

*The original of this document contains information which is subject to withholding from disclosure under 5 U.S. C. § 552. Such material has been deleted from this copy and replaced with XXXXXX's.

**United States Department of Energy
Office of Hearings and Appeals**

In the Matter of: Personnel Security Hearing)
)
Filing Date: February 16, 2021) Case No.: PSH-21-0018
)
)
_____)

Issued: April 23, 2021

Administrative Judge Decision

Steven L. Fine, Administrative Judge:

This Decision concerns the eligibility of XXXXX XXXXX 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 and Special Nuclear Material.”¹ As discussed below, after 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 should not be granted access authorization.

I. BACKGROUND

On July 19, 2019, the Individual submitted a Questionnaire for National Security Positions (QNSP) to a Local Security Office (LSO) initiating an application for a DOE security clearance.² Exhibit (Ex.) 6 at 39. The QNSP required that the Individual identify each of his previous employers and provide his reason for leaving each employer. Ex. 6 at 12-16. The Individual reported that he had resigned from his position with a municipal government (the Former Employer) because he “joined the union.” *Id.* at 14–15. The QNSP further asked the Individual if he left any previous employer, in the seven years prior to completing the QNSP, after being told he would be fired or by “mutual agreement following allegations of misconduct.” *Id.* at 15. The Individual checked a box indicating that he had not. *Id.* at 15.

The Office of Personnel Management (OPM) subsequently conducted a background investigation of the Individual’s eligibility to be granted a DOE Security Clearance. On August 9, 2019, an OPM Investigator (the Investigator) conducted an Enhanced Subject Interview (ESI) of the Individual.

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.

² By signing this QNSP, the Individual certified that all the information he provided therein was true, complete, and correct to the best of his knowledge and belief. Ex. 6 at 39.

Ex. 7 at 55-58. During this ESI, the Individual claimed that he had “no issues” while employed by the Former Employer, and was eligible for rehire there. Ex. 7 at 57.

On August 19, 2019, the Investigator interviewed the Individual’s supervisor (the Supervisor) at the Former Employer, who reported that the Individual was not eligible for rehire. Ex. 7 at 67. The Supervisor further reported that the Individual resigned “on his own free will” after the Former Employer’s Financial Director (the Financial Director) discovered that the Individual had engaged in unusual financial transactions, such as writing checks to himself and to “cash,” and that the Individual’s conduct was under investigation by a state authority. *Id.* at 67. According to the Supervisor, the Individual “was questioned about the transactions and decided to resign instead of answering questions concerning the transactions.” Ex. 7 at 67. The Supervisor also reported that graphic photos of the Individual and women were discovered on the Individual’s work computer after he resigned. *Id.* at 68. Despite these issues, the Supervisor recommended the Individual for a security clearance.³ Ex. 7 at 67.

The Investigator also interviewed the Financial Director on August 19, 2019. Ex. 7 at 68. The Financial Director reported that she had discovered “lots of different accounts for [the Individual] with no receipts,” and that funds under the Individual’s control could not be accounted for. *Id.* at 69. The Financial Director further reported that the Individual resigned when he was questioned about the missing money. Ex. 7 at 69. The Financial Director reported that she had reported the financial irregularities to state officials who then began an investigation. Ex. 7 at 67. The Financial Director also provided the Investigator with a copy of the Individual’s personnel file which indicated that pornographic material was discovered on the Individual’s work computer after he resigned, including graphic images of the Individual and women with whom he was communicating online. *Id.* at 71. Despite the information she provided to the Investigator, the Financial Director recommended the Individual for a security clearance, unless the outcome of the investigation of the Individual’s financial irregularities is not favorable to him. Ex. 7 at 68.

