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United States Department of Energy
Office of Hearings and Appeals

In the Matter of Personnel Security Hearing)

Filing Date: December 2, 2013)

Case No.: PSH-13-0126

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Issued: February 28, 2014

Decision and Order

Robert B. Palmer, Administrative Judge:

This Decision concerns the eligibility of XXXXXXXXXXXXXXXX (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 individual’s security clearance should not be restored at this time.²

I. BACKGROUND

The individual is employed by a Department of Energy (DOE) contractor, and was granted a security clearance in connection with that employment. In April 2013, the individual reported to the local security office (LSO), as required by DOE security rules, that he had received a citation for Shoplifting. Because this information raised security concerns, the LSO summoned the individual for an interview with a personnel security specialist. After this Personnel Security

¹An 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 also be referred to in this Decision as a security clearance.

² Decisions issued by the Office of Hearings and Appeals (OHA) are available on the OHA website located at <http://www.oha.doe.gov> . The text of a cited decision may be accessed by entering the case number of the decision in the search engine located at <http://www.oha.doe.gov/search.htm>.

Interview (PSI) failed to adequately address these concerns, the LSO determined that derogatory information existed that cast into doubt the individual's eligibility for access authorization. It informed the individual of this determination in a letter that set forth the DOE's security concerns and the reasons for those concerns. I will hereinafter refer to this letter as "the Notification Letter" or "the Letter." The Notification Letter also informed the individual that he was entitled to a hearing before an Administrative Judge in order to resolve the substantial doubt concerning his eligibility for access authorization.

The individual requested a hearing on this matter. The LSO forwarded this request to the Office of Hearings and Appeals, and I was appointed the Administrative Judge. The DOE introduced nine exhibits into the record of this proceeding, and presented the testimony of a personnel security specialist and of the Loss Prevention Manager (LPM) for the retailer at which the individual was cited for Shoplifting in 2013. The individual and his common law wife also testified.

II. THE NOTIFICATION LETTER AND THE DOE'S SECURITY CONCERNS

As indicated above, the Notification Letter included a statement of derogatory information that created a substantial doubt as to the individual's eligibility to hold a clearance. This information pertains to paragraph (l) and (f) of the criteria for eligibility for access to classified matter or special nuclear material set forth at 10 C.F.R. § 710.8.

Criterion (l) defines as derogatory information indicating that the individual has engaged in unusual conduct or is subject to circumstances which tend to show that he is not honest, reliable or trustworthy; or which furnishes reason to believe that he may be subject to pressure, coercion, exploitation or duress which may cause him to act contrary to the best interests of national security. Such conduct or circumstances include, but are not limited to, criminal behavior. As support for its invocation of this criterion, the Letter refers to the individual's 2013 and 2001 citations for shoplifting, and to the police report generated as a result of the 2013 incident. In that report, a local police officer stated that the loss prevention officer at a local retailer told him that the individual stole approximately \$41 in groceries by obtaining grocery bags at a closed checkout lane, putting the groceries in the bags, and walking out of the store without paying for the items.

Under criterion (f), information is derogatory if it indicates that the individual "has deliberately misrepresented, falsified or omitted significant information from . . . 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 administrative review proceedings. In support of its invocation of this criterion, the Letter cites the individual's statements to the DOE about the 2013 incident indicating that:

- He found empty grocery bags in a cart. PSI (DOE Exhibit (DOE Ex.) 6) at 7. However, video surveillance shows that he entered the store, obtained a shopping cart without bags in it, and went to a closed checkout line to get the empty bags.

- He stopped and talked to an acquaintance while he was in the store, and that conversation distracted him from his shopping. DOE Ex. 6 at 9, 20, 22. However, video surveillance shows that he did not talk to anyone while in the store.
- He took his shopping cart through the checkout line, but some items in his cart were missed in the checkout. April 26, 2013, e-mail from the individual to the LSO. However, according to video surveillance and his own statements during the PSI, DOE Ex. 6 at 22, he exited the store without attempting to take his shopping cart through a checkout line.
- He inadvertently left the store without paying for the items in his shopping cart. DOE Ex. 6 at 24. However, video surveillance shows that after placing the items in his cart, he left the grocery section of the store, went to the clothing section, placed the items in the grocery bags that he had obtained from the closed checkout line, browsed momentarily through some items in the clothing section, all the while looking around repeatedly to make sure that he had not been observed, and then left the store without paying for the items.

