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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: April 27, 2023 ) Case No.: PSH-23-0080  
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Issued: July 20, 2023

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**Administrative Judge Decision**

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Janet R. H. Fishman, 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."<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**

A DOE Contractor employs the Individual in a position that requires him to hold an access authorization. On July 28, 2022, the Individual reported to the Local Security Office (LSO) that, on July 10, 2022, he turned himself in to police and was arrested and charged with Aggravated Battery (use of a deadly weapon), Negligent Use of a Deadly Weapon (discharging a firearm near an inhabited building), and Criminal Damage to Property. Exhibit (Ex.) 5. The Individual characterized the arrest as having been related to an "altercation" that occurred on July 9, 2022. *Id.* at 18. The Individual claimed that he delayed reporting his arrest "due to being out on workman's comp." *Id.* In a July 28, 2022, Questionnaire for National Security Positions (QNSP), the Individual disclosed he had a history of arrests dating back to November 2012. Ex. 8 at 77-81.

The LSO subsequently issued a Letter of Interrogatory (LOI) to the Individual, which sought additional information related to the Individual's arrests. Ex. 6. The Individual responded to the LOI in November 2022. *Id.* at 38. In the LSO, the Individual disclosed that on June 26, 2022, he

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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.

was charged with battery, after he “slapped” a man who approached him in a grocery store. *Id.* at 34.

Due to the unresolved security concerns related to the Individual’s responses in the November 2022 LOI, the 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. In a Summary of Security Concerns (SSC) attached to the Notification Letter, the LSO explained that the derogatory information raised security concerns under Guideline E (Personal Conduct) and Guideline J (Criminal Conduct) of the Adjudicative Guidelines. Ex. 1.

In April 2023, the Individual requested an administrative hearing, and the LSO forwarded the Individual’s request to the Office of Hearings and Appeals (OHA). The Director of OHA appointed me as Administrative Judge in this matter. At the hearing I convened pursuant to 10 C.F.R. § 710.25(d), (e), and (g), I took testimony from two witnesses, including the Individual. *See* Transcript of Hearing, Case No. PSH-22-0080 (Tr.). The Individual did not submit any exhibits. Counsel for the DOE submitted ten exhibits, marked as Exhibits 1 through 10, and did not present any witnesses.

## **II. The Summary of Security Concerns**

As previously mentioned, the Notification Letter included the SSC, which sets forth the derogatory information that raised concerns about the Individual’s eligibility for access authorization. The SSC specifically cites Guideline E and Guideline J of the Adjudicative Guidelines. Ex. 1.

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. 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.

A security concern may be raised under Guideline E when a person “[d]eliberately provid[es] false or misleading information; or conceal[s] or omit[s] information, concerning relevant facts to an employer, investigator, security official, competent medical or mental health professional involved in making a recommendation relevant to a national security eligibility determination, or other official government representative.” Adjudicative Guidelines at ¶ 16(b). In citing Guideline E, the LSO relied upon the Individual’s July 10, 2022, arrest, which he did not report until July 28, 2022, and his June 26, 2022, arrest, which he did not report until responding to the November 9, 2022, LOI. Ex. 1 at 5. In raising the two arrests under Guideline E, the LOI also indicated that the Individual violated DOE Order 472.2A, which requires that all individuals who hold a DOE security clearance report, in writing, “[a]rrests, criminal charges (including charges that are dismissed), citations, tickets, summons, or detentions by federal, state, or other law enforcement authorities for violations of law . . . no event later than three (3) working days after the occurrence.”

DOE Order 472.2A, Attachment 5 at ¶ 6. I find the LSO's security concerns under Guideline E are justified.

Guideline J provides that "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. Conditions that could raise a security concern under this guideline include "evidence (including, but not limited to, a credible allegation, an admission, and matters of official record) of criminal conduct, regardless of whether the individual was formally charged, prosecuted or convicted." *Id.* at ¶ 31(b). The LSO cited seven instances in which the Individual was arrested, including: the two arrests listed above under Guideline E; an October 2019 Public Disturbance charge; a January 2016 Assault and Battery charge; a November 2012 Aggravated Battery of a Household Member charge; an August 2009 Reckless Driving and no Driver's License charge; and a June 2003 Reckless Driving, Fleeing/Eluding an Officer, and Immediate Notice of Accident charge. Ex. 1 at 6. Based on this conduct, I find the LSO's security concerns under Guideline J are justified.

