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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: January 10, 2013	)	Case No.: PSH-13-0005
	)	
	)	

Issued: May 16, 2013

Hearing Officer Decision

Steven J. Goering, Hearing Officer:

This Decision concerns the eligibility of XXXXXXXX (hereinafter referred to as "the individual") for access authorization under the regulations set forth at 10 C.F.R. Part 710, entitled "Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material."[1] For the reasons set forth below, I conclude that the DOE should not restore the individual's access authorization at this time.

I. BACKGROUND

The individual is an employee of a DOE contractor and holds a suspended access authorization. On a February 1, 2012, Questionnaire for National Security Positions (QNSP), the individual reported that, in July 2008, he was arrested and charged with Driving Under the Influence (DUI). Exhibit 4. In addition, an Office of Personnel Management (OPM) background investigation revealed that the individual was also arrested and charged with DUI on March 2, 2010. Exhibit 8. Because of the concern these arrests raised, a Local Security Office (LSO) summoned the individual for an interview (PSI) with a personnel security specialist on August 16, 2012. Exhibit 7. After the PSI, the LSO determined that derogatory information existed that cast into doubt the individual's eligibility for access authorization. Exhibit 3. The LSO informed the individual of this determination in a Notification Letter that set forth the DOE's security concerns and the reasons for those concerns. Exhibit 1. The Notification Letter also informed the individual that he was entitled

[1] An access authorization is an administrative determination that an individual is eligible for access to classified matter or special nuclear material. 10 C.F.R. § 710.5. Such authorization will be referred to in this Decision as access authorization or a security clearance.

to a hearing before a Hearing Officer in order to resolve the substantial doubt concerning his eligibility for access authorization.

The individual requested a hearing in this matter. The LSO forwarded this request to OHA, and I was appointed the Hearing Officer. The DOE introduced nine exhibits into the record of this proceeding. The individual introduced four exhibits and presented the testimony of two witnesses, in addition to his own testimony.

II. REGULATORY STANDARDS

The criteria for determining eligibility for security clearances set forth at 10 C.F.R. Part 710 dictate that in these proceedings, a Hearing Officer must undertake a careful review of all of the relevant facts and circumstances, and make a "common-sense judgment . . . after consideration of all relevant information." 10 C.F.R. § 710.7(a). I must therefore consider all information, favorable and unfavorable, that has a bearing on the question of whether restoring the individual's security clearance would compromise national security concerns. Specifically, the regulations compel me to consider the nature, extent, and seriousness of the individual's conduct; the circumstances surrounding the conduct; the frequency and recency of the conduct; the age and maturity of the individual at the time of the conduct; the absence or presence of rehabilitation or reformation and other pertinent behavioral changes; the likelihood of continuation or recurrence of the conduct; and any other relevant and material factors. 10 C.F.R. § 710.7(c).

A DOE administrative proceeding under 10 C.F.R. Part 710 is "for the purpose of affording the individual an opportunity of supporting his eligibility for access authorization." 10 C.F.R. § 710.21(b)(6). Once the DOE has made a showing of derogatory information raising security concerns, the burden is on the individual to produce evidence sufficient 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 regulations further instruct me to resolve any doubts concerning the individual's eligibility for access authorization in favor of the national security. 10 C.F.R. § 710.7(a).

III. FINDINGS OF FACT AND ASSOCIATED SECURITY CONCERNS

The Notification Letter cited derogatory information within the purview of two potentially disqualifying criteria set forth in the security regulations at 10 C.F.R. § 710.8, subsections (f) and (l) (hereinafter referred to as Criteria F and L, respectively). Exhibit 1.[2] Under Criterion F, the LSO cited the individual's response on the 2012 QNSP indicating that he had not been on probation in the last seven years, his omission of his 2010 DUI arrest from the 2012 QNSP, and his omission of his

[2] Criterion F defines as derogatory information indicating that the individual has "[d]eliberately misrepresented, falsified, or omitted significant information from a Personnel Security Questionnaire, a Questionnaire for Sensitive (or National Security) Positions, a personnel qualifications statement, a personnel security interview, written or oral statements made in response to official inquiry on a matter that is relevant to a determination regarding eligibility for DOE access authorization, or proceedings conducted pursuant to § 710.20 through § 710.31." 10 C.F.R. § 710.8(f). Under Criterion L, information is derogatory if it indicates that the individual has "[e]ngaged in any unusual conduct or is subject to any circumstances which tend to show that the individual is not honest, reliable, or trustworthy; or which furnishes reason to believe that the individual may be subject to pressure, coercion, exploitation, or duress which may cause the individual to act contrary to the best interests of the national security." 10 C.F.R. § 710.8(l).

2008 DUI arrest from QNSPs he completed in January 2009 and January 2010. Under Criterion L, the Notification Letter cited the individual's 2008 and 2010 DUI arrests,[3] and his failure to report either of those arrests within the time period required. *See* DOE M 470.4-5 (August 26, 2005) at V-1 (requiring "direct notification to the cognizant DOE personnel security office," verbally within two working days followed by written confirmation within the next three working days, of "any arrests, criminal charges (including charges that are dismissed), or detentions").