This derogatory information adequately justifies the DOE's invocation of criteria (f) and (l), and raises significant security concerns. 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 information. Criminal activity also 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. *See Revised Adjudicative Guidelines for Determining Eligibility for Access to Classified Information, The White House (December 19, 2005), Guidelines E and J.*

III. REGULATORY STANDARDS

The criteria for determining eligibility for security clearances set forth at 10 C.F.R. Part 710 dictate that in these proceedings, an Administrative Judge 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 or unfavorable, that has a bearing on the question of whether granting or restoring a 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). *See Personnel Security Hearing, Case No. VSO-0013, 24 DOE ¶ 82,752 at 85,511 (1995) (affirmed*

by OSA, 1996), and cases cited therein. 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).

IV. FINDINGS OF FACT AND ANALYSIS

At the hearing, the individual attempted to establish, through his testimony and that of his wife, that he is an honest and law-abiding person who accidentally left a store without paying for his groceries (two packages each of bacon, chicken strips, and hotdogs) in 2013. However, for the reasons set forth below, I find that the individual lied in his April 2013 incident report to the DOE and during his 2013 PSI, and that he attempted to steal the items in question.

A. Criterion (f)

The first misrepresentation alleged in the Notification Letter is the individual's statement during his PSI that the shopping cart that he used in the store had empty bags in it when he acquired it. The Letter states that this is inconsistent with video from the store's security cameras, which allegedly shows that the individual's cart did not have any bags in it. However, the video was not introduced at the hearing.³ Instead, the DOE introduced Exhibit 7 into the record, which consists of a memorandum describing the video written by a DOE personnel security specialist who allegedly viewed it. This specialist did not testify at the hearing. Consequently, there was no one who could be cross-examined about the exhibit's accuracy and validity. Paragraph (l) of Section 710.26 of the DOE's Personnel Security regulations sets forth two circumstances under which a written statement that is adverse to the individual relating to a controverted issue can be received and considered by an Administrative Judge without affording an opportunity for cross-examination. The first circumstance is when the person making the statement is a confidential informant, and the second is when the Secretary of Energy or his designate has determined that (i) the statement appears to be reliable and material, (ii) failure of the Administrative Judge to consider the statement would be substantially harmful to the national security, and (iii) the person who provided the statement cannot testify due to death, serious illness, or other good cause. Because neither of those circumstances is applicable to the current proceeding, I did not consider DOE Exhibit 7 in reaching a decision in this case. As there is no other evidence that contravenes the individual's statement that he found empty bags in the shopping cart, I cannot conclude that this statement is false.

However, there is sufficient evidence in the record from other sources to refute the other statements made by the individual that are cited in the Letter. With regard to the individual's alleged conversation while in the store, during his PSI the individual said "I generally use the self-checkout, and when I went through the se – when I went through that area, I stopped and talked to an individual that I knew. I just kind of got . . . preoccupied, and I just went out the door." DOE Ex. 6 at 9. Later during the PSI, he said that he encountered this acquaintance in the bakery department, and not at the self-checkout. *Id.* at 20. At the hearing, the individual testified that he talked to this acquaintance in the "deli" area of the store. Hearing transcript (Tr.) at 35,

³ I inquired of both the DOE Counsel and the individual as to whether the security video could be obtained for viewing at the hearing. Both informed me that the video was not available.

75. These accounts are inconsistent with each other and also with the testimony of the LPM, who observed the individual while he was in the store, and said that at no time did he see the individual in the “deli” department or witness the individual talking to anyone. Tr. at 43-44. During cross-examination, the LPM admitted that there was a chance that such a conversation took place before he began observing the individual. Tr. at 47. However, given the existence of other evidence, to which the LPM did not have access, I find this to be highly unlikely. The individual testified that he entered the store, obtained some bags from a closed checkout station, and proceeded to the “Home” department of the store. Tr. at 73. The LPM testified that the store’s Photo Electronics Assistant Manager informed him that the Photo Electronics Assistant Manager had seen the individual taking bags from an unmanned register, which is “a behavioral indicator” of shoplifting. Tr. at 41. The LPM then “reviewed video to get a visual observation” of the individual, went out onto the sales floor, located the individual in the “Home” department, and followed him throughout the store. Tr. at 41-42. Moreover, the individual’s statements during the PSI indicate that he engaged in the alleged conversation, got distracted, and then left the store with the un-paid for items in his cart. DOE Ex. 6 at 20. Accordingly, this would have occurred after the individual left the “Home” department, and after the LPM’s surveillance had begun. Because I attribute greater weight to the disinterested testimony of the LPM than I do to the self-serving and inconsistent statements made by the individual, I find that the individual lied during his PSI and during the hearing about having a conversation with an acquaintance while in the store that distracted him from his shopping.