### **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 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 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.* § 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 and Hearing Testimony**

During the hearing, the Individual's mother testified that she was present at the July 2022 birthday party that led to the Individual's arrest. Tr. at 13. She stated that her son-in-law hit the Individual's arm, which caused the Individual to spill his drink. *Id.* at 14. She stated her son-in-law and the Individual confronted each other, but things later "calmed down," and she left the party because people were becoming intoxicated. *Id.* at 17–18. She claimed that after she left, her son-in-law and the Individual apparently got into a physical fight. *Id.* at 19. She asserted the Individual has never

appeared drunk around her, and that she raised the Individual to be respectful. *Id.* at 20, 22. She also asserted that he is always honest with her. *Id.* at 19–20. She stated the Individual has always “followed rules with us, you know. . . I don’t know what goes on, you know, out of the house.” *Id.* at 20. She stated that she raised the Individual to have respect, she said “he’s good to us . . . he respects us.” *Id.*

The Individual then testified as to his numerous arrests. As to his August 2009 charge for Reckless Driving and No Driver’s License, the Individual testified he always carried a driver’s license, and he would not have been able to get his job without one. *Id.* at 77–78. When the Individual was questioned about his June 2003 arrest for Reckless Driving and related charges, he stated he was 14 years old at that time, and asked “[h]ow are you going to pull up stuff from 23 years ago?” *Id.* at 78. The Individual stated he rear-ended a car at a streetlight and “everyone’s wrecked into someone, not – you know, at one point in their life.” *Id.* at 81. The Individual stated he “freaked out when a cop got behind [him]” and he started driving away from the officer. *Id.* at 78–79.

On November 23, 2012, the Individual was arrested and charged with Battery Against a Household Member, and was ordered to undergo 12 “counseling session,”. Ex. 6 at 30; Ex. 10 at 148. In his November 2022 response to the LOI, the Individual reported that before the arrest, he received a telephone call from someone, who alleged that his ex-wife was at a casino with two men and was intoxicated. *Id.* The Individual reportedly went to the casino and saw two men carrying his ex-wife out of the casino, he then “jumped out and fought the [two] men.” *Id.* As a result of this incident, the Individual was arrested, and his sentence included attending 12 “counseling sessions.” *Id.* at 164. At the hearing, the Individual confirmed this explanation, but also asserted “[e]verybody was drunk except for me, and I’m the one that got in trouble.” Tr. at 71. The Individual further testified that there was an allegation he hit his ex-wife, but he did not. *Id.* He stated the district attorney tried to force his ex-wife to say it was a domestic violence incident. *Id.* When the Individual was told a police report of the incident indicates that he struck his wife before he attacked the two men, the Individual responded, “[h]ow was I going to strike her when they were carrying her?” *Id.* at 73.

In January 2016, the Individual was arrested and charged with Assault and Battery, after he got into a physical confrontation with his ex-wife’s boyfriend. Ex. 6 at 31. At the hearing, the Individual explained that before this arrest, he was waiting at a gas station for his ex-wife to pick-up his children. Tr. at 61–62. He stated that when his ex-wife appeared, she had her boyfriend with her, and he and the boyfriend started arguing. *Id.* at 62–63. He claimed the boyfriend got out of the car, pushed him, and he struck the boyfriend. *Id.* at 64. He asserted the boyfriend “was drunk, he shouldn’t have been there . . . and I handled him.” *Id.* The Individual acknowledged that he was required to take anger management classes to resolve his criminal case related to his January 2016, arrest. at. At 66. When asked to explain whether he attended anger management classes, the Individual stated he attended two classes and could not explain whether he learned anything from the classes. *Id.* at 66–68.

In October 2019, the Individual was charged with Public Disturbance, after he had a physical altercation with someone at a gym, which resulted in a Temporary Restraining Order (TRO) being filed against him. Ex. 7 at 42; Ex. 6 at 33. In his response to the April 2021 LOI, that the LSO issued to him, the Individual claimed that the allegations in the restraining order were not true and

“if [he] had been wrongful in the case [sic] . . . the restraining order would have been granted.” Ex. 7 at 40. The Individual also claimed in his response to the April 2021 LOI, that he did not report the TRO or his court appearances to the DOE because he was not arrested. *Id.* at 42.

At the hearing, the Individual explained that before the October 2019 arrest, he was at a gym and saw his current girlfriend’s ex-boyfriend, staring at him. Tr. at 51–56. He stated the man approached him, asked him to step outside, and “there was some words exchanged” between the two of them. *Id.* at 56. He stated that after the incident, “they got [him] on a stupid public disturbance” charge. *Id.* The Individual stated he did not get into a physical fight with the individual, it was “just basically words.” *Id.* at 58. When asked why he told the LSO, in his April 2021, LOI, that he had a physical fight with the man at the gym, the Individual stated the man tried to wrestle with him, and they had a “scuffle.” *Id.* at 58.

