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**United States Department of Energy
Office of Hearings and Appeals**

In the Matter of Personnel Security Hearing)

Filing Date: May 3, 2016)

Case No.: PSH-16-0039

Issued: July 28, 2016

Administrative Judge Decision

William M. Schwartz, Administrative Judge:

This Decision concerns the eligibility of XXXXX (hereinafter referred to as “the individual”) to hold an access authorization¹ under the Department of Energy’s (DOE) regulations set forth at 10 C.F.R. Part 710, Subpart A, entitled, “General Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material.” As discussed below, after carefully considering the record before me in light of the relevant regulations and 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), I have determined that the individual should be granted an access authorization.

I. Background

The individual works for a DOE contractor in a position that requires that she hold a DOE security clearance. After she was hired, but before she started in her position, the individual was instructed to complete the online version of a Questionnaire for National Security Positions (QNSP), the application for access authorization. Responding to two questions on the form, the individual indicated that she had not used marijuana in the past seven years, and that she had not been issued a summons, citation, or ticket to appear in court in the past seven years. In interviews conducted regarding her application for access authorization, she admitted that she had used marijuana at age 13 and had been charged with Minor in Possession (of alcohol) (MIP) at age 15; both of these events occurred within seven years of the date of her online application. She also admitted that she has consumed alcohol while under the minimum drinking age of 21.

¹ Access authorization is defined as “an administrative determination that an individual is eligible for access to classified matter or is eligible for access to, or control over, special nuclear material.” 10 C.F.R. § 710.5(a). Such authorization will be referred to variously in this Decision as access authorization or security clearance.

On March 10, 2016, the local security office (LSO) sent a letter (Notification Letter) to the individual advising her that it had reliable information that created a substantial doubt regarding her eligibility to hold a security clearance. In the 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(f) and (l) (hereinafter referred to as Criteria F and L, respectively).²

Upon receipt of the Notification Letter, the individual exercised her right under the Part 710 regulations to request an administrative review hearing, and I was appointed the Administrative Judge in the case. At the hearing, the individual presented the testimony of three witnesses—her boyfriend, a former supervisor, and her aunt and guardian—and testified on her own behalf. There were no witnesses for the LSO. In addition to the testimonial evidence, the LSO submitted ten numbered exhibits into the record. The individual submitted three exhibits, Exhibits A-C, transcripts of educational history to date. The exhibits will be cited in this Decision as “Ex.” followed by the appropriate numeric or letter designation. The hearing transcript in the case will be cited as “Tr.” followed by the relevant page number.

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

² Criterion F concerns information that indicates that the individual has “deliberately misrepresented, falsified, or omitted significant information from a Personnel Security Questionnaire, a Questionnaire for Sensitive (or National Security) Positions, a personnel qualifications statement, a personnel security interview, written or oral statements made in response to official inquiry on a matter that is relevant to a determination regarding eligibility for DOE access authorization....” 10 C.F.R. § 710.8(f). Criterion L concerns information that indicates that the individual has “engaged 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, criminal behavior....” 10 C.F.R. § 710.8(l).

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). Hence, 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 cited two criteria as the basis for administrative review of the individual's request for security clearance, Criteria F and L. It is well established that conduct involving lack of candor or dishonesty can raise questions about an individual's trustworthiness to protect classified information. Of special interest is any failure to provide truthful and candid answers during the security clearance process, or any other failure to cooperate with the security clearance process. Adjudicative Guidelines at Guideline E, ¶ 15.

As support for its security concerns under Criterion F, the LSO stated that the individual signed and dated a QNSP on May 13, 2015, in which she certified that she had not illegally used any drugs or controlled substance in the previous seven years. The LSO noted, however, that during a Personnel Security Interview (PSI) conducted on November 12, 2015, the individual admitted that she had intentionally omitted her 2009 illegal use of marijuana on her QNSP for fear of not gaining employment. Ex. 1.