The individual also deliberately attempted to mislead the DOE in his April 16, 2013, e-mail in which he reported the shoplifting citation. As alleged in the Notification Letter, he said that “some items in my shopping cart were missed in the check-out.” DOE Ex. 9. However, during his PSI, the individual admitted that he did not go through a check-out line, and that the wording of his e-mail was “a mistake.” DOE Ex. 6 at 22. At the hearing, he indicated that he was not totally forthcoming in this e-mail because he wanted to be “discreet,” and did not want his co-workers and subordinates to learn the full extent of his behavior. Tr. at 76-78. Potential embarrassment is not a valid excuse for attempting to deliberately mislead the DOE.

Finally, I did not find credible the individual’s claim, during his PSI and at the hearing, that he accidentally walked out of the store without paying for the items in his shopping cart. The LPM testified that after the individual left the “Home” department, he went to the “Meat” department, where he picked up the items in question and placed them in his cart. He then proceeded to the “Apparel” department, where he went between racks of clothing, and concealed the merchandise that he had chosen in the “Meat” department in the empty store bags. While doing so, the LPM continued, the individual appeared to be looking around to see if he was being observed by anybody. The individual then left the store without paying for the merchandise, and the LPM confronted him outside of the store. Tr. at 43-45. When asked during his PSI why he put the items in bags before paying for them, the individual replied:

A. I don’t – I don’t – I can’t honestly answer that. I just – I put ‘em in the bag, and I said, I – I had every intention on paying

Q. Why would you put ‘em in the bag, if you intended to pay?

A. Um, I can’t honestly answer that. I just – to collect them in the same unit. I – I don’t know what the right answer is there.

Q. Well, the right hon – answer is the honest answer, because that’s what your obligation is in this interview.

* * * * *

A. I – yeah, yeah, I put ‘em in the bag. I – I don’t know why I put ‘em in the bag. I put them in the bag, not intentionally to steal ‘em. I – I put ‘em in the bag for containment. They were frosty bags, cuz I took ‘em out of the freezer. . . . It was just the frosty um, bag – frozen bag of chicken was – was in the bag.

Left unanswered by this explanation is why the individual did not “contain” the frozen food immediately by bagging it in the “Meat” department, and why he apparently felt it necessary to check for surveillance before bagging the items in the “Apparel” department. My judgment as to the relative credibility of the individual and the LPM, and my examination of the other evidence of record, leads me to conclude that the individual intended to steal the items in question. The individual committed multiple acts of deliberate falsification, both during his PSI and at the hearing. Serious security concerns under criterion (f) remain unresolved.

B. Criterion (l)

As set forth in the Letter, the individual was also cited in 2001 for shoplifting. According to the individual, he had selected hundreds of dollars worth of panels, and brackets to use with them, from a local home improvement store. In his 2001 notification to the DOE about the citation, he allegedly stated that he placed the brackets in a vest pocket because he could not carry them and the panels, too, paid for the panels, but inadvertently walked out of the store without paying for the brackets. DOE Ex. 6 at 29. During his 2013 PSI, he said that the brackets slipped from his grasp and fell into the vest pocket. DOE Ex. 6 at 10.

I am skeptical about the individual’s explanations, especially given his misrepresentations concerning the 2013 shoplifting incident. However, even if I were to conclude that the 2001 incident was inadvertent, and that the 2013 citation was therefore an isolated incident of illegal behavior, I could not conclude that the individual has successfully addressed the DOE’s security concerns under criterion (l).

As an initial matter, in order to successfully address a problem, one must generally first admit that a problem exists. The individual has failed to do this, having steadfastly maintained, in the face of credible evidence to the contrary, that he accidentally left the store in 2013 without paying for the items in his cart. Moreover, the 2013 incident happened less than one year ago. An insufficient amount of time without further illegal behavior has passed to convince me that future incidents of a similar nature are unlikely. Finally, at the hearing the individual expressed great concern at the prospect of his shoplifting citations becoming widely known among his co-workers and subordinates. Tr. at 69. This knowledge, or similar knowledge of any future illegal behavior, could create leverage that could potentially be used to attempt to influence the individual to act in a manner that would be contrary to the best interests of national security. The individual has not successfully addressed the DOE’s security concerns under criterion (l).

V. CONCLUSION

For the reasons set forth above, I find that the individual has not adequately addressed the DOE's concerns under criteria (f) and (l). Consequently, he has failed to convince me 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.

Robert B. Palmer
Administrative Judge
Office of Hearings and Appeals

Date: February 28, 2014