

the derogatory information fell within the purview of one potentially disqualifying criterion set forth in the security regulations at 10 C.F.R. § 710.8, subsection (l) (hereinafter referred to as Criterion L).²

Upon her receipt of the Notification Letter, the individual exercised her right under the Part 708 regulations to request an administrative review hearing, and I was appointed the Administrative Judge³ in this case. At the hearing I convened pursuant to 10 C.F.R. § 710.25(e) and (g), I took testimony from the individual and the father of her child, with whom she currently lives. The LSO submitted nine numbered exhibits (Exs. 1 through 9) into the record, and the individual submitted ten exhibits (Exs. A through J). The transcript of the hearing will be cited hereinafter as “Tr.”

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 restoring her 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 her 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). An individual is

² Criterion L relates, in pertinent part, to information that a person 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 interest of the national security. Such conduct or circumstances include, but are not limited to, criminal behavior . . .” 10 C.F.R. § 710.8(l) (Criterion L).

³ Effective October 1, 2013, the titles of attorneys in the Office of Hearings and Appeals (OHA) changed from Hearing Officer to Administrative Judge. *See* 78 Fed. Reg. 52389 (August 23, 2013). The title change was undertaken to bring OHA Hearing Officers in line with the title used at other federal agencies for officials performing identical or similar adjudicatory work. *See Personnel Security Hearing*, Case No. PSH-13-0114 at 1 n.1 (2014).

thereby 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.*

III. The Notification Letter and the Security Concerns

In the Notification Letter, the LSO cites one criterion, Criterion L, as the basis for suspending the individual's security clearance. Ex. 1. The LSO's security concerns arise from the individual's long-term association with a person involved in criminal conduct. As evidence of that association, the LSO cites information the individual provided to the LSO in Personnel Security Interviews conducted in 2002, 2007, and 2013 that led the LSO to conclude that she has maintained ongoing contact with a person involved in criminal activity continually from 1998 through 2013. *Id.*

I find that the information as set forth above constitutes derogatory information that raises substantial doubt regarding an individual's eligibility for access authorization under Criterion L. Association with persons involved in criminal activity raised doubt about an individual's judgment and calls into question his or her reliability, trustworthiness, and ability to protect classified information. *See Revised Adjudicative Guidelines for Determining Eligibility for Access to Classified Information*, issued by the Assistant to the President for National Security Affairs, The White House (December 29, 2005) (Adjudicative Guidelines) at Guideline E, ¶ 16(g). Sharing living accommodations with someone who has been arrested, charged, and convicted of numerous felonies raises such a concern.

IV. Findings of Fact

The individual has held a security clearance since 2002. Tr. at 62. She met her boyfriend in 1997 and started a relationship with him in 1998. *Id.* at 64. They lived together as a couple beginning in 1998 or 1999. *Id.*; Ex. 7 (Transcript of Personnel Security Interview (PSI), July 16, 2013) at 133. The boyfriend served a one-year jail term starting in late 2000 for a 1996 assault with a deadly weapon. Ex. 7 at 31-32. After the boyfriend's release in 2001, the couple resumed living together. They separated in early 2004, because they were not getting along, and the individual felt he was not "ready to be a full-time companion." *Id.* at 65; Ex. 7 at 135.

Although they lived separately, the individual and the boyfriend continued to see each other, and in 2005, the individual became pregnant with his child. Ex. 7 at 128. After the baby was born, the individual and the boyfriend were committed to ensuring that the

child had two parents in her life. They tried living together a few months at a time, but they were not successful. Tr. at 66. He lived with friends and family and visited the individual occasionally. Ex. 7 at 125, 136-37, 145. The individual provided financial support for the boyfriend and one of his sons, who also lived with her at times. *Id.* at 97, 144-45. During this period of separation, the boyfriend was arrested and convicted on a number of criminal charges.⁴ He was arrested for burglary and receiving stolen property in June 2004, when he brought a wetsuit to a sporting goods store intending to have the store sell it for him on consignment and the store personnel determined that it had been stolen. Tr. at 16. In November 2005, while on probation for the June 2004 offense, the police discovered a stolen credit card in the vehicle he was driving; he was ultimately charged with a second count of receiving stolen property, as well as violating the terms of his parole. *Id.* at 14. In April 2006, he was charged with driving on a suspended license and providing a false identity to a police officer when he gave his brother's name to a police officer who stopped him. *Id.* at 27. Released from incarceration after serving ten months of a two-year sentence for the 2004, 2005, and 2006 offenses, he was arrested for disorderly conduct, public drunkenness, and violating parole following a brawl that involved several people in July 2010. *Id.* at 36, 40-41. He was arrested again in October 2011 for violating parole, because he was not reporting regularly to his parole officer. *Id.* at 42. His final arrest was in July 2012, again for parole violation; after 12 hours in custody, he was informed that the charge was dismissed. *Id.* at 43.

