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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: November 30, 2011)

Case No.: PSH-11-0027

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Issued: April 6, 2012

Decision and Order

Robert B. Palmer, Hearing Officer:

This Decision concerns the eligibility of XXXXXXXXXXXXXXXX (hereinafter referred to as “the individual”) for access authorization under the regulations set forth at 10 C.F.R. Part 710, entitled "Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material.”¹ For the reasons set forth below, I conclude that the individual’s security clearance should not be restored at this time.²

I. BACKGROUND

The individual is employed by a Department of Energy (DOE) contractor, and was granted a security clearance in connection with that employment. In June 2011, the individual was arrested for Inflicting Corporal Injury on a Spouse or Cohabitant. Because this arrest raised security concerns,

¹An access authorization is an administrative determination that an individual is eligible for access to classified matter or special nuclear material. 10 C.F.R. § 710.5. Such authorization will also be referred to in this Decision as a security clearance.

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

the local security office (LSO) summoned the individual for an interview with a personnel security specialist in July 2011. After reviewing the transcript of this Personnel Security Interview (PSI) and the rest of the individual's personnel file, the LSO determined that derogatory information existed that cast into doubt the individual's eligibility for access authorization. They informed the individual of this determination in a letter that set forth the DOE's security concerns and the reasons for those concerns. I will hereinafter refer to this letter as the Notification Letter. The Notification Letter also informed the individual that he was entitled to a hearing before a Hearing Officer in order to resolve the substantial doubt concerning his eligibility for access authorization.

The individual requested a hearing on this matter. The LSO forwarded this request to the Office of Hearings and Appeals, and I was appointed the Hearing Officer. The DOE introduced 13 exhibits into the record of this proceeding. The individual introduced five exhibits and presented the testimony of three witnesses, in addition to testifying himself.

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

As indicated above, the Notification Letter included a statement of derogatory information that created a substantial doubt as to the individual's eligibility to hold a clearance. This information pertains to paragraph (1) of the criteria for eligibility for access to classified matter or special nuclear material set forth at 10 C.F.R. § 710.8.

Under criterion (1), information is derogatory if it indicates that the individual "has engaged in any unusual conduct or is subject to any circumstances which tend to show that [he] is not honest, reliable, or trustworthy; or which furnishes reason to believe that [he] may be subject to pressure, coercion, exploitation or duress which may cause [him] to act contrary to the best interests of the national security." Such conduct includes, but is not limited to, "criminal behavior." 10 C.F.R. § 710.8(1). As support for this criterion, the Letter cites the individual's arrests in June 2011 and March 1998 for Inflicting Corporal Injury on a Spouse or Cohabitant and in 1990 for Driving Under The Influence of Alcohol, and his admission that in 1996 he was involved in a physical altercation with a co-worker. The letter also cites the individual's statements during his July 2011 PSI that he did not strike his live-in girlfriend during the events leading up to the June 2011 arrest, that he was not intoxicated during this incident, and that he had not had any other incidents of domestic violence since June 2010 other than his June 2011 arrest, all of which are inconsistent with records obtained from the local police.

This derogatory information adequately justifies the DOE's invocation of criterion (1), and raises significant security concerns. Criminal activity creates doubt about a person's judgement, reliability and trustworthiness. By its very nature, it calls into question a person's ability or willingness to

comply with laws, rules and regulations. Conduct involving questionable judgement, lack of candor, or dishonesty can also 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, The White House (December 19, 2005), Guidelines J and E.*

III. REGULATORY STANDARDS

The criteria for determining eligibility for security clearances set forth at 10 C.F.R. Part 710 dictate that in these proceedings, a Hearing Officer must undertake a careful review of all of the relevant facts and circumstances, and make a "common-sense judgment . . . after consideration of all relevant information." 10 C.F.R. § 710.7(a). I must therefore consider all information, favorable or unfavorable, that has a bearing on the question of whether granting or restoring a security clearance would compromise national security concerns. Specifically, the regulations compel me to consider the nature, extent, and seriousness of the individual's conduct; the circumstances surrounding the conduct; the frequency and recency of the conduct; the age and maturity of the individual at the time of the conduct; the absence or presence of rehabilitation or reformation and other pertinent behavioral changes; the likelihood of continuation or recurrence of the conduct; and any other relevant and material factors. 10 C.F.R. § 710.7(c).

