



The Individual exercised her right to request an administrative review hearing pursuant to 10 C.F.R. Part 710. The Director of the Office of Hearings and Appeals 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 testified on her own behalf, and the LSO submitted the testimony of an investigator employed by the Individual's employer ("Investigator"). The Individual submitted three exhibits, marked Exhibits A through C. The LSO submitted thirteen exhibits, marked Exhibits 1 through 13.<sup>2</sup>

## II. THE NOTIFICATION LETTER AND THE ASSOCIATED SECURITY CONCERNS

As indicated above, the LSO cited Guideline E (Personal Conduct) and Guideline K (Handling Protected Information) 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.* ¶ 16(d)(3). In the Notification Letter, the LSO stated that the Individual failed to follow policy and procedure by (1) introducing her personally owned cellular phone into a limited area, (2) using her phone to exchange a series of inappropriate text messages with two other employees, (3) using her phone on duty, and (4) refusing to provide requested information during a company investigation. Ex. 2 at 5-6. The above information justifies the LSO's invocation of Guideline E.

Guideline K provides that "[d]eliberate or negligent failure to comply with rules and regulations for handling protected information - which includes classified and other sensitive government information, and proprietary information - raises doubt about an individual's trustworthiness, judgment, reliability, or willingness and ability to safeguard such information, and is a serious security concern." *Id.* at ¶ 33. Conditions that could raise a security concern include "[a]ny failure to comply with rules for the protection of classified or sensitive information." *Id.* at ¶ 34(g). In the Notification Letter, the LSO stated that the Individual violated rules and regulations for the protection of sensitive information when she (1) introduced her phone into a limited area, (2) used her personal phone while on duty, and (3) failed to report, as required, another employee's violation of their employer's rules regarding inappropriate text messages and use of company provided phones. Ex. 2 at 6. The above information justifies the LSO's invocation of Guideline K.

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<sup>2</sup> The LSO's exhibits were combined and submitted in a single, 59-page PDF workbook. Many of the exhibits are marked with page numbering that is inconsistent with their location in the combined workbook. This Decision will cite to the LSO's exhibits by reference to the exhibit and page number within the combined workbook where the information is located as opposed to the page number that may be located on the page itself.

### 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 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

During a 2020 investigation into another employee's conduct, the Individual was observed on recorded surveillance video footage using her personal cell phone in a limited area approved for storage of classified and other sensitive matter at her job site. Ex. 3 at 7. She later admitted to introducing her phone into the limited area approximately three times. *Id.* As a result of her conduct, she became the subject of a security investigation conducted by her employer to determine whether she possessed classified information on her personal cellphone, and a search of it revealed additional violations of her employer's policies, including transmitting "inappropriate and offensive materials" to a company issued cellphone possessed by another employee while they were both on duty. Ex. 7 at 7, 10.

The Investigation Report from the Individual's employer concluded that the above conduct violated procedures designed to protect classified information and company policy and rules around cellphone use. Ex. 3 at 10-11. She received a security infraction and a two-week suspension. Ex. 11. She also subsequently received remedial training regarding the use of personal cellular phones while on duty and in limited areas. Ex. B at 32.

The record indicates that, at a point during the above investigation, the Individual learned that the Investigator removed related evidence from a protected area. Ex. 3 at 9. Within a few minutes of the Investigator's exit from the protected area, the Individual, who was on administrative leave,

contacted the Investigator and asked him if the evidence contained her personal information. *Id.* at 9; Ex. 6 at 18. When later asked to identify the person who notified her of the Investigator's exit from the protected area, the Individual refused on three separate occasions: once during a phone call, and twice during investigation interviews. Ex. 3 at 9; Tr. at 88. As a result of her failure to cooperate with the investigation, she remained on SAR and off duty without pay. Ex. 3 at 9. She was later terminated for her failure to cooperate in the investigation, but her employer reinstated her after an arbitration panel reduced her penalty. Ex. 12 at 33, 55; Ex. 13 at 59.

