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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 28, 2014) Case No.: PSH-14-0005
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Issued: May 19, 2014

Administrative Judge Decision

Richard A. Cronin, Jr., Administrative Judge:

This Decision concerns the eligibility of XXXXXXXXXXXX (hereinafter referred to as “the Individual”) to hold an 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 Department of Energy (DOE) should not restore the Individual’s access authorization.

I. BACKGROUND

The Individual is an employee at a DOE facility and possessed a security clearance. DOE Exhibit (DOE Ex.) B at 1. In August 2013, the Individual received a five-day suspension from her employer. DOE Ex. E at 1. The Individual received the suspension because she had conducted gambling activities on the premises of the DOE facility, provided a misleading answer during an investigation, and had used a classified computer system for unauthorized purposes. DOE Ex. E at 1.

The Local Security Office (LSO) subsequently conducted a personnel security interview (PSI) with the Individual in November 2013, (November 2013, PSI). DOE Ex. C. Because the November 2013, PSI failed to resolve the security concerns raised by the Individual’s alleged gambling activities and other derogatory information discovered during its investigation of the

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 an access authorization or a security clearance.

Individual, the LSO suspended the Individual's security clearance later that month. Ex. 2. In a November 2013, letter (Notification Letter), the LSO informed the Individual of its decision to suspend her security clearance and specified the derogatory information, described under 10 C.F.R. § 710.8 (l), upon which the LSO relied in making its decision.² DOE Ex. A.

The Notification Letter also informed the Individual that she was entitled to a hearing before an Administrative Judge³ to present evidence to resolve these doubts. The Individual requested a hearing in this matter. The LSO forwarded this request to OHA and the OHA Director assigned me as the Administrative Judge in this matter. The DOE introduced eight exhibits into the record of this proceeding. The Individual introduced three exhibits and presented the testimony of six co-workers, a supervisor, and her father, along with her own testimony during the hearing.

II. FACTUAL FINDINGS AND THE ASSOCIATED SECURITY CONCERNS

The Part 710 regulations require that I “make specific findings based upon the record as to the validity of each of the allegations” in the Notification Letter. 10 C.F.R. § 710.27(c). In this case, the Notification Letter cites Criterion L of the criteria for eligibility for access to classified matter or special nuclear material set forth at 10 C.F.R. § 710.8. Ex. 1. The Individual does not, for the most part, dispute the factual accuracy of the Criterion L derogatory information described in the Notification Letter. I set forth my factual findings below.

In August 2012, a co-worker reported that the Individual had brought a cell phone into a “limited area” where cell phones were prohibited.⁴ The Individual's supervisor, on the same day of the report and in the presence of a manager, asked the Individual if she had a cell phone in her pocket. DOE Ex. G; DOE Ex. H; Hearing Transcript (Tr.) at 58, 81-82. The Individual responded “no” although her cell phone was in her coat pocket which was located in the limited area. Tr. at 14, 58, 81. Later in the day, the Individual reported to the LSO that she did have her cell phone in the limited area. Tr. at 14-15; DOE Ex. G.

In September 2012, as a result of the cell phone incident, the Individual was suspended for three days from her position at the DOE facility. DOE Ex. G. The Individual's employer cited her failure to cooperate and her withholding of information to her supervisor as grounds for the suspension. DOE Ex. G.

² Criterion L refers to information indicating that an 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).

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).

⁴ This area will also be referred to as the “secured,” “limited” or “protected” area.

In 2013, the Individual's employer conducted an investigation regarding allegations of gambling occurring at the DOE facility.⁵ Various E-mail messages from the Individual's workplace classified computer, dated in 2013, referenced gambling activities ("pools") that the Individual had organized. DOE Ex. E; DOE Ex. F. During the employer's investigation, the Individual, when asked where she collected money for the pools, stated that she received the money outside of the facility. DOE Ex. C at 56-57. However, the Individual, in reality, had received some of the money in the protected area of the DOE facility. DOE Ex. C at 56-57. As a result of her gambling activities, her misuse of a classified computer system to facilitate her gambling activity, and her failure to be forthcoming during the course of her employer's investigation, the Individual received a five-day suspension. DOE Ex. E.