In October 2012, the individual allowed the boyfriend to move back in with her and their daughter. *Id.* at 96. She testified that in early 2012, she saw changes in him that convinced her that they could now live together: he was getting older, and he wanted to be part of the household and a father figure to their daughter. Tr. at 66-67. The boyfriend testified that since he moved in with the individual and their daughter, he no longer associates with others from his past. Instead, he takes care of his daughter, getting her ready for school in the morning, working construction when work is available, and helping her with her homework at night. *Id.* at 45, 76. He also stated that his life changed as soon as his daughter was born. *Id.* at 43. When questioned about the criminal offenses of 2010 to 2012, which did not precede his daughter's birth, the boyfriend explained that they occurred while he was not living with the individual; he had an unstable lifestyle and was surrounded by bad influences that no longer figure in his life. *Id.* at 56-58.

The individual has consistently stated that she was aware of only a few of the offenses with which her boyfriend has been charged. She learned of his 1996 assault charge when he was incarcerated for that offense in 2000. *Id.* at 68. She was also aware of his being charged with criminal misconduct on two occasions in 2004 and 2006 when they fought

⁴ The Notification Letter alleges that the boyfriend was arrested and charged with criminal offenses 19 times between 1999 and 2012. *See* Ex. 1. At the hearing, the boyfriend convincingly explained that many of the stated charges are related to a single incident and merely reflect procedural steps as the case passed through the criminal justice system. For example, the Notification Letter lists two identical arrests dated three weeks apart in September and October 2006; these arrests actually concern a single incident of criminal behavior. Nevertheless, I find that the boyfriend engaged in criminal offenses on at least five discrete occasions between 2004 and 2011, which I describe below.

with each other and she called the police. Ex. 7 at 107, 113.⁵ Except for the two fights, she maintains that she was unaware of his criminal activity that occurred between 2004 and 2012, when they did not live together. *Id.* at 125; Tr. at 68-69, 78. When asked why she had not questioned her boyfriend more extensively about his criminal past, she replied that she is concerned about his past, but wants him to succeed and be a full-time father to their daughter. She feels that he has paid for his mistakes and she has given him another chance. *Id.* at 78-79. Nevertheless, both the individual and the boyfriend testified that she holds him to a high standard of behavior, and he knows he has no chances left; if he fails to toe the line, he will not be allowed in the house. *Id.* at 53, 72, 78. As she explained, she lives “on the straight and narrow,” and will not take risks that could affect her ability to hold her job. *Id.* at 78. For example, she allows no alcohol or drugs in their home. Ex. 7 at 130-31.

The individual testified that she has always worked, even as a child, and has a reputation for being honest, reliable, and a hard worker. *Id.* at 73-74. Several of her exhibits contain statements by friends and co-workers, as well as her most recent employee performance appraisal, all of which corroborate her stated reputation. *See* Exs. A–D, G (2007 Investigation), I.

V. Analysis

I have thoroughly considered the record of this proceeding, including the submissions tendered in this case and the testimony of the witnesses 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).⁶ After due deliberation, I have determined that the individual’s security clearance should be restored. The specific findings that I make in support of this decision are discussed below.

