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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 24, 2021 ) Case No.: PSH-21-0072  
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Issued: Tuesday, July 27, 2021

**Administrative Judge Decision**

Steven L. Fine, Administrative Judge:

This Decision concerns the eligibility of XXXXX XXXXX (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."<sup>1</sup> 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 not be restored.

**I. Background**

In 1982 or 1983, police arrested and charged the Individual with Driving Under the Influence (DUI). Ex. 4 at 3. On November 22, 1985, police again arrested and charged the Individual with DUI. Ex. 11 at 1.

On September 11, 2005, the Individual submitted a Questionnaire for National Security Positions (QNSP) to the Local Security Office (LSO). Ex. 9 at 1. The QNSP asked the Individual "Have you ever been charged with or convicted of any offense(s) related to alcohol or drugs?" The Individual answered this question "yes" and reported his November 22, 1985, DUI. Ex. 9 at 25-26. The Individual did not report his previous DUI arrest that occurred in 1982 or 1983.

On January 30, 2012, police arrested and charged the Individual with Profane Swearing or Intoxication in Public. Ex. 11 at 18. On February 7, 2012, the Individual sent an email to his

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<sup>1</sup> 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.

employer's (the Employer) security and human resources representative (the Representative) reporting the incident that led to this arrest but omitting the fact that he had been arrested and incarcerated as a result of this incident. Ex. 4 at 4-5.

On February 10, 2012, the Individual met with the Employer's Site Manager and the Representative for the purpose of discussing the events that led to January 30, 2012, arrest. Ex. 4 at 5. During this meeting, the Individual stated that he failed to report his arrest and incarceration in the February 7, 2012, email because "he did not want to put it in writing." Ex. 4 at 5.

On February 21, 2012, the Employer issued a "Final Written Warning" (the Warning) to the Individual for his "failure to provide complete and relevant information when requested by company Representatives during an investigation." Ex. 4 at 4. The Warning further states:

The investigation began following your reports that you had been robbed while traveling between [two of the Employer's sites]. You reported that company property had been stolen (Blackberry, Company Credit Card). When reporting the events to [the Employer's HR Representative] and your manager, . . . you failed to include information regarding your incarceration and the local police's search of your hotel for the missing company property. The information was not given to the company in its entirety until [the Employer's Security Manager] followed up with you on the written statement you provided to the company.

Ex. 4 at 4.

On November 3, 2016, the Individual submitted another QNSP to the LSO. Ex. 8 at 3. The QNSP specifically asked, on two separate occasions, if the Individual had "received a written warning, been officially reprimanded, suspended, or disciplined for misconduct in the workplace, such as a violation of security policy?" The Individual answered "no" to both questions. Ex. 8 at 11-12. The QNSP also asked the Individual several questions concerning his police record during the previous seven years. Ex. 8 at 25-27. In response to these questions, the Individual reported his January 30, 2012, arrest for Profane Swearing or Intoxication in Public. Ex. 8 at 25-26. However, the QNSP then asked the Individual "Other than those offenses already listed . . . Have you **EVER** been charged with an offense involving drugs or alcohol?" Ex. 8 at 27 (emphasis in the original). The Individual answered this question "no," despite his two previous DUI arrests. Ex. 8 at 27.

Another question in the QNSP asked the Individual "Has your use of alcohol had a negative impact on your work performance, your professional or personal relationships, your finances, or resulted in intervention by law enforcement/public safety personnel?" Ex. 8 at 29. The Individual answered this question "yes," explaining that in January of 2012, he:

Drank heavily alone [at a restaurant while on travel]. Personal vehicle had broken down and was in a shop for repair. Left the restaurant on foot and became disoriented. Was attacked and credit card/iPhone/iPod taken. Woke up and walked to convenience store to ask for help. Police were called I was arrested for intoxication.

Items were stolen from me. I had to have dental repair, work probation for one year, relationship with my supervisor was impacted. I chose to go to counseling and the company followed up with a psychological assessment through our EAP program.

Ex. 8 at 29.

On January 14, 2019, the LSO issued Letters of Interrogatory (LOI) to the Individual. Ex. 3 at 1. On February 4, 2019, the Individual submitted his Response to the LOI (the Response) to the LSO. Ex. 4 at 1. In the Response, the Individual acknowledged his 1985 DUI arrest and indicated that it “was the end of my drinking and driving.” Ex. 4 at 1. The Response further provided the following account of the events that led to his January 30, 2012, arrest:

I went to [a restaurant] and had several beers over a few hours. I was alone. It was not the best decision I've made by a long shot. I left at closing and began walking to my hotel. It was during that walk that I believe I was jumped. I remember getting up from the ground and looking for my phone. It was missing. My credit cards were also missing. I was cold. I went to a local gas station and, probably incoherently, asked if I could use the phone to call the police. I don't remember if I called or the store called, but the police did show up. I was arrested for public intoxication. I called my employer the next day to report the missing items. I followed up with Human Resources and Security.

Ex. 4 at 2. The Response included copies of the Warning and the meeting notes from the Individual's February 10, 2012, meeting with the Site Manager and the Representative. Ex. 4 at 5.

