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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 12, 2024)
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_____)

Case No.: PSH-24-0151

Issued: November 13, 2024

Administrative Judge Decision

Phillip Harmonick, Administrative Judge:

This Decision concerns the eligibility of XXXXXXXX (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 or Eligibility to Hold a Sensitive Position."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 be restored.

I. BACKGROUND

The Individual is employed by a DOE contractor in a position which requires him to hold access authorization. *See* Exhibit (Ex.) 10 at 119 (listing the dates of the Individual's employment by the DOE contractor).² On March 31, 2023, the local security office (LSO) received a Personnel Security Information Report indicating that the Individual had been arrested and charged with "Publish/Threat to Publish Intimate Visual Material." Ex. 6 at 28–32.

The LSO issued the Individual a letter of interrogatory (LOI) concerning his arrest. Ex. 7. In his response, the Individual indicated that his wife, from whom he was in the process of divorcing, had "filed charges" after the Individual shared intimate photos of his wife with his wife's boyfriend. *Id.* at 38.

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 exhibits submitted by DOE were Bates numbered in the upper right corner of each page. This Decision will refer to the Bates numbering when citing to exhibits submitted by DOE.

The LSO subsequently issued the Individual a Notification Letter advising him that it possessed reliable information that created substantial doubt regarding his eligibility for access authorization. Ex. 1 at 6–8. In a Summary of Security Concerns (SSC) attached to the letter, the LSO explained that the derogatory information raised security concerns under Guideline J of the Adjudicative Guidelines. *Id.* at 5.

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 conducted an administrative hearing. The LSO submitted ten exhibits (Ex. 1–10). The Individual submitted six exhibits (Ex. A–F). The Individual testified on his own behalf and offered the testimony of four character witnesses.³ Hearing Transcript, OHA Case No. PSH-24-0151 (Tr.) at 3, 10, 22, 33, 40, 50. The LSO did not call any witnesses to testify.

II. THE NOTIFICATION LETTER AND THE ASSOCIATED SECURITY CONCERNS

The LSO cited Guideline J (Criminal Conduct) of the Adjudicative Guidelines as the basis for its substantial doubt regarding the Individual’s eligibility for access authorization. Ex. 1 at 5. “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 SSC cited the Individual’s March 2023 arrest. Ex. 1 at 5. The LSO’s allegation that the Individual engaged in criminal conduct justifies its 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 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.

³ One of the Individual’s character witnesses, a personal friend who had known the Individual since childhood, testified that he had no knowledge of the Individual ever having been arrested and that he was “not certain why” he was testifying at the hearing. Tr. at 34. In light of the friend’s lack of knowledge of the Individual’s criminal conduct, I assigned minimal weight to the friend’s assessment of the Individual’s reliability and ability to follow rules and regulations.

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.* § 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

The Individual was first granted a security clearance in 2009 in connection with his service in a branch of the U.S. military. Ex. 10 at 125, 145. DOE granted the Individual access authorization in 2019 in connection with his employment with a DOE contractor. Tr. at 66. Other than traffic infractions that occurred in 2008 or earlier, the Individual had never been arrested or cited for any offense prior to his 2023 arrest. Tr. at 67; *see also* Ex. 10 at 78–79, 143, 167, 216–18 (reflecting that background investigations of the Individual did not identify any criminal offenses committed by the Individual and that the Individual self-disclosed traffic offenses in a 2008 QNSP); Tr. at 43–45 (testimony by a friend of the Individual for over thirty years who was “shocked” when the Individual was arrested in 2023 because the friend knew the Individual to be a trustworthy and reliable person who complied with rules and had never experienced legal trouble before).

The Individual is well regarded in the workplace. According to the Individual’s second-line supervisor, other than a warning he gave the Individual for entering an area he was not supposed to when he was a new employee, the Individual has established a “perfect” employment record. Tr. at 16. A coworker of the Individual who worked with him daily prior to the suspension of the Individual’s access authorization described the Individual’s adherence to rules and regulations as “impeccable.” *Id.* at 23.

The Individual and his wife married in 2012. Ex. 10 at 132. In July 2022, the Individual’s wife revealed to him that she had been engaged in an extramarital affair since 2021. *Id.* at 69. The Individual and his wife separated in September 2022, and she moved out of the family home. *Id.* at 70. For the next several months, the Individual attempted to reconcile with his wife who returned to the family home for days at a time before leaving again on multiple occasions. *Id.* at 70–71; *see also id.* at 29–31 (reflecting the testimony of the Individual’s coworker that the Individual’s wife would call the Individual at work “constant[ly]” during the separation and that the Individual “remained calm and cool” but appeared “emotionally drain[ed]” by the situation). The Individual and his wife remained intimate during this period and on at least one occasion in late November or early December of 2022, with his wife’s knowledge, the Individual took an explicit photo of her. *Id.* at 55–56, 71–72.

According to the Individual, he shared the explicit photo of his wife during an altercation with his wife’s affair partner in December 2022. *Id.* at 52–54. The Individual testified at the hearing that his wife unexpectedly brought the affair partner to an exchange of custody of the Individual’s and his wife’s children, and a dispute ensued. *Id.* at 52–53. According to the Individual, he represented to the affair partner that he and his wife were “still trying to work things out” and that she was taking advantage of them both. *Id.* at 53–54; *see also id.* at 72–73 (testifying that prior to the altercation he believed that he and his wife were trying to reconcile and that she was living alone in an apartment, but that he learned during the argument that she was returning to the affair partner after her temporary stays at the family home). The Individual testified that the affair partner asked

for proof of the Individual's claims, and that he sent text messages containing the explicit photo to his wife and her affair partner to prove that he and his wife were still intimate and that she had been lying to the affair partner about the status of her relationship to the Individual.⁴ *Id.* at 54, 73.

