

1. On October 15, 2019, the Individual responded to the LOI, stating: “It was alleged that I came up inconclusive on a urinalysis. I was denied the chance to retake the test.” Ex. 5 at 1. The Individual further stated: “I have never failed a drug test before or since. And I have no reason I would.” Ex. 5 at 1.

On March 11, 2020, 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 hold 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. At the hearing I convened pursuant to 10 C.F.R. § 710.25(d), (e) and (g), I took testimony from two witnesses: the Individual and his former supervisor. *See* Transcript of Hearing, Case No. PSH-21-0016 (hereinafter cited as “Tr.”). The LSO submitted seven exhibits, marked as Exhibits 1 through 7 (hereinafter cited as “Ex.”). The Individual submitted five exhibits, marked as Exhibits A through E.

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, citing the Bond Amendment and Guidelines E and H 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).

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 signed a QNSP in August 2019 stating only that he was terminated from an employer for non-conformance to company policy, omitting the fact that the employer had terminated him for testing positive for methamphetamine. The LSO further alleges that the Individual indicated in his LOI response that he had never failed a drug test, even though he had previously admitted (during his ESI) to failing the March 2019 drug urinalysis. The LSO also alleges that the Individual had further indicated in his LOI response that the drug test that resulted in his termination was inconclusive, which was not fully candid. These allegations raise a significant security concern that the Individual had attempted to conceal derogatory information during his clearance investigation. Accordingly, the LSO’s concerns under Guideline E are justified.

The LSO alleges that the Individual’s positive drug test for methamphetamine in March 2019, raises security concerns under Guideline H and disqualifies the Individual from holding a security clearance pursuant to the mandates of the Bond Amendment. Guideline H (Drug Involvement and Substance Misuse) relates to security risks arising as a result of an individual’s illegal use of controlled substances, including misuse of prescription and non-prescription drugs, and use of other substances that cause physical or mental impairment or are used in a manner inconsistent with their intended purpose. Illegal drug use raises concerns about an individual’s reliability and

trustworthiness because such drug use may impair a person's judgment and because illegal drug use raises questions about a person's ability or willingness to comply with laws, rules, and regulations. *See* Adjudicative Guidelines at § 24. The conditions that could raise a disqualifying security concern under Guideline H include "any substance misuse" or "testing positive for an illegal drug." Guideline H at § 25(a) and (b). The Bond Amendment states: ". . . the head of a Federal agency may not grant or renew a security clearance for a covered person who is an unlawful user of a controlled substance² or an addict . . ." 50 U.S.C § 3343(b).

The LSO's concerns that the Individual used methamphetamine are based solely on his admission that he tested positive for methamphetamine in March 2019. The Individual denies that he has ever used illegal drugs, alleging that the test was not reliable or accurate. Neither party has submitted evidence documenting the procedures used to conduct this test, ensure its chain of custody, and analyze the Individual's urine specimen. Drug tests vary widely in their accuracy, reliability, and validity. When conducted properly, they are highly accurate, reliable, and useful. However, reliance upon improperly conducted tests can pose two dangers: First, that an individual's drug use might go undetected, and second, that an individual will be falsely identified as an illegal drug user. Recognizing these concerns, the DOE has issued regulations setting forth its requirements for "Specimen collection, handling and laboratory analysis for drug testing." 10 C.F.R. § 707.12. The DOE Regulations further require that the agency and its contractors conduct their drug testing programs in accordance with the guidelines of the Department of Health and Human Services and subsequent amendments to those guidelines (the "Mandatory Guidelines for Federal Workplace Drug Testing Programs," 53 FR 11970, April 11, 1988). 10 C.F.R. § 707.5. Unless a drug test is conducted in accordance with these mandated guidelines, I cannot rely upon it alone to conclude that an individual engaged in illegal drug use.

Accordingly, I find that the Individual's positive March 2019 drug test does not justify the LSO security concerns under Guideline H and does not disqualify the Individual from eligibility to maintain a security clearance under the Bond Amendment.

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).

² "Controlled substance" is defined in the Amendment as any substance listed as a controlled substance by 21 U.S.C. § 802.

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 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. THE HEARING

The Individual’s Former Supervisor testified that they had known each other for over 10 years and had worked together for over eight years. Tr. at 53–54. He testified that the Individual was a hard worker and that he had never suspected the Individual of using illegal drugs. *Id.* at 54-55. He was not aware of the Individual taking any drug tests during the time they worked together. *Id.* He testified that the Individual called him around the time he was terminated and claimed that his drug test had come back inconclusive. *Id.* at 62. The Former Supervisor believed that the test and surrounding circumstances sounded “shady.” *Id.*

The Individual testified that he was given a drug test by his prior employer as part of a routine screening. Tr. at 24. A company employee handed him a urine cup and, after it was filled, read the initial results off the side of the cup. *Id.* at 21–24. The Individual testified that this initial result came back as inconclusive and that he was sent home in accordance with company policy. *Id.* at 14. He testified that the results were later changed to positive for methamphetamine after being sent to a laboratory. *Id.* at 14, 21. He admitted that he was terminated for noncompliance with company drug and alcohol policy because he had failed the drug test. *Id.* at 13–14. The Individual claimed that, after receiving the positive test result, he purchased three over-the-counter test kits and administered two of the three tests to himself. *Id.* at 15, 24-25. He alleged that, even though both tests were negative, he later discarded the results. *Id.* at 15, 24-25.

