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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: July 19, 2022)	Case No.: PSH-22-0120
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_____)	

Issued: November 30, 2022

Administrative Judge Decision

Janet R.H. Fishman, Administrative Judge:

This Decision concerns the eligibility of XXXXXXXXXXXX (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's access authorization should not be restored.

I. BACKGROUND

The Individual is employed by a DOE contractor in a position that requires him to hold a security clearance. In October 2021, he was indicted by a grand jury on charges of Criminal Sexual Penetration and Criminal Sexual Contact. Exhibit (Ex.) 1 at 1. Those charges are still pending. The Individual was also investigated in October 2018 for Criminal Sexual Penetration, though he was never charged. *Id.*; Ex. 6 at 1. From 1999 until 2018, the Individual was charged with or involved in approximately 41 instances of criminal activity, many of which involved traffic moving violations. Ex. 1 at 1-5.

Due to unresolved security concerns, the Local Security Office (LSO) informed the Individual, in a Notification Letter, that it possessed reliable information that created substantial doubt regarding his eligibility to hold a security clearance. Ex. 1. In the Summary of Security Concerns that accompanied the Notification Letter, the LSO explained that the derogatory information described above raised security concerns under Guideline J (Criminal Conduct) of the Adjudicative

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.

Guidelines. Ex. 1. The Notification Letter informed the Individual that he was entitled to a hearing before an Administrative Judge to resolve the substantial doubt regarding his eligibility to hold a security clearance. *See* 10 C.F.R. § 710.21.

The Individual exercised his right to request an administrative review hearing pursuant to 10 C.F.R. Part 710. Ex. 2. 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 hearing. The LSO submitted sixteen exhibits (Exs. 1–16) and the Individual submitted six exhibits (Exs. A–F). The Individual testified on his own behalf and presented the testimony of his fiancée. Hearing Transcript (Tr.) at 20, 55.

II. THE NOTIFICATION LETTER AND THE ASSOCIATED SECURITY CONCERNS

The LSO cited Guideline J (Criminal Conduct) as a basis for its determination that the Individual was ineligible for access authorization. Ex. 1. at 2. “Criminal activity creates doubt about a person’s judgment, reliability, and trustworthiness. By its very nature, it calls into question a person’s ability or willingness to comply with laws, rules, and regulations.” Adjudicative Guidelines at ¶ 30. The LSO cited the two charges of Criminal Sexual Penetration and Criminal Sexual Contact and the Individual’s extensive pattern of criminal behavior. Ex. 1 at 2. The criminal charges and other allegations against the Individual justify the LSO’s invocation of Guideline J. Adjudicative Guidelines at ¶ 31(b).

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 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 Dep’t 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 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. FINDINGS OF FACT

From 1999 to 2018, the Individual was charged with approximately 32 traffic violations, including eleven charges for speeding which he either did not recall or admitted that he was in violation; six charges of unlawful use of a license or a revoked/suspended license which he either did not recall, admitted occurred, or claimed it was an error by the division of motor vehicles; three charges of mandatory financial responsibility; four charges of careless driving; two charges of mandatory seat belt violations; and six miscellaneous traffic violations including unsafe lane change, stop sign/traffic lights.² Ex. 1 at 1–5; Tr. at 70–94. During this time period, he also was involved in other criminal incidents: 1) a 1999 fraud charge that occurred when the Individual was a minor, which was resolved by consent degree and dismissed; 2) a 2001 possession of a deadly weapon charge; 3) a 2004 possession of a deadly weapon charge, which was eventually dropped, from an occasion when the Individual borrowed his brother’s car which contained a knife and gun belonging to the Individual’s brother; 4) a 2003 possession of marijuana charge and a possession of a firearm while in commission of a felony charge while driving cross country with his brother; 5) a 2007 simple assault charge that was dismissed; 6) a 2009 driving while intoxicated (DWI) charge, which he claimed should have been attributed to his brother who used his name on occasion; and 7) a 2015 possession of synthetic urine charge, which he stated he did not know was illegal to possess. Tr. at 69–70, 73–74, 77–79, 80–81, 93. The Individual admitted to semi-regular use of marijuana from 1999–2017, use of mushrooms twice around 2000–2001, and use of cocaine on two occasions, in 1997 and 2001. *Id.* at 99; Ex. 15 at 41; Ex. 16 at 80–82.

In 2018, the Individual was investigated for Criminal Sexual Penetration. The Individual admitted to having sexual intercourse with the alleged victim but declared it was consensual. Ex. 5 at 1; Ex. 4 at 1. The alleged victim claimed that the encounter was initially consensual, but, at some point, she wanted to stop, and the Individual did not listen. Ex. 4 at 1. No charges were ever filed. *Id.*

In Exhibit 13, which is a copy of the police report, the Individual’s fiancée stated that in June 2020, her young relative came to stay in the home that the Individual, his fiancée, and their children shared. Ex. 13 at 10. The young relative was having issues at home and was hospitalized for suicidal ideation. *Id.* According to the fiancée’s written statements submitted to both the police and at the hearing, the young relative pleaded to come live with them. *Id.*; Ex. A at 2.

