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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: June 3, 2021)	Case No.: PSH-21-0073
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Issued: September 2, 2021

Administrative Judge Decision

James P. Thompson III, Administrative Judge:

This Decision concerns the eligibility of XXXXXXXXXXXXX (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 should not be granted access authorization.

I. BACKGROUND

The Individual is a prospective employee of a DOE contractor for a position that requires the possession of a security clearance. As part of the application for access authorization, the Individual completed a Questionnaire for National Security Positions (QNSP) form in 2019. The DOE Local Security Office (LSO) subsequently obtained information regarding the Individual’s past employment misconduct. In a letter dated May 3, 2021 (“Notification Letter”), the LSO informed the Individual that it possessed reliable information that created substantial doubt regarding the Individual’s eligibility to possess a security clearance. In an attachment to the Notification Letter, entitled Summary of Security Concerns, the LSO explained that the derogatory information raised security concerns under Guideline E of the Adjudicative Guidelines.

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 exercised his right to request an administrative review hearing pursuant to 10 C.F.R. Part 710. 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 review hearing. *See* Transcript of Hearing (Tr.). At the hearing, the Individual had four witnesses testify on his behalf and provided his own testimony. The Individual submitted three exhibits, marked Exhibits A through C. The LSO submitted three exhibits, marked Exhibits 1 through 3.

II. THE NOTIFICATION LETTER AND THE ASSOCIATED SECURITY CONCERNS

As indicated above, the LSO cited Guideline E (Personal Conduct) of the Adjudicative Guidelines as the basis for concern regarding the Individual's eligibility to possess a security clearance. Ex. 2. Guideline E provides that "[c]onduct involving questionable judgment, lack of candor, dishonesty, 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. Conditions that could raise a security concern include "[c]redible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations[.]" *Id.* at ¶ 16(d). Examples of concerning behavior includes "[a] pattern of dishonesty or rule violations[.]" *Id.* The Notification Letter provided the following information: the Individual received written and verbal warnings from an employer in 2019, he resigned from a position in 2018 to avoid possible termination after violating the company's policy, and he was fired from multiple positions between 2012 and 2017 for policy and rule violations. Ex. 2 at 4-6. The cited information justifies the LSO's invocation of Guideline E.

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).

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 or her 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. *Id.*

at § 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

The record includes the Individual's QNSP, the investigation report from the Office of Personnel Management, and the Individual's response to the Notification Letter. According to the records, in 2019, the Individual received a verbal warning from his current employer for attendance issues, a written warning for attendance issues, and a written warning for watching videos during work hours. Ex. 3 at 1, 13. The Individual explained that he received the written attendance warning because he was late four or five times due to vehicle issues, and, in each instance, he called and notified his assigned site that he would be late but neglected to notify his employer. Ex. 3 at 12-13. The Individual reported that, more recently, he has been punctual. Ex. 1 at 2.

In 2018, the Individual worked for a health care provider that had a no-contact policy and required employees to disclose if they knew a patient under observation in the facility. Ex. 3 at 13. During his employment, the Individual met and spoke with a patient under his observation with whom he had a previous relationship. Ex. A at 1; Ex. 3 at 13. He did not disclose these interactions to his employer. *Id.* After the patient was released, the two continued to communicate. *Id.* The former patient then abruptly stopped responding to the Individual, and the Individual went to her place of employment to eat. Ex. A at 2; Ex. 3 at 13. He believes that she saw him arrive, but she avoided him, and he left after his meal. Ex. A at 2; Ex. 3 at 13-14. Afterward, the Individual was arrested and charged with stalking. Ex. 3 at 14. The charges were later dropped for lack of evidence, but the health care provider discovered the circumstances and placed the Individual on administrative leave. Ex. A at 2; Ex. 3 at 14. The Individual wrote a letter of apology to Human Resources and subsequently resigned to avoid possible termination. *Id.* The Individual explained his failure to alert his employer of the relationship by stating that the job was too hectic to identify and notify management of the patients he knew. Ex. 1 at 2. He also stated that he "was guilty of having a big heart and wanting to see an individual prosper." Ex. A at 2. However, he stated he learned a lesson and admitted that it was poor judgment to violate the employer's policy by not notifying management and continuing to communicate with the patient after she was released. *Id.*

