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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 29, 2019) Case No.: PSH-19-0041
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Issued: November 5, 2019

Administrative Judge Decision

Janet R. H. Fishman, Administrative Judge:

This Decision concerns the eligibility of XXXXXX (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, "Procedures for Determining Eligibility for Access to Classified Matter and Special Nuclear Material."¹ 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) (Adjudicative Guidelines), I conclude that the Individual's access authorization should be restored.

I. BACKGROUND

A DOE contractor employs the Individual in a position that requires him to hold a security clearance. Beginning in March 2017, the Individual was issued written warnings for workplace infractions and received citations and reprimands for traffic violations, security violations, damage to a government vehicle, and failing to report for duty. *See Ex. 1 at 3.* In December 2017, the local security office (LSO) conducted a personnel security interview (PSI) of the Individual to address the Individual's conduct. *See id.*

The PSI did not resolve the security concerns, and the LSO subsequently recommended that the Individual undergo an evaluation by a DOE-contracted psychologist (DOE Psychologist). The DOE Psychologist conducted a clinical interview of the Individual in January 2018, and issued a report in which he concluded that the Individual did not demonstrate any psychological condition. *Ex. 3 at 3.* However, after the Individual was issued additional reprimands at work, the LSO asked the DOE Psychologist to opine on whether the Individual, even in lieu of a diagnosis, had emotional, mental, and personality conditions which could impair his judgment, reliability, or trustworthiness. The DOE Psychologist issued another report in which he indicated that, although

¹ 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 did not meet the diagnostic criteria for a psychological condition, the Individual's workplace conduct raised concerns as to the Individual's trustworthiness, reliability, and veracity. *Id.* at 6.

On July 2, 2019, the LSO issued the Individual a letter (Notification Letter) in which it indicated 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 E (Personal Conduct) of the Adjudicative Guidelines. Ex. 1.

The Individual exercised his right to request an administrative review hearing pursuant to 10 C.F.R. Part 710. Ex. 2. The Director of the Office of Hearings and Appeals (OHA) appointed me as the Administrative Judge in this matter, and I subsequently conducted an administrative hearing. The LSO submitted twenty numbered exhibits (Ex. 1–20) into the record. The Individual submitted nine lettered exhibits (Ex. A–I) into the record. The LSO presented the testimony of the DOE Psychologist and the Individual presented the testimony of four witnesses, including himself.

II. THE NOTIFICATION LETTER AND THE ASSOCIATED SECURITY CONCERNS

The LSO cited Guideline E (Personal Conduct) of the Adjudicative Guidelines as the basis for its determination that the Individual was not eligible to hold a security clearance. Ex. 1.

Conduct involving questionable judgement, lack of candor, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness, and ability to protect classified or sensitive information. Adjudicative Guidelines at ¶ 15. The Notification Letter listed as relevant facts that, between March 2017 and October 2018, the Individual was issued a traffic citation and issued written warnings for failure to report to overtime, failure to report to training, and damaging a government vehicle. Additionally, the Individual had been counseled for insubordination after refusing to follow a supervisor's orders, for walking off of an assignment, and for calling in sick from the parking lot. Ex. 1 at 3–4.² The Individual's disruptive behavior and pattern of rule violations justify the LSO's invocation of Guideline E. Adjudicative Guidelines at ¶ 16(d)(2)–(3).

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*

² The Notification Letter identified eight additional charges against the Individual. Ex. 1 at 3. However, the DOE Counsel stipulated at the hearing that six of these charges were mitigated by the passage of time; another charge was mitigated by evidence that the Individual was not at fault; and finally, the last charge was mitigated by evidence indicating that the charge was factually inaccurate. Tr. at 3–4, 15, 50. Therefore, this Decision will not consider these eight charges.

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 March 2017, the Individual was cited for speeding after a police officer measured him travelling at 74 miles per hour in an area where the speed limit was 55 miles per hour. Ex. 11. At the hearing, the Individual explained that he was trying to pass a dump truck that was spewing gravel, and in doing so, he exceeded the speed limit in the presence of a police officer. Hearing Transcript (Tr.) at 16. In July 2017, the Individual received a written warning for failing to report to required training. Ex. 2 at 3. The Individual testified that he had received all of the necessary paperwork prior to the training, but he “totally forgot that [he] had training. . . . I just forgot.” Tr. at 16. During the hearing, the Individual acknowledged that in both of these incidents he was at fault. Tr. at 16.

