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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:	August 4, 2017)	Case No.:	PSH-17-0049
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Issued: October 23, 2017

Administrative Judge Decision

Janet R.H. Fishman, Administrative Judge:

This Decision concerns the eligibility of XXXXXXXXXXXX (hereinafter referred to as “the individual”) to hold an access authorization¹ under the Department of Energy’s (DOE) regulations set forth at 10 C.F.R. Part 710, entitled “General Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material.” 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*, effective June 8, 2017 (Adjudicative Guidelines), I conclude that the individual’s access authorization should not be granted.

I. Background

The individual is employed by a DOE contractor in a position requiring a DOE security clearance. The Local Security Office (LSO) received potentially derogatory information regarding the individual’s personal conduct, federal and state tax delinquency, and criminal conduct. In order to address those concerns, the LSO summoned the individual for a Personnel Security Interview (PSI) in May 2017.

On June 30, 2017, the LSO sent the individual a letter (Notification Letter) advising him that the DOE possessed reliable information that created substantial doubt regarding his eligibility to continue to hold an access authorization. In an attachment to the Notification Letter, the LSO explained that the derogatory information fell within the purview of Guidelines E (Personal Conduct), F (Financial Considerations), and J (Criminal Conduct) of the Adjudicative Guidelines.

¹ Access authorization is defined 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). Such authorization will be referred to variously in this Decision as access authorization or security clearance.

Upon receipt of the Notification Letter, the individual exercised his right under the Part 710 regulations by requesting an administrative review hearing. The Director of the Office of Hearings and Appeals (OHA) appointed me the Administrative Judge in the case, and I subsequently conducted an administrative hearing in the matter. At the hearing, the individual testified on his own behalf and presented the testimony of one witness. The DOE Counsel submitted five exhibits (Exhibits 1-5) into the record. The individual tendered two exhibits (Exhibits A-B). The exhibits will be cited in the Decision as “Ex.” followed by the appropriate numeric or alphabetic designation. The hearing transcript in the case will be cited as “Tr.” followed by the relevant page number.²

II. Regulatory Standard

A. Individual’s Burden

A DOE administrative review proceeding under Part 710 is not a criminal matter, where the government has the burden of proving the defendant guilty beyond a reasonable doubt. Rather, the standard in this proceeding places the burden on the individual because it is designed to protect national security interests. This is not an easy burden for the individual to sustain. 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 his 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.

B. Basis for the Administrative Judge’s Decision

In personnel security cases arising under Part 710, it is my role 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). I am instructed by the regulations to resolve any doubt as to a person’s access authorization eligibility in favor of the national security. *Id.*

² OHA decisions are available on the OHA website at www.energy.gov. A decision may be accessed by entering the case number in the search engine at www.oha.gov/search.htm.

III. Notification Letter and Associated Security Concerns

As previously mentioned, the Notification Letter included a statement of derogatory information that raised concerns about the individual's continued eligibility to hold an access authorization. The information in the letter specifically cited Guidelines E, F, and J of the Adjudicative Guidelines. Under 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. *See* Guideline E at ¶ 15. Of special interest is any failure to cooperate or provide truthful and candid answers during national security investigative or adjudicative processes. *Id.* In citing Guideline E, the LSO asserted that: (1) the individual omitted three alcohol-related charges from his Questionnaire for National Security Positions (QNSP); (2) the individual omitted two criminal charges that were drug related from his QNSP; (3) the individual omitted three felony charges from his QNSP; (4) the individual failed to disclose that he had not filed his 2015 state or federal tax returns; (5) the individual omitted from his QNSP that he had not filed his federal or state tax returns for the years 2009 through 2014; and (6) the individual stated on his QNSP that he had received his high school diploma, although he had not. Ex. 1 at 1-2.

Failure to live within one's means, satisfy debts, and meet financial obligations may indicate poor self-control, lack of judgment, or unwillingness to abide by rules and regulations, all of which can raise questions about an individual's reliability and trustworthiness. *See* Guideline F at ¶ 18. Of special note is the failure to file or fraudulently filing annual Federal, State, or local income tax returns, along with the failure to pay what tax is required. *See* Guideline F at ¶ 19(f). In citing Guideline F, the LSO asserted that the individual had failed to file his federal and state tax returns for the years 2015 and 2016.

Finally, 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. *See* Guideline J at ¶ 30. In citing Guideline J, the LSO asserted that the individual had 14 criminal charges on his record, including a 2012 charge of Aggravated Driving While Intoxicated (ADWI) and Motorcycle License Endorsement. In addition, the LSO asserted that the individual admitted to using marijuana approximately once a month between 1992 and 1997. Ex. 1 at 6.