On August 29, 2019, the Investigator conducted a Triggered Enhanced Subject Interview (TESI) of the Individual. Ex. 7 at 59. During the TESI, the Individual initially denied that he had left any position by mutual agreement because of his conduct. *Id.* When the Investigator confronted the Individual with the Supervisor and Financial Director’s allegations concerning his financial irregularities, he claimed that he omitted this information from his QNSP because he had not been the subject of disciplinary action. *Id.* The Individual further claimed that he had resigned from the Former Employer because of his dissatisfaction with the work environment and his interest in obtaining a better position. *Id.* at 59-60. He claimed that he was not the only subject of the state’s investigation. *Id.* While the Individual acknowledged that he had not been “a good bookkeeper,” he denied dishonestly managing the Former Employer’s money. *Id.* at 60. According to the Individual, he primarily used the unaccounted funds to purchase gift cards to reward volunteers at events organized by the Former Employer and to pay instructors for courses they taught for the Former Employer. *Id.* The Individual acknowledged that he had written himself checks for “extra work” he performed outside of his normal duties but asserted that his predecessor told him that he could do so. *Id.*

³ The Supervisor expressed his belief that the Individual’s financial irregularities resulted from his “irresponsibility” and “neglect,” rather than an intent to embezzle. *Id.*

During the TESI, the Individual initially denied having violated any Information Technology (IT) use policies in previous positions. *Id.* However, when the Investigator confronted him with the Supervisor and Financial Director's allegations concerning the discovery of graphic images found on his work computer, the Individual claimed that he had previously discovered the images on his computer when it was initially provided to him and attributed them to the prior user of the computer. *Id.* at 60. The Individual also claimed to have received unsolicited photos from women on his work phone. *Id.* The Individual denied that any of the graphic images on his work computer were of him. *Id.* at 61.

In February 2020, the LSO issued a Letter of Interrogatory (LOI) to the Individual. Ex. 5 at 1–10. The Individual responded to the LOI on February 11, 2020 (the Response). *Id.* at 11. In the Response, the Individual admitted that the investigation of his financial irregularities was “a big factor” in his decision to resign. *Id.* at 11. The Individual further claimed that he did not disclose this information before being confronted with it by the Investigator because he was not specifically directed to resign by the Former Employer and his submitted resignation did not indicate the reason. *Id.* at 12. The Individual acknowledged that writing checks to himself was “not a good practice” and that he should have been more diligent in documenting expenditures, but noted that the Former Employer's policies were vague, other departments besides his own unilaterally made cash expenditures without oversight, and the Former Employer's oversight of finances and accounting was lax across the organization. *Id.* at 13–14.

The Response admitted that the Individual was responsible for the graphic images the Former Employer discovered on his work computer and admitted that he had used his work-issued cellphone for “inappropriate chat [and] image sharing” with “ex-girlfriends, acquaintances, and women [he] met in public,” as well as to solicit additional inappropriate content from women he met online. *Id.* at 16. The Individual indicated that he had attempted to hide this behavior from the Former Employer by deleting the images, but “[a]pparently [] was not successful.” *Id.* The Individual indicated that he had deleted his social media accounts, disclosed his behavior to his wife, and sought counseling at his church to help him avoid engaging in this behavior in the future. *Id.* at 17.

On April 13, 2020, the LSO issued a notification letter to the Individual, informing him that it possessed reliable information that created substantial doubt regarding his eligibility to hold a security clearance. In a summary of security concerns (SSC) attached 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 requested a hearing, and the LSO forwarded the Individual's request to the Office of Hearings and Appeals (OHA). Ex. 2. The Director of OHA appointed me as the Administrative Judge in this matter. At the hearing that I convened pursuant to 10 C.F.R. § 710.25(d), (e), and (g), I took testimony from four witnesses: one of the Individual's Sunday school students (Church Associate), a Licensed Professional Counselor (Counselor), a friend of the Individual (Friend), and the Individual. *See* Transcript of Hearing, Case No. PSH-21-0018 (hereinafter cited as “Tr.”). The LSO submitted seven exhibits, marked as Exhibits 1 through 7. The Individual submitted seven exhibits marked as Exhibits A through G.