A DOE administrative proceeding under 10 C.F.R. Part 710 is "for the purpose of affording the individual an opportunity of supporting his eligibility for access authorization." 10 C.F.R. § 710.21(b)(6). Once the DOE has made a showing of derogatory information raising security concerns, the burden is on the individual to produce evidence sufficient to convince the DOE that granting or restoring access authorization "will not endanger the common defense and security and will be clearly consistent with the national interest." 10 C.F.R. § 710.27(d). *See Personnel Security Hearing, Case No. VSO-0013, 24 DOE ¶ 82,752 at 85,511 (1995) (affirmed by OSA, 1996), and cases cited therein.* The regulations further instruct me to resolve any doubts concerning the individual's eligibility for access authorization in favor of the national security. 10 C.F.R. § 710.7(a).

IV. FINDINGS OF FACT AND ANALYSIS

At the hearing, the individual attempted to refute, primarily through his testimony and that of his live-in girlfriend, the allegations set forth in the Notification Letter concerning his prior illegal acts and his statements during the July 2011 PSI. However, for the reasons set forth below, I did not find this testimony to be credible. I attribute greater weight to the police report generated subsequent to the individual's June 2011 arrest, DOE Exhibit (DOE Ex.) 11, and I find that the individual has not adequately addressed the security concerns set forth in the Notification Letter.

A. The Testimony of the Individual and his Girlfriend

The individual's girlfriend first testified about her relationship with the individual, stating that she has been romantically involved with the individual for 23 years, that they have lived together for almost this entire period of time, that they have two sons, and that they regard themselves as a family. Hearing Transcript (Tr.) at 39. Although at the time of the hearing they were not sharing the same house, they saw each other daily and the individual was planning eventually to move back in with the girlfriend. Tr. at 40.

The individual testified about the allegations in the Notification Letter that did not directly involve his girlfriend, and he and his girlfriend both discussed the individual's 1998 and 2011 arrests. Regarding his 1990 DUI arrest, the individual said that he was out with several of his friends when a car in which he was a passenger ended up in a ditch. While his friends attempted to push the vehicle, the individual got behind the wheel to guide the car back onto the road. The police arrived at the scene at that point and arrested the individual for DUI. Although the car belonged to his father, the individual testified that he had not driven the vehicle that evening. The individual ended up pleading guilty to a lesser offense, and was told that, since he was a minor, his record would be sealed, and he could "move on." Tr. at 91-92.

The individual then testified about his 1996 altercation with a co-worker. He said that he was with his "technical lead" and the co-worker, and laughed when the lead made a sarcastic remark to the co-worker. This apparently offended the co-worker, who repeatedly attempted to goad the individual into a fight throughout the rest of the day. The individual tried to ignore him, but towards the end of the work day, the individual approached work site security, informed them of the co-worker's behavior, and asked for advice. Tr. at 96. The security officer allegedly told the individual that he did not care what the individual did, as long as he did it offsite, and that the individual should "do what you got to do." Tr. at 97. This advice made the individual think that "maybe I got to go do this," Tr. at 97, so he left the site, fought the co-worker briefly, returned to the site to gather his belongings, and then went home. Tr. at 98. The individual was suspended for two days as a result of this incident. Tr. at 98.

The testimony of the individual and his girlfriend about the individual's 1998 and 2011 arrests for Corporal Injury on a Spouse or Cohabitant was similar in many respects. The 1998 incident centered around the individual's desire to spend the evening out with his friends, and the girlfriend's wishes that he remain home with her. Tr. at 42, 101. The girlfriend testified that she blocked the doorway to prevent the individual from leaving, and the individual attempted to move her. Tr. at 42. During the ensuing struggle, the girlfriend scratched the individual's face, and the individual called the

police. Tr. at 43, 101. According to the girlfriend, when the police came, they arrested both of them because both received visible, minor injuries during the incident. Tr. at 44. Although the individual did not strike her, the girlfriend sustained “a bruise or a scratch or something” on her ankle or her arm.” *Id.* The charges were subsequently dropped. Tr. at 44, 102.

