

eligibility to hold a security clearance. In an attachment to the Notification Letter, the LSO explained that the derogatory information fell 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 Criterion F and Criterion L, respectively).² See Exhibit 3.

Upon his receipt of the Notification Letter, the individual exercised his right under the Part 710 regulations by requesting an administrative review hearing. See Exhibit 4. The Director of the Office of Hearings and Appeals (OHA) appointed me the Administrative Judge in the case and, subsequently, I conducted an administrative hearing in the matter. At the hearing, the LSO presented no witnesses; the individual, represented by counsel, presented the testimony of five witnesses, including that of himself, his wife and forensic experts. The LSO introduced 10 numbered exhibits into the record; the individual tendered 26 lettered exhibits (Exhibits A – Z). The exhibits will be cited in this Decision as “Ex.,”³ followed by the appropriate numeric or alphabetic designation. The hearing transcript in the case will be cited as “Tr.” followed by the relevant page number.⁴

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

² Criterion F refers to information that a person has “deliberately misrepresented, falsified, or omitted significant information from a Personnel Security Questionnaire, a Questionnaire for Sensitive National Security Positions, a personnel qualifications statements, 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 [Part 710 administrative review] proceedings....” 10 C.F.R. § 710.8(f).

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. Such conduct or circumstances include, but are not limited to . . . a pattern of financial irresponsibility . . . or violation of any commitment or promise upon which DOE previously relied to favorably resolve an issue of access authorization eligibility.” 10 C.F.R. § 710.8(l).

³ Exhibit 8 contains both the July 2013 PSI and the September 2013 PSI as independently numbered documents. For clarity, the July 2013 PSI will be referred to in this Decision as Ex. 8A and the September 2013 PSI will be referred to as Ex. 8B.

⁴ OHA decisions are available on the OHA website at www.oha.doe.gov. A decision may be accessed by entering the case number in the search engine at www.oha.gov/search.htm.

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).

An individual must come forward with evidence to convince the DOE that granting or restoring his or 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 his or 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). Thus, an individual is 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 at Issue

As previously noted, the LSO relies on two criteria as the bases for suspending the individual’s security clearance, Criterion F and Criterion L. To support its reliance on Criterion F, the LSO first cites the individual’s admission to the GA that he sexually molested his infant daughter, and became aroused in her presence. It then cites the individual’s denial and subsequent modification of those same statements during the September 2013 PSI. The divergent information provided by the individual set forth above provided adequate justification for the LSO to invoke Criterion F. 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. Any failure to provide truthful and candid answers during the security clearance process is of particular concern. See Guideline E of the *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).

As for Criterion L, the LSO cites the following information: (1) the individual’s 1987 arrest for Driving Under the Influence (DUI); (2) the individual’s admission the he stole \$100 from his parents in the late 1980s, and a tape deck from a department store during the same timeframe; (3) the individual’s admission that he stole computer equipment from his former employer at some unspecified time; (4) the individual’s admission that

his current employer has no knowledge of his thefts; (5) the individual's denial during the September 2013 PSI that he had any sexual contact with his infant daughter, and his subsequent admission that the infant placed her mouth on his penis on one occasion while he was wearing sweat pants; (6) the individual's admission that he would become sexually aroused while his daughter was in his presence, and he would leave the room to masturbate; and (7) the individual's admission to the GA that he had sexually molested his infant daughter, but his statement to the LSO is that he fabricated the entire story to get out of the interview with the GA.

There is ample justification for the LSO to invoke Criterion L in this case. Regarding the individual's arrest and admissions of criminal conduct (thefts), I find that such criminal activity by its very nature calls into question a person's ability or willingness to comply with laws, rules and regulations." See Adjudicative Guidelines Guideline J ¶30. In addition, the individual's differing statements regarding his interactions with his infant daughter and his physiological responses in her presence calls into question the individual's judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations raises questions about an "individual's reliability, trustworthiness and ability to protect classified information." Adjudicative Guidelines at Guideline E. Additionally, the LSO is concerned about the individual's sexual contact with a minor. Questions concerning an individual's reliability, trustworthiness and ability to protect classified information are raised by "[s]exual behavior that involves a criminal offense ... or which may subject the individual to undue influence or coercion, exploitation or duress." Adjudicative Guidelines at Guideline D.