Pursuant to its investigation after revelation of the Individual's participation in gambling pools, the LSO obtained statements from co-workers indicating that the Individual had ridden an employer-sponsored bus to work without purchasing the required bus pass. DOE Ex. C at 29; Tr. at 153. During the November 2013, PSI, the Individual reported that, four or five years prior to the November 2013, PSI, she had ridden the bus for approximately a year without the required bus pass. DOE Ex. C at 30.

III. REGULATORY STANDARDS

The criteria for determining eligibility for security clearances set forth at 10 C.F.R. Part 710 dictates 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 and unfavorable, that has a bearing on the question of whether granting the Individual 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). In considering these factors, the Administrative Judge also consults the *Adjudicative Guidelines* that set forth a more comprehensive listing of relevant factors.

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).

⁵ During the November 2013, PSI, the Individual admitted to participating in and organizing gambling pools since 2010 or 2011. DOE Ex. C at 38.

Conduct involving lack of candor or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. See Revised Adjudicative Guidelines for Determining Eligibility for Access to Classified Information issued on December 29, 2005, by the Assistant to the President for National Security Affairs, The White House (*Adjudicative Guidelines*), Guideline E. Given the Individual's admissions that she had failed to comply with rules regarding possession of a cell phone, gambling, and her failure to be candid regarding these activities, I find that the LSO had sufficient grounds to invoke Criterion L.

IV. ANALYSIS

The Individual does not challenge most of the underlying facts of this case. Tr. at 186. However, the Individual believes that the derogatory information should be examined in the light of mitigating circumstances for which she offered testimonial evidence.

At the hearing, the Individual testified that she inadvertently took her cell phone into the limited area. Tr. at 158. She also testified that her answer to her supervisor was in fact correct because he only asked if she had a cell phone in her pocket when, at the time, it was in her bag which she was not holding.⁶ Tr. at 158. She believes her misleading answer was an unintentional mistake.⁷ Tr. at 158. She also testified that when contacted by security agents from the facility, she told the truth about her possession of a cell phone and, unprompted by the agents, offered to let them examine her cell phone. Tr. at 158-59. As a measure to prevent another unintentional incident with her cell phone, she would ride the bus with her cell phone in her hand to remind her not to take it into the limited area. Tr. at 159-60. As for her misleading answer regarding where money was transferred in connection with her gambling pools, the Individual stated that she told the investigator that the money was exchanged outside of the gate to the secured area because the majority of the money was exchanged there. Tr. at 177. Because she believed that her answer could have been misunderstood, she elaborated her answer to the question in the November 2013, PSI. Tr. 177-78. The Individual asserts that with regard to her misleading answers, she has made prompt admissions to remedy the misrepresentations. Tr. at 184. The Individual also testified as to her belief that she voluntarily revealed facts concerning the bus pass incident and her possession of a cell phone in the secured area to the November 2013, PSI interviewer even though the interviewer did not know about these facts. Tr. at 191-92. The Individual testified that she has integrity and is deserving of a chance to regain her security clearance.⁸

⁶ Earlier in the hearing, the Individual stated that her cell phone was in her coat pocket. See Tr. at 15, 81-82. This discrepancy is not significant for the purpose of evaluating the Individual's fitness to hold a security clearance.

⁷ The Individual elicited testimony from a co-worker indicating that employees, such as the witnesses and the Individual, had been trained to "answer the question and not elaborate." Tr. at 25, 105.

