



The Individual requested a hearing and the LSO forwarded the Individual's request to the Office of Hearings and Appeals (OHA). The Director of OHA appointed me as the Administrative Judge in this matter on October 11, 2018. At the hearing I convened pursuant to 10 C.F.R. § 710.25(d), (e) and (g), the Individual presented the testimony of one witness and testified on his own behalf. *See* Transcript of Hearing, Case No. PSH-18-0073 (hereinafter cited as "Tr."). The LSO submitted 12 exhibits, marked as Exhibits 1 through 12 (hereinafter cited as "Ex."). The Individual submitted one exhibit, marked as Exhibit A.

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

As indicated above, the Notification Letter informed the Individual that information in the possession of the DOE created a substantial doubt concerning his eligibility for a security clearance. That information pertains to Guidelines E, H, and J of the *National Security Adjudicative Guidelines for Determining Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position*, effective June 8, 2017 (Adjudicative Guidelines).

Guideline E relates to conduct involving questionable judgment, lack of candor, or unwillingness to comply with rules and regulations, which raises questions about an individual's reliability, trustworthiness, and ability to protect classified information. Any failure to provide truthful and candid answers during the security clearance process is of particular concern. *See* Adjudicative Guidelines at ¶ 15. With respect to Guideline E, the LSO cited the Individual's failure to include three DUI arrests, from 1992, 1993, and 1994, on his QNSP. Ex. 3 at 4. Given these apparent failures to disclose the above referenced arrests, the LSO had sufficient grounds to invoke Guideline E.

Guideline H relates to an individual's drug involvement, which raises questions about an individual's reliability and trustworthiness. Guideline H at ¶ 14. In citing Guideline H, the LSO cited that the Individual admitted he used marijuana between June 1981 and September 2012; failed a random drug test while on probation in 1998; and was charged with Drug Possession/Paraphernalia in 2012. Ex. 3 at 5. On review, I find that the LSO had sufficient grounds to reference Guideline H in light of the Individual's admissions regarding illegal drug use.

Criminal activity creates doubt about a person's judgment, reliability, and trustworthiness and by its very nature calls into question a person's ability or willingness to comply with laws, rules, and regulations. Guideline J at ¶ 30. With respect to Guideline J, the Notification Letter listed the Individual's six arrests for DUI, one of which also involved Drug Possession/Paraphernalia; along with his arrests for Telephone Harassment; Assault, Endangering Children and Violation of Protection Order; and two charges of Driving on a Suspended License. Ex. 3 at 5—6. The Individual's documented history of arrests supports the LSO's determination that Guideline J is applicable in the present case.

## **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), cert. denied, 499 U.S. 905 (1991) (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 so as 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.

The discussion below reflects my application of these factors to the testimony and exhibits presented by both sides in this case.

#### **IV. FINDINGS OF FACT**

The Individual does not dispute the facts alleged in the Notification Letter. Tr. at 68. As such, I adopt the factual allegations in the Notification Letter as my factual findings in this case. In addition to testifying himself, the Individual presented one character witnesses, his co-worker who is also the union steward. Tr. at 8.

The Individual's co-worker testified that the Individual has had no written or verbal warnings issued to him at work. Tr. at 11. The co-worker also testified that the Individual testified against another employee in a disciplinary action of that employee. *Id.* at 13. According to the co-worker, the Individual chose to "do the right thing" and was an intricate part of the discipline process, while other employees ignored the situation. *Id.*

During the hearing, the Individual testified that he failed to list the three DUI arrests on his QNSP because he believed that by listing the 1998 arrest as a fourth offense<sup>2</sup>, he was including the other three DUI arrests. Tr. at 21. "When I . . . put down the fourth offense felony DUI I had in '98, I thought they would understand that I was including all the other three before that." *Id.* His statement at the hearing confirms what he said during the PSI. "I'm thinking because the, the

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<sup>2</sup> The Individual specifically listed the charge as "4TH/MORE Driving under the influence of alcohol/drugs." Ex. 9 at 29.

fourth offense felony, it covers all them. . . . [T]here is no reason why I wouldn't, when I put that one on there.” Ex. 10 at 11.

The Individual has two drug-related criminal charges and admitted on the QNSP and during the PSI that he used marijuana between 1981 and 2012. Ex. 3 at 5; Ex. 10 at 104. At the hearing, the Individual testified that he used marijuana occasionally while he was in college, but not when he was in the army or while he worked at another DOE site. Tr. at 27. The Individual last used marijuana in 2012. *Id.*

The Individual testified that the other non-alcohol related criminal charges occurred during his divorce. Tr. at 25. The Individual's ex-wife submitted a letter admitting that she did request a restraining order and taped a telephone conversation in order to have him charged during their divorce. Ex. A. She also admitted that she made “many ugly phone calls to him” as well. *Id.* She concluded that the Individual “is a good man who was going through a lot at the time of these charges.” *Id.* The charges for driving on a suspended license occurred in November 2004 and March 2005 when the Individual was behind on his child support. Tr. at 25. The Individual claimed that his last DUI occurred after a friend's funeral. Tr. at 27. His girlfriend was supposed to drive him home after the funeral, but she failed to arrive. *Id.*

## V. ANALYSIS

The issue before me is whether the Individual, at the time of the hearing, presents an unacceptable risk to national security and the common defense. I must consider all the evidence, both favorable and unfavorable, in a common sense manner. “Any doubt concerning personnel being considered for access for national security eligibility will be resolved in favor of the national security.” Adjudicative Guidelines at ¶ 2(b). In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record. Because of the strong presumption against granting security clearances, I must deny granting if I am not convinced that the LSO's security concerns have been mitigated such that granting the Individual's clearance is not an unacceptable risk to national security.

