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

In the Matter of Personnel Security Hearing)
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Filing Date: November 15, 2011)
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Case No.: PSH-11-0019

Issued: March 2, 2012

Hearing Officer Decision

William M. Schwartz, Hearing Officer:

This Decision concerns the eligibility of XXXXXXXXXXXX (the individual) to hold an access authorization (also called a security clearance) under the provisions of 10 C.F.R. Part 710, entitled “Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material.” In this Decision, I will consider whether, on the basis of the testimony and other evidence in the record of this proceeding, the individual’s access authorization should be restored. For the reasons discussed below, I have determined that the individual’s access authorization should be restored.

I. Background

The individual has held a Department of Energy (DOE) access authorization for a number of years. In February 2011, the individual disclosed to an Office of Personnel Management (OPM) investigator that he had been viewing images on his home computer that he characterized as child pornography. At a Personnel Security Interview (PSI) that the local DOE security office (LSO) conducted with the individual in July 2011, he admitted that he had viewed images of nude and provocatively dressed teenage girls about once a month from 2008 to February 2011 and further admitted that it might have been illegal to do so. The LSO determined that the individual’s admissions constituted derogatory information that created a substantial doubt about his eligibility for an access authorization. Because its security concerns remained unresolved after the PSI and an ensuing psychiatric evaluation, the LSO proceeded to obtain authority to initiate an administrative review proceeding.

The administrative review proceeding began with the issuance of a Notification Letter to the individual. *See* 10 C.F.R. § 710.21. That letter informed the individual that his access authorization had been suspended on the basis of information that created a substantial doubt concerning his eligibility for access authorization. The Notification Letter included a statement of that derogatory information and explained how the information fell within the purview of one potentially disqualifying criterion, Criterion L, which is set forth at 10 C.F.R. § 710.8(l).¹ The letter further 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 the individual's request to the Office of Hearings and Appeals (OHA). The Director of OHA then appointed me as the Hearing Officer in this matter.

At the hearing convened pursuant to 10 C.F.R. § 710.25(e) and (g), I took testimony from the individual, two close friends, two supervisors, a co-worker, and a psychiatrist who had evaluated the individual at his request. The LSO and the individual each submitted five exhibits into the record. A transcript of the hearing was produced and will be hereinafter cited as "Tr."

II. Regulatory Standard

The provisions of 10 C.F.R. Part 710 govern the eligibility of individuals who are employed by or are applicants for employment with DOE, contractors, agents, DOE access permittees, and other persons designated by the Secretary of Energy for access to classified matter or special nuclear material. The Hearing Officer's role in this proceeding is to evaluate the evidence concerning the individual's eligibility for access authorization presented by the agency and the individual, and to reach a decision based on that evidence. *See* 10 C.F.R. § 710.27(a). Part 710 generally provides that "[t]he decision as to access authorization is a comprehensive, common-sense judgment, made after consideration of all relevant information, favorable and 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. Any doubt as to the individual's access authorization eligibility shall be resolved in favor of national security." 10 C.F.R. § 710.7(a). I have considered the following factors in reaching this decision: the nature, extent, and seriousness of the conduct; the circumstances surrounding 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 continuance or recurrence; and other relevant 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 evidence presented by both sides in this case.

III. Derogatory Information and Associated Security Concerns

¹ Criterion L relates, in relevant part, to information that a person 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 undue duress which may cause the individual to act contrary to the best interests of national security" 10 C.F.R. § 710.8(l).

