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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: March 1, 2023) Case No.: PSH-23-0062
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Issued: July 17, 2023

Administrative Judge Decision

Phillip Harmonick, Administrative Judge:

This Decision concerns the eligibility of XXXXXXXXXXXXXXXX (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

DOE first granted the Individual access authorization in 2005 in connection with his work for a DOE contractor (First Contractor). Exhibit (Ex.) 12 at 48–49, 67–68.² The Individual was employed by the First Contractor from 2005 until April 2022. Ex. 11 at 16–17. On April 4, 2022, the local security office (LSO) received documentation from the First Contractor indicating that the Individual had resigned in lieu of termination after the First Contractor determined that he had “surreptitiously videotap[ed] an individual in a state of undress in the [] men’s chang[ing] room” Ex. 7. The First Contractor provided supplemental documentation to the LSO concerning the cause for the Individual’s resignation, including a signed statement in which the Individual admitted to having recorded men in a locker room without their knowledge on previous occasions. Ex. 6 at 9.

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 The internal pagination of numerous exhibits offered by the local security office does not correspond to the number of pages included in the exhibits. For example, the pagination of Ex. 12 does not correspond to the total number of pages due to an unnumbered first page. This Decision cites to pages in the order in which they appear in exhibits without regard for their internal pagination.

In September 2022, a DOE contractor (Second Contractor) hired the Individual. Ex. 11 at 13. The Individual submitted a Questionnaire for National Security Positions (QNSP) in connection with seeking access authorization. *Id.* at 39–40. The LSO subsequently issued the Individual a letter of interrogatory (LOI) concerning the circumstances that led to his separation from his employment with the First Contractor. Ex. 8. The information that the Individual provided in response to the LOI did not resolve the LSO’s concerns related to the matter. *See* Ex. 4 (summarizing the LSO’s 2022 review of the Individual’s eligibility for access authorization).

On November 22, 2022, the Individual met with a DOE-contracted psychologist (DOE Psychologist) for a psychological assessment. Ex. 9 at 2. On December 5, 2022, the DOE Psychologist issued the results of the psychological assessment (Report) in which she opined that the Individual met sufficient criteria for a diagnosis of Voyeuristic Disorder under the *Diagnostic and Statistical Manual of Mental Disorders – Fifth Edition (DSM-5)*, and that this condition could impair the Individual’s judgment, stability, reliability, or trustworthiness. *Id.* at 10–11.

The LSO issued the Individual a letter notifying him that it possessed reliable information that created substantial doubt regarding his eligibility for access authorization. In a Summary of Security Concerns (SSC) attached to the letter, the LSO explained that the derogatory information raised security concerns under Guideline E (Personal Conduct) and Guideline I (Psychological Conditions) of the Adjudicative Guidelines. Ex. 1.

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 twelve exhibits (Exs. 1–12). The Individual submitted one exhibit (Ex. A). The Individual testified on his own behalf and offered the testimony of a Licensed Marriage and Family Therapist (LMFT). Hearing Transcript (Tr.) at 3, 11, 74. The LSO offered the testimony of the DOE Psychologist. *Id.* at 3, 99

II. THE NOTIFICATION LETTER AND THE ASSOCIATED SECURITY CONCERNS

The LSO cited Guideline E of the Adjudicative Guidelines as the first basis for its substantial doubt regarding the Individual’s eligibility for access authorization. Ex. 1. Guideline E indicates that:

Conduct 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. 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 SSC cited the Individual’s resignation from his employment with the First Contractor in lieu of termination after the First Contractor determined that the Individual had surreptitiously recorded men in a state of undress in a locker room on multiple occasions. Ex. 1. The LSO’s allegation that

the Individual engaged in inappropriate behavior that supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, or unwillingness to comply with rules and regulations, and which creates a vulnerability to exploitation, manipulation, or duress, justifies its invocation of Guideline E. Adjudicative Guidelines at ¶ 16(d)–(e).