On June 26, 2022, the Individual was charged with Assault-Battery, after the Individual “slapped” a man who “came up to [him] in the grocery store unexpectedly.” Ex. 6 at 34. After this incident, a warrant was issued for the Individual’s arrest. Ex. 10 at 154, 158. During the hearing, the Individual stated he was in a grocery store and saw a man who had threatened to kill him in the past. Tr. at 46. He maintained that the man started yelling at him, and he walked away. *Id.* at 47. He stated that the man claimed he hit him, but he did not. *Id.* He averred “there was no proof” he slapped anyone, and the charges were dismissed. *Id.* at 46. He stated he did not report this incident to the LSO because he did not serve any jail time, so “there was no reason to.” *Id.* at 47–48. The Individual stated that since he has been out of work for four years, it has not been easy “trying to deal with a bunch of idiots.” *Id.* at 48.

In July 2022, the Individual was arrested and charged with Aggravated Battery (Use of a Deadly Weapon), Negligent Use of a Deadly Weapon (Discharging Firearm Near an Inhabited Building), and Criminal Damage to Property. Ex. 6 at 26. In his response to the November 2022 LOI, the Individual reported that before his arrest, he was at his godson’s birthday party and was “attacked by [the child’s] intoxicated father” as he was trying to leave. *Id.* He also reported that he was carrying his “licensed, legal firearm and it discharged during the confrontation while [he] was trying to defend [himself].” *Id.*

At the hearing, the Individual testified that, while at his godson’s birthday party, someone ran past him and hit his arm, which caused him to spill his drink. Tr. at 30. He claimed the person did not apologize and was laughing about it. *Id.* The Individual asserted that he asked the man “what are you laughing about?” and then the man started calling him names. *Id.* at 31. He declared that, later, as he tried to leave the party, he and the man got into a fight. *Id.* at 35. He testified that after he left the party, he was told someone called the police and there was a warrant out for his arrest. *Id.* at 36. He then claimed that he learned about the warrant in January 2023, from his attorney. *Id.* at 49–50. He determined that the courts were sending notices regarding the warrant to an address where he no longer lived, so he did not receive notice of the warrant. *Id.* at 50.

As to the charge he used a deadly weapon during the incident, the Individual claimed “[t]here’s no shred of evidence whatsoever that there was a gun involved” in the fight. Tr. at 39. The Individual was questioned about his response to the LOI, wherein he stated, “I was being attacked as I was trying to leave the birthday party. I was carrying my licensed, legal firearm and it discharged during

the confrontation while I was trying to defend myself.” Ex. 6 at 26, Tr. at 40. He claimed he “never said anything about a gun going off.” Tr. at 40. He insisted that he remembers disclosing he had a firearm with him, but it was in his car. *Id.* at 41. When asked why he waited 18 days to report his arrest to the LSO, the Individual stated he was in jail for ten days, and he was going through a lot. *Id.* at 43. The Individual then stated he turned himself into the police on the Sunday after the party and was released from jail three days later. *Id.* at 44.<sup>2</sup>

At the conclusion of his testimony, the Individual stated he has worked for his employer for many years, and “if [he] was [the] type of person that people are trying to make [him] out to be, there’s no way that [he] would have lasted that long holding a federal government job.” *Id.* at 68–69. The Individual then concluded:

In my mind...if I was guilty of anything, I would have been – I would have been convicted. They just don’t let people off without, you know, them being guilty or not guilty. Obviously, I was not guilty, so, you know – if I was guilty, it would be there...And I wasn’t. I’m not no criminal...So don’t talk to me like I’m some kind of criminal...There’s idiots all over this place. You know what I mean? And I have to deal with them.

*Id.* at 82–83.

## V. Analysis

### A. Guideline E

The Adjudicative Guidelines set forth seven factors that may mitigate security concerns under Guideline E:

- (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;

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<sup>2</sup> In addition to the criminal charges listed on the SSC, the Individual admitted to three other charges, which he listed on the LOI. Those charges include Failure to Maintain Traffic Lane in 2017, Speeding in 2017, and Property Damage to a Vehicle in 2014. Ex. 7 at 42. The Individual also listed an unexplained charge, from 2020, of Parenting Plan/Custody. *Id.*

- (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.