In 2017, the Individual was employed as a security guard and was fired that year for "sleeping on the job." Ex. 3 at 14. He explained that he was unprepared for the assigned late-night shift, to which he initially objected, and during the night he briefly "dozed" three or four times. Ex. 1 at 4. He stated that, when confronted with photographic proof of his conduct, he stressed to his supervisor that he "was never completely out[.]" and he still disputes that he fell asleep. *Id.* That same year, the Individual was terminated from a separate employer for failing to list an assault charge on his employment application. *Id.* However, the Individual explained that he responded appropriately because the application only required the listing of convictions, and he was not found guilty of the charge. *Id.*

The Individual was also fired from a third employer in 2017 after attempting to balance the conflicting work schedules of his two jobs. Ex. 3 at 14. The Individual stated that, since his supervisor failed to adjust his schedule to remove the conflict, he began leaving his shift early to arrive at his second job. *Id.* After five or six times, the employer terminated him. *Id.* at 14-15.

Lastly, the record indicates that the Individual was fired after two days from a restaurant, his first job as an adult. Ex. 3 at 15. While the Individual reported that he was not given a reason for his termination, he believes it was because he was provided inadequate training, he spilled raw meat during his first shift, and management wanted somebody with more experience. *Id.*; Ex. 1 at 6.

At the hearing, the testifying witnesses provided positive estimates of the Individual's character. They described him as a loyal and kind person with a strong work ethic. Tr. at 15, 25, 51, 54. Two witnesses, both close friends, testified that the Individual was not fully at fault for violating his employer's no-contact policy. *Id.* at 31, 57-58. One of the witnesses added that the Individual has consequently become more cautious. *Id.* at 32-33.

The Individual testified that his string of terminations resulted from his poor decision-making and bad luck. Tr. at 64. He testified that he now works full time for his current employer after originally being hired as a temporary employee. *Id.* at 81. The Individual also testified that he has grown from his past conduct. *Id.* at 64. For example, he testified that while his 2019 tardiness was due to vehicle issues, he is now more aware about vehicles and currently has reliable transportation. *Id.* Since early 2020, he has worked from home. *Id.* at 114. He also testified that he accepts full responsibility for violating his current employer's rules regarding watching videos at work. *Id.* at 65. When asked whether he has violated any of his current employer's rules since 2019, the Individual stated the following: "No . . . not necessarily like I had a few emergencies that caused some [disciplinary] points and some being late at times."² *Id.* at 81-82. He confirmed that his supervisor recently "coached" him on attendance issues in 2020. *Id.* at 82. He testified that he has not had any new issues since January 2021. *Id.* at 82, 103-04.

The Individual also provided testimony regarding his 2018 conduct working for the health care provider. He stated that, at the time, he interpreted the no-contact rules based on his personal interest and believed that his conduct would not be a problem since the patient was only going to be in the facility for a short period of time. Tr. at 66, 86. He stated his conduct was "inexcusable," and he reaffirmed that he failed to inform his employer that he knew the patient because "it became very hectic" due to personnel changes, and he did not "keep up" with who he knew and did not know. *Id.* at 66. As a result, he "didn't take [the policy] as seriously as [he] should have." *Id.* He testified that, at the time, he wanted to help the patient because he has "a big heart." Tr. at 66, 68. When asked whether he intended to have a relationship with the patient, the Individual testified that he wanted "an association sort of relationship, not close[.]" in part, because she worked at a restaurant the Individual enjoyed.³ *Id.* at 84. He testified that he felt embarrassed about his behavior and learned that "he can't help everybody." *Id.* at 86. He also testified that he must take his employer's rules seriously and approach management if he has questions about the rules. *Id.* at 90. He testified that he regrets that his conduct cost him a career. *Id.* at 86.

² Points, in this context, are disciplinary points that, when accumulated past a certain employer-defined threshold, can lead to termination. Tr. at 98.

³ He also explained that he wanted to "just be a friend" and that he "tried to go above and beyond." Tr. at 87.