As support for its security concerns under Criterion L, the LSO relied on two additional statements the individual made during the same PSI:

- A. She acknowledged that she failed to list her 2011 MIP charge on her May 2015 QNSP; and
- B. She admitted that she had been consuming alcohol while under the age of 21.

Id.

I find that there is ample information in the Notification Letter to support the LSO's reliance on Criteria F and L. Failure to provide truthful and candid answers during the security clearance process raises questions about an individual's reliability, trustworthiness and ability to protect classified information. Adjudicative Guidelines at Guideline E, ¶ 15. In addition, consuming alcohol below the minimum age constitutes criminal activity, which creates doubt about a person's judgment, reliability, and trustworthiness and, by its very nature, calls into question a

person's ability or willingness to comply with laws, rules and regulations. *Id.* at Guideline J, ¶ 30.

IV. Findings of Fact

The individual was raised by her mother until her mother died from alcohol-related causes when the individual was a junior in high school. Tr. at 44, 69. While she was in middle school, the individual was caught using marijuana at school and was disciplined by school authorities. *Id.* at 72. According to her testimony, she experimented with marijuana on that single occasion and has not used it since. *Id.* at 73. At age 15, she attended a party at which alcohol was served; the police raided the party and she was charged with MIP. *Id.* at 46. There is no evidence that she attended other parties where alcohol was served while she was in high school.

Two years before her mother's death, the individual moved in with her mother's sister, who became her legal guardian. Ex. 9 (Transcript of November 12, 2015, PSI) at 60-61. Her grades improved, she engaged in school sports, and she worked as a volunteer. Tr. at 41 (testimony of aunt); Ex. B. She lived with her aunt and her aunt's daughters for about three years, until she graduated from high school. Tr. at 45. When she began college, she moved out on her own, and has been living independently since then. *Id.* She has financed her education on her own, through scholarships and employment. *Id.* at 42. She is devoted to her studies and a very reliable worker. *Id.* at 11, 31 (testimony of boyfriend and supervisor). She remains close to her aunt and cousins, and spends much of her weekends with them. *Id.* at 42.

In the spring of 2015, the individual sought an internship at the DOE facility. One of the first forms she was asked to complete was an Electronic Questionnaire for Investigations Processing (e-QIP), which is the electronic version of the QNSP, and which she mistakenly believed was a job application. *Id.* at 57. It was on that form, which the individual completed on May 13, 2015, that she answered two questions inaccurately: she stated that she had not illegally used any drugs in the past seven years nor had she been issued a summons, citation, or ticket to appear in court in the past seven years. Ex. 8 at 21-22. At her PSI as well as at the hearing, the individual admitted that she had not reported her middle-school marijuana use because, believing the QNSP was her job application, she felt she would not be hired if her employer knew she had used drugs in the past. Ex. 9 at 74; Tr. at 57. Shortly after starting her position at the DOE facility, the individual met with a senior manager who, assuming she had not yet completed her QNSP, advised her to reveal even the most trivial offenses on her QNSP. Tr. at 57. She testified that her heart sank at that point, as that advice was too late in coming, and she decided that she would correct her misstatement at the first opportunity. She did so when she met with a background investigator shortly after she completed her QNSP, and again during her PSI. *Id.* at 58; Ex. 9 at 74-77.

With respect to her failure to acknowledge her MIP charge on her QNSP, the individual offered the following explanation. She interpreted the question on the QNSP to be seeking information about charges or citations that required appearance in court. Tr. at 65. Moreover, she did not believe that she had been arrested. *Id.* at 63. During her PSI, she stated that the police called the parents of the underage drinkers; in her case, they drove her home and spoke to her mother; later, she received a letter that directed her to take a class, with which she complied. Ex. 9 at 37-38.

She testified at the hearing that she “was not read my rights”; she was not handcuffed or taken to jail, and was not required to report to court. *Id.* at 63, 65. She also recalled being told that the charge would be expunged from her record when she turned 18. *Id.* at 59. As a result, she concluded that the MIP charge from age 15 was not the kind of charge that she was to report on the QNSP.