Regarding factor (a), the Individual did not report his June 2022 arrest to the LSO until more than four months later, and only reported the conduct after being prompted to do so in the November 2022 LOI. The Individual did not report his July 2022 arrest until 18 days later, after he had been released from jail for over two weeks. Throughout the administrative process, the Individual has failed to acknowledge his responsibility to report his arrests, and continued to assert that reporting was not necessary because he was innocent of the charges levied against him. Therefore, I find that the Individual has not mitigated the security concerns under ¶ 17(a).

Regarding factor (b), the Individual did not submit evidence to support that his failure to report his June 2022 and July 2022, arrests to the LSO was caused, or contributed to, by the advice of legal counsel or some other professional. Therefore, I find that the mitigating factor under ¶ 17(b) is not applicable to this case.

Regarding factor (c), the Individual's failure to report his June 2022 and July 2022 arrests to the LSO occurred recently, less than one year before this hearing. The Individual failed to report his arrests because he did not believe it was necessary for him to do so, not due to any unusual or unique circumstances. In addition, the Individual has not acknowledged his responsibility to report his arrests to the LSO, irrespective of the validity of any underlying charges filed against him. Therefore, I cannot find the Individual's conduct is unlikely to recur, and the Individual has not mitigated the security concerns under ¶ 17(c).

Regarding factor (d), as noted above, the Individual has not acknowledged he was required to timely report his June 2022 and July 2022 arrests to the LSO. The Individual has not sought any assistance to address his behavior or other factors that may have contributed to his conduct. Therefore, I find the Individual has not mitigated the security concerns under ¶ 17(d).

Regarding factors (e), (f), and (g), the security concerns raised by the LSO do not involve allegations the Individual is subject to exploitation, manipulation, or duress because of his failure

to timely report his arrests. There is also no evidence to support that the information relied upon by the LSO was unsubstantiated or from a source of questionable reliability. Finally, the security concerns raised by the LSO do not involve allegations that the Individual associates with persons involved in criminal activities. Therefore, I find the mitigating conditions under ¶ 17 (e), (f), and (g) are not applicable to this case.

For these reasons, I find the Individual has not resolved the Guideline E security concerns raised by his June 2022 and July 2022 arrests, and his failure to report them to the LSO, as required by DOE Order 472.2A.

## **B. Guideline J**

The Adjudicative Guidelines set forth four factors that may mitigate security concerns under Guideline J:

- (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;
- (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.

Regarding factor (a), the Individual's most recent arrests occurred in June 2022 and July 2022, one year before the hearing. The Individual has a history of criminal conduct, spanning over 20 years, that was not due to unique or unusual circumstances. The Individual has not taken responsibility for his role in his criminal conduct; instead, he believes that the allegations supporting his criminal charges were either fabricated or caused by others, and that he was unfairly arrested. Finally, despite being ordered to undergo counseling after his November 2012 arrest, and anger management classes after his January 2016 arrest, the Individual's criminal conduct continued. Therefore, I cannot conclude the Individual's criminal conduct is unlikely to recur and he has not mitigated the security concerns under ¶ 32(a).

Regarding factor (b), there is no evidence to establish that the Individual was pressured or coerced into committing the acts for which he was arrested. The Individual's criminal conduct shows a pattern of responding to conflict, or challenge, with physical violence. Also, many of the criminal offenses cited by the LSO involved his ex-wife or persons connected to his ex-wife, and the



Individual's inability to maintain self-control when he is in stressful environments. Therefore, I find the Individual has not mitigated the security concerns under ¶ 32(b).

Regarding factor (c), the Individual has not put forth any evidence to support that the facts used to support his criminal offenses were not from a reliable source. On the contrary, the Individual admitted he committed most of the acts for which he was charged. Furthermore, the fact that the Individual's June 2022, charge for Assault-Battery was dismissed, does not mean the allegation that he slapped a person was not true. Therefore, I find the Individual has not mitigated the security concerns under ¶ 32(c).

Regarding factor (d), less than one year has elapsed since the Individual's most recent arrest, in July 2022, which is not enough time to support that the Individual's criminal conduct will not recur, given his history. The Individual has not submitted evidence he is involved in constructive community activities or is enrolled in some type of counseling program to address his criminal behavior. Therefore, I find the Individual has not mitigated the security concerns under ¶ 32(d).

For the reasons stated above, I cannot find that the Individual has mitigated the Guideline J security concerns raised by his history of criminal offenses detailed in the SSC.

## **VI. Conclusion**

For the reasons set forth above, I conclude that the LSO properly invoked Guideline E and Guideline 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, I find 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