On February 10, 2021, the LSO began the present administrative review proceeding by issuing a Notification Letter informing the Individual that it possessed reliable information that created substantial doubt regarding his eligibility to hold a security clearance. The Notification Letter further informed the Individual that he was entitled to a hearing before an Administrative Judge to resolve these substantial doubts. *See* 10 C.F.R. § 710.21. A Statement of Security Concerns (SSC) attached to the Notification Letter cited the Individual's three alcohol-related arrests and his omissions of information from his QNSPs that would have revealed two DUI arrests and the fact that he had received a Warning from the Employer for his omission of his arrest and incarceration from the account of the events of January 30, 2012, that he originally provided.

On May 13, 2021, the Individual requested a hearing. The LSO forwarded the Individual's request to the Office of Hearings and Appeals (OHA) on May 24, 2021. The Director of OHA appointed me as the Administrative Judge. At the hearing I convened pursuant to 10 C.F.R. § 710.25(d), (e), and (g), I took testimony from the Individual, his supervisor (the Supervisor), and the Representative. *See* Transcript of Hearing, Case No. PSH-21-0072 (hereinafter cited as “Tr.”). The DOE Counsel submitted eleven exhibits marked as Exhibits 1 through 11. The Individual submitted one exhibit marked as Exhibit A.

## 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 substantial doubt concerning his eligibility for a security clearance. In support of this determination, the LSO cited Guidelines E, G, and J 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) provides that “[c]onduct 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. The LSO cites the Individual’s repeated omissions of information from his QNSP that would have revealed his two DUI arrests and the Warning, in support of the invocation of Guideline E. Adjudicative Guidelines at § 16(a)–(d). This information adequately justifies the LSO’s invocation of Guideline E.

Guideline G (Alcohol Consumption) applies when an Individual has “alcohol-related incidents away from work, such as driving while under the influence . . . disturbing the peace, or other incidents of concern, regardless of the frequency of the individual's alcohol use or whether the individual has been diagnosed with alcohol use disorder.” Adjudicative Guidelines at § 22(a). The LSO cites the Individual’s three alcohol-related arrests in support of its invocation of Guideline G. This information adequately justifies the LSO’s invocation of Guideline G.

Guideline J (Criminal Conduct) provides that “[c]riminal activity creates doubt about a person’s judgement, reliability, and trustworthiness. By its very nature, it calls into question a person’s ability or willingness to comply with laws, rules, and regulations.” Guideline J at ¶ 30. The LSO cites the Individual’s three alcohol-related arrests in support of its invocation of Guideline J. This information adequately justifies the LSO’s invocation of Guideline J.

## 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) (strong presumption against the issuance of a security clearance).

An 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.

#### **IV. The Hearing**

At the hearing, the Individual denied that he tried to conceal the fact that the Employer had issued the warning to him. While the Individual admitted that he had inaccurately answered a question in the 2016 QNSP in a manner indicating that he had never been disciplined for misconduct in the workplace, he claimed that he had actually reported that misconduct and the events surrounding it in response to another question in that QNSP. Tr. at 29, 54. The Individual also recounted the events that led to his June 30, 2012, arrest. Tr. at 30-32. The Individual testified that, even though he had been attending counseling prior to that arrest, the Employer required him to continue that counseling and to see a psychiatrist. Tr. at 32-33. The Individual testified that he had attended court-ordered Alcoholics Anonymous (AA) meetings for two years after his second DUI but is no longer active in AA. Tr. at 33-34, 43-44. Since then, he testified, he has not operated a motor vehicle after consuming alcohol. Tr. at 34. The Individual testified that he stayed sober for five years after starting the AA program, but now consumes alcohol on special occasions and in small quantities. Tr. at 34, 44, 65. The Individual testified that, after his 1985 DUI, a court ordered him to undergo counseling for two years. Tr. at 37. When the Individual was asked why he failed to report this court-ordered counseling in his 2016 QNSP, he testified that he did not know why he omitted it. Tr. at 37. The Individual noted that he had previously reported that court-ordered counseling in his 2005 QNSP. Tr. at 38-39. The Individual further testified that he reported his 1985 DUI in his 2005 QNSP as well. Tr. at 38. The Individual also stated that he does not know why he omitted the 1982 or 1983 DUI from his QNSPs. Tr. at 39. The Individual also reiterated that his 2012 arrest was his last. Tr. at 41-43. He stated that the psychiatrist and the counselor that he met with after the 2012 incident did not recommend that he return to AA. Tr. at 47.

The Representative testified on the Individual’s behalf at the Hearing. The Representative described herself as a friend and coworker of the Individual. Tr. at 83. She testified that, at the time that the Employer issued the Warning to the Individual, she was the Employer’s security representative. Tr. at 82. Other than the incident that led to the Warning, she saw no reason to question the Individual’s truthfulness, reliability, or judgement. Tr. at 84. She testified that the Individual did not grieve or challenge the Warning. Tr. at 86. The Warning was issued to the Individual because he failed to report that the January 30, 2012, incident had resulted in his arrest. Tr. at 122-123. The Representative testified that she became aware of the Individual’s 2012 arrest after reading the investigation report. Tr. at 87.

