

request to the Office of Hearings and Appeals (OHA). On June 4, 2020, the Director of OHA appointed me as the Administrative Judge in this matter. DOE submitted eleven exhibits, marked as Exhibits 1 through 11 (cited as “Ex.”). The Individual submitted ten exhibits, marked as Exhibits A through J.² At the hearing, the Individual presented his own testimony.

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. The LSO cited Guideline E (Personal Conduct) and Guideline M (Use of Information Technology) as the basis for suspending the Individual’s security clearance. Guideline E states 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.” Adjudicative Guidelines at ¶ 15. Special emphasis is placed on “any failure to cooperate or provide truthful and candid answers during national security investigative or adjudicative processes.” *Id.* A condition that could raise a security concern includes “a pattern of dishonesty or rule violations.” *Id.* at ¶ 16 (d)(3). Guideline M states that “[f]ailure to comply with rules, procedures, guidelines, or regulations pertaining to information technology systems may raise security concerns about an individual’s reliability and trustworthiness, calling into question the willingness or ability to properly protect sensitive systems, networks, and information.” *Id.* at ¶ 39. Information technology “includes any computer-based . . . device used to . . . access . . . information.” *Id.* The information submitted by the LSO includes the Individual’s three-day suspension for information technology system misconduct, his documented rule violations, his failure to disclose information during the security process, and his continued failure to take responsibility for his actions. The information presented in the Notification Letter justifies the LSO’s invocation of Guidelines E and M.

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) (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 or her eligibility for an access authorization.

² Exhibits 11 and J were submitted and received after the hearing.

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's Alleged Inappropriate Access of Files on Classified Computer Systems

In 2018, the Individual's employer directed an investigation into the inappropriate access of unclassified documents contained on a DOE site's classified computer system by several employees. Ex. 7 at 1. During the investigation, the investigator identified twenty-seven documents allegedly accessed by the Individual, and then asked the Individual to confirm whether he had viewed each document. *Id.* at 18-21. The Individual admitted to viewing some but not all of the documents. *Id.* at 19. Some of the documents he admitted viewing included a Counseling Database; interview questions for a higher-ranked position because he thought "it could help him in an interview"; a union discipline document; and emails to and from other employees. *Id.* at 19, 20-22. For the remaining documents, the Individual admitted attempting to access them, but he explained that he was unsuccessful due to access restrictions. *Id.* These documents included, among others, a document referred to as "Grievances"; a verbal counseling letter to another employee; a document with a title that included the name of two other employees; and two union related documents. *Id.* at 20-22. After being shown the documents he attempted to view, he confirmed that several of them contained information that would not have been appropriate for him to read, had he gained access to them. *See, e.g., id.* at 21.

The investigator's report provided general and specific conclusions and recommendations. Generally, it concluded that the employees were unintentionally given access to several documents. Ex. 7 at 37. The report recommended training employees on the company's "need to know" standard for accessing documents in light of the employees' apparent lack of understanding that the standard applied to unclassified material. *Id.* at 37. Specific to the Individual, the report concluded the Individual had been untruthful during the investigation, noting that while the Individual admitted to viewing some documents, he had denied accessing the most sensitive management-intended documents. *Id.* at 42. The report also concluded that he had accessed documents in violation of the net user agreement and his access of the interview questions and lack of truthfulness violated the employer's rules of conduct. *Id.* at 42.

Based on the report, the Individual received a three-day suspension in September 2018. Ex. 8. The suspension letter recounted that the Individual admitted that he had opened a document with the designation "Personal & Private" and "Management Sensitive Communication" that was not intended for him to access. *Id.* It also stated that he "failed to fully cooperate during the Company investigation, lied, and/or withheld information during [the] interview." *Id.*

The Individual submitted evidence that several other investigated employees also told investigators that they were unable to access, or could not recall accessing, some of the documents that they

were alleged to have accessed. Ex. A; Ex. B; Ex. C. The report of investigation similarly concluded that many of these employees were not credible or provided misleading statements. *See, e.g.*, Ex. C at 30.