The LSO cited Guideline I of the Adjudicative Guidelines as the second basis for its substantial doubt regarding the Individual’s eligibility for access authorization. Ex. 1. “Certain emotional, mental, and personality conditions can impair judgment, reliability, or trustworthiness. A formal diagnosis of a disorder is not required for there to be a concern under this guideline.” Adjudicative Guidelines at ¶ 27. The SSC cited the DOE Psychologist’s opinion that the Individual met sufficient diagnostic criteria for a diagnosis of Voyeuristic Disorder under the *DSM-5*. Ex. 1. The LSO’s citation to the opinion of the DOE Psychologist that the Individual has a psychological condition that could impair his judgment, stability, reliability, or trustworthiness justifies the LSO’s invocation of Guideline I. Adjudicative Guidelines at ¶ 28(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 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 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).

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). An 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.

IV. FINDINGS OF FACT

DOE granted the Individual access authorization in 2005 in connection with his work for the First Contractor. Ex. 12 at 48–49, 67–68. On March 28, 2022, the Individual’s cellphone was discovered, partially covered by a towel, recording video in the men’s locker room at the DOE facility at which the Individual worked. Ex. 6 at 6. The First Contractor summoned law enforcement officers who interviewed the Individual; however, he was never charged with a crime. *Id.*; Tr. at 19–21.

On March 29, 2022, the Individual submitted a statement to the First Contractor in which he admitted to having surreptitiously recorded another man he observed in the locker room because he “admired his physique.” Ex. 6 at 9. The Individual represented that he “did not realize [he] would see him naked.” *Id.* The Individual stated that he had previously recorded men in the locker room “probably less than 10 times.” *Id.* The Individual indicated that he had not recorded anyone at a commercial gym at which he exercised outside of the DOE facility because he “didn’t think [he] could record anyone there without them knowing.” *Id.*

On March 31, 2022, the First Contractor convened a panel to consider the Individual’s conduct. *Id.* at 3. The panel concluded that the Individual had violated the First Contractor’s policies related to use of electronic devices and sexual harassment. *Id.* at 8. On April 1, 2022, the Individual resigned from his employment with the First Contractor in lieu of termination. Ex. 7 at 3.

In September 2022, the Second Contractor hired the Individual. Ex. 11 at 13. The Individual submitted a QNSP in connection with seeking access authorization. *Id.* at 39–40. On October 20, 2022, the LSO issued the Individual the LOI. Ex. 8. In his response to the LOI, the Individual represented that he had recorded the man in the locker room in March 2022 because he “admired his physique” and “wanted to have a memory to reflect on for inspiration” while pursuing his fitness goals. *Id.* at 7. The Individual denied any sexual motivation for his conduct and denied that he knew that his conduct violated any rules, regulations, or policies. *Id.* at 2, 4; *but see* Tr. at 55–56 (admitting at the hearing that he knew that secretly recording men in the locker room violated a law, rule, or policy when he engaged in the conduct).

On November 22, 2022, the Individual met with the DOE Psychologist for a psychological assessment. Ex. 9 at 2. During the clinical interview, the Individual admitted to first having secretly recorded a man in the locker room at the DOE site in 2018, and to having done so “four or five times . . .” in total. *Id.* at 6. The Individual denied any sexual motivation for his conduct. *Id.* The Individual indicated that he recorded men in the locker room at the DOE facility and not the commercial gym that he attended because the commercial gym had “surveillance cameras so he thought he would be caught.” *Id.*

On December 5, 2022, the DOE Psychologist issued her Report in which she concluded that the Individual met sufficient criteria for a diagnosis of Voyeuristic Disorder under the *DSM-5*, and that this condition impaired the Individual’s judgment, reliability, and trustworthiness. *Id.* at 10–11. The DOE Psychologist recommended that the Individual enter into treatment with a licensed mental health professional with appropriate knowledge concerning treatment of Voyeuristic Disorder. *Id.* at 10.

In February 2023, the Individual enrolled in counseling with the LMFT. Tr. at 40. The Individual has met with the LMFT on an at least monthly basis since that time. *Id.* The LMFT has treated the Individual using a strategic family therapy model in which she and the Individual discuss how his values and family history influence his day-to-day life, how he has sought to satisfy “unmet needs” through inappropriate behaviors, and how he can make more appropriate choices by recognizing his unmet needs and the beliefs that interfere with meeting them. *Id.* at 81. According to the LMFT, the Individual has been an active participant in therapy who has “made great progress” and is “more accepting of himself.” *Id.* at 78, 80, 83.