Regarding the 2020 sexual penetration charge, according to the police report, the young relative alleged that one evening, after coming to live with the family, she was in bed with the Individual’s child, and they asked the Individual to read them a story. Ex. 13 at 5. The Individual got into the bed and began reading with them, and eventually the Individual’s child fell asleep. *Id.* At this point, the young relative alleged, the Individual began touching her buttocks underneath her clothes and put his fingers in her “private part.” *Id.* The young relative was unsure what the Individual was doing with his hand that wasn’t touching her, but “she could hear a weird sound coming from his mouth.” *Id.* She said that she was crying and telling the Individual to stop; she said she kept closing her legs, but he told her to stop. *Id.* Eventually, he left the room. *Id.* The next day, the young relative said, the Individual told her that “if she told anyone he would come back for her.” *Id.* She

² In addition to the charges listed on the SSC, the Individual presented evidence that he was charged with Speeding in July 2020 and January 2022. Ex. D at 7. The LSO did not raise either of these charges in the SSC.

told the Individual's child, who did not believe her, and then the young relative called her mother to tell her. *Id.* Her mom then came to pick her up from the Individual's home, and later called the Individual's fiancée to talk to her about what had happened. *Id.* The young relative was taken for a sexual assault examination after her mother reported the alleged assault to the police. *Id.* This examination came back "consistent with the history provided" but "the majority of exams in sexually abused children are normal or non-specific regardless of the type of sexual acts involved." *Id.* DNA tests performed on the underwear that the young relative was allegedly wearing the night of the alleged assault did not detect any male human DNA. Ex. E at 1. The police report filed about this incident also contains a handwritten allegation that the Individual sexually assaulted the young relative on a previous occasion. Ex. 13 at 3. This incident was not mentioned in the narrative incident report filed by the police department, and, in fact, the report states the young relative "clarified . . . that was the only time this occurred." *Id.* at 8.

The Individual and his fiancée have lived together for 12 years, although they have been acquainted 15 years and share two children. Tr. at 51. The fiancée testified that her young relative had come to live with her and the Individual after experiencing some serious mental health challenges that included a period of hospitalization. *Id.* at 20, 52; Ex. A at 2. The fiancée and the Individual felt that their home would be a safe environment for the young relative because they could provide stability and the fiancée has professional training in helping children with "various issues." *Id.* at 60.

The fiancée's account of the time surrounding the alleged offense differed from that of the young relative.³ Two days before the alleged assault was reported to the Individual's fiancée and the police, the Individual permanently sent the two family dogs away because the children had not been doing their part to take care of the animals. Ex. 13 at 11; Tr. at 30. The children, including the young relative, were extremely upset by this development. Ex. A at 4. The next day, *i.e.*, the day of the alleged assault, the young relative was upset that the Individual had made the children clean up a mess that they had made in the backyard and that the Individual had chained up their bikes because she had been disrespectful when the Individual had initially asked her to help clean up. *Id.* The day after the alleged assault, according to the Individual's fiancée, everything at the home seemed normal. Ex. A at 4. The Individual's children and the young relative were "playing and laughing together." *Id.* The two children went to the mall with the young relative's grandmother. *Id.* Following the trip to the mall, the young relative's mother came and took her daughter back up to her home for the weekend. Tr. at 31. The young relative hugged the fiancée and the Individual, telling them that she loved them and would see them when she came back. *Id.*; Ex. 13 at 7. Shortly after the young relative left the house with her mother, the fiancée received a call from the young relative's mother informing her of the young relative's allegations. Tr. at 33. The fiancée asserted that after receiving the call and realizing that the young relative was not returning to her home, she requested the return of a cell phone she had given to the young relative while she was living in her home. Ex. A at 4. The phone was eventually returned but had been wiped clean of all data and the sim card removed. *Id.*

³ The Individual did not testify about the incident underlying the charges because they are still pending. Tr. at 20, 60–61.

The fiancée does not find the young relative’s claims to be credible for several reasons. First, the fiancée explained that her young relative’s story changed on multiple occasions. Tr. at 34. She also noted that she could see into the room where her young relative was on the bed with her child and the Individual from her bedroom and that the doors to both rooms are always open. *Id.* at 39; Ex. F. The fiancée did not hear her young relative crying that night or any other unusual sounds. Tr. at 39. She stated to the police that her child, who was allegedly in the bed with the Individual and the young relative, is not a heavy sleeper and “would have woken up with any movement on the bed.” Ex. 13 at 10. The fiancée also testified that she spoke to her children, including the child who was allegedly in the bed at the time of the assault, and neither of them said that they had heard or seen anything the night of the alleged assault. Tr. at 39–40. Finally, she asserted to the police that “I don’t care who [the Individual] is to me, I would have reported it” if something had happened to the young relative.⁴ Ex. 13 at 11. The Individual reported the allegations to his supervisor the next business day after the phone call to his fiancée from the young relative’s mother. *Id.* at 61–64.