The Individual received another written warning in August 2017, after he failed to appear at his worksite to work overtime. *See* Ex. 1 at 3. The Individual asserted that management had failed to notify him that he was assigned to work the overtime shift. *Id.* at 13. According to the Individual, he was scheduled to be off work on the day in question and he was never provided with notice that he was to work overtime. *Id.* At the hearing, the Individual again asserted that he was not aware he was needed to work overtime because this overtime assignment had been changed after he went home from his worksite. Tr. at 17. He claimed that he spoke with a supervisor when he received the written warning but, because he had not received any previous warnings, he decided not to challenge the warning. *Id.* at 19.

In November 2017, the Individual was issued a written reprimand for damaging a government vehicle. Ex. 9 at 1. According to the reprimand, the Individual kicked the trim off of a vehicle after he slipped when trying to enter the vehicle. *Id.* At the hearing, the Individual confirmed that when he slipped from the vehicle, he caused the trim to dangle from the vehicle. He stated that the driver then tried to move the vehicle with the trim out of place. *Id.* However, the driver could not move the vehicle. Because the officers onboard were going to be late for training if the van could not be moved, the Individual removed a clip holding the trim and told the driver to make a report when he returned. *Id.* The Individual acknowledged that he “should have got a supervisor and let him take it off” but said that he was “just trying to do the right thing.” Ex. 8 at 21.

On June 21, 2018, the Individual was issued a written reprimand for failing to report to mandatory training without notifying his supervisor or seeking approval for his absence. Ex. 5 at 1. The written reprimand noted that this was the third warning the Individual had received for violating work rules within the previous year. *Id.* At the hearing, the Individual asserted that he had not been notified, as required, about the training. Tr. at 22. He claimed that when he asked to see the paperwork indicating that he had been informed of the training, the paperwork could not be produced. *Id.* The LSO stipulated that it did not have the requisite paperwork that would indicate that the Individual had been informed about the training. *Id.* at 23. During the July 2018 PSI and at the hearing, the Individual speculated that the paperwork oversight was due to new leadership in his work group, and indicated that he completed the training the day after he was notified of the discrepancy. Ex. 4 at 6; Tr. at 23.

In October 2018, the Individual received corrective counseling for voicing displeasure with an assignment, walking away from his assignment, and calling in sick from the parking lot. *See* Ex. 1 at 3 (summarizing the charges against the Individual). At the hearing, the Individual explained that he arrived at work 30 minutes early and realized that he was beginning to feel ill. Tr. at 27. He explained that he told the supervisor that he was “tired” and was leaving. *Id.* The Individual asserted that the supervisor claimed that he was leaving because he did not want to work the assigned post. *Id.* The Individual continued that, on arriving at his car in the parking lot, he decided he should call his supervisor to tell him he was leaving because he was sick. *Id.* at 29. He asserted that he called in from the parking lot, because the regulations require a telephone call. *Id.* Finally, he asserted that this assignment was an overtime shift, as he had already worked over 68 hours that week. *Id.* at 30.

On January 25, 2018, the DOE Psychologist conducted a clinical interview of the Individual and administered the Minnesota Multiphasic Personality Inventory-2-Restructured Form (MMPI-2-RF) psychological test. Ex. 3 at 1. During the clinical interview, the Individual discussed challenges in his personal life which had been causing him stress, including being struck by a drunk driver in a car accident and balancing his work with caring for his chronically ill wife. *Id.* at 2. Based on the results of the clinical interview and MMPI-2-RF, the DOE Psychologist concluded that the Individual did not demonstrate any psychological condition, but noted that the stressors in the Individual’s life were having an adverse impact on his behavior. *Id.* at 3.