IV. Findings of Fact

In 1987, the individual was arrested for driving under the influence of alcohol (DUI); he was 19 years old at the time of the incident. He has had no subsequent alcohol related arrests since that incident. Tr. at 226 – 227.

During the 1980's, while in high school, the individual stole \$100 from cash his mother kept at home; he also asked a classmate working at a local department store to steal a tape deck for him. While an undergraduate, the individual and members of his fraternity stole numerous items of computer equipment, glassware from science laboratories and a large oil painting from their undergraduate university. While the individual was subsequently employed by his undergraduate university (as both a student and, later, as a professional), these thefts occurred prior to his employment by the university. The individual has not stolen any property since his sophomore year in college (1988 – 89). *Id.* at 227 – 229.

At some unspecified time, the individual's DOE contractor employer had the opportunity to work on a project for the GA which necessitated those working on the project to satisfactorily complete a polygraph. Between January 2013 and April 2013, the individual underwent three polygraph examinations, all administered by the GA. *Id.* at 208 – 210. The results of the first polygraph raised some questions, so the GA conducted a second one to address the individual's commission of "serious crimes." Ex. 8B at 4 – 6. The individual at some point acknowledged numerous thefts that he committed while an undergraduate student. Ex. 10 at 6. The GA conducted a third polygraph at a different

venue. According to the individual, he traveled by air to reach the destination. Ex. 8B. Prior to the administration of the third polygraph, the individual was asked to remember any additional criminal activity or think of any situation that “bothered” him. *Id.* at 8. At some point, the individual graphically described sexual contact between him and his daughter, stating that the contact occurred when his daughter was three to six months old and continued until she was approximately one year old. He told the GA that the conduct occurred in part because his wife was suffering from postpartum depression after the birth of their daughter and that he and his wife were not having sexual relations at this time. Ex. 10 at 3.

The GA reported the individual’s admissions regarding child molestation to child welfare authorities in both the jurisdiction where the individual and his family lived at the time the events the individual described were said to have occurred, and the jurisdiction where they lived at the time of the third polygraph examination. Ex. 8B at 10. Both jurisdictions commenced investigations; no criminal charges were filed against the individual. Ex. G; Ex. T.

In July 2013, the LSO interviewed the individual regarding information reported by the GA with respect to its interviews with the individual. When the LSO posed questions about the third polygraph examination, the individual informed the LSO that the lawyer he had retained with respect to the then-current investigation by the local child welfare authorities had stated that he should not discuss the polygraph unless the lawyer was present. The LSO then agreed to reschedule the PSI at a time that the individual’s lawyer could attend. *See* Ex. 8A.

In September 2013, the LSO conducted the re-scheduled PSI. Although his lawyer was not present, the individual freely participated in this rescheduled PSI with the knowledge and consent of his lawyer. Ex. 8B at 3. The individual stated that he left the third polygraph examination being very confused and with limited memory of what he may have said. He had sought counseling to try to recall what he had said and to understand what he had said. Ex. 8B at 11; Tr. at 186 – 187. He described his lack of comfort with the polygraph examination and the interview, and stated that he had fabricated the story of molesting his daughter as an attempt to end the interview. During the GA interview, the individual created additional facts to elaborate on the descriptions that he had provided earlier in the interview. He stated that he also included certain factually accurate information in the GA interview, such as the fact that his wife experienced postpartum depression following the birth of their first child. Ex. 8B at 8 – 10.

During the September 2013 PSI, the individual stated that he had had no inappropriate sexual contact with any of his children. In response to specific questions by the LSO about the details of the molestation that the individual had described during the GA interview, the individual stated that there was one occasion when his daughter placed her mouth on his penis through his sweat pants and that there were occasions when he would become sexually aroused while his daughter was present and he would go to another room and masturbate.

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)⁵ 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 DOE security clearance will not endanger the common defense and security and 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.

A. Criterion F Allegations

During the September 2013 PSI, the individual refuted the statements he made during the GA interview and attributed them to his stress and discomfort with the interview; he wanted the interview to end and, therefore, made the decision to provide answers that he thought would facilitate the termination of the GA interview. Tr. at 9, 14, 20, 82. Additionally, both during the PSI and at the hearing, the individual described how one false statement would lead to a question or a request for details which would result in his responding with information (frequently false) which would logically support one of his earlier false statements. Ex. 8B at 91; Tr. at 185. Elaborating on his story to the GA so that it maintained internally consistency further evidences the individual's intention to provide false information to the GA.