It is clear to me that the individual has two competing, driving forces in her life that have brought her to this juncture. She is a well-respected worker, friend, and family member who accepts her responsibilities, including raising a child to the best of her abilities, and complies with laws, rules, and regulations. On the other hand, she has made room in her life for the father of her child, who has a significant history of criminal activity, because she feels strongly that the child should have two parents to look up to. Although her desire to give her child the upbringing she deserves is honorable, it raises a concern from the perspective of personnel security, as her ongoing association with someone who has engaged in criminal activity potentially places her at risk for behaving, or being coerced to behave, in a manner inconsistent with the national interest. The consequences of that

⁵ During the 2004 fight, the boyfriend bit her arm, and served 30 days in jail. *Id.* at 107.

⁶ Those factors include the following: the nature, extent, and seriousness of the conduct, the circumstances surrounding the conduct, including knowledgeable participation, the frequency and recency of the conduct, the individual’s age and maturity at the time of the conduct, the voluntariness of the individual’s participation, the absence or presence of rehabilitation or reformation and other pertinent behavioral changes, the motivation for the conduct, the potential for pressure, coercion, exploitation, or duress, the likelihood of continuance or recurrence, and other relevant and material factors.

possible behavior are exacerbated when an individual has access to classified information or material.

In weighing the risk that the individual's continuing association with a person with a criminal history raises a security concern, I have considered a number of factors. She is currently living with her boyfriend. Although, to her credit, she has been straightforward with the LSO regarding their history of involvement, including cohabitation, the fact remains that their closeness, both physical and emotional, renders her subject to some degree of his influence. This office has recognized on previous occasions that association with family members—as opposed to unrelated persons such as roommates—who engage in criminal activity present a special circumstance, as the clearance holder cannot simply withdraw from association. *See, e.g., Personnel Security Hearing, Case No. PSH-13-0116 (2014).*⁷ Although the individual, her boyfriend, and their daughter do not constitute a conventional family for the lack of a marriage, it is a family nonetheless, bound together through mutual affection and a commitment to raise a child together.

I also note that the boyfriend's criminal activity has not occurred during those times that he and the individual have cohabited, and that his last criminal offense occurred over two years ago. In addition, the individual has had limited knowledge of her boyfriend's criminal activity and has clearly not condoned it, but rather has expressed her own concern and discomfort about it. Tr. at 71, 78. Her motivation to continue her association with her boyfriend, despite his past and the difficulties his criminal record causes, is to create a better life for her daughter. Her ongoing association with him is not likely to subject her to pressure or coercion: she testified that, while embarrassed about his criminal record, she would tell any family member or friend about it, as she has in the past when necessary. *Id.* at 69-70.

Finally, I take note of the ultimatum the individual has issued her boyfriend. At the hearing, each one clearly expressing his or her understanding that the boyfriend has no more chances left, from her perspective. If he fails to comport himself according to her standards, which clearly exclude alcohol in the home and criminal activity anywhere, he will not be permitted to live with his daughter and her, despite her strong desire to create a strong family unit for the sake of the child. I am confident that the individual will carry through with this commitment, because she has separated from him before, in 2004, and waited eight years before she determined he was ready to rejoin her household. I am therefore convinced that she will not continue to cohabit with a person involved in criminal activity: she will associate with her boyfriend only if he is not involved in criminal activity. Because the individual's association with a person involved in criminal activity is unlikely to recur, and because her current living arrangement does not cast doubt on her reliability, trustworthiness, judgment, or willingness to comply with rules and regulations, I find that the individual has mitigated the LSO's security concerns regarding her association with such an individual. *See* Adjudicative Guidelines at Guideline E, ¶ 16(g). *See also Personnel Security Hearing, Case No. TSO-0766 (2009)*

⁷ Decisions issued by the Office of Hearings and Appeals after November 19, 1996, are available on the OHA website located at <http://www.energy.gov/oha>.

(access authorization restored where wife set very clear rules against husband's possessing or using illegal drugs in her presence or in her vehicle).

VI. Conclusion

As explained in this Decision, I find that the LSO properly invoked 10 C.F.R. § 710.8(l) in suspending the individual's access authorization on the basis of derogatory information it received regarding the individual. 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 have found that the individual has brought forth sufficient evidence to mitigate the security concerns associated with this criterion. I therefore find that restoring an access authorization to the individual would not endanger the common defense and security and would be consistent with the national interest. Accordingly, I have determined that the individual's access authorization should be restored.

William M. Schwartz
Administrative Judge
Office of Hearings and Appeals

Date: March 14, 2014