At the hearing, the Individual testified that he only received a few minutes of training on the concept of “need to know” in relation to unclassified documents. Tr. at 15. In essence, the Individual explained that he did not believe, at the time, that he was violating the company policy by attempting to access the twenty-seven documents. *See, e.g., Id.* at 31. Furthermore, the Individual testified that several colleagues engaged in the same behavior. *Id.* at 23. The Individual explained that the questionable documents he accessed were in the same folder as documents that he was authorized to access. *Id.* at 30-31. He also testified that he was completely truthful during the investigation and took responsibility for his actions. *Id.* at 45.

Turning to specific documents, the Individual testified that he believed he had a right to view the Counseling Database because he heard his name was included in the database and he wanted to evaluate its accuracy. Tr. at 38-39. Afterward, the following exchange occurred:

[Individual]: Yes. So, like the verbal counseling database, when I was granted access to that I thought, I felt that I should absolutely be able to see that.

[DOE Counsel]: Okay. You felt you should be able to see that? Anything that might have contained personal information about other employees?

[Individual]: Personal information? I don't ever recall seeing anything that was, that contained personal information.

[DOE Counsel]: [. . .] Would you consider a counseling statement given to a fellow [employee] as being personal employment information?

[Individual]: I guess, I don't know. I guess you could call it that.

[DOE Counsel]: All right. Well, isn't it a fact that you reviewed all of the counseling statements that were contained in the folder?

[Individual]: So, yes. Well, in order to find the ones that included me you had to scroll through everything. So, in this also you could argue that everyone had access to my information as well.

. . . .

[DOE Counsel]: So, it's your testimony today then that you went through most of the files in the PF counseling folder, and reviewed even negative counseling statements given to fellow employees?

[Individual]: That is correct, as well as my own.

Id. at 66-69. When later asked whether the suspension letter was correct in stating that he admitted to opening a document designated “Personal & Private” and “Management Sensitive Communication,” he first agreed with the statement before testifying that he could not remember. *Id.* at 105-06. He also testified that he does not currently think it was inappropriate for him to access and review the interview questions for a higher-ranked position for which he was interested in applying. *Id.* at 32, 75-76.

The Individual further testified that he no longer accesses documents at work unless he is told to do so, and he keeps it “very simple on the computers” *Id.* at 99. He also testified that he “would seek advice from management” if he believed he was going to view something which appeared “questionable.” *Id.* at 116. He went on to state that the entire process has been “painstaking” and something he does not want to repeat. *Id.* at 99.

Finally, the record includes a declaration from an Information Technology Advisor (“IT Advisor”) who opined that, while the Individual’s record of accessing documents “could technically have included failed attempts . . . in addition to actual access to document content[,] . . . it is standard practice that files inherit permissions from their parent folders so I would expect that access would be consistent across all files in a particular directory.” Ex. 11 at 4. The report of investigation contains similar information. Ex. at 5.

The Individual’s Alleged Rule Violations

In addition to the above technology-related misconduct, the Individual allegedly failed to follow site security procedures on four occasions. The first three alleged violations were for excessive cell phone use and resulted in verbal counseling for each of the violations. Ex. 4 at 7, 8. The fourth alleged violation occurred after the Individual was caught watching a video on his personal phone while on duty. Ex. 6 at 16. As a result, his manager issued him a November 2017 Record of Discussion. *Id.* In response, the Individual told the manager that he would comply with security procedures and no longer watch videos on his cell phone. Ex. 4 at 8. When questioned about this incident during an Enhanced Subject Interview (ESI), the Individual stated he was not aware that he was breaking any rule watching the video. *Id.* at 7. The Record of Discussion states that the Individual watched the video for an “extended period” and “was unaware of what was happening at his assigned post.” Ex. 6. The letter also notes that, when the Individual’s manager first asked what he was watching on his phone, the Individual responded by stating “nothing” before admitting the truth. *Id.*

At the hearing, the Individual admitted he watched a “short video clip” on his phone and also testified that other employees engaged in the same behavior because it was part of the culture. Tr. at 47-48. He testified that he did not recall the dates of the verbal counseling that preceded the Record of Discussion, and he could not “recall any sort of conversation on those dates” or “remember what was said . . . or what was not said. . . .” *Id.* at 89. The Individual also testified that he had generally received exemplary performance evaluations from his employer since being hired in 2014. Tr. at 13.