The Individual testified that he has never used methamphetamines or any other illegal drug. Tr. at 20. He denied that he was trying to hide his failed drug test by stating on his QNSP that he was terminated for violating company policy and by stating in his LOI response that he was terminated for an inconclusive drug test. *Id.* at 32. He testified that he was attempting to be formal in his responses. *Id.* The Individual further testified that, when he stated that he had never failed a drug test before in his life, his intention was to indicate that he had not failed any other drug test. *Id.* at 20, 33.

V. ANALYSIS

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 commonsense 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 or restoring security clearances, I must deny access authorization if I am not convinced that the LSO's security concerns have been sufficiently resolved to conclude that allowing the Individual to maintain a security clearance would not constitute an unacceptable risk to national security.

The Record indicates that the Individual has engaged in conduct revealing his questionable judgement, lack of candor, dishonesty, and unwillingness to comply with rules and regulations by failing to provide truthful and candid answers to the LSO during his security clearance investigation. While the Individual gave a vague but technically correct answer on his QNSP, he was not being fully candid regarding the circumstances of his termination. I note that this omission was not the only omission that the Individual made in his QNSP concealing his positive drug test (as well as another disciplinary matter). The QNSP asked the Individual “. . . have you received a written warning, been officially reprimanded, suspended, or disciplined for misconduct in the workplace such as a violation of security policy?” Ex. 6 at 12. The Individual responded “no” to this question, even though he had been suspended pending the results of his laboratory drug urinalysis.³ Ex. 6 at 12; Ex. 7 at 53. These omissions indicate that the Individual was intentionally concealing derogatory information when he completed and submitted his QNSP. Only when questioned by the OPM Investigator did the Individual admit that he had been suspended and then fired for violating his employer's policy against illegal drug use. Even so, when he was subsequently asked by the LSO to explain the termination in writing, the Individual falsely stated that his drug test was inconclusive and that he had never failed a drug test, omitting the fact that he had tested positive for methamphetamine.

The following conditions (in relevant part) may mitigate Personal Conduct security concerns arising under Guideline E. Section 17(a) provides that mitigation can occur if “the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts. Section 17(c) provides that mitigation can occur if “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.” Section 17(d) provides that mitigation can occur if “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.” Adjudicative Guideline E at § 17(a), (c), (d).

In the present case, the Individual had not made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts. His omissions from his QNSP served to conceal the fact that he had tested positive for methamphetamine, and he did not reveal that he had tested positive for illegal drug use until his ESI, when he was specifically questioned about the circumstances leading to his termination. He subsequently continued to exhibit a lack of candor in responding to the LOI, where he claimed that his drug test was “inconclusive” and that

³ The Individual also provided a false answer to this question concerning another past employer. Information obtained by the OPM indicates that although the Individual had answered this same question “no” for another previous employer in his QNSP, he had in fact received a written warning, a “final warning,” and a suspension from that employer. Ex. 5 at 1; Ex. 6 at 13; Ex. 7 at 56-57.

he had never failed a drug test. Accordingly, I find that the Individual has not shown that the mitigating condition set forth at § 17(a) is present in the instant case.

The Individual's failure to fully disclose his positive drug test was not a minor offense; indeed, it involved an allegation that the Individual had tested positive for illicit drug use less than five months prior to submitting his QNSP. While his positive drug test did eventually come to light, questions remain about the Individual's candor, given the fact that he has never fully acknowledged his less than candid behavior during his security clearance investigation. Instead, he has tried, as recently as at his hearing in this matter, unsuccessfully, to show that his omissions were unintentional and has continued to deny that he has exhibited a lack of candor. Tr. at 13-14. Accordingly, I find that the Individual has not shown that any of the mitigating conditions set forth at § 17(c) are present in the instant case.

The Individual has not acknowledged his lack of candor, nor has he sought counseling or treatment to address his lack thereof. Given these factors, I find that the Individual has not shown that his lack of candor is unlikely to recur. Accordingly, I find that the Individual has not shown that any of the mitigating conditions set forth at § 17(d) are present in the instant case.

I therefore find that the Individual has not mitigated the LSO's Guideline E security concerns.

VI. CONCLUSION

For the reasons set forth above, I conclude that the Bond Amendment does not disqualify the Individual from maintaining a security clearance. I also find that the LSO has not properly invoked Guideline H. I have however, concluded that the LSO properly invoked Guideline E. After considering all the evidence, both favorable and unfavorable, in a commonsense manner, I find that the Individual has not mitigated the security concerns raised under Guideline E. Accordingly, the Individual has not demonstrated that granting his security clearance would not endanger the common defense and would be clearly consistent with the national interest. Therefore, the Individual's security clearance should be denied. The parties may seek review of this Decision by an Appeal Panel under the procedures set forth at 10 C.F.R. § 710.28.

Steven L. Fine
Administrative Judge
Office of Hearings and Appeals