

The Notification Letter informed the Individual that he was entitled to a hearing before a Hearing Officer in order to resolve the substantial doubt regarding his eligibility for access authorization. The Individual requested a hearing, and the LSO forwarded his request to the Office of Hearings and Appeals (OHA). The Director of OHA appointed me as the Hearing Officer in this matter on July 30, 2012.

At the hearing I convened pursuant to 10 C.F.R. § 710.25(e) and (g), I took testimony from the Individual, and his colleague. *See* Transcript of Hearing, Case No. PSH-12-0097 (hereinafter cited as “Tr.”). The LSO submitted 13 exhibits, marked as Exhibits 1 through 13. The Individual did not submit any exhibits.

II. STANDARD OF REVIEW

The Hearing Officer's role in this proceeding is to evaluate the evidence presented by the agency and the Individual and to render a decision based on that evidence. *See* 10 C.F.R. § 710.27(a). The regulations state that “[t]he decision as to access authorization is a comprehensive, common-sense judgment, made after consideration of all relevant information, favorable or unfavorable, as to whether the granting or continuation of 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 have considered the following factors in rendering this decision: the nature, extent, and seriousness of the conduct; the circumstances surrounding the conduct, including knowledgeable participation; the frequency and recency of the conduct; the Individual's age and maturity at the time of the conduct; the voluntariness of the Individual's participation; the absence or presence of rehabilitation or reformation and other pertinent behavioral changes; the motivation for the conduct; the potential for pressure, coercion, exploitation, or duress; the likelihood of continuation or recurrence; and other relevant and material factors. *See* 10 C.F.R. §§ 710.7(c), 710.27(a). The discussion below reflects my application of these factors to the testimony and exhibits presented by both sides in this case.

III. FACTUAL BACKGROUND

On April 27, 2011, the Individual and a Male Friend (the Male Friend) were on an out-of-town vacation. They went to a bar, where they met, for the first time, two women (the Victim and the Female Friend).¹ The four then proceeded to a second bar. The Victim and the Individual kissed consensually in the back seat of the vehicle on the way to the second bar. The four eventually drove to the hotel (the Hotel) at which the men were staying.

In her original statement to police, the Victim stated that she didn't remember much of what happened after she arrived at the second bar, stating she recalled not being able to see or stand-up straight and feeling “very intoxicated.” Exhibit 11 at 41. She further reported that she “felt light headed and really intoxicated” when she left the second bar, and that she fell asleep in the car on

¹ The record shows that the Victim had consumed a total of four alcoholic beverages, in two bars prior to arriving at the bar where she met the Individual. Exhibit 11 at 4. The record also shows that the Victim consumed a portion of an additional alcoholic beverage at the bar where she met the Individual. *Id.*

the way to the Hotel.² Exhibit 11 at 2, 41. The Victim's next recollection was kissing the Individual outside of the Hotel and then waking up in the Individual's hotel room with the Individual having anal sex with her. *Id.* at 43. The Victim reported that she then pushed the Individual off of her. Exhibit 11 at 42. She further reported that the Individual was on the phone stating that she had passed out. *Id.* When the Individual left the room, the Victim left the Hotel and ran across the street. She borrowed a cell phone from a stranger (her cell phone's battery had gone dead) and called a former boyfriend (Ex-Boyfriend #1) to pick her up and take her to her parents' home.³ Exhibit 11 at 45. The local police subsequently traced this call by using the Ex-Boyfriend #1's cell phone (to which to call had been placed). When the police interviewed the cell phone's owner, he confirmed that a hysterical, crying woman had asked to borrow his cell phone. Exhibit 11 at 10-11, 84. The Victim's mother transported her to a local hospital for treatment and a forensic medical examination, which revealed "numerous lacerations to [the Victim's] rectum." Exhibit 11 at 5.