At the hearing, the Investigator testified regarding the Individual's prohibited conduct and failure to cooperate with the investigation. The Investigator testified that he had previously supervised the Individual and then later trained the Individual on aspects of her security position. Tr. at 22. The Investigator testified that the limited area, which requires badge access, contains classified networks, weapon and sensitive item storage, and, potentially, classified documents. *Id.* at 27. The Investigator also described reviewing the recorded video footage of the Individual with her personal cellphone in the limited area, and he testified that he observed her concealing the device under her leg when alerted, by sound, to the door switch. *Id.* at 34.

The Investigator explained that, when a personal cellphone is discovered in a limited area, protocol requires the phone to be confiscated and reviewed for classified information to determine whether information vital to the government has been leaked. *Id.* at 35-36. A review of the Individual's cellphone revealed that she had also sent an inappropriate photograph of herself to another security force employee while both were on duty status. *Id.* at 37-38.

Regarding his removal of investigation materials from the protected area, the Investigator testified that some of the sensitive information in the package had been classified as unclassified controlled nuclear information. *Id.* at 39. The Investigator explained that the exposure of his actions to the Individual meant that a person entrusted with a security clearance staffing the security post was potentially willing to call people on the outside to reveal confidential information. *Id.* at 41. As to the Individual's failure to cooperate during the investigation, the Investigator testified that he found it surprising and out of character because of her past trustworthiness regarding classified information. *Id.* at 45.

The Individual testified that she had never been the subject of an investigation or had her integrity questioned during her seventeen-year career. *Id.* at 66-67. She testified that she did not realize at the time that she could not use her personal cell phone in the limited area because she had, in the past, been asked by management to bring her personal cellphone into a limited area. *Id.* at 70-71. However, she also testified that her previous belief that there was no actual "rule" prohibiting possessing a personal cell phone in the limited area "sounds crazy" in hindsight. *Id.* at 72. She stated that she made a regretful mistake, accepted her suspension as "punishment" for the phone infractions, and testified that, going forward, she would always leave her personal phone in her vehicle anytime she is on-site. *Id.* at 73-74.

As for her failure to cooperate, the Individual testified that she only recognized her mistake when, after refusing, she later realized that she had been looking at it from a "personal standpoint" while her employer had been looking at it "as a security issue." *Id.* at 79. She testified that she refused to disclose the informant to the facility manager because she was bothered that her personal

information “was laying out on [a] desk in the security office . . . where anybody can walk in or out at any time” and because release of the information could be personally embarrassing for her. *Id.* at 92-93. She also testified that when she initially spoke with the facility manager, he made statements that she believed were untrue regarding what had been done to her cellphone during the investigation. *Id.* at 77.

After she realized her refusal was a mistake, she disclosed the informant’s identity to her union representative, whom she knew would appropriately report the information to her employer. *Id.* at 79. She stated that she made the disclosure to her union representative instead of the facility manager because the facility manager had told her at their final meeting not to contact the employer while on SAR. *Id.* at 79-80.

The Individual testified that her rule violations and failure to cooperate with the investigation arose from unusual circumstances and that, going forward, she would comply “100 percent” if placed in a similar situation. *Id.* at 84-85. She also testified she has not had any disciplinary issues at work since her return from SAR. *Id.* at 83.

## **V. ANALYSIS**

The Individual, through counsel, argued that her long, incident-free tenure—coupled with the unusual circumstances surrounding her concerning conduct, her contrition, and her subsequent growth—demonstrate that she will not engage in the same concerning conduct in the future and that the security concerns have been mitigated. Tr. at 96-97. I disagree.