According to the Notification Letter, the derogatory information that raises the LSO's concerns relates to the individual's viewing, downloading and storing of hundreds of images of nude and provocatively dressed underage teenage girls on his home computer. The LSO stated in the Notification Letter that the individual admitted that he had consulted an attorney who advised him that this activity was likely illegal; that he viewed the images despite feeling guilty and trying to stop doing so on more than one occasion; that he stopped the activity because he was worried about its potential impact on his security clearance, given an upcoming security clearance reinvestigation; and that, but for the upcoming reinvestigation, he probably would not have stopped the activity despite his belief that the activity was probably illegal. In the LSO's view, the individual's behavior presents two categories of concerns that fall within Criterion L. First, the LSO contends that the individual's downloading and storing images of nude and provocatively dressed underage teenage girls constitutes criminal conduct. Second, the LSO contends that the individual's engaging in that unusual conduct while aware that it was likely illegal and his succeeding in stopping the activity only when faced with its perceived adverse effect on his security clearance tends to show "questionable judgment and an unwillingness to comply with rules." Exhibit 1.

Criterion L concerns that arise from criminal conduct and conduct involving questionable judgment and unwillingness to comply with rules and regulations generally call into question an individual's reliability, trustworthiness, and ability to protect classified information. *See Revised Adjudicative Guidelines for Determining Eligibility for Access to Classified Information* issued by the Assistant to the President for National Security Affairs, The White House (December 29, 2005) (Adjudicative Guidelines) at Guidelines J and E; *Personnel Security Hearing*, Case No. TSO-1014 (July 13, 2011) (criminal conduct). I find that the individual's personal conduct as described above constitutes derogatory information that raises questions about the individual's honesty, reliability, and trustworthiness under Criterion L.

IV. Findings of Fact

The individual has never married and has had few intimate relationships. Exhibit 4 at 2. He has viewed, downloaded and stored adult pornography on his home computer for many years. Tr. at 119. For several years before 2008, he had two close friends, who testified at the hearing and with whom he did the bulk of his socializing. *Id.* at 12-13, 22, 33, 39-47, 120. Within a few months of each other in late 2007 and early 2008, these friends moved to distant parts of the country. *Id.* at 120. Shortly thereafter, the individual began viewing, downloading and storing images of girls between the ages of 14 and 16 who were either nude or, by his description, in "fashion magazine type . . . poses . . . wearing . . . short skirt, high heels." *Id.* at 124, 128.

In February 2011, OPM notified the individual that it would conduct its periodic interview with him in order to re-evaluate his eligibility for access authorization. *Id.* at 128-29. A representative from that office asked him to set aside one to two hours and secure a private room for an interview. *Id.* at 129. At that juncture, the individual stopped viewing the images of teenage girls described above, and erased all such stored images, along with all stored adult pornographic materials, from his home computer. *Id.* at 133. When the individual appeared for his OPM interview, he told the interviewer that he had decided not to proceed with the interview, though he understood that his security clearance would not be continued without the interview.

The interviewer convinced him to participate in the interview, which proceeded without incident. Concluding the interview, the interviewer asked the individual why he had not wanted to proceed with the interview, and the individual responded that he may have engaged in an illegal activity, specifically child pornography. *Id.* at 134-36.

Concerned that he may have been engaging in an illegal activity by viewing and storing child pornography, the individual consulted an attorney about his activities. *Id.* at 137. Based on the individual's description of the images of mid-teenagers he had been viewing—nude teenage girls “in nudist-type nature settings and fully dressed girls . . . wearing . . . short skirts and heels” who were not involved in any type of sexual activity, without focus on the subjects' genitals—the attorney did not tell him that the images were likely illegal, but rather stated that he thought it unlikely that the individual's activity would lead to “any kind of criminal prosecution.” Exhibit D (affidavit of attorney). The attorney's noncommittal response did not fully alleviate the individual's concern. *Id.* at 203.

At the July 2011 PSI, the interviewer focused several questions on the individual's recognition that his viewing, downloading and storing images of underage teenage girls was wrong and illegal. Exhibit 5. From the individual's responses to those questions, the LSO concluded that he believed, at the time of his activity, that the activity was either illegal or potentially illegal. The LSO also determined that the individual should be evaluated by a psychiatrist.