The foregoing information was provided by the Victim in her first statement to police. The police conducted a second interview of the Victim in which she stated that at one point, prior to falling asleep and the sexual battery, she attempted to leave and got as far as the elevator, but was pulled back into the room by the Individual. Exhibit 11 at 51-52. The police subsequently created a timeline of the events, as recounted by the Victim, based upon surveillance videos obtained from the Hotel and the Victim's cell phone records. The cell phone records, surveillance videos, and police timeline essentially corroborate the assertions made in the Victim's second statement.⁴ *Id.* at 12. Police Interviews of the Male Friend, the Female Friend and Ex-Boyfriends #1 and #2, were also consistent with the account provided by the Victim. *Id.* at 65-67, 74, 81, 90. In addition, the police interviewed the Medical Director (the Doctor) for the local Sexual Assault Response Team. The Doctor, who is a certified sexual assault forensic examiner, stated that the lacerations and abrasions she had observed in contemporaneous photographs of the Victim were typical of an un-consensual sexual encounter. *Id.* at 91-92. The Doctor speculated that the Victim was most likely asleep when the injuries occurred. *Id.*

During his police interview, the Individual provided vague and inconsistent statements regarding the Victim's state of intoxication and particularly whether the Victim was asleep when he began having sex with her. When the Individual was asked if the Victim seemed "drunk at all," he stated: "I didn't see her stagger, she wasn't slurring her speech or anything like that." Exhibit 11 at 25. He was subsequently asked: "Okay did she seem okay still or was she falling down drunk?" The Individual responded: "No I mean she seemed fine, you know, **she was intoxicated definitely.**" *Id.* at 27 (emphasis supplied). The Individual initially repeatedly denied that the Victim had fallen asleep during sex. *Id.* at 28-30. At some point during this interview, the police administered a "Computer Voice Stress Analyst Test" to the Individual. Exhibit 11 at 8. The police then told the Individual that he lied on two relevant questions. The

² She further recalled that while they were riding in the car, the Female Friend suggested taking the Victim home because "I was like just pretty much incoherent in the back seat." Exhibit 11 at 43.

³ The Victim had seen Ex-Boyfriend #1 at one of the bars she visited earlier that night, but left in order to avoid an awkward situation.

⁴ These records show that the Victim left the Hotel room and texted Ex-Boyfriend #1 seeking help, and then was lead back into the Hotel room by the Individual, who was holding her arm. Exhibit 11 at 12.

Individual responded by indicating that the Victim might have been asleep when they were having sex, but would then change his mind stating: "no, no, I know she was awake." *Id.* The police further noted that: "Throughout the interview his memory of the chain of events was great until [he was asked] questions about what occurred after sex." *Id.* Interestingly, the Individual omitted mentioning that the Victim had left the room in his presence. Exhibit 11 at 21-31.

On September 12, 2011, the police issued a warrant for the Individual's arrest. Exhibit 9. That warrant states, in pertinent part: "[The Individual] did unlawfully commit a sexual battery upon a person . . . by anal penetration . . . without the consent of [the Victim] and without the prior knowledge or consent of [the Victim]. [The Individual] did administer a narcotic, anesthetic, alcoholic beverages or other intoxicating substance, which mentally or physically incapacitated the said victim." Exhibit 9 at 1.

On October 18, 2011, the LSO conducted a PSI of the Individual. During this PSI, the Individual was repeatedly asked about the Victim's alcohol impairment or lack thereof. Initially the Individual was asked: "Okay. Um, so you met these two girls. Were they, um, drunk, intoxicated?" To which the Individual stated: "I didn't notice them to be **at all**. Didn't seem that way." Exhibit 12 at 17 (emphasis supplied). Later on during the PSI, the Individual was asked: "You were not intoxicated. Were the girls you were with intoxicated at all? No?" The Individual responded by stating: "No, sorry, I shook my head. I mean, I didn't observe them to be physically –." *Id.* at 21. The Individual was then interrupted by the interviewer who stated: "Like stumbling." *Id.* To which the Individual stated: "Unsteady on their feet or anything like that." *Id.* Still later during the PSI, the Individual was asked: "The young lady did not seem intoxicated? There was no stumbling?" *Id.* at 53. The Individual responded by stating: "No." *Id.* The Interviewer then asked: "And she did not blackout or anything?" The Individual responded: "No, huh-uh. She didn't appear to be intoxicated enough to, to blackout. She was steady on her feet and her speech wasn't slurred." *Id.*