II. THE NOTIFICATION LETTER AND THE ASSOCIATED SECURITY CONCERNS

The LSO cited Guideline E (Personal Conduct) as the basis for denying the Individual 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. Of special interest is any failure to cooperate or provide truthful and candid answers during national security investigative or adjudicative processes.” Adjudicative Guidelines at ¶ 15. Specifically, the SSC cited the Individual’s repeated failure to disclose during the background investigation that he resigned from his position with the Former Employer while his conduct was under investigation, the Individual’s financial irregularities, and the Individual’s inappropriate use of a cellphone and computer issued to him by the Former Employer to exchange nude images and inappropriately chat with women. Ex. 1. The LSO’s allegations that the Individual deliberately omitted relevant facts from the QNSP and provided false or misleading information in the ESI and TESI, misused or mismanaged the Former Employer’s financial resources, and sent sexually explicit messages and photos using the Former Employer’s IT resources justify the LSO’s invocation of Guideline E. Adjudicative Guidelines at ¶ 16(a)–(d).

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. Adjudicative Guidelines at ¶ 22(a), (c)–(d).

IV. THE HEARING

At the Hearing, the Individual attempted to mitigate the security concerns raised under Guideline E by attempting to show that he had not intentionally tried to mislead the LSO by initially denying that he was responsible for the graphic images discovered on his work computer, and by failing to report that he had resigned his position with the Former Employer while under investigation for employment-related financial irregularities. The Individual attempted to attribute the financial irregularities that led to his resignation from the Former Employer to the Former Employer’s own questionable management practices. The Individual further attempted to show that the state’s investigation of these financial irregularities had absolved him of wrongdoing. The Individual also

attempted to show that the concerns raised by his IT misuse had been mitigated through his having obtained counseling for the underlying issues that led him to engage in that behavior. The Individual further sought to address the concerns about his judgement, reliability and trustworthiness raised in the SSC, by submitting character evidence in the form of letters and testimony. *See Ex. B.*

The Church Associate testified at the Hearing on the Individual's behalf. The Church Associate testified that he had known the Individual through their church for approximately fifteen years, and that the Individual's devotion to his religious beliefs provided him with a firm commitment to integrity. Tr. at 12–13, 16. The Church Associate denied knowledge of the details of the Individual's financial irregularities but expressed the opinion that the Individual's problems with the Former Employer resulted from the Individual not being properly trained. *Id.* at 14, 17–18. The Church Associate testified that his knowledge of the Individual's inappropriate contact with women was limited to "inappropriate texts to a woman" and that he believed that the Individual's actions were relevant to his marriage but not to his work. *Id.* at 17–19. The Church Associate recalled learning about the Individual's alleged financial irregularities by reading a local newspaper article, which he characterized as "propaganda." *Id.* at 22.

The Counselor testified that he had provided the Individual with cognitive-behavioral therapy for approximately two years, in order to address the problems that caused him to text women and to address the problems that this behavior had caused in his marriage.⁴ *Id.* at 33, 38. The Counselor testified that the Individual had made significant progress and that he anticipated that the Individual would soon complete the course of treatment. *Id.* at 34–35. The Counselor testified that he had deployed the Individual as a resource to aid other patients struggling with similar issues. *Id.* at 36. The Counselor opined that the Individual's behavior was related to a desire to feel better about himself due to depressive symptoms, and that he did not believe that the Individual's behavior was compulsive or a symptom of a psychological condition. *Id.* at 41, 46. The Counselor expressed the opinion that the Individual had a positive prognosis for avoiding inappropriate contacts with women in the future because he had developed healthy methods for coping with depressive symptoms and a robust support system to help him sustain his improved behavior going forward. *Id.* at 42, 49.

The Friend testified that he had known the Individual for over twenty years and had no reason to doubt his honesty. *Id.* at 54. The Friend testified that he believed that the Individual "was let go from the [Former Employer] because he did not follow a procedure that he was not aware existed."⁵ *Id.* at 57-58. The Friend expressed the opinion that, had the Individual known that his financial management practices were prohibited, he would have conformed his behavior to the Former Employer's procedures. *Id.* at 57. The Friend denied personal knowledge of the Former Employer's procedures and expressed that his opinion was based on his knowledge of the Individual's character. *Id.* at 58. The Friend expressed that he was so confident in the Individual's reliability and trustworthiness that he had made the Individual the godfather to his son. *Id.* The Friend denied any knowledge of the Individual having misused the Former Employer's IT equipment. *Id.* at 59.