As regards her consuming alcohol while under the age of 21, the individual told the PSI interviewer that most of her underage drinking occurred in the presence of her aunt and was quite limited. Ex. 9 at 57. The PSI interviewer advised her that such consumption was in fact legal in her state of residence. Ex. 9 at 62; Tr. at 77. The individual admitted, however, that she had, on a few occasions, consumed alcohol under other circumstances. Ex. 9 at 57, 63. When she learned in the fall of 2015 that the DOE was concerned about the latter form of drinking, she committed to not consume any alcohol unsupervised until she reached the age of 21. Tr. at 81. Her boyfriend and her aunt, both of who testified at the hearing and both of whom spend significant time with the individual when she is not at work or school, confirmed that she has abided by her commitment. Tr. at 10, 17-19; 51, 68 (last alcoholic beverage was glass of champagne on New Year’s Eve 2015 under aunt’s supervision). Furthermore, at the hearing, she testified that, while she may have a celebratory drink when she turns 21, she does not intend to consume alcohol with any regularity in the future. *Id.* at 84. She explained that her concern and caution arise from the knowledge that alcohol contributed to her mother’s death and that alcoholism runs in her family. *Id.* at 85.

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) and the Adjudicative Guidelines. After due deliberation, I have determined that the individual should be granted a DOE security clearance. I find that granting 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: Misrepresentation, Falsification or Omission

In the Notification Letter, the LSO describes, as facts supporting its Criterion F concern, the individual’s certifying on her QNSP that she had not used drugs illegally within the last seven years. I note that the LSO also describes the individual’s failure to list her MIP charge on her QNSP, but as support for its Criterion L concern rather than as support for its Criterion F concern. Because both of these actions constitute misrepresentations to the LSO and potentially demonstrate a lack of candor, it is appropriate for me to consider them together in this section.

The Criterion F concern centers on the individual’s misrepresentations in her QNSP: that she certified that she had not used marijuana in the past seven years, and that she had not been issued a summons, citation, or ticket to appear in court in the past seven years. With respect to the latter, I find that the individual’s omission of information regarding her MIP charge does not fall

within Criterion F. Criterion F concerns information that indicates that the individual has “*deliberately* misrepresented, falsified, or omitted significant information.” The individual explained at the hearing that she did not report the 2011 MIP charge because she did not believe she was issued a summons, citations, or ticket to appear in court, focusing on the words “to appear in court.” Nor did she believe that she had been arrested. Because she believed she had not been arrested and was never required to appear in court, she believed that her MIP charge was not the type of information the QNSP sought. Furthermore, she understood that, whatever the nature of the MIP charge, it would be expunged from her record when she turned 18. Regardless whether she was correct in her belief, I cannot find that she *deliberately* omitted information about that charge.

On the other hand, the individual has admitted that she intentionally omitted information about her middle-school marijuana use, out of fear that she would not be hired if her employer knew the truth. The Adjudicative Guidelines provide a list of conditions that could mitigate this type of security concern, including:

- (a) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts;
- (b) the refusal or failure to cooperate, omission, or concealment was caused or significantly contributed to by improper or inadequate advice of authorized personnel or legal counsel advising or instructing the individual specifically concerning the security clearance process. Upon being made aware of the requirement to cooperate or provide the information, the individual cooperated fully and truthfully;
- (c) the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment;
- (d) the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that caused untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur.

Adjudicative Guidelines at Guideline E, ¶ 17(a)-(d).