IV. DEROGATORY INFORMATION AND SECURITY CONCERNS

The record shows that the Individual was criminally charged with sexual battery. Specifically, the Individual was charged with administering an intoxicating substance to the Victim, and then when she was incapacitated, forcibly having anal sex with her without her consent. Such serious criminal conduct raises security concerns under Criterion L. Moreover, the evidence gathered during the LSO's investigation of these criminal charges constituted derogatory information which raised serious security concerns under Criterion L. "Criminal activity creates doubt about a person's judgment, reliability and trustworthiness. By its very nature, it calls into question a person's ability or willingness to comply with laws, rules and regulations." *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 J at ¶ 30.

The facts cited above also show that the Individual has deliberately misrepresented, falsified, or omitted significant information during a personnel security interview made in response to official inquiry on a matter that is relevant to a determination regarding eligibility for DOE access authorization, by failing to acknowledge, during his October 18, 2011, PSI, that the Victim was at least somewhat intoxicated during the events of April 27, 2011. This deliberate omission

raises security concerns under 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. 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 Guideline E at ¶15.

V. ANALYSIS

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, an individual must 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 also Department of Navy v. Egan*, 484 U.S. 518, 532 (1988) (*Egan*) (security clearances will be granted only when “clearly consistent with the national interest”); *Personnel Security Hearing, Case No. PSH-12-0100* (2012), and cases cited therein.⁵ The regulations and the case law further instruct me to resolve any doubts concerning the Individual’s eligibility for access authorization in favor of the national security. *Egan*, 484 U.S., at 532 (“the clearly consistent standard indicates that security-clearance determinations should err, if they must, on the side of denials”); 10 C.F.R. § 710.7(a). Accordingly, unlike a criminal matter, where the government has the burden of proving the defendant guilty beyond a reasonable doubt, the standard in this proceeding places the onus on the individual because it is designed to protect national security interests. An individual, however, is afforded a full opportunity to present evidence supporting his 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).

The Individual, attempting to establish mitigation of the security concerns raised by derogatory information discussed above, has raised a number of arguments. After careful consideration of each of these arguments and the record, I find that the Individual has not sufficiently mitigated the security concerns raised under Guidelines E and J or Criteria L and F.

Criterion F

As discussed above in the Factual Background section, the Individual denied that the Victim was intoxicated on three different occasions during the PSI.⁶ The Individual’s deliberate failure to

⁵ 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>.

⁶ At the hearing, the Individual was asked: “Why didn’t you mention to the personnel security analyst that she was intoxicated definitely even if you had to define what you meant?” The Individual responded by stating: “I felt that considering from my knowledge of personnel security investigators . . . they have little or no street criminal experience. Okay? . . . So I felt that I should explain exactly what I meant when I said what I said, and that’s why I

disclose that the Victim was moderately intoxicated shows that he was clearly trying to either avoid revealing that she was intoxicated, or to create the impression that he was unaware that the Victim was intoxicated.⁷ The record contains evidence however, showing that the Individual was aware that the Victim was moderately intoxicated. Exhibit 11 at 27. Moreover, the Victim, the Female Friend, the Male Friend, and the Individual himself, each told the police that the Victim was intoxicated on the night of the alleged sexual battery. Based on the evidence before me, I find that the LSO properly invoked Criterion F.