At the hearing, the individual challenged the procedure used by the GA during his third polygraph examination. He characterized the interview as an interrogation, challenging the nature of the questions and the tone of the questioning. The individual also challenged the appropriateness of the a polygraph being conducted when he had little sleep the night before and had not eaten that day; he challenges the length of the polygraph examination and the interview, without being able to specify its length; and he challenges the interviewer having left polygraph equipment attached to the individual during a period of time when the interviewer had left the room.⁶ Ultimately, the individual challenges the appropriateness of the use of a polygraph examination in the access authorization process. Tr. 176, 180 – 181, 219, 298 – 299.

⁵ Those factors include the following: the nature, extent, and seriousness of the conduct, the circumstances surrounding the conduct, to include knowledgeable participation, the frequency and recency of the conduct, the age and maturity at the time of the conduct, the voluntariness of his 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 continuation or recurrence, and other relevant and material factors.

⁶ To the extent that the individual's argument is that these factors effected the accuracy of the polygraph results, the argument ignores that the only response by the individual that was evaluated as inaccurate or questionable on the polygraph examination itself (as distinguished from the GA interview) related to the commission of serious crimes and that the same concern resulted from the individual's two earlier polygraph examinations where these factors were apparently not present. Ex. 10; Ex. 8B at 4 – 6.

The individual also argued that due to the stress of the polygraph examination and other factors that he experienced what he characterized as “temporary psychosis” during the PSI (Ex. 8B at 18) or what his forensic experts characterized as an anxiety episode which resulted in his making a “false confession” during the GA interview. Tr. 264 – 278; Ex. A at 8.

As an initial matter, challenges based on the validity and accuracy of a polygraph are not relevant in this proceeding as the falsified information was provided by the individual during an interview while he was *not* connected to any polygraph equipment. The LSO has not alleged that the individual provided false information based on the interpretation of any polygraph results, but based upon what he said to an interviewer – and the individual does not deny that he made the statements documented in the GA report on its interview. Tr. at 241 – 242.

Although the individual’s arguments that he experienced a psychological episode during the GA interview are supported by an opinion of a forensic psychologist, these arguments are speculative and insufficient to remove the doubt that exists as to the individual’s eligibility for access authorization that arises from his deliberate falsifications. Even his expert seemed to acknowledge this uncertainty when he responded to one of my questions at the hearing. Tr. at 292. If we were to agree that some psychological episode was the reason that the individual provided falsified information during the GA interview, the resulting security concern would be resolved only by demonstrating that such behavior would not be repeated by the individual in similarly stressful situations. At best, the individual highlighted the potential role of sleep deprivation as a contributing factor in his falsification and notes that his long-term sleep apnea is not being treated. The individual also argued that he and his family experienced significant hardship as a result of his falsification (including investigations by child welfare authorities in two jurisdictions and the individual being limited to supervised visitation with his children during the pendency of the investigations) and that he would not risk the consequences of a falsification in the future. This assumes, *inter alia*, that the individual would be able to use reasoning to overcome a future psychological episode, but he provides no convincing evidence that he could do so. There are many other questions raised by the theory that the individual experienced a psychological episode that remain unaddressed.⁷ The individual has failed to remove the doubt as to his eligibility raised by his false statements during the GA interview.

In the end, the individual convinced me that he deliberately provided false information to the GA during its process, but did not deliberately provide false information to the DOE during any phase of the DOE security clearance eligibility process. As a legal matter, the individual’s deliberate false statements during the GA interview do not fall within the scope of Criterion F. Criterion F only applies to information that is given in response to an official inquiry on a matter that relates to a person’s eligibility for a DOE access

⁷ For example, even his own expert pointed to the individual’s trait to deferring to authority figures (Ex. A at 10), as well as other psychological traits that were revealed by the psychological testing of the individual. See Ex A; Tr. at 278 – 286.

authorization. *See* 10 C.F.R. § 710.8 (f). Therefore, I find that the security concerns connected with the Criterion F are resolved. As set forth below, however, I find that serious concerns remain under Criterion L with the individual's honesty and trustworthiness relating to this matter.