The Individual testified at the hearing that he is a bisexual man and that his sexuality had been a secret that he had “always guarded very [] closely.” *Id.* at 17. The Individual indicated that he had been “raised in a very strict and very religious household,” and that his parents had not been receptive to his “gay brother” expressing his sexual orientation. *Id.* at 11, 25. The Individual indicated that he had resisted acknowledging his sexual orientation because it did not conform to the stereotype of masculinity that he had developed through his upbringing and because he was “scared” of how his family would respond. *Id.* at 25–26.

The Individual claimed that “everything that [he] answered was truthful” in connection with the First Contractor’s investigation of his March 2022 conduct, but admitted that he had intentionally “omit[ted] [] facts” during the investigation because his sexual orientation “was something that [he] didn’t want in the public and [] wasn’t ready to face.” *Id.* at 20. The Individual claimed that he told his wife, members of his immediate family, and some of his friends about his sexual orientation. *Id.* at 21, 29, 34, 59. However, the Individual provided contradictory testimony concerning when he purportedly made this disclosure to his wife. *Compare id.* at 21 (indicating that after meeting with the First Contractor and law enforcement in March 2022 concerning his misconduct he “went home, had the hardest discussion I’ve ever had to have with anybody[] with my wife . . . and that’s when I disclosed to her that I was bisexual”) *with id.* at 33–34 (stating that he had not told anyone about his bisexuality prior to the clinical interview with the DOE Psychologist in December 2022 and answering “no” in response to a question as to whether he had disclosed his bisexuality to his wife prior to the clinical interview).

The Individual testified that he and his wife separated in February 2023 after he revealed his bisexuality to her and amicably divorced sometime after. *Id.* at 42–43, 61. The Individual denied having recorded anyone without their knowledge since March 2022. *Id.* at 38. The Individual claimed that, through his treatment with the LMFT, he had accepted himself and had been “able to move forward and make sure [his mistakes would not] happen again.” *Id.* at 41–42. The Individual represented that, although he previously feared the disclosure of his sexual orientation, he was no longer at risk of blackmail or coercion because “[t]he secret’s out” *Id.* at 69–70.

The DOE Psychologist opined that, based on the Individual’s self-described acceptance of his sexual orientation and her belief that the Individual’s voyeurism was a means of satisfying his repressed sexuality rather than his “primary sexual object,” she no longer believed that the Individual met the diagnostic criteria for Voyeuristic Disorder. *Id.* at 102–03, 105, 108. She further opined that his risk of repeating voyeuristic behavior was “low to very low” and that his prognosis is “good.” *Id.* at 103.

V. ANALYSIS

A. Guideline E

Conditions that could mitigate security concerns under Guideline E include:

- (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.

The Individual secretly recorded men in states of undress at the DOE facility from 2018 to 2022, only stopping when the First Contractor discovered his conduct and the Individual resigned his employment. As the Individual did not come forward before being discovered, and even then denied the true motivations for his conduct and that he knew that he was violating laws, rules, or procedures, I find that the Individual did not make prompt, good faith efforts to correct his concealment and that the first mitigating condition is inapplicable. *Id.* at ¶ 17(a).

The Individual has not asserted that his conduct was influenced by the advice of legal counsel, and thus the second mitigating condition is inapplicable. *Id.* at ¶ 17(b).

The Individual has acknowledged that he acted wrongly in secretly recording men in the locker room and has obtained counseling related to the behavior. He has also asserted that the conduct occurred under unique circumstances because of his repressed sexuality and is unlikely to recur now that he has accepted his bisexual identity. While I accept that the Individual is unlikely to attempt to record men in states of undress in a DOE facility again, I am not convinced that he will refrain from other forms of inappropriate self-gratifying behavior in the future if he believes that he can do so without detection.