Regarding the 2011 arrest, the individual and the girlfriend testified that when she came home from work one evening, the individual was already home and was working out in the couple’s exercise room. After realizing that she needed to purchase some items from the store before preparing dinner, she left, did her shopping, and returned home. Tr. at 47-48, 108. When she returned, the individual had already left, and she prepared and ate dinner with their two sons. Afterwards, the individual called their eldest son, and asked him to pick the individual up from a local sports bar, where the individual had been drinking. Tr. at 48, 109. When the individual got home, he and the girlfriend started arguing in their bedroom about why he had left without informing her and about his missing dinner. When the individual tired of the argument and attempted to leave the room, the girlfriend again blocked the doorway and refused to allow him to exit. Tr. at 49. The individual insisted that he was going to leave their home and take their youngest son with him. Tr. at 49, 111. The two struggled, and the girlfriend fell backwards out of the doorway onto the floor. According to both witnesses, at no time during this incident did the individual hit her. Tr. at 55, 116. The individual then remained in the bedroom and closed the door. The girlfriend then called the police because she was very angry and because the individual threatened to leave with their younger son. Tr. at 50, 55, 111-113. When the police arrived, she said, she told them that they had fought, that the individual was in the bedroom, and that he had no weapons. When the police knocked on the bedroom door and the individual failed to answer, the police asked the girlfriend if they could force the door open, and the girlfriend consented. Tr. at 58. After the police gained entry to the room, they arrested the individual.

The girlfriend went on to testify that she had been the aggressor during this incident, as she had been the aggressor during the incident in 1998, and that the individual was just trying to get away from her. Tr. at 66. The girlfriend did not want to press charges against the individual, and she informed the district attorney’s office of this. Tr. at 67.

B. Analysis

Evaluating this testimony and the record as a whole, I harbor serious doubts about the credibility of the individual and the girlfriend. The police report detailing the incidents that led up to the individual’s June 2011 arrest is inconsistent with their testimony in a number of respects.

According to the report, the police were dispatched to the individual's residence, and were told by the dispatcher that the girlfriend had reported that the individual had punched her in the head and thrown her to the ground during an argument between them. After the police arrived at the residence, entered, and asked the girlfriend what had happened, the report quotes the girlfriend as saying "My fiancé punched me in the head two times and knocked me down on the ground. . . . He was trying to take my seven year old out of the house and he's drunk." The policeman saw fresh bruises and abrasions on her arms and knees. The girlfriend also allegedly reported that the individual punched her on the back of the head, and on the right side of her face near her ear. The girlfriend told the policeman that she had a bump on the back of her head and that she was in pain.

After the officer forced open the bedroom door, arrested the individual, and took him out to the squad car, he returned to the house to interview the girlfriend further. According to the report, the girlfriend said that as soon as the individual entered their bedroom after returning from the restaurant, he immediately began calling her names and asking her why she was still in the house. The girlfriend did not want to argue with the individual, but he continued to swear at her and threatened to take their younger son away from the home. The girlfriend allegedly told the policeman that she was afraid that the individual was too intoxicated to properly care for their son or to drive. Consequently, she sent the son upstairs to the room of the older son. This angered the individual, who then grabbed her hair, punched her on the back of her head near the left side, and punched her a second time on the right side of her head. According to the report, when this second punch landed, she lost her vision for a moment, and thought that she was going to pass out. The individual grabbed her neck and told her that she was not going to tell him what to do with their son. When the individual released her and left the room to call out to their sons, the girlfriend called the police. When the individual realized that she was doing this, he went back into the bedroom, closed the door and locked himself inside. The policeman asked the girlfriend if the individual had been physically abusive to her in the past, and the girlfriend said that he had done "this same thing to me two nights ago on the fifteenth." She pointed out bruises on her arms that she claimed the individual caused on that date.

The officer also spoke to the older son about what he heard during these events. According to the report, the son said that he was aware of the individual's abusive behavior, and that when he returned with the individual from the restaurant that evening he heard the individual cursing at his mother. Several moments later, the son heard "bumping" sounds that he believed was his mother bumping into the walls and the bedroom door, and he heard the individual's voice changing in a manner that led him to believe that his father was being physical with his mother.

Understandably, a substantial portion of the evidence presented by the individual during this proceeding was directed at attacking the credibility of this report. The girlfriend testified that the

police report was not accurate in that the individual did not punch her, did not throw her to the floor, and did not tell the police that the individual was drunk or that he had been physically abusive with her in the past. Tr. at 61-66. She further claimed that, contrary to the impression conveyed by the report, it was she, and not the individual, who was the aggressor during this incident. She attempted to explain some of these discrepancies by speculating that the policeman may have misinterpreted her statements. For example, instead of being punched in the head and being knocked to the ground, she testified that she told the police that she had been pushed to the ground and hit in the head when she fell backwards. Tr. at 62. The individual testified that the report was “not at all” accurate, and that he did not hit his girlfriend. Tr. at 116, 119. Furthermore, the individual submitted a written statement from his older son in which he said that he was not aware of his father’s allegedly abusive behavior, that he did not hear bumping sounds on the night in question that he believed were caused by his mother bumping into walls and the door, and that he did not hear his father’s voice change as if he was being physical with his mother. Individual’s Exhibit B.