### **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.

The evidence in the record does not demonstrate that either of the above mitigating conditions apply to resolve the security concerns. First, in examining the applicability of ¶ 17(c), I find that the conduct was not minor because there is evidence that the Individual deliberately refused to cooperate several times during a security investigation and violated the rules governing personal cellphone use and security on several occasions. Despite her testimony, I am unconvinced that she was unclear regarding her ability to use her personal cellphone in the limited area given her

seventeen-year tenure in a security-related position, the evidence that she attempted to conceal her behavior, and her own testimony that her explanation for her behavior “sounds crazy” or, stated differently, is implausible.

Regarding the frequency of her concerning conduct, while, over the Individual’s entire career, it may appear infrequent, her employer’s investigation uncovered several instances of prohibited conduct within a short period, and it prompted her to immediately engage in additional concerning conduct by refusing to provide a material fact during the security investigation. I therefore conclude that the concern is not mitigated by infrequency.

Next, I find that there is no evidence from which I find that her violation of the security rules is unique. I conclude the same for her using her phone on duty and sending text messages in violation of company policy. Furthermore, I find that she decided not to cooperate in the investigation because she distrusted the process and wanted to prevent potentially embarrassing personal information from being exposed, the latter being a common impetus that can create vulnerability. *See* Adjudicative Guideline E ¶ 16(e) (identifying a basis for concern as “[p]ersonal conduct, or concealment of information about one’s conduct, that creates a vulnerability to exploitation, manipulation, or duress[.]”). And, in this case, the Individual exercised poor judgment in acting on that impetus. Finally, for all the reasons stated above, the mere passage of time does not resolve the concern.

Turning to ¶ 17(d), while the Individual admitted her mistake, I still have doubt, based on my reasoning above, regarding the Individual’s reliability, trustworthiness, and good judgment. While the Individual has undergone remedial security training and she has not violated any additional security rules since her return from SAR, these actions are not sufficient to overcome all of the evidence cited above that supports my present concern regarding her judgment, reliability, and trustworthiness.

## **B. Guideline K Considerations**

The Guideline K and Guideline E security concerns arise from much of the same conduct involving the Individual’s use of her personal cellphone while on duty. I also note here that while the Individual’s refusal to participate in the investigation is not cited as a Guideline K security concern, her conduct does impact my assessment of her trustworthiness, judgment, reliability, or willingness and ability to safeguard classified and other sensitive government information. Adjudicative Guidelines at ¶ 33. Therefore, my above findings will guide my below analysis.

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

- (a) So much time has elapsed since the behavior, or it has happened so infrequently or under such unusual circumstances, that it is unlikely to recur and does not cast doubt on the individual’s current reliability, trustworthiness, or good judgment;
- (b) The individual responded favorably to counseling or remedial security training and now demonstrates a positive attitude toward the discharge of security responsibilities;

- (c) The security violations were due to improper or inadequate training or unclear instructions[.]

Adjudicative Guidelines at ¶ 35.

For the same reasons set forth in my analysis and findings under the Guideline E mitigating conditions, I conclude that ¶ 35(a), (b), and (c) do not apply to resolve the Guideline K security concerns. Turning first to ¶ 35(a), the factors and my reasoning thereunder are analogous to my above analysis of the factors set forth in ¶ 17(c) of Guideline E. I remain skeptical that she was unclear regarding her ability to use her personal cellphone in the limited area; and the passage of time, the frequency of her rule violations, and the particular circumstances surrounding her conduct do not resolve the security concerns. Second, as to ¶ 35(b) and (c), again, my analysis is consistent with my analysis in the preceding section under the factors set out in ¶ 17(c) and (d): namely, I find that the Individual has not resolved the concern based on her recent remedial security training nor her alleged misunderstanding of the rules surrounding personal cellphone use. I therefore remain concerned regarding the Individual's trustworthiness, judgment, reliability, and willingness and ability to safeguard protected information. Thus, I conclude that Individual has not resolved the Guideline K security concerns.

## **VI. CONCLUSION**

In the above analysis, I found that there was sufficient derogatory information in the possession of the DOE that raised a security concern under Guideline E and Guideline K 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's access authorization should not be restored.

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