After considering the facts underlying the Criterion F concern, the mitigating factors listed above, the individual's youth, and the testimony concerning her responsible and trustworthy character, I have concluded that the individual has resolved this concern. Once her manager advised her to reveal all of her infractions in the personnel security process, she clearly understood the necessity for full candor and has been straightforward with the LSO from that point forward. Although it is not clear whether she acknowledged her one-time marijuana use in middle school before or after the background investigator confronted her with that information (factor (a) above), she had already resolved before that interview to raise it at the interview. She

fully explained the incident at that time and later during her PSI. Generally, the second factor applies where an individual was given improper advice and relied on it when providing information to the LSO. In this case, the individual received no advice before she completed her QNSP, but rather received good advice too late. The manager clearly thought the advice was important to deliver to a new employee, which indicates that he believed a new employee would not necessarily be aware of the need for complete candor. Had she received this advice before she completed her QNSP, I have no doubt that she would have provided more complete information. Finally, considering the third mitigating factor, I note that her misrepresentation occurred only one time, and after receiving advice from her manager, she has not engaged in any further lack of candor with the LSO. Moreover, in light of her testimony and that of her boyfriend, aunt, and supervisor regarding her thoroughly reliable character, such behavior is highly unlikely to recur and does not cast doubt, in my opinion, on her reliability, trustworthiness, or good judgment. Accordingly, I find that these factors, and record's reflection of the individual's whole person, serve to adequately resolve the concern.

B. Criterion L: Underage Drinking as Criminal Activity

The Criterion L concern focuses on the criminal nature of the individual's consumption of alcohol under the age of 21 which, as a violation of a law, demonstrates that the individual may be unwilling or unable to abide by laws, rules, and regulations, including those that protect classified information. The factual bases supporting this concern are the individual's admission that she has consumed alcohol while still under 21 years old, and her acknowledgment that she had failed to list her 2011 MIP charge on her QNSP. I have addressed the misrepresentation aspect of her omission of the MIP charge in the above section. What remains as applicable to the Criterion L concern is that the MIP charge is evidence, along with her admission, that she has engaged in underage drinking.

The Adjudicative Guidelines provide a list of conditions that could mitigate this type of security concern, including:

- (a) so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment; and
- (b) the person was pressured or coerced into committing the act and those pressures are no longer present in the person's life;

Adjudicative Guidelines at Guideline J, ¶ 32(a)-(b).

Although the record reflects only one alcohol-related charge, the individual has provided the LSO with a more complete picture of the full extent of her alcohol consumption as a minor. The majority of her drinking has occurred while under the supervision of her guardian, which is in accordance with the laws of the individual's state of residence. The rest of her drinking appears to have been sporadic and limited in quantity; her busy schedule of school and work (and sports when she was in high school) left her little time for this activity. When she became aware that the DOE was concerned about her unlawful underage drinking, she committed to abstain until

her 21st birthday, and the testimony of her boyfriend and her aunt—people with whom she spends most of her free time—corroborate her commitment.

After considering the entire record in this case, I find that the individual has resolved the LSO's security concerns in this regard. There is no evidence that the individual has engaged in any other form of criminal activity. She has voluntarily curtailed her underage drinking, and violating that particular law will shortly become logically impossible, as the individual was rapidly approaching her 21st birthday at the time of the hearing. Because she is law-abiding in all other respects, I find that her underage drinking does not cast doubt on her reliability, trustworthiness and good judgment. Finally, if she was subject to peer pressure to drink as a teenager, the maturity and strength of character that she demonstrated during this administrative review process convinces me that she is no longer subject to peer pressure of that sort.

VI. Conclusion

Upon consideration of the entire record in this case, I find that there was evidence that raised doubts regarding the individual's eligibility for a security clearance under Criteria F and L of the Part 710 regulations. I also find that the individual has presented sufficient information to fully resolve those concerns. Therefore, I conclude that granting DOE access authorization to the individual "will not endanger the common defense and security and is clearly consistent with the national interest." 10 C.F.R. § 710.7(a). Accordingly, I find that the DOE should grant the individual DOE access authorization.

The parties may seek review of this Decision by an Appeal Panel, under the regulation set forth at 10 C.F.R. § 710.28.

William M. Schwartz
Administrative Judge
Office of Hearings and Appeals

Date: July 28, 2016