Nevertheless, I find the police report to be more credible than the testimony and other evidence presented by the individual. As an initial matter, the report described the officer’s actions and observations in considerable detail. For example, the report states that the bedroom was in the “northwest portion of the home,” that the officer kicked open the bedroom door with his right foot, and that he “placed three pairs of handcuffs on [the individual] and ensured they were double locked for his safety.” DOE Ex. 11 at 4-5. It is difficult to imagine that the officer would be so meticulous regarding peripheral matters, yet so careless in documenting the most important parts of the report: the actions and statements of the parties involved. As previously stated, the individual’s girlfriend suggested that the officer may have misinterpreted her statements. However, neither she nor the individual could adequately explain how the officer could reasonably derive the conclusion that the individual punched the girlfriend in the back of her head near the left side, and punched her a second time on the right side of her head, causing her to lose her vision momentarily, from her alleged reply to the officer that she was pushed to the floor and hit her head as she was falling backwards.³

I am therefore left with the conclusion that either the officer deliberately falsified his report, or that the individual provided false information during the 2011 PSI and at the hearing, and his girlfriend was also less than totally forthcoming during her testimony. Whereas there is no readily discernable reason for the officer to file a false report, the incentive for the individual and his family to provide false or misleading information is compelling and evident: the maintenance of the individual’s access authorization and the avoidance of the possible consequences of the loss of that authorization.

³ Moreover, according to the police report, the girlfriend also told the police dispatcher that the individual punched her in the head. DOE Ex. 11 at 4.

There are other reasons to question the credibility of the individual and his girlfriend. Whereas the girlfriend indicated at the hearing that she did not tell the police that the individual struck her, during his 2011 PSI, the individual stated that “she called the cops and told ‘em that I was hitting her.” DOE Ex. 12 at 35. Furthermore, there are other instances in which the individual has been less than totally forthcoming in his communications with the DOE. In Questionnaires for National Security Positions (QNSPs) executed by the individual in 2005, 2008 and 2010, the individual failed to disclose his 1990 DUI arrest despite having been asked on each occasion if he had ever been arrested for any offense pertaining to alcohol or drugs. The final two omissions occurred despite having been informed during a 2006 PSI that he was required to report the arrest on his QNSPs. DOE Ex. 12 at 178-183. During that same 2011 PSI, the individual stated that he was not disciplined as a result of the 1996 altercation with a co-worker. However, as previously stated, at the hearing the individual testified that he was suspended for two days.

Based on the foregoing, I cannot conclude that the individual has adequately addressed the security concerns under criterion (1) raised in the Notification Letter concerning his illegal acts and false statements. In an attempt to demonstrate that further incidents of domestic violence were unlikely, the individual and his girlfriend both testified about the counseling they have received and the improvements in their relationship that have resulted. He also presented the testimony of the Employee Assistance Program psychologist associated with his employer to that same general effect. Tr. at 8-24. However, my lack of confidence in the veracity of the individual and his girlfriend lessens the weight that I can justifiably attribute to their testimony about their counseling and its benefits. Moreover, even if I was to assume that the two testified truthfully in this regard, the period of domestic calm of approximately eight months between the 2011 arrest and the date of the hearing is not sufficient to convince me that future incidents of domestic violence are unlikely. This is especially true given the fact that there have been repeated instances of violence over a 13 year period. Finally, for the reasons previously discussed, I conclude that the individual was not being truthful during the 2011 PSI and at the hearing, when he stated that he did not punch his girlfriend during the incident that led to his arrest, and when he indicated in the PSI that he did not engage in any incidents of domestic violence between June 2010 and his June 2011 arrest. The police report indicates that there was another such incident two days prior to the arrest.

V. CONCLUSION

For the reasons set forth above, I find that the individual has not successfully addressed the DOE’s security concerns under criterion (1). I therefore conclude that he has not demonstrated that restoring his access authorization would not endanger the common defense and would be clearly consistent with the national interest. Accordingly, I find that the individual’s security clearance should not be

restored at this time. The individual may seek review of this Decision by an Appeal Panel under the procedures set forth at 10 C.F.R. § 710.28.

Robert B. Palmer
Hearing Officer
Office of Hearings and Appeals

Date: April 6, 2012