⁸ The Notification Letter identified as derogatory information an incident where the Individual was verbally counseled for insubordination when, in July 2012, she informed an acting supervisor that she would not perform an assigned task. DOE Ex. A at 2 (Notification Letter). The Individual testified at the hearing that when the acting supervisor directed her to perform a particular work task she requested that she be excused from the assignment and that someone else be selected. The acting supervisor denied this request. Then the Individual met another co-worker who was also dissatisfied with his work assignment. Both employees then approached the acting supervisor and requested that they be allowed to trade assignments to which the acting supervisor agreed. Tr. at 156-57. The

With regard to her failure to purchase a bus pass, the Individual testified that because her grandfather had recently passed away she neglected to sign up with her employer to receive a bus pass through regular payroll deductions during the enrollment period. Tr. at 153. Afterwards, she contacted her employer who informed her that, if she would come in to the appropriate office, she still could enroll for the payroll deduction. Tr. at 153. The Individual testified that she then became busy with work and neglected to re-enroll. She rode the bus without a pass for a year until the next re-enrollment period. Tr. at 153. However, when the Individual access authorization was suspended and she no longer needed to ride the bus to work, she did not cancel her then current bus pass in order to provide restitution to her employer. Tr. at 154.

The Individual has also submitted documentary evidence about her financial status to show that she does not have any type of significant gambling problem. Ind. Ex. C. The Individual asserted that her participation and organizing gambling pools while working at the DOE facility was a way to have fun with her co-workers. Tr. at 21-22. Additionally, the Individual presented testimony from a number of co-workers and supervisors to establish that the Individual has an excellent workplace record for following safety rules and was an excellent worker. *See, e.g.*, Tr. at 45, 56, 60, 66, 80. Several witnesses testified that they have not observed the Individual bring a cell phone into the secured area since the Individual received her 2012 suspension. Tr. at 49, 56, 58, 66. The witnesses each expressed the opinion that the Individual could be trusted to possess a security clearance.

After reviewing the evidence in the record, I conclude that the Individual has not demonstrated sufficient evidence to resolve the concerns raised by the Criterion L derogatory information. The security concern raised by the derogatory information is the Individual's failure to obey certain rules and regulations and her failure to be totally forthcoming when asked about the cell phone and gambling incidents. The Individual presented evidence which convinces me that she is an excellent worker and complies with all safety regulations while she was working at the DOE facility. However, the fact remains that the Individual willingly violated a number of rules and regulations related to her employment such as a prohibition of gambling and failed to be completely truthful in connection with inquiries made by her employer. Further, these incidents are recent.

In her testimony and in other witness testimony, the Individual has suggested that her failure to be initially candid with her manager regarding the cell phone incident or the investigator concerning where money was exchanged was a result of training that she received by her employer that she should only "answer the question" and not elaborate on answers. Tr. at 25, 158. However, a co-worker testified that this method of answering questions was intended to be applied to fact-finding meetings regarding an incident at the DOE facility and were not a general guidance to be used during any other type of inquiry. Tr. at 109-110. Further, given my assessment of the Individual's intelligence and sophistication, I cannot find that her initial answer to her supervisor was a simple mistake. Her answer, while technically truthful, was intentionally incomplete, especially given her knowledge that bringing cell phones to the secured area was a security violation. I believe that a more compelling reason for the Individual's failure to be completely candid was the Individual's fear of being disciplined or terminated from her position. At the hearing, the Individual admitted that she did not

Individual's supervisor testified that he spoke to the acting supervisor about the incident but that the acting supervisor reported that he and the Individual had a disagreement about a work assignment but that it was resolved. The acting supervisor did not report to the Individual's supervisor that he had issued any type of verbal reprimand. Tr. at 99. Tr. at 99. Given the evidence before me, especially the Individual's supervisor's testimony, I find that the Individual has resolved any concern relating to this alleged "verbal counseling."

reveal the true extent of bringing her cell phone into the restricted area of the facility because of fear of being fired. Tr. at 171-72. As such, her conduct raises serious unresolved security concerns regarding her ability to provide accurate answers.

The Individual's conduct in bringing a cell phone into the restricted area of her workplace raises concerns beyond that of her misleading answer to her supervisor. Despite knowing that she should not have brought her phone into this area, she did so over an extended period of time. During the November 2013, PSI, the Individual admitted bring her phone into the restricted area for approximately a year and a half. DOE Ex. C at 17; Tr. at 169. This was an extended period of exercising poor judgment. The Individual's excuse for this behavior, offered during the hearing, was that she did not bring the phone in "purposely," does not provide mitigation for this significant failure to conform to an important security rule. *See* Tr. at 170.