By the time the individual met with the DOE-sponsored psychiatrist, he had begun seeing a counselor about his online viewing of images of teenage girls. Exhibit 4 at 6. The individual and his counselor had determined that the roots of his problem were his loneliness and social isolation. *Id.* After interviewing the individual, the DOE psychiatrist issued an evaluative report, in which he found that the individual suffers from no diagnosable disorder, according to the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders, 4th Edition, Text Revision (DSM-IV-TR). *Id.* at 8. In his report, the DOE psychiatrist specifically addressed whether the individual could be diagnosed as suffering from pedophilia, and ruled out this possibility. *Id.* at 9-10. He also noted that the individual had, in any event, stopped engaging in this “inappropriate” behavior, and found many factors indicating a good prognosis that the individual will not engage in it in the future. *Id.* at 11.

IV. 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. After due deliberation, I have determined that the individual's access authorization should be restored at this time. I find that restoring the individual's access authorization would not endanger the common defense and security and would be clearly consistent with the national interest. 10 C.F.R. § 710.27(a). The specific findings I make in support of this decision are discussed below.

A. Mitigating Evidence

A finding of derogatory information does not end the evaluation of evidence concerning an individual's eligibility for access authorization. *See Personnel Security Hearing*, Case No. TSO-

0508 (November 27, 2007) (and cases cited therein). Rather, I must exercise my common-sense judgment in deciding whether the individual's access authorization should be restored after considering the applicable factors prescribed in 10 C.F.R. § 710.7(c) as well as the mitigation factors set forth in the Adjudicative Guidelines. Therefore, I must consider whether the individual has produced sufficient evidence of mitigation to resolve the security concerns raised by his unusual conduct.

1. Criminal Conduct

Although the individual erased from his home computer all images of the underage teenage girls he had downloaded and stored, he has consistently described the two categories of images of concern here. One category, described in the Notification Letter as images of "provocatively dressed underage teenage girls," consisted of images of fully clothed teenage girls in fashion-magazine-like poses, wearing short skirts and high heels, revealing no private body parts. Exhibit 5 at 20; Tr. at 128. At the hearing, the individual clarified that the images were not sexually suggestive. Tr. at 128. "Provocatively dressed" and "child pornography" were terms the LSO interviewer used during the PSI. Although the individual did not challenge her use of those terms, he did not agree with it but felt it was fruitless to argue the point, as she had made her mind up on these matters. Tr. at 156-57, 169.

The individual provided consistent details on several occasions regarding the second category of images he viewed, downloaded and stored on his home computer, which was described in the Notification Letter as images of nude underage teenage girls. During the PSI, he described them as "snapshots taken at nudist colonies," and stated, "apart from the fact they weren't wearing clothes, it'd be just like . . . pictures of someone on vacation." Exhibit 5 at 9, 10, 19-20. While he acknowledged that he had been interested in pornography involving adult subjects in the past, starting in 2008 his interest shifted to images of nude 14- to 16-year-old girls in nudist camp settings, "something less commercial, more innocent perhaps, more natural." Tr. at 121. At the hearing, the individual emphasized that the subjects of the photographs were not engaged in any sexual behavior. *Id.* at 124-25. He explained that he had located these images from an online collection of images devoted to nudism rather than pornography. *Id.* at 123. To demonstrate the nature of these images, he returned to the same online collection with his attorney at the attorney's office and downloaded some 15 images representative of, and in some cases, identical to, the images he had viewed and stored on, and later deleted from, his home computer. *Id.* at 208-09. These images comprise Exhibit A, and included photographs of nude girls drinking soda and standing around a charcoal grill. The individual also testified that the images in this category were comparable to the contents of books of photography he had seen for sale in commercial book stores. Tr. at 126-27.