IV. Findings of Facts and Hearing Testimony

During an investigation for the individual's security clearance, discrepant information arose that caused the LSO to interview the individual. Ex. 5. At the May 2016 PSI, the individual admitted that he did not list any of his criminal charges on the QNSP, including some felony offenses and some offenses that involved controlled substances. Ex. 5. The individual stated that he is embarrassed by all the charges listed in his record. Tr. at 18. At the hearing, he stated that he thought the question was whether he had been *convicted* of any charges, rather than been *charged* with any crime. Tr. at 16. In addition to the criminal charges, he confessed that he omitted his failure to file his 2009 through 2015 federal or state tax returns on the QNSP. Ex. 5. At the PSI, the individual stated that he had also failed to file his 2016 federal and state tax returns. Ex. 5 at 14. On the QNSP, the individual also answered that he had received his high school diploma, when he had not, in fact, graduated. Ex. 5 at 171; Tr. at 36. He stated at the hearing that he was

six months short of finishing high school when he received a job offer that he felt he needed to accept to help his family. Tr. at 38. He routinely indicates on job applications that he graduated from high school even though he has not. Tr. at 40. The individual did testify that rather than completing the QNSP on his own, he was interviewed by someone else who completed the paperwork. Tr. at 30, 32. He could not recall whether she asked him the complete questions or not. Tr. at 31.

During the hearing, the individual testified regarding his 2012 criminal charge. He stated that he had been at a tattoo convention where he was competing and was driving his motorcycle home when he misjudged a curve and crashed. Ex. 5 at 32. He continued that he never consumes alcohol when he is competing. Ex. 5 at 36. However, he admitted he was carrying a small bottle of alcohol in his saddlebags, and he believes that is why the responding officers assumed he had been consuming alcohol. Ex. 3 at 3; Ex. 5 at 35. He stated that he was taken to the hospital where a blood test was performed, but he does not know if his blood alcohol level was tested. DOE Ex. 3 at 3. The individual continued that, after a trial, he was found not guilty. Ex. 5 at 31; Tr. at 35. About his other criminal charges, the individual testified that “I hung out with a bad crowd, I think. I had crazy friends and did dumb things, made poor choices.” Tr. at 20. At the PSI, the individual admitted that he used marijuana once a month from 1992 to 1997. Ex. 1 at 6.

The individual’s fiancée testified that she trusts him, stating, “I trust him with the lives of my children.” Tr. at 11. She also testified that if she had seen his criminal record prior to getting to know him, she never would have made an effort. Tr. at 19.

V. Analysis

I have thoroughly considered the record of this proceeding, including the submissions tendered in this case and the testimony of the witness presented at the hearing. In resolving the question of the individual’s eligibility for access authorization, I have been guided by the applicable factors prescribed in 10 C.F.R. § 710.7(c) and the Adjudicative Guidelines. After due deliberation, I have determined that the individual’s security clearance should not be granted. I cannot find that granting the individual’s DOE security clearance will not endanger the common defense and security, and is clearly consistent with the national interest. 10 C.F.R. § 710.27(a). The specific findings that I make in support of this decision are discussed below.

A. Adjudicative 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 cooperate or provide truthful and candid answers during national security investigative or adjudicative processes. *See* Guideline E at ¶ 15. Here, the individual failed to list any of his numerous criminal charges on his QNSP, including those involving controlled substances and alcohol or were felonies. In addition, the individual failed to list his federal or state tax delinquencies between 2009 and 2015 and falsely claimed he had a high school diploma. Ex. 1.

Conditions that could mitigate this security concern 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;

* * *

(e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress

See id. at ¶ 17(a)-(c), (e). The individual failed to list his numerous criminal charges on his QNSP. At the PSI and the hearing, the individual claimed that he confused the words “charges” and “conviction.” While that may be true, it is not excused by the mitigation factors listed above. Further, the individual did not correct the situation until confronted by the Office of Personnel Management (OPM) investigator. I cannot find that the individual has resolved his failure to list them under any of the mitigation criteria listed above.

As to the individual’s failure to disclose on the QNSP that he had not filed his federal and state income tax returns, I do not believe he has met any of the mitigation criteria listed above. The individual did not voluntarily disclose the fact that he failed to file his tax returns until confronted by the OPM investigator. Furthermore, he does not allege that he received poor advice from an attorney or other professional.

The individual has since filed those outstanding tax returns, thereby reducing his vulnerability to blackmail. However that is insufficient to mitigate the concern raised by the individual’s failure to file his federal and state tax returns for seven years.