### A. Guideline E

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 provide truthful and candid answers during national security investigative or adjudicative processes. Adjudicative Guidelines ¶ 15. Guideline E provides that the following conditions may mitigate security concerns:

- (a) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts (*id.* at ¶ 17(a));
- (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 (*id.* at ¶ 17(c)).

The Individual failed to include three DUI arrests on his QNSP. At his PSI and at the hearing, the Individual asserted that he did not intentionally omit the three DUI arrests from his QNSP. He declared that by including his fourth DUI, and listing it as a fourth offense, he believed that “they would understand that I was including all the other three before that.” Tr. at 21. The Individual included all his other arrests on the form. His reporting of a fourth arrest for DUI indicates to me that he was not attempting to hide his prior DUI arrests from the LSO. Further, his inclusion of the other arrests supports my finding that the Individual was not trying to hide his prior criminal history. I found the Individual to be credible in his testimony regarding his omissions from the form. For the foregoing reasons, I find that the Individual has mitigated the Guideline E security concerns.

### **B. Guideline H**

The illegal use of controlled substances can raise questions about an individual's reliability and trustworthiness, both because such behavior may lead to physical or psychological impairment and because it raises questions about a person's ability or willingness to comply with laws, rules, and regulations. Adjudicative Guidelines ¶ 24. Guideline H provides that the following condition may mitigate security concerns:

(a) the behavior happened so long ago, was so infrequent, or happened under such circumstances that it is unlikely to recur or does not cast doubt on the individual's current reliability, trustworthiness, or good judgment (*id.* at 26(a)).

The Individual admitted that he used marijuana between 1981 and 2012. In addition, he admitted that he was arrested on two occasions for drug possession or paraphernalia and failed a random drug test while on probation. The Individual's last drug use or possession arrest occurred in 2012, over six years prior to the date of the hearing, thus satisfying the condition above requiring a temporal distance. The record is devoid of any evidence of any current drug usage. Further, the LSO sent the Individual to a consulting Psychologist for an evaluation regarding the Individual's alcohol use. Ex. 11. The Psychologist found that one of the tests he ran showed the Individual's “Drug Problems Scale (DRG=55 T) was non-significant.” *Id.* at 9. Due to the passage of time, I find that the Individual has mitigated the Guideline H security concerns.

### **C. Guideline J**

Criminal activity creates doubt about a person's judgment, reliability, and trustworthiness because it calls into question a person's ability or willingness to comply with laws, rules, and regulations.

Adjudicative Guidelines ¶ 30. Guideline J provides that the following conditions may mitigate security concerns:

- (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 (*id.* at ¶ 32(a));
- (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 (*id.* at ¶ 32(d)).

The Individual admitted to his numerous arrests, including six DUI arrests; Telephone Harassment; Assault, Endangering Children and Violation of Protection Order; and a two charges for Driving on a Suspended License. Notwithstanding his alcohol-related arrests, the Individual testified that his other arrests occurred during, and were related to, his divorce.<sup>3</sup> His ex-wife confirmed his recollection. Further, his divorce is now complete. The Individual's last alcohol-related arrest occurred in 2012. As stated above, the LSO sent the Individual to a consulting Psychologist for an evaluation regarding the Individual's alcohol use. Ex. 11. In his report, the Psychologist opined that the Individual previously suffered from Alcohol Abuse but stated that, at the time of the evaluation, the Individual did not demonstrate current symptoms of Alcohol Use Disorder. *Id.* at 11—12. The Individual's co-worker confirmed that he is a great employee with no written or verbal warnings. Due to the passage of time, the fact that his arrests appear unlikely to recur, and the co-worker's testimony regarding his good employment record, I find that the Individual has mitigated the Guideline J security concerns.

## VI. CONCLUSION

Upon consideration of the entire record in this case, I find that there was evidence that raised concerns regarding the Individual's eligibility for a security clearance under Guidelines E, H, and J of the Adjudicative Guidelines. I further find that the Individual has succeeded in fully resolving those concerns. Therefore, I conclude that granting DOE access authorization to the Individual "will not endanger the common defense and security and is clearly consistent with the national interest." 10 C.F.R. § 710.7(a). Accordingly, I find that the DOE should grant access authorization to the Individual at this time.

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<sup>3</sup> The Telephone Harassment charge originated when he called his ex-wife after speaking with her and her "cussing" him out. Tr. at 22. He left a recorded message, which she kept and played for the judge. *Id.* In her letter, she stated that she wanted to make things difficult for him and decided to file charges and ask for a restraining order. Ex. A. The child endangerment charge occurred after the restraining order was in place. After appearing in court, the Individual was approached by his ex-wife's boyfriend who attempted to fight the Individual. Bystanders told the boyfriend to leave. Later when the Individual returned his son to his ex-wife's house, his son left a duffle bag in the car. When the Individual exited the car to return the duffle bag, the ex-wife's boyfriend came outside and confronted the Individual again attempting to start a fight. Tr. at 23-24. In her correspondence, the ex-wife accepted blame for causing the Individual pain regarding the various charges she filed. Ex. A.

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

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