In reaching the aforementioned conclusion, I have been guided by the factors concerning the application of the Adjudicative Guidelines listed in 10 C.F.R. § 710.7(c). Specifically, the Individual committed the misconduct repeatedly over about four years, the Individual's misconduct showed serious disregard for laws, rules, and regulations, the Individual was a mature

adult who had possessed access authorization for 13 years when he first began secretly recording men in the locker room, the Individual chose to record men in the locker room at the DOE site rather than at the commercial gym he attended because he believed that he was at a lower risk of being caught, and the Individual insisted at the hearing that he merely omitted facts concerning his misconduct and did not acknowledge his untruthfulness in connection with the investigation of his misconduct. The Individual's calculated decision to engage in misconduct at a DOE site due to lower risk of detection, prioritization of his desires over compliance with rules and regulations despite being a mature adult with over a decade of experience as a clearance holder, the extent and seriousness of his misconduct, and his current denial of his untruthfulness even after having received counseling lead me to believe that the Individual will not act responsibly in the future and that he will likely prioritize personal gratification and avoiding discipline over his obligations as a clearance holder. For these reasons, I find the third and fourth mitigating conditions inapplicable. Adjudicative Guidelines at ¶ 17(c)–(d).

The Individual claimed that he has eliminated any risk of manipulation that his conduct might have presented by disclosing his bisexuality to his family and close friends. However, the Individual failed to present testimony or evidence from persons to whom he allegedly shared his workplace misconduct or sexual orientation who could have corroborated his testimony. Moreover, the Individual's testimony concerning when he allegedly shared his bisexuality with his wife was contradictory and reflected negatively on his credibility. In light of the Individual's contradictory testimony and the lack of corroborating evidence from members of his family as to his having disclosed his sexual orientation or workplace misconduct to them, I cannot conclude that the Individual has fully shared this information with members of his family and friends to whom he is close who might disapprove. Thus, I cannot conclude that he has resolved his susceptibility to manipulation from disclosure of his recordings of men in the locker room at the DOE site. Therefore, the Individual has not demonstrated the applicability of the fifth mitigating condition. *Id.* at ¶ 17(e).

The sixth mitigating condition is inapplicable because the Individual does not deny that he committed the misconduct, and the LSO did not rely on sources of questionable reliability. *Id.* at ¶ 17(f). The final mitigating condition is inapplicable because the LSO did not allege that the Individual associated with persons engaged in criminal activity. *Id.* at ¶ 17(g).

Having concluded that none of the mitigating conditions are applicable, I find that the Individual has not resolved the security concerns asserted by the LSO under Guideline E.

B. Guideline I

Conditions that could mitigate security concerns under Guideline I include:

- (a) the identified condition is readily controllable with treatment, and the individual has demonstrated ongoing and consistent compliance with the treatment plan;
- (b) the individual has voluntarily entered a counseling or treatment program for a condition that is amenable to treatment, and the individual is currently receiving counseling or treatment with a favorable prognosis by a duly qualified mental health professional;

- (c) [a] recent opinion by a duly qualified mental health professional employed by, or acceptable to and approved by, the U.S. Government [indicates] that an individual's previous condition is under control or in remission, and has a low probability of recurrence or exacerbation;
- (d) the past psychological/psychiatric condition was temporary, the situation has been resolved, and the individual no longer shows indications of emotional instability; and,
- (e) there is no indication of a current problem.

Id. at ¶ 29.

The Individual voluntarily entered treatment for Voyeuristic Disorder, the condition is controllable with treatment which the Individual is receiving, and, according to the LMFT, he is compliant with the treatment program. The DOE Psychologist opined at the hearing that the Individual no longer meets sufficient diagnostic criteria for a diagnosis of Voyeuristic Disorder and that he is at low risk of engaging in voyeuristic behavior in the future. Accordingly, the Individual has established the applicability of the first four mitigating conditions under Guideline I. *Id.* at ¶ 29(a)–(d).

For the aforementioned reasons, I find that the Individual has resolved the security concerns asserted by the LSO under Guideline I.

VI. CONCLUSION

In the above analysis, I found that there was sufficient derogatory information in the possession of DOE to raise security concerns under Guideline E and Guideline I of the Adjudicative Guidelines. After considering all the relevant information, 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 brought forth sufficient evidence to resolve the security concerns set forth in the Summary of Security Concerns under Guideline I. However, the Individual has not brought forth sufficient evidence to resolve the security concerns set forth in the Summary of Security Concerns concerning Guideline E. Accordingly, I have determined that the Individual's should not be granted access authorization. This Decision may be appealed in accordance with the procedures set forth at 10 C.F.R. § 710.28.

Phillip Harmonick
Administrative Judge
Office of Hearings and Appeals