The Individual surrendered to local law enforcement and was arrested on March 30, 2023, after learning from the lawyer representing him in his divorce proceeding that a warrant had been issued for his arrest. Ex. 5 at 20; Ex. 6 at 29. The Individual was charged with a felony but pleaded guilty to a misdemeanor offense to resolve the charges against him. Ex. 8 at 46–47; *see also* Tr. at 59–60 (testifying at the hearing that the charges were reduced to a misdemeanor by the prosecuting agency because it lacked sufficient evidence to convict him of the felony offense). On February 5, 2024, a judge issued an order deferring adjudication of the misdemeanor offense for two years and directing the Individual to pay a fine of \$1,000. Ex. 8 at 46. Pursuant to the order, the Individual was also required to, among other things, pay fees, refrain from committing any criminal offenses, and refrain from contact with his wife except as necessary to exchange custody of their children or discuss child-related matters. *Id.* at 46–52.

The Individual and his wife subsequently divorced. Tr. at 65; *see also* Ex. E (reflecting the caption of the divorce decree). According to the Individual, the two of them only communicate via a court-ordered cellphone application to ensure that “if anything is said or done it’s recorded . . .” Tr. at 65. The Individual claimed that he had voluntarily participated in counseling for anger management and to “make [him] feel better about the situation.”⁵ *Id.* at 75–76. The Individual testified that he regretted having embarrassed his wife by sending the explicit photo and that he had asked for her forgiveness. *Id.* at 57–58; *see also id.* at 18–19 (reflecting the testimony of the second-line supervisor that the Individual had told him that he had shared the photo in connection with a dispute over the relationship of the Individual’s “wife and another individual” and that the Individual showed “great remorse” for sharing the explicit photo when describing the incident to the second-line supervisor); *id.* at 47 (containing testimony from a friend of the Individual that the Individual had expressed regret and remorse for his conduct).

The Individual began making \$100 monthly payments in April 2024 to comply with the court’s order to pay fines and fees. Ex. C at 1 (containing a ledger showing the dates of the Individual’s payments); *see also* Tr. at 74 (reflecting the Individual’s testimony that he was unable to pay more towards the court-ordered fines and fees because of his child support obligations and reduced earnings as a result of the suspension of his access authorization). As of the date of the hearing, the Individual owed an unpaid balance of \$538. Ex. C at 2. The Individual testified that he had

⁴ I invited the Individual to submit the text of the messages, redacting or omitting any explicit images, to confirm the Individual’s claims as to the context in which he sent the image of his wife to the boyfriend. *See* Tr. at 79 (noting that I invited the Individual to submit the text of the messages during a pre-hearing conference). The Individual indicated that he could not do so because he had destroyed the texts pursuant to a court order in connection with his divorce. *Id.* at 63–64; *see also* Ex. F (excerpt from the divorce decree ordering the Individual to “destroy any and all photographs and/or videos of [his wife] that are sexually explicit or sexually suggestive in nature”).

⁵ I invited the Individual to submit a letter from his counselor after the hearing describing the nature and duration of his counseling. Tr. at 78–79. The Individual subsequently submitted an undated Microsoft Word document listing dates of the Individual’s attendance at counseling and the name of his counselor. Ex. B. I cannot adequately authenticate this document to conclude that it was prepared by a counselor providing services to the Individual and therefore I find that it does not corroborate the Individual’s claim to have attended counseling.

engaged in positive community involvement by volunteering to coach youth sports. Tr. at 50; *see also* Tr. at 48 (containing testimony from a friend of the Individual who believed that the Individual was “getting back into” volunteering).

V. ANALYSIS

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;
- (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.

Id. at ¶ 32.

The Individual is regarded as a reliable, trustworthy person by friends and colleagues and had no record of criminal conduct, other than traffic infractions, prior to his 2023 arrest. The circumstances in which the Individual shared the explicit photo – a dispute with his wife’s affair partner over the status of his relationship with his wife – constituted highly unusual circumstances. Taking into account the isolated nature of the Individual’s offense, his contrition for his conduct, his forthcomingness to his management about the nature of his conduct, and the fact that the Individual and his wife have divorced and he has destroyed all explicit images of his wife, I find it highly unlikely that the Individual will engage in similar conduct in the future. Accordingly, I find that the security concerns presented by the Individual’s conduct are mitigated under the first mitigating condition. *Id.* at ¶ 32(a).

The second mitigating condition is inapplicable because the Individual does not allege that he was pressured or coerced into transmitting the explicit photo of his wife. *Id.* at ¶ 32(b). The third mitigating condition is inapplicable because the Individual does not deny that he committed the offense. *Id.* at ¶ 32(c). With regard to the fourth mitigating condition, while the Individual has made some progress towards paying court ordered fines and fees, he has yet to satisfy this obligation despite the passage of approximately nine months since his sentencing. Although the Individual testified to attending counseling and volunteering as a youth sports coach, he has not brought forth sufficient evidence to corroborate these claims. As the Individual has yet to complete even half of the term of his probation, has not fully paid court-ordered fines and fees, and has not substantiated his other claimed positive actions towards

rehabilitation, I cannot conclude that the fourth mitigating condition is applicable. *Id.* at ¶ 32(d).

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

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 J 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 J. Accordingly, I have determined that the Individual's access authorization should be restored. 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