Though the individual acknowledges that he failed to list his 2008 DUI arrest on his 2009 and 2010 QNSPs, Hearing Transcript (Tr.) at 52-53, he contends that he, in fact, did list both his 2008 and 2010 DUI arrests on his 2012 QNSP, which he completed electronically using the OPM's Electronic Questionnaires for Investigations Processing (e-QIP) system. Exhibit 2; Ex. 7 at 101-02; Tr. at 44-45 ("I do not know why they are not here"). As the individual has provided no evidence to show that the e-QIP system would not have captured all of the information he entered on his 2012 QNSP, I find here that the individual did not provide information regarding his 2010 DUI on the 2012 QNSP.[4]

Other than this, the individual has not disputed any of the allegations set forth in the Notification Letter, Tr. at 14-15, and, with the exception of the number of times the individual has been arrested for DUI, discussed above, *see supra* note 3**,** I find that the allegations are supported by the evidence in the record, and are therefore valid. *See* 10 C.F.R. § 710.27(c) (requiring that Hearing Officer "make specific findings based upon the record as to the validity of each of the allegations" in the Notification Letter).

I further find that the allegations in the Notification Letter adequately justify the DOE's invocation of Criteria F and L, and raise significant security concerns. First, any failure to provide truthful and candid answers during the security clearance process demonstrates questionable judgment, lack of candor, dishonesty, and/or unwillingness to comply with rules and regulations. *See Revised Adjudicative Guidelines for Determining Eligibility for Access to Classified Information* (*Adjudicative Guidelines*), The White House (December 19, 2005) at ¶ 15(b). More generally, conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations, such as the failure to timely report certain events to DOE, can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. *Id.* at ¶ 15. In addition, evidence of criminal conduct 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. *Id.* at ¶ 30.

[3] The Notification Letter cites DUI arrests occurring in July 2008, January 2009, March 2010, and August 2010. However, my review of the record leads me to conclude that references to July 2008 and January 2009 both relate to the individual's July 2008 arrest, and that the references in the record to March 2010 and August 2010 both relate to the individual's March 2010 arrest. *See* Exhibit 8; Exhibit D at 3-4; Tr. at 45-51, 62.

[4] Based on the omission of the information alone, it is reasonable to presume that this omission was deliberate, for purposes of determining whether the omission raises a concern under Criterion F. I address separately below whether this concern has been resolved by evidence that the individual, in fact, intended to include his 2010 DUI arrest on the QNSP.

IV. ANALYSIS

A. Criterion F

First, regarding his omission of information from his 2012 QNSP, the individual contends that he believed that he did report his 2010 DUI charge on the QNSP. He testified that he completed the QNSP, which was submitted electronically, while he was working in a remote location, and that he completed part of it on his Blackberry. Tr. at 31. As noted above, there is no evidence in the record that the e-QIP system would not have captured all of the information the individual entered when completing his 2012 QNSP. And while it is possible that the individual intended to report his 2010 DUI charge on the QNSP, I find it more likely that the individual purposefully omitted this information. This finding is supported by the undisputed fact that the individual previously failed to report his 2008 DUI arrest on two prior QNSPs, completed in January 2009 and January 2010. Thus, it would not have been out of character for the individual to omit an arrest on his most recent QNSP.

With respect to his negative response to the question on the 2012 QNSP regarding whether he had been on probation in the last seven years, the individual states that he was not aware that he had been sentenced to three years of probation for both the 2008 and 2010 DUI offenses. Tr. at 31-32 ("I was told by my attorneys that I was not."). For the same reason that I find that the individual intentionally omitted intentionally his 2010 DUI charge from the 2012 QNSP, I find that his failure to report his probation stemming from the 2010 offense was also intentional. However, I find it less likely that the individual intentionally failed to report the three-year probation he received in connection with the 2008 DUI arrest, both because he freely reported the arrest itself on the 2012 QNSP, and because the record indicates that the probation for the 2008 offense was informal, or unsupervised, probation. Exhibit 7 at 28, 104.

Nonetheless, what is left are the individual's admitted intentional falsifications regarding criminal charges on two QNSPs, in 2009 and 2010, and what I find to be further intentional falsification regarding criminal charges on a third QNSP, completed in February 2012. Considering whether concerns raised by an individual's deliberate omission and false statements have been resolved, Hearing Officers have generally taken into account a number of factors, including whether the individual came forward voluntarily to renounce his falsifications, the timing of the falsification, the length of time the falsehood was maintained, whether a pattern of falsification is evident, and the amount of time that has transpired since the individual's admission. *Personnel Security Hearing*, Case No. TSO-0307 (2007), and cases cited therein. *See also Adjudicative Guidelines* at Guideline E (listing among potential mitigating conditions "prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts").

Here, there is a clear pattern of falsification evidenced in three consecutive QNSPs submitted over an approximately three-year period from 2009 to 2012. As such, all of the falsifications are quite recent. Further, to the extent that the individual denies intentionally omitting information from his 2012 QNSP, he clearly has not yet renounced those falsifications. Finally, the fact that the individual continues to deny, including under oath at the hearing, any intent to omit information from the 2012 QNSP is a troubling indication of an ongoing pattern of dishonesty. Taking these factors into account, based on the information in the record, including the individual's hearing

testimony, I cannot find that the individual has resolved the security concerns raised in this case under Criterion F.