The Supervisor testified on the Individual’s behalf at the hearing. The Supervisor has known the Individual for 33 months. Tr. at 17. The Supervisor testified that he has “no question” about the Individual’s character, work performance, trustworthiness, or truthfulness. Tr. at 21, 24-25. The Supervisor further testified that he has never questioned the Individual’s ability to follow instructions and noted that the Individual is detail oriented. Tr. at 24.

## V. Analysis

The Individual has a history of alcohol-related arrests in 1982 or 1983, 1985, and 2012. The Individual received counseling and attended AA after his second DUI. He remained sober for five years afterward but began using alcohol again. In 2012, the Individual had a third alcohol-related arrest. Since that 2012 arrest, the Individual has not had any further interactions with law enforcement. There is no evidence in the record indicating that he has been diagnosed with any alcohol-related disorder.

Despite that fact that his supervisor considers him to be detail oriented and competent, the Individual also has a history of omitting significant derogatory information from his QNSPs. As a result of these omissions, both QNSPs submitted by the Individual only reported one alcohol-related arrest despite the fact that the Individual had a history of two DUIs at the time he submitted his 2005 QNSP and had a history of three alcohol-related arrests at the time he submitted his 2016 QNSP. More importantly, in his 2016 QNSP, the Individual twice denied that he had “ever been officially reprimanded, suspended, or disciplined for misconduct in the workplace, such as a violation of security policy,” when in fact he had been issued a Final Written Warning for failing to disclose the 2012 alcohol-related arrest and incarceration to the Employer’s security officials. At the hearing, the Individual claimed that he was not trying to conceal the fact that he was disciplined by his employer in 2012, noting that he had reported that the Employer had placed him on probation for a year in response to another question in the 2016 QNSP. However, the Individual reported being placed on probation in response to a question about alcohol’s impact on his work performance. His answer to this question gave the impression that he was disciplined for his 2012 alcohol-related arrest, rather than for his failure to disclose that arrest to the Employer’s security officials. Therefore, the Individual’s 2016 QNSP failed to disclose that he had been disciplined by the Employer for failing to disclose his 2012 arrest to the Employer’s security officials.

### **Guideline E**

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).

The Individual did not make prompt, good-faith efforts to correct the omissions, concealments, or falsifications before being confronted with the facts. While the Individual eventually supplied the information that he originally omitted from his QNSP’s, he did not do so until the LSO confronted

him with the LOI. Accordingly, I find that he has not satisfied the mitigating conditions under § 17(a).

Furthermore, the Individual's omissions are not minor; they served to conceal significant derogatory information about his alcohol and criminal history as well as an incident in which he concealed information from his employer's security officials. This behavior occurred as recently as 2016 and has been repetitive in nature. It casts doubt on the Individual's reliability, trustworthiness, and good judgment. Accordingly, I find that he has not satisfied the mitigating conditions under § 17(c).

Moreover, the Individual has not acknowledged the behavior, obtained counseling to change the behavior, or taken other positive steps to alleviate the stressors, circumstances, or factors that contributed to his untrustworthy and unreliable behavior. Nor has the Individual shown that this behavior is unlikely to recur. Accordingly, I find that he has not satisfied the mitigating conditions under § 17(d).

Accordingly, I find that the Individual has not resolved the security concerns raised under Guideline E by his multiple omissions from his QNSPs.

### **Guideline G**

The Adjudicative Guidelines provide that an individual may mitigate security concerns under Guideline G if “[s]o much time has passed, or the behavior was so infrequent, or it happened under such unusual circumstances that it is unlikely to recur or does not cast doubt on the individual's current reliability, trustworthiness, or judgment.” Guideline G at § 23(a). It has been nine years since the Individual's last alcohol-related incident. He reports that while he continues to use alcohol, he does so infrequently and in moderation, and there is no evidence in the record to the contrary. Accordingly, I find that his present alcohol use does not cast doubt on his current reliability, trustworthiness, or judgment. Therefore, I find that the Individual has satisfied the mitigating conditions under § 23(a).

Accordingly, I find that the Individual has resolved the security concerns raised under Guideline G.

### **Guideline J**

The Adjudicative Guidelines provide that security concerns arising from criminal conduct can be mitigated when “[s]o 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.” Adjudicative Guideline J at § 32(a). Nine years have passed since the Individual's last offense and I am convinced that his criminal activity is unlikely to recur. Therefore, I find that the Individual has satisfied the mitigating conditions under § 32(a).

Accordingly, I find that the Individual has resolved the security concerns raised under Guideline J.

## **VI. Conclusion**

For the reasons set forth above, I conclude that the LSO properly invoked Guidelines E, G, and J. After considering all the evidence, both favorable and unfavorable, in a commonsense manner, I find that the Individual has mitigated the security concerns raised under Guidelines G and J. However, the Individual has not mitigated the security concerns raised under Guideline E. Accordingly, the Individual has not demonstrated that restoring 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 not be restored. 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