⁴ Notably, the Individual's Counselor expressed the opinion that the Individual had "never been attracted to pornography" and that the behavior causing the Individual marital problems was "the occasional texting." Tr. at 40

⁵ On five occasions during his testimony at the Hearing, the Friend stated that the Individual had been "let go" from his employment with the Former Employer. Tr. at 57-58, 60.

The Individual testified that the Former Employer tolerated other departments' use of cash payment for services and that he believed that his financial practices were not unusual. *Id.* at 67–68. The Individual asserted that he had fully cooperated with the investigation into his financial management and denied that he resigned from the Former Employer to “avoid answering financial questions.” *Id.* at 69. The Individual testified that the allegations of his financial irregularities had been submitted to a grand jury that declined to indict him.⁶ *Id.* at 68.

The Individual testified that he had left the Former Employer “out of frustration” with numerous issues, including politics and a lack of support from his management, but admitted that the investigation into his financial management “was a factor.” *Id.* at 76. The Individual testified that, after the Former Employer notified him of the investigation into his financial management practices, he called his wife and several other people for advice and decided to resign. *Id.* at 78, 86. The Individual denied that he feared that he would be terminated because of the investigation and expressed regret that he resigned instead of trying to defend his conduct. *Id.* at 87, 96. The Individual expressed that he believed that he was eligible for rehire at the Former Employer and that he was surprised to learn that a representative of the Former Employer had informed the Investigator that he was not eligible for rehire. *Id.* at 96–97. The Individual expressed the opinion that there was no risk that the circumstances of his resignation could be used against him because of the coverage of his conduct in a local newspaper. *Id.*

Regarding his inappropriate communications with women using the Former Employer's IT equipment, the Individual admitted that he “carried on conversations . . . and exchanged images” with women in the community and women he found online using IT equipment issued to him by the Former Employer and his work e-mail account. *Id.* at 84. The Individual testified that he had made mistakes “in [his] personal life” but that, through counseling, he had learned from his mistakes. *Id.* at 70. The Individual acknowledged that his conduct violated the Former Employer's policies and his own personal moral code. *Id.* at 94. The Individual expressed the opinion that his personal support system and behavioral changes made at the recommendation of the Counselor would prevent him from engaging in extra-marital sexual communications in the future. *Id.* at 93–95.

The Individual acknowledged that he “didn't go as deep as [he] should have” during the ESI and TESI, but denied that he was trying to hide derogatory information out of fear of not obtaining a security clearance, asserting instead, that he wanted to leave an unpleasant situation behind him. *Id.* at 102, 104–05. Moreover, the Individual asserted that the information that he provided on the QNSP was not false and that he had joined a union in connection with his position with the DOE contractor. *Id.* at 102; *see also* Exs. F–G (purporting to show that the Individual joined a trade union in April 2019, over three months after his resignation).

V. FINDINGS OF FACT

⁶ This testimony is corroborated by Ex. G, a letter from an attorney who represented the Individual during the Grand Jury proceedings.