On December 5, 2018, the Individual met with the DOE Psychologist for a second clinical interview. Ex. 3 at 4. During the clinical interview, the Individual reported that his wife’s condition was somewhat improved, and that counseling had helped him to manage the stressors he experienced in his personal life. *Id.* at 5. The Individual reported that the latest disciplinary allegations against him in connection with the October 2018 incident were “embellished” and that witnesses could confirm that he had not acted as management alleged. *Id.* The Individual reiterated this statement at the hearing. Tr. at 36. In the December 5, 2018 report, the DOE Psychologist concluded that the Individual did not demonstrate any diagnosable psychological conditions. *Id.* at 6. However, the DOE Psychologist noted that the Individual continued to experience difficulties at work despite improving his ability to manage the stressors in his personal life. *Id.*

As a follow-up to the January 25, 2018, and December 5, 2018 reports, the LSO sent two email requests, December 6, 2018, and May 2, 2019, requesting a further opinion from the DOE

Psychologist regarding the Individual's suitability to hold a security clearance. In response to the December 6, 2018, email, the DOE Psychologist noted that he had spoken with representatives of the DOE contractor who believed that the Individual responded negatively when he did not get his way, was unreliable, did not make good decisions, and did not accept responsibility for his actions. *Id.* at 5–8. Based on these accounts, and the persistence of the Individual's work-related issues despite his improved coping skills, the DOE Psychologist concluded that the Individual's behavior raised security concerns related to his trustworthiness, reliability, and veracity. *Id.* at 9.

However, at the hearing, the DOE Psychologist testified that, based on the new information that he had learned at the hearing, he no longer believed that the Individual displayed a lack of trustworthiness, reliability, or veracity. *Id.* at 56–57. Moreover, the DOE Psychologist expressed that he now doubted the veracity of the information provided to him by the DOE contractor personnel with whom he consulted concerning the Individual's conduct prior to issuing his second report. *Id.* at 57.

The Individual offered three character witnesses to testify as to his trustworthiness and reliability. A senior manager in the Individual's chain of command testified as to his reliability. *Id.* at 53–54. A co-worker of the Individual testified as to his honesty and his willingness to assist others when the need arose. *Id.* at 60. A long-time personal friend and co-worker of the Individual testified as to his honesty and dependability over several decades. *Id.* at 66. The Individual also offered written statements from current supervisors concerning his reliability and trustworthiness. Ex. G.

V. ANALYSIS

A. Guideline E

The Individual's repeated disciplinary issues raise security concerns under Guideline E of the Adjudicative Guidelines. Adjudicative Guidelines at ¶ 16(d)(2)–(3). However, two mitigating conditions under Guideline E are present which resolve the security concerns.

An individual may resolve security concerns under Guideline E if “the information was unsubstantiated . . .” *Id.* at ¶ 17(f). In this case, the LSO did not bring forth evidence to substantiate that the Individual knowingly failed to report for overtime in August 2017 or to attend mandatory training in June 2018, but rather relied on the contractor's contemporaneous reports regarding these two incidents. I found the Individual to be credible in his testimony that he did not know about either his assigned overtime or his required training. Further, his witnesses, the DOE Psychologist, and the letters submitted by his current supervisors support his honesty, trustworthiness, and good judgment, as does his nearly 20 years of service without a reprimand. Therefore, I find that these security concerns are resolved.

The three remaining concerns – the March 2017 traffic citation, the July 2017 failure to report for training, and the November 2017 damage to government property – are also mitigated under Guideline E. The Individual provided substantial witness testimony and statements as to his trustworthy and reliable character. Moreover, the Individual has worked at a DOE site since 1999, and there is no indication that he was disciplined for workplace misconduct prior to 2017. Against this significant period of satisfactory service, I find that the three substantiated charges are “so

minor” that they do “not cast doubt on the [I]ndividual’s reliability, trustworthiness, or good judgement,” and are therefore mitigated under Guideline E. *Id.* at ¶ 17(c). In a further indication that these concerns are mitigated, the DOE Psychologist testified that, in his opinion, these three remaining concerns no longer raise a concern regarding the Individual reliability, trustworthiness, or good judgement.

Having determined that the Individual has satisfied two mitigating conditions under Guideline E, I conclude that the Individual has resolved the security concerns asserted by the LSO.

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 of the Adjudicative Guidelines. After considering all of 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 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 be restored. Either party may seek review of this Decision by an Appeal Panel pursuant to 10 C.F.R. § 710.28.

Janet R.H. Fishman
Administrative Judge
Office of Hearings and Appeals