The Individual contends that he was confused by some of the questioning during the PSI. He notes that some of the questions, specifically those appearing at page 21 of the PSI transcript posed by the interviewer, were confusing and compound in nature and that it is therefore unfair to hold him responsible for his answers to those questions. While the questions appearing on page 21 of the PSI transcript were inartfully posed, and the resulting transcript was somewhat ambiguous, it was clear that the Individual's statements appearing at page 21 were intended to suggest the Victim was not intoxicated. Even if I were to accept that the Individual was confused by the personnel security specialist's questions appearing on page 21 of the PSI transcript, I find that the questions posed on pages 17 and 53 of the PSI transcript were clear. The Individual's responses to these questions related to the Victim's state of intoxication were deliberately misleading based on my reading. In the end, I find that the Individual did not mitigate the security concerns associated with his deliberate falsifications at issue.

Criterion L

The Individual admits to having anal sex with the Victim in the Hotel room. According to the Police Report, the Victim claims that she did not consent to the anal sex act. Portions of the Police Report appearing in the record, strongly support the Victim's contention.⁸ If the sex act was not consensual, then the Individual has engaged in serious criminal activity which raises security concerns under Criterion L. Moreover, since the Individual has repeatedly claimed that the sex act was consensual during a PSI and at the hearing, if the sex act was non-consensual, then the Individual has repeatedly lied under oath and would therefore pose an unacceptable security risk.

At the hearing, the Individual testified that a jury trial was held on the criminal charge of Sexual Battery and that the jury acquitted him. Tr. at 108-109. The Individual's co-worker testified that he was in the courtroom when the jury returned a verdict in favor of the Individual. *Id.* at 134. The Individual argues that his acquittal proves that he was unjustly accused and resolves the security concerns raised by his arrest for sexual battery. In the criminal proceeding, the burden

followed it up with the definition that I did. That's why I didn't feel uncomfortable saying that to a beat cop, actually a detective that was interviewing me, because I think he understands there is different degrees of intoxication or impairment." Tr. at 42.

⁷ Since the warrant for the Individual's arrest accused the Individual of administering an intoxicating substance to the victim with the intent to incapacitate her, the extent to which she was impaired that night was a highly relevant and material issue: the more impaired the Victim was, the less likely that she was able to provide meaningful consent to the sex act or to defend herself.

⁸ Those portions of the Police Report provided to the LSO by the Individual appear in the record as Exhibit 11.

of proof was on the government to show beyond a reasonable doubt that the Individual had committed a sexual battery, while in the present proceeding the onus is on the Individual to adequately mitigate the security concerns associated with his conduct leading to the criminal charges.

There is sufficient derogatory information in the record to raise substantial doubts about the Individual's conduct on the night of April 27, 2011/early morning of April 28, 2011. The accounts of that night provided by the Victim, the Individual, the Female Friend and the Male Friend, as well as the corroborative evidence (including the opinion of the Doctor) gathered by the police, constitute sufficient unresolved derogatory information to raise serious security concerns about the Individual. This hearing was an opportunity for the Individual to provide evidence to resolve or mitigate the lingering doubts raised by this derogatory information. However, the only evidence submitted by the Individual was his testimony and that of a co-worker.⁹ After considering the evidence in the record, including the testimony of the Individual and his co-worker, I find that the Individual has not resolved or mitigated the lingering doubts raised by this derogatory information concerning the alleged sexual battery.

Accordingly, I find that the Individual has not resolved the security concerns raised under Criterion L.

V. CONCLUSION

For the reasons set forth above, after carefully considering the evidence before me, I find that the Individual has not resolved the security concerns raised under Criteria F and L. Therefore, the Individual has not demonstrated that restoring his security clearance 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. The Individual may seek review of this Decision by an Appeal Panel under the procedures set forth at 10 C.F.R. Part 710.28.

Steven L. Fine
Hearing Officer
Office of Hearings and Appeals

Date: November 29, 2012

⁹ Somewhat surprisingly, the Individual did not submit any documentary evidence relating to the criminal trial.