B. Criterion L Concerns

1. DUI Arrest and Criminal Activity

The individual acknowledges his arrest for DUI in 1987 and committing two thefts while in high school and numerous thefts with his fraternity members while an undergraduate, all occurring in the 1980's. The individual credibly testified that his 1987 DUI arrest was his only alcohol arrest and that his subsequent consumption of alcohol has been limited and properly controlled. He also credibly testified that (1) he had stolen no property since the thefts committed with his fraternity brothers approximately 27 years ago, and (2) the thefts of property from his undergraduate university all occurred prior to his commencement of student-employment with the university. Tr. at 227 – 229.

I find that the passage of such a significant period of time since the occurrence of the behavior, without recurrence of similar criminal activity, makes it unlikely that such activity is likely to recur and it does not in itself cast doubt on the individual's present reliability, trustworthiness or good judgment. Adjudicative Guidelines at Guideline J ¶ 32 (a) and (d). Based on the foregoing, I find that the individual has sufficiently resolved the Criterion L security concerns arising from his alcohol arrest and thefts of property.

2. Sexual Contact with Minor

As previously noted, the description of the contact between the individual and his daughter contained in the Notification is suggestive of sexual behavior which could raise a security concern under Adjudicative Guideline D. However, an accurate and fair evaluation of the individual's statements requires review of all of his related responses during the PSI. The PSI was prompted by the GA report which summarized the individual's graphic descriptions of sexual contact between him and his infant daughter. During the PSI (and consistently thereafter), the individual has denied any sexual contact with his daughter. *See* Ex. 8B; Tr. at 141 –142. During the administrative review process, he characterized those statements during the GA interview as a false confession.⁸ *See* Ex. D.

The individual contends that none of the behavior described in the Notification Letter between him and his infant daughter was inappropriate. Ex. D at 3 – 4. He claims that the allegation that his daughter placed her mouth on a part of his genitals while he was wearing sweat pants occurred on an occasion when he was sitting on a couch and his daughter climbed up and put her head in his lap in such a way that her mouth was on a

⁸ During the hearing, the individual testified that, although he denies any sexual behavior occurred between him and his infant daughter, the statements attributed to him in the GA report describing such behavior were either directly made by him or reflect his affirmative responses to questions posed by the GA interviewer. Tr. at 241 – 242.

part of his sex anatomy. Ex. 3 at 5; Ex 8B at 51 – 53. He further contends that when this occurred, he repositioned his daughter’s head to eliminate the contact. *Id.* Regarding the allegation that he became sexually aroused by his daughter, which required him to leave the room to go masturbate, the individual claims that his conduct was *not* the result of arousal from her presence. Ex, 8B at 59-61, 66, 67; Ex. D. at 4. He contends that he was embarrassed by being in an aroused state in the presence of his young daughter and, as a result, would leave the room and relieve himself. He stated that his arousal and the presence of his daughter may have occurred at the same time, but that one was not the result of the other. *Id.*

These incidents, when examined in the context of the totality of the individual’s responses to questions asked by the LSO during the PSI, do not describe sexual behavior that is illegal, reflect a personality or emotional disorder or otherwise raises security concerns, as described in the Adjudicative Guidelines. *See* Adjudicative Guidelines at Guideline D ¶ 12. This conclusion is reinforced by the fact that he was examined by two forensic psychologist who testified at the hearing on his behalf, as well as by a DOE consulting psychologist, none of whom concluded that the individual had a sexually-related mental health disorder. Ex. A; Ex. I; Ex. J; Ex. K; Ex. 9. Based on the evidence before me, I find that the individual has sufficiently resolved the Criterion L security concerns arising from his statements during the PSI describing “sexual behavior.”

3. Inconsistent Statements

During the GA interview, the individual described numerous incidents in which there was contact between his infant daughter’s mouth and his bare genitals. Ex. 10 at 3. When he denied during the PSI that such contact had ever occurred, the LSO asked numerous questions to ascertain the nature of any related contact that may have occurred. In response to one of those questions, the individual responded that there was one occasion “when [his daughter] had her mouth on [his] penis, but it was while [he] was wearing sweat pants, and it was through the sweat pants.” Ex. 8B at 51 – 52. He described it as occurring when his daughter had climbed on to the couch where he was sitting and put her head in his lap. He stated that such contact made him uncomfortable and that when this occurred he moved her. *Id.* at 51 – 53.