Among the Individual’s exhibits were records from the young relative’s school, indicating that she had received a five-day in school suspension for “[f]alse accusations against a male staff member” involving a claim of inappropriate conduct by the school janitor. Ex. B. The Individual’s first exhibit, which is a statement from the fiancée, also claims that the young relative lies regularly, including claiming without evidence that her stepfather was beating her, telling her grandfather that all her teeth had been knocked out, and saying that a vape pen found in her jewelry box in her mother’s home was her cousin’s rather than hers. Ex. A at 2–3. The fiancée claimed that the young relative’s mother told her that the young relative lies regularly when the fiancée mentioned to the young relative’s mother what the fiancée had been told about her stepfather beating her. *Id.* The fiancée heard the young relative attempt to force two other people lie about who the vape pen belonged to. *Id.*

In August 2020, the Individual was charged with Criminal Sexual Penetration and Criminal Sexual Contact. Ex. 1. In October 2021, a grand jury indicted him on those charges. *Id.* The charges were still pending at the time of the hearing.

V. ANALYSIS

The LSO raised security concerns under Guideline J. Guideline J was properly invoked by the LSO based on the charges made against the Individual as well as his pattern of criminal behavior.

Conditions that could mitigate security concerns under Guideline J include:

- (a) so 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;
- (b) the individual was pressured or coerced into committing the act and those pressures are no longer present in the person’s life;

⁴ The fiancée works as a licensed social worker in her state and works for her state children, youth, and families department in a position to protect children, especially in the area of behavioral health.

- (c) no reliable evidence to support that the individual committed the offense; and
- (d) there is evidence of successful rehabilitation; including, but not limited to, the passage of time without recurrence of criminal activity, restitution, compliance with the terms of parole or probation, job training or higher education, good employment record, or constructive community involvement.

Adjudicative Guidelines at ¶ 32.

The Individual has a substantial pattern of criminal behavior. Although most of the numerous criminal charges he faced prior to 2018 were traffic violations, the Individual has faced two accusations of criminal sexual penetration, one of which is recent. While the 2018 sexual penetration claim did not result in charges against the Individual and he claimed that the activity was consensual, these allegations are very serious. Regarding the most recent sexual penetration claim, although the Individual presented evidence that the young relative has fabricated a claim of inappropriate conduct by a school janitor in the past and that his fiancée was near when the alleged event occurred but did not hear or see any inappropriate activity, he has not been cleared of the charges at this time. As stated above, my consideration of the Individual's behavior must consider whether restoring the Individual's access authorization will endanger the common defense and security and is clearly consistent with the national interest. 10 C.F.R. § 710.7(a). Where there is any doubt as to an individual's access authorization eligibility, there is a presumption against restoring his security clearance.

Based on the serious charges against the Individual, I find that he has not mitigated the concerns raised by his extensive criminal record. The most recent alleged criminal activity occurred in June 2020, and he was indicted in October 2021. There is no evidence that he was pressured into committing the alleged criminal act. While there is some evidence in the record to support that the Individual may not have committed the 2020 sexual penetration offense, which goes towards the mitigating condition at ¶ 32(c), he has been indicted on those charges and those charges are currently pending. Moreover, the Individual has admitted to most of the dozens of instances of criminal activity listed in the SSC, which span a period of twenty years. That extensive record of criminal activity, without more, by its own nature, loudly questions the Individual's ability or willingness to comply with laws, rules, and regulations. Thus, although there may be some question as to the credibility of the 2020 accusations against him, viewed in light of the Individual's long-standing pattern of criminal involvement, the totality of the derogatory information precludes me from finding that he has mitigated the security concerns cited by the LSO under Guideline G. Finally, the Individual did not present any evidence that he has undergone any rehabilitation.

Therefore, I find that the Individual has not mitigated the Guideline J concerns.

VI. CONCLUSION

For the reasons set forth above, I conclude that the LSO properly invoked Guidelines J of the Adjudicative Guidelines. After considering all the evidence, both favorable and unfavorable, in a comprehensive, common-sense manner, including weighing all 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 Notification Letter. 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, I find that the Individual's access authorization should not be restored. This Decision may be appealed in accordance with the procedures set forth at 10 C.F.R. § 710.28.

Janet R.H. Fishman
Administrative Judge
Office of Hearings and Appeals