The Individual's conduct in continuing to operate and participate in gambling pools at work also demonstrates a failure to comply with her employer's rules and is a significant incident of poor judgment, specifically so since she had received workplace discipline regarding the cell phone incident. Even if I were to consider the testimony from her witnesses that gambling was widespread at her workplace, almost all of the witnesses were aware of the fact that gambling was prohibited at the DOE facility. Tr. at 30, 48, 59-60, 75, 86, 97. As to her improper use of a workplace classified computer system for her gambling activity, the Individual offered testimony from one co-worker indicating that the computer system could be used for non-employer purposes during an employee's personal time. Tr. at 71-72. However, this witness also testified that her employer never gave authorization that gambling activity could be conducted using the firm's computer system. Tr. at 76. I find that the Individual could not have had a reasonable belief that such use of a classified computer system was allowed by her employer especially since she knew gambling was prohibited by her employer. The Individual purposely chose to ignore rules about gambling and the proper use of the classified computer system. Further, the Individual deliberately provided a misleading answer to her employer's investigator admittedly because she was afraid that she would be terminated from her position. *See* DOE Ex. C at 56-57. All of this conduct raises serious questions as to the Individual's ability to obey all rules and creates doubts as to her judgment.

I also find that the Individual exhibited poor judgment concerning her failure to pay for a bus pass. At the hearing, she testified, that when asked why she did not purchase a bus pass, that "it's just something I got on and did, and by the time I got to work, it's one of those [things], you fall asleep, you're groggy, you get up, you go inside the gate, and then you go right to your work area." Tr. at 174. This does not excuse the Individual's failure to purchase a bus pass and shows a lack of attention to her responsibilities in complying with rules. Even if I assume that she attempted to compensate her employer by not cancelling her bus pass after she stopped going to work, her initial failure to ride the bus without a pass is a violation of her employers rules as well as a potential fraud against her employer.

In reviewing the mitigating factors listed for Guideline E of the *Adjudicative Guidelines*, I find that, the Individual, after misleading her supervisor about the presence of her cell phone, voluntarily contacted the facility's security force and admitted, without prompting, that she had, in fact, taken her cell phone in the secured area of the facility. *See Adjudicatory Guideline*, Guideline E, ¶ 17(a).⁹

⁹ Paragraph 17(a) states "the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts." *Adjudicative Guidelines*, Guideline E at ¶ 17(a).

However, I cannot consider her disclosure, made during the November 2013, PSI, that she had carried her cell phone into the secured area on a regular basis for a year and a half, as an unprompted disclosure. This disclosure was made in response to questioning during the November 2013, PSI. DOE Ex. C at 56-57. For similar reasons, I cannot apply this mitigating factor to her disclosures, during the November 2013, PSI, concerning the exact locations where she collected money related to the gambling pools. The Individual's disclosure regarding the money was prompted by the November 2013, PSI investigator's questioning. DOE Ex. C at 57. Overall, the Individual has demonstrated a pattern of not complying with rules not directly related to her immediate job functions and not being completely candid with management and security officials. While I believe that the Individual is an excellent worker, the fact remains that the Individual has demonstrated a recent and repeated failure to comply with her employers rules and for failing to provide forthright answers for which she has not shown sufficient evidence to mitigate. Consequently, I find that the Criterion L concerns, as of the date of the hearing, have not been resolved.

V. CONCLUSION

For the reasons set forth above, I conclude that the Individual has not resolved the DOE's security concerns under Criterion L. Therefore, the Individual has not demonstrated that restoring her 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 access authorization. Review of this decision by an Appeal Panel is available under the procedures set forth at 10 C.F.R. § 710.28.

Richard A. Cronin, Jr.
Administrative Judge
Office of Hearings and Appeals

Date: May 19, 2014