B. Criterion L

Regarding the criminal charges cited in the Notification Letter under Criterion L, the LSO cites a "pattern of criminal conduct" demonstrated by two DUI charges in 2008 and two in 2010. As noted above, *supra* note 3, the individual appears to have only been arrested and charged twice with DUI, once in July 2008 and again in March 2010. Thus, the individual's criminal conduct constitutes less of a pattern than initially alleged.

Also relevant to my consideration of this conduct is that both of the criminal charges arose from the individual's problematic use of alcohol. Because of this, the LSO referred the individual to a local psychiatrist for an agency-sponsored evaluation. The psychiatrist found that, while the individual suffered from Alcohol Abuse, given the "adverse consequences related to his alcohol use," there was "adequate evidence of rehabilitation or reformation" based upon the individual's report that he had discontinued his use of alcohol after his March 2010 DUI arrest. Exhibit 9 at 12-13 ("If his self-report of alcohol use is accurate, and he solely experienced excessive alcohol use during a brief period of time, then his self discontinuation of alcohol use has adequately rehabilitated and reformed his previous abuse.").

Ultimately, the LSO found that any concerns raised by the individual's use of alcohol had been mitigated. Exhibit 3 at 2. Given that the only criminal conduct cited in the Notification Letter was a direct result of the individual's past use of alcohol, I find that the concern raised under Criterion L by the individual's two DUI arrests has also been sufficiently resolved. *Adjudicative Guidelines* at ¶ 32(a) ("criminal behavior happened . . . under such unusual circumstances that it is unlikely to recur or does not cast doubt on the individual's reliability, trustworthiness, or good judgment").

The concerns raised by the individual's failure to report these two arrests as required, however, have clearly not been resolved. In his August 2012 PSI, the individual partially attributed his failure to report his 2008 arrest to "shock," a circumstance that would logically apply to any arrest. Exhibit 7 at 8. Even this would not account for the individual's failure to report the arrests for, by his account at the hearing, six to nine months. Tr. at 61. There is, in fact, nothing in the record that documents any report by the individual of this arrest prior to his February 2012 QNSP. At his PSI, the individual stated, "I wouldn't say I wanted to hide it, I just didn't feel that it was . . . correct. And I wanted to get it eliminated from the record so it wasn't on my record." Exhibit 7 at 10.

Similarly with respect to his failure to report the 2010 DUI arrest, he stated in his PSI that

> you're tryin' to fight it and you, you don't, you think you can get it off of your record and then three days go by in a heartbeat and then you just keep hoping that you can, can, uh, you know, get it off your record, so, you know, no one knows. It's not tryin' to hide anything.

Id. at 43. In fact, it is difficult to escape the conclusion that the individual *was* trying to hide something if, as he states, he was hoping to have the arrest removed from his record so that "no one knows." The individual's apparent failure to grasp this contradiction is troubling. Again, when

asked to provide an explanation at the hearing, the individual testified that "part of it was disputing the case in court and my legal representative thought it could be dropped, ..." Tr. at 70. The individual further stated that he was "suffering from alcohol abuse. My wife and I had a lot of other things going on. We had -- we got into a business with relatives that went south, we lost a lot of money, and I think mentally I wasn't making the right decisions at that time." *Id.* at 70-71.

In his PSI, the individual stated that he had held a security clearance since 1984 and was well aware of the relevant requirements regarding reporting arrests. Exhibit 7 at 9-10. Considering the individual's explanations, such as they are, of his failure to timely report his two DUI arrests, I cannot find that they resolve the concerns raised by what can only be described as a conscious choice by the individual to disregard the DOE's reporting requirements. Nor do I find that any of the relevant conditions in the Adjudicative Guidelines mitigate the concerns in this case. *See Adjudicative Guidelines* at ¶ 17.

V. CONCLUSION

The DOE security program is based on trust, and when a security clearance holder breaches that trust, it is difficult to determine to what extent the individual can be trusted again in the future. *Personnel Security Hearing*, Case No. PSH-12-0059 (2012) (citing *Adjudicative Guidelines* at Guideline E). To make meaningful determinations regarding a person's eligibility for access authorization, the DOE must rely upon applicants to provide accurate information, both in the case of incidents that must be reported, and in response to questions on a QNSP. Based on the information in the record, including the individual's hearing testimony, I cannot find that the individual has resolved the grave concern that he cannot be relied upon in this fundamental respect.

I conclude that the individual has not resolved the DOE's security concerns under Criteria F and L. Therefore, the individual has not demonstrated that restoring his access authorization would not endanger the common defense and would be clearly consistent with the national interest. Accordingly, I find that the DOE should not restore the individual's security clearance at this time. Review of this decision by an Appeal Panel is available under the procedures set forth at 10 C.F.R. § 710.28.

Steven J. Goering
Hearing Officer
Office of Hearings and Appeals

Date: May 16, 2013