The Individual also testified regarding the circumstances surrounding his other terminations. Regarding the 2017 termination for sleeping on the job, he testified that the incident differed from the previously discussed no-contact violation because, in this case, his conduct was accidental and not intentional: “it was just something that happened.” Tr. at 92. Going forward, the Individual explained that he would speak to a manager if he felt he was physically incapable of completing a task. *Id.* at 93. Regarding his other termination in 2017 that resulted from his unsuccessful attempt to balance two jobs, he stated that he was treated unfairly by management at the first job, which led him to obtain a second job with a different employer. *Id.* at 71-74. He ended up being terminated from the first position because he accumulated a number of “points” for leaving early, and a late arrival due to a personal emergency put him over the termination threshold. *Id.* at 75, 98-99. Up until the final emergency, he had accumulated points through rule violations at a rate he knew would not result in his termination. *Id.* at 99.

Lastly, the Individual provided additional information regarding his termination in 2012. He stated that, due to his friend, he was hired in a position that was supposed to be for an experienced restaurant worker. Tr. at 78. He testified that he was terminated due to his inexperience and because of circumstances beyond his control.⁴ Tr. at 78.

The Individual testified that he has improved his conduct by reminding himself of the rules, being more professional and punctual, planning ahead, eliminating bad associations and bad habits, pursuing education, and staying focused. Tr. at 108-10.

V. ANALYSIS

A. Guideline E Considerations

Under Guideline E, an individual may mitigate security concerns, in relevant part, if:

- (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.

....

Adjudicative Guidelines at ¶ 17.⁵

⁴ The Individual explained that another employee told him that the hiring manager had asked another employee to send an update regarding the Individual's performance during his second work shift, but this employee forgot to send the update, and the hiring manager consequently assumed the worst and terminated the Individual. Tr. at 78.

⁵ The Adjudicative Guidelines include other mitigating factors which are not relevant in this case.

In this case, I conclude that the Individual has not put forth sufficient evidence to resolve the Guideline E security concerns. First, I do not find the Individual's offense to be minor because the record establishes a pattern of him failing to follow his employer's rules despite knowing his obligations. Furthermore, at least one instance, standing alone, is not minor: his intentional disregard of the health care provider's rules regarding reporting relationships and contacting patients. I also conclude that the Individual has still, until relatively recently, been unable to meet his employer's expectations around attendance. While he has purportedly avoided attendance issues in 2021, the weight I place on his recent improvement is lessened by the fact that he has been working remotely during that same period, and his ability to comply with attendance rules should he return to an in-person working environment is uncertain. Therefore, the passage of time does not resolve the security concern. I similarly conclude, based on his longstanding pattern of rule violations, that his concerning behavior has not been infrequent. Finally, I conclude that the Individual did not present sufficient evidence to demonstrate that his behavior happened under unique circumstances. Accordingly, I conclude that the Individual has not resolved the security concerns under ¶ 17(c).

My conclusion above is also based on my finding that the Individual has failed to take full responsibility for his conduct, and I therefore remain concerned regarding his reliability and judgment. For example, while he stated that he has no excuse for his actions while employed by the health care provider, he continues to blame his behavior on the hectic nature of the position, his genuine desire to help the patient because of his compassionate nature, and his interest in the cuisine at the patient's place of work. Furthermore, the Individual blamed his many attendance issues in 2019 on vehicle trouble and emergencies, but he neglected to address why he failed to notify his employer about his issues instead of just the site. This leaves me concerned that he was attempting to avoid the consequences of his actions.

Further still, the relatively recent coaching he received for attendance issues leaves me concerned that he remains unwilling or unable to meet the obligations of his employer and the behavior is, therefore, likely to recur. I also note that, when asked about any recent rule violations, he attempted to distinguish between violating his employer's rule and being late even though he received coaching as a result of his tardiness. And he did not disclose the recent coaching until confronted with a direct question during the hearing. As a final example, I turn to his explanation surrounding his termination for sleeping at work. Instead of accepting that his conduct violated his employer's rules, the Individual continues to minimize his behavior by explaining that he "dozed off" several times.

In total, the evidence in the record prevents me from finding that the Individual has resolved the security concern stemming from his pattern of rule violations by acknowledging his conduct and taking sufficient positive steps to address his behavior. Accordingly, I conclude that the Individual has not resolved the security concerns under ¶ 17(d).

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 Guidelines 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 brought forth sufficient evidence to resolve the security concerns set forth in the Summary of Security Concerns. Accordingly, I have determined that the Individual should not be granted access authorization.

The parties may seek review of this Decision by an Appeal Panel, under the regulation set forth at 10 C.F.R. § 710.28.

James P. Thompson III
Administrative Judge
Office of Hearings and Appeals