The Individual’s Alleged Failure to Report Misconduct

The record indicates the Individual did not disclose the investigation in his May 2018 Questionnaire for National Security Positions (QNSP) that he submitted in connection with a reinvestigation for continued access authorization. The Individual testified that he did not know about the investigation when he initially submitted the QNSP. Tr. at 46-47. He also testified that he disclosed the investigation to the investigator during the first ESI interview despite there being no reference to the disclosure in the ESI records. Tr. at 47, 49.

There is no dispute the Individual failed to disclose his Record of Discussion in the QNSP. The QNSP included the question whether the Individual had received, within the last seven years, a written warning or official reprimand for misconduct from his employer. Ex. 3 at 27. He similarly provided a negative response to the same question during his initial ESI interview, but when the investigator confronted him in a follow-up ESI interview after discovering the Record of Discussion, he stated that he “completely forgot” about it. Ex. 4 at 7.

The record contains the text of the Record of Discussion, which the Individual acknowledged and signed.³ Ex. 6. The letter contains the following language: “This is the fourth occurrence of this unacceptable behavior in the past 9 months The previous 3 events resulted in verbal counseling. This behavior . . . is a serious matter. Any further occurrences will result in disciplinary action up to and including termination.” *Id.* at 16.

At the hearing, the Individual testified that a Record of Discussion differs from a letter of reprimand.⁴ Tr. at 48. He defined the former as “simply an on the record talk between me and my supervisor . . . about behavior[,]” not discipline. *Id.* He stated the Union Board told him that “a letter of discussion is not a discipline or reprimand” and “it does not need to be noted on anything.” *Id.* at 97. However, he also stated that while it is “an informal thing[,] management uses it to “address the behavior and kind of nip it in the bud.” *Id.* at 48-49. Finally, he stated that, despite his understanding that it is not discipline, he would include it in future QNSPs. *Id.* at 97.

V. ANALYSIS

I have thoroughly considered the record of this proceeding, including the submissions tendered in this case and the testimony of the Individual. 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 access authorization should not be restored. I cannot find that restoring the Individual’s security clearance will not endanger the common defense and security, and that it 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.

Guideline E

The Guideline E security concerns stem from the Individual’s repeated rule violations and alleged lack of candor during the employer-led investigation and the subsequent security

³ The record contains the relevant information from the Record of Discussion, not the letter itself.

⁴ The terms Record of Discussion and letter of discussion are interchangeable.

clearance investigation process. Conditions that may mitigate Guideline E concerns include, in relevant part:

...

- (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;

....

Adjudicative Guidelines at ¶ 17.

In this case, the Individual committed two types of rule violations: the security protocol infractions that led to his Record of Discussion and his misuse of the computer system that resulted in his three-day suspension. Regarding the former, excessive phone use while on duty is relatively minor. However, it required three verbal counseling notices and one written notice within a nine-month period before the Individual ceased the behavior. Furthermore, less than a year passed before he received a three-day suspension for misconduct.

Although almost two years have passed since the Individual's last disciplinary incident, the suspension, I remain concerned by his statements and testimony surrounding his rule violations, which reflect negatively on his candor and character for truthfulness. For instance, he did not initially respond truthfully to his supervisor when asked about his cell phone use; he only admitted to watching a video when confronted with evidence. Then, during his ESI, he told the interviewer that he did not know he was breaking a rule, which I find not to be credible because the Individual had been verbally counseled on three prior occasions regarding his phone use; he must have therefore known that he was violating the rules the second, third, and fourth time he decided to inappropriately use his cell phone while on duty. Furthermore, if he truly believed that he was not violating a rule, he would have little incentive to deny his conduct before his supervisor confronted him with the evidence. Further still, he characterized the video as short while the record reflects he watched the video for an extended period. While minor, it appears to be another attempt to minimize the behavior. Additionally, I do not place much weight on his testimony that his behavior was part of the work culture. I do not find this

excuse credible given that his employer counseled him several times on the issue. Finally, the Individual's testimony that he had generally received exemplary performance evaluations from his employer since being hired in 2014 does not outweigh the concerns raised by his misconduct discussed above.