The Record shows that the Individual has exhibited a lack of candor throughout the adjudication of his security clearance. The Individual completed his QNSP stating that he left the Former Employer because he joined the union when in fact he had left that position three months before joining the union, and immediately after being informed that he was under investigation for financial irregularities. He answered a question on his QNSP that was clearly designed to inquire whether he left the former employer under duress in a manner concealing the fact that he was. When he was questioned during the ESI about his position with the Former Employer, the Individual falsely indicated that there had been no issues and that he was eligible for rehire. During the TESI, the Individual was asked whether he had left any position by mutual agreement because of his conduct and whether he had violated any IT use policies in previous positions. The Individual initially denied that he had left any position by mutual agreement because of his conduct, and that he had violated any IT use policies in previous positions. After the Individual was confronted with the statements of the Supervisor and the Financial Director concerning the circumstances of his resignation, he claimed that he omitted this information from his QNSP because he had not been the subject of disciplinary action, and further claimed that he had resigned from the Former Employer because of his dissatisfaction with the work environment and his interest in obtaining a better position. The Individual further claimed that the graphic images found on his work computer had been placed there by a previous user and denied that any of the graphic images on the computer had been of himself. The Individual did eventually admit, in his responses to the LOI, that he had placed the graphic images on his work computer, that some of these images had been of himself, and that the investigation of his management of finances was “a big factor” in his decision to resign his position with the Former Employer. However, the Individual’s lack of candor returned during the Hearing, when he failed to acknowledge his misrepresentations, and instead sought to minimize the significance of the state’s investigation of his alleged financial mismanagement by asserting that it was only one of several factors that led him to resign.

Moreover, the Record shows that, relatively recently, the Individual had been placed in a position of public trust and had conducted himself in a manner that was inconsistent with that trust by engaging in financial mismanagement, by misusing government equipment for his own personal ends, and by violating the Former Employer’s IT policies.

VI. ANALYSIS

The LSO’s allegations that the Individual deliberately omitted relevant facts from the QNSP and intentionally provided false or misleading information to the Investigator, misused or mismanaged the Former Employer’s financial resources, and sent explicit messages and photos using the Former Employer’s IT resources, justify the LSO’s invocation of Guideline E. Adjudicative Guidelines at § 16(a)–(d). The Adjudicative Guidelines provide the following seven conditions which may mitigate security concerns under Guideline E:

- (a) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts;
- (b) the refusal or failure to cooperate, omission, or concealment was caused or significantly contributed to by advice of legal counsel or of a person with professional responsibilities for advising or instructing the individual specifically concerning security processes. Upon being made aware of the requirement to cooperate or provide the information, the individual cooperated fully and truthfully;

- (c) 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;
- (d) 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;
- (e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress;
- (f) the information was unsubstantiated or from a source of questionable reliability; and,
- (g) 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)–(g).

The mitigating condition set forth at § 17(a) is not present. The Individual did not disclose his inappropriate conduct until confronted with the information by the Investigator, at which point the Individual still partially denied responsibility for the conduct. While the Individual provided a more candid account of his separation from the Former Employer and of his misuse of his government computer in his responses to the LOI, his responses to the LOI occurred after he had been confronted with the facts. Moreover, as discussed above, his lack of candor continued during the Hearing.

The mitigating condition set forth at § 17(b) is not present. There is no credible evidence in the Record indicating that Individual's omissions occurred upon the advice of legal counsel or of a person with professional responsibilities for advising or instructing the individual specifically concerning security processes.

The mitigating condition set forth at § 17(c) is not present. The Individual's offenses are not minor, have occurred recently, have been recurrent, and continue to cast significant doubt on the individual's reliability, trustworthiness, and judgment because of their significance, recency and recurrence.

The mitigating condition set forth at § 17(d) is partially applicable because the Individual has acknowledged the behavior that led to the misuse of his computer, obtained counseling to change the behavior, and has taken positive steps to alleviate the stressors, circumstances, or factors that contributed to that particular behavior. However, the Individual has never fully acknowledged his inappropriate behavior concerning his financial irregularities and his lack of candor, and I find that such behavior is likely to recur.

The mitigating conditions set forth at §17(e)(f) and (g) are clearly not intended to apply to the circumstances present in this case.

Accordingly, I find that the Individual has not resolved the security concerns asserted by the LSO under Guideline E.

VI. CONCLUSION

In the above analysis, I found that there was sufficient derogatory information in the possession of 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 of the testimony and other evidence presented at the hearing, I find that the Individual has not resolved the security concerns asserted by the LSO. Accordingly, I have determined that the Individual should not be granted access authorization. Either party may seek review of this Decision by an Appeal Panel pursuant to 10 C.F.R. § 710.28.

Steven L. Fine
Administrative Judge
Office of Hearings and Appeals