigated when: (1) the individual's alcohol use was so infrequent or so long ago that it is unlikely to recur and does not cast doubt on his current reliability, trustworthiness, or judgment; (2) the individual acknowledges his pattern of alcohol abuse, provides evidence of actions taken to overcome this problem, and has demonstrated a clear and established pattern of modified consumption or abstinence; (3) the individual has no history of relapse and is making satisfactory progress in treatment or counseling; or (4) the individual has successfully completed a treatment program and has established pattern of modified consumption or abstinence. Adjudicative Guidelines at ¶ 23.

The Individual provided no evidence of abstinence beyond his self-reports. Given his history of conflicting self-reporting, I cannot find this evidence sufficient to establish the Individual's abstinence. The Individual has taken some actions to treat his Alcohol Use Disorder, but both the Psychologist and the Substance Abuse Counselor agree that he needs further treatment to support his recovery. It is also significant that the Individual did not seek treatment until February 2019, despite the Psychologist recommending treatment to him in June 2018, a delay of over six months. Furthermore, the Psychologist testified that the Individual is not yet rehabilitated. I find this testimony persuasive.

The Individual has a long history of alcohol-related problems, some with serious long-term consequences, and yet he persisted in his alcohol consumption. Without empirical evidence of abstinence and completion of a comprehensive treatment program, there is still doubt about whether the Individual will return to alcohol use in ways that could negatively affect his judgment, trustworthiness, and reliability. As doubt must be resolved in favor of the national security, I find that the Individual has not mitigated the DOE's concerns under Guideline G.

VI. CONCLUSION

Upon consideration of the entire record in this case, I find that there was evidence that raised concerns regarding the Individual's eligibility for a security clearance under Guidelines E and G of the Adjudicative Guidelines. I further find that the Individual has not succeeded in fully resolving those concerns. Therefore, I cannot conclude that granting DOE access authorization to the Individual "will not endanger the common defense and security and is clearly consistent with the national interest." 10 C.F.R. § 710.7(a). Accordingly, I find that the DOE should not grant access authorization to the Individual at this time.

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