I am similarly concerned by his testimony surrounding his questionable use of the employer's computer system. The Individual disputes the finding that he was not truthful during the investigation, and attempts to blame his attempts to access the prohibited documents on a lack of training. I do not believe he has thereby mitigated the Guideline E concerns. I did not receive any information which convinced me that his employer was incorrect in its finding of misconduct. First, he admitted that he attempted to access the twenty-seven documents. Second, an IT Advisor explained that it would be atypical for the Individual to have access to some, but not all, documents in a particular folder. Thus, the employer had evidence the Individual withheld information or failed to fully cooperate with the investigation when he denied reading some of the files. Third, the Individual admitted during the investigation that he should not read documents identified as "Personal & Private."

The Individual conceded during the hearing, after an initial denial, that some of the documents he reviewed contained personal information related to other employees. Consequently, I find specious his continued explanation that, at the time, he did not think he was violating a rule by reviewing documents that contained personal information related to other employees and unrelated to his employment. In a similar vein, I am concerned by his continued belief that it was appropriate to access and review interview question in order to gain personal advantage. My concerns remain despite the fact that he did not apply to the position and that other employees engaged in similar behavior. I therefore remain concerned by the Individual's questionable judgment, lack of candor, dishonesty, and unwillingness to comply with rules and regulations.

Turning to the Individual's failure to disclose misconduct during the security clearance process, I find questionable his explanation for omitting his Record of Discussion in his QNSP. Standing alone, this may be characterized as minor, but it is another example of questionable judgement and lack of candor. Just as he initially denied watching a video on his cell phone until confronted with evidence, he initially denied receiving any record of warnings or discipline before being challenged during a second ESI interview. He then blamed his omission on poor memory. At the hearing, he went to great lengths to explain that he thought, and still thinks, that the Record of Discussion, which documented his "fourth occurrence" of "unacceptable behavior" and stated that any further occurrences will result in "disciplinary action up to an including termination," did not constitute a written warning. The language of

the document leaves little doubt it is a written warning. His present assertion that he relied upon the Union Board's definition of reportable discipline does not mitigate the concern.

Finally, the record contradicts the Individual's testimony that he disclosed the misconduct investigation during the first ESI interview. Accordingly, I do not find that the Individual has mitigated the Guideline E concerns.

Guideline M

The Individual attempted to mitigate his failure to comply with his employer's information technology system rules by demonstrating that he is not likely to repeat the behavior and that the behavior resulted from the company's culture and inadequate training. The following relevant conditions may mitigate Guideline M concerns:

- (a) So much time has elapsed since the 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) The misuse was due to improper or inadequate training or unclear instructions.

Adjudicative Guidelines at ¶ 41.

The LSO relied upon information related to the Individual's concerning use of the employer's technology system to invoke both Guidelines E and M. Therefore, the same conclusions I reached in the preceding section for Guideline E also prevent me from finding that the Individual has mitigated the Guideline M concerns. The record in this case, along with the Individual's testimony regarding the circumstances that led to his suspension for violating his employer's information technology rules of conduct, leave me with doubt regarding his reliability, trustworthiness, and good judgment or that such misconduct will be unlikely to reoccur.

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 and M of the Adjudicative Guidelines. I further find that the Individual has not succeeded in resolving those concerns, and I cannot conclude that restoring the Individual'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). Accordingly, I have determined that the Individual's access authorization should not be restored. Either party may seek review of this Decision by an Appeal Panel pursuant to 10 C.F.R. § 710.28.

James P. Thompson III
Administrative Judge
Office of Hearings and Appeals