Finally, the individual falsely claimed on the QNSP that he received a high school diploma, although he did not. He was candid about his lack of diploma at the hearing; however, he admitted that he usually answers “yes” when asked on an employment application. Again, the individual has not adequately mitigated the concern raised by the falsification on his QNSP. Although he is open about his lack of a high school diploma, he does consistently falsify the matter on applications and did on his QNSP. Further, he does not allege that he received poor advice from an attorney or other professional regarding this matter.

In summary, the evidence before me is insufficient to resolve the individual’s omissions and falsifications on his QNSP.

B. Adjudicative Guideline F

Failure to live within one's means, satisfy debts, and meet financial obligations may indicate poor self-control, lack of judgment, or unwillingness to abide by rules and regulations, all of which can raise questions about an individual's reliability, trustworthiness, and ability to protect classified or sensitive information. Guideline F at ¶ 18. Listed as a condition that may raise such a security concern is "failure to file or fraudulently filing annual Federal, state, or local income tax returns or failure to pay annual Federal, state, or local income tax as required." *Id.* at 19(f). During the PSI, the individual admitted that he failed to file his 2015 and 2016 federal and state tax returns. Until he files those returns, his tax liability is unknown and he has failed to "meet financial obligations."

Conditions that could mitigate this security concern are:

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

* * *

(d) the individual initiated and is adhering to a good-faith effort to repay overdue creditors or otherwise resolve debts;

* * *

(g) the individual has made arrangements with the appropriate tax authority to file or pay the amount owed and is in compliance with those arrangements.

Id. at ¶ 20(a), (d), (e). In this case, the individual's behavior occurred within the past two years. Further, he had failed to file his previous six years of tax returns. Therefore he does not meet the conditions in ¶ 20(a). However, the individual has now filed all of his tax returns, including those for years 2015 and 2016. Ex. A; Ex. B. I find, therefore, that he has resolved the concern under ¶ 20(d) and ¶ 20(g) raised by his failure to file his 2015 and 2016 federal and state tax returns.

C. Adjudicative Guideline J

Criminal activity creates doubt about a person's judgment, reliability, and trustworthiness and by its very nature, it calls into question a person's ability or willingness to comply with laws, rules, and regulations. Guideline J at ¶ 30. A pattern of minor offenses or evidence of criminal conduct, even if the individual was not charged, prosecuted, or convicted, is sufficient to raise a security concern. *Id.* at 31 (a)-(b). In this case, the individual has a list of 14 criminal charges and admitted that he smoked marijuana once a month between 1992 and 1997.

Conditions that could mitigate the security concern are:

(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;

* * *

(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(a), (d). The individual has 14 separate charges listed in the Notification Letter. Ex. 1 at 4-5. Most of these charges are over ten years old, except for one charge from 2012. His marijuana use, also

raised as a security concern under Guidelines J, ceased 20 years prior to the hearing. For the marijuana use and the charges that are over ten years old, with five of them being over 20 years old, I find that the individual has resolved the concerns under ¶ 32(a) and (d). A sufficient amount of time has passed, and therefore, these charges do not cast doubt on the individual's reliability, trustworthiness, or good judgment thereby satisfying ¶ 32(a). Further, because of the amount of time that has passed, I believe that he shows evidence of rehabilitation, thereby satisfying ¶ 32(d). That being said, the individual does have criminal charges from 2012, resulting from a motorcycle accident. Although the individual did not bring forth any evidence except for his own testimony that the charges had been dismissed, I find his recounting of the incident to be credible and convincing. The individual testified that he never consumes alcohol when he is competing. He also testified that he was taken to the hospital, where a blood test was performed. He asserted that the results were not presented at his trial for the ADWI, as I believe they would have been had he had an elevated blood alcohol level. Therefore, I find that the individual has resolved the security concerns raised by his criminal charges under Guideline J.

VI. Conclusion

In the above analysis, I have found that there was sufficient derogatory information in the possession of the DOE that raised serious security concerns under Guidelines E, F, and J. After considering all of the relevant information, favorable and unfavorable, in a comprehensive common-sense manner, including weighing all of the testimony and other evidence presented at the hearing, I find that although the individual has brought forth sufficient evidence to resolve the security concerns associated with Guidelines F and J, he has not brought forth sufficient evidence to resolve the security concerns associated with Guideline E. I therefore cannot find that granting the individual's access authorization will not endanger the common defense and is clearly consistent with the national interest. Accordingly, I have determined that the DOE should not grant the individual's access authorization.

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

Date: October 23, 2017