Also during the GA interview, the individual described masturbating following sexual contact with his daughter, usually after he had put his daughter down or out in her playpen with the exception of one occasion on which he held his daughter over his shoulder while masturbating. Ex. 10 at 3. During the PSI, the individual also denied that any of those events had ever occurred. On questioning, the individual did state that there were occasions when he became aroused when his daughter was present, but that his daughter was not the basis of his arousal. He was embarrassed by being aroused in the presence of a child and would leave the room to relieve himself. Ex. 8B at 59 – 61, 66 – 67.

An examination of the record in this matter reveals numerous examples of the individual’s lack of reliability and trustworthiness. For example, while the individual challenges the propriety of GA conducting a polygraph examination when the individual

was suffering from sleep deprivation and lack of food, he ignores his own role in creating this situation. He was aware that he was scheduled to fly to GA headquarters for a polygraph, but he made the decision to stay up the night prior to his flight preparing for a professional meeting that followed the polygraph examination. Tr. at 176. It was also his decision to not eat breakfast prior to leaving for his flight or take the time to eat prior to arriving for the polygraph exam. Similarly, to the extent that he was without medications on the day of the polygraph, that was a factor fully within his control. All of these show questionable judgment on the part of the individual.

Further, it is often difficult to decipher the record in this matter because there is so much variation in the information that the individual provided during the investigation and the administrative review process. The individual's acknowledging sexual contact with his daughter and subsequently refuting it negatively affects his reliability. Moreover, there are other examples in the record that suggest the individual has been less than forthcoming: (1) during the PSI, the individual stated that he had been randomly selected for a polygraph (Ex. 8A at 14); at the hearing, he testified that he volunteered to take a polygraph so his employer would be eligible for a new DOE program (Tr. at 208 – 210); (2) during the GA interview and the PSI, he described his wife suffering from post-partum depression as a factor in his household following the birth of his daughter (Ex. 10 at 3; Ex. 8B at 9 – 10, 67 – 68, 91); at the hearing, both the individual and his wife testified that she had not suffered from post-partum depression but the individual testified that his wife had previously told him that (Tr. at 58, 229 – 231); (3) during the PSI, the individual stated that there was one occasion on which his daughter placed her mouth on his penis through his sweat pants (Ex. 8B at 51); at the hearing the individual testified that his daughter had never placed her mouth on his penis through his sweat pants (Tr. at 245); (4) during the PSI, the individual stated that on the night before the third polygraph examination he had stayed up working on a program until 2 a.m. and had gotten up at 4 a.m. to go to the airport (Ex. 8B at 7); at the hearing, he testified that he had worked the entire night without getting any sleep the night before the third polygraph examination (Tr. at 176); and (5) during the PSI, the individual dated his last intoxication to prior to the birth of his oldest child (circa 2006) when he was working for his prior employer (Ex. 8A at 11); at the hearing, he dated his last intoxication to being an undergraduate (circa 1990) (Tr. at 226 – 227). This pattern of inconsistent information reinforces security concerns arising from the individual's lack of reliability.

In the end, the individual's honesty, reliability and trustworthiness remain a security concern because of the nature, extent and seriousness of the lies that he told the GA, and the other inconsistent statements that he provided during the DOE's administrative review process. Accordingly, the individual has not resolved the Criterion L security concerns.

V. Conclusion

In the above analysis, I have found that the individual has sufficiently mitigated certain matters alleged with respect to Criterion L, and resolved the security concerns associated with Criterion F. Notwithstanding the foregoing, other derogatory information in the possession of the DOE raises additional serious security concerns under Criterion L.

Accordingly, 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 not brought forth sufficient evidence to resolve all of these security concerns. Accordingly, I have determined that the individual's access authorization should not be restored. The parties may seek review of this Decision by an Appeal Panel under the regulations set forth at 10 C.F.R. § 710.28.

Wade Boswell
Administrative Judge
Office of Hearings and Appeals

Date: July 15, 2015