2. Questionable Judgment

At the hearing, the individual testified in great detail that the LSO had misunderstood statements he made during the OPM investigation and at the PSI that caused it to believe he viewed images knowing they were a form of child pornography and therefore against the law. He explained that, at the time he was viewing images of underage teenage girls, he did not believe he was doing anything contrary to the law. The images were similar to those that appeared in published

books of photography, by artists such as Jock Sturges and David Hamilton, which could be purchased in book stores. *Id.* at 120, 191. It was only after an OPM representative contacted him about an upcoming routine interview that he began to question his behavior. The representative asked that he set aside one to two hours for an interview in a private setting. As his previous OPM interviews had been quite short and held in a less formal manner, he began to wonder why the upcoming interview was to be held under different circumstances. He reviewed his recent activities to determine what could possibly require this special treatment.² He determined that the only difference in his life since the last interview was his viewing of images of underage teenage girls. *Id.* at 129-30, 195, 233-34; *see also* Exhibit 5 at 11 (issue similarly addressed during PSI). From that conclusion, his thoughts began to spiral out of control, and he arrived at the belief that OPM had learned of his activity and considered it to be a form of child pornography. He wanted to eliminate the concern as he perceived it, and therefore deleted all his images of teenage girls, along with all adult pornography, from his home computer. *Tr.* at 131-33. The individual testified that, at the end of the OPM interview, when he used the words “child pornography,” he did not know whether he was guilty of such conduct, but rather voiced his fear, convinced that that was OPM’s concern. *Id.* at 136. Although it had not arisen in the course of the interview, he felt he could not be fully honest without raising the matter to the OPM interviewer. *Id.* at 197-201.

At several points in the PSI, the individual answered questions about his recognition of the possibility that his viewing of images of underage teenage girls was illegal. Those responses led the LSO to conclude that the individual believed his activity was possibly illegal at the time he was engaging in it. The individual reviewed each of those statements at the hearing and explained that his statements were misinterpreted. For example, when the interviewer asked him if he was aware that it was “wrong” to view the images of underage teenage girls “when you were doing it,” the individual responded, “Aware, certain it was wrong and potentially illegal.” The interviewer then asked, “Why do you say potentially illegal?” to which he responded, “I don’t know what exactly the . . . rules are for child pornography.” Exhibit 5 at 18. While the individual clearly conceded that child pornography is illegal, he stated, “I don’t know . . . whether pictures” he had viewed constituted child pornography. *Id.* at 19. At the hearing, the individual explained that his response about the potential illegality referred to his state of mind at the time of the interview rather than at the time of the activity. In other words, he acknowledged that he was concerned about the potential illegality of his viewing preferences both at the time of the OPM interview, when he had convinced himself that the request for a lengthy, private interview reflected a concern on the part of OPM, and certainly at the time of the PSI, by which time he had consulted an attorney and was still unsure about the potential illegality of the activity in which he had formerly engaged. *Tr.* at 131, 163-65. Nevertheless, he maintained that he was not acting without regard for the law when he viewed the images of teenage girls because, at that juncture, he believed those images were similar to photographs he had seen published in books. *Id.* at 126.

The individual addressed each of the LSO’s bases for concluding that he was aware of the potential illegality of his viewing the described images while doing so. In each instance, he

² He later learned that OPM had apparently modified its standard procedure, and now conducts its interviews under these conditions. *Id.* at 135.

reviewed the transcript of the PSI as in the above example, and distinguished his frame of mind while he was viewing the images from his frame of mind after the OPM representative contacted him to arrange an interview in February 2011. In each instance, he demonstrated, as above, that the language of the PSI supported his contention that his concern about potential illegality did not arise until February 2011, by which time he had ceased the activity at issue. *Id.* at 146-51, 162-67, 181-88, 224-27.

After the PSI, the individual voluntarily sought treatment. At the hearing, he stated that he had not been able to answer, to his own satisfaction, some of the questions the interviewer had posed during the PSI, and realized he wanted to understand his situation better. *Id.* at 173. He began seeing a psychotherapist for weekly counseling in July 2011, and continues to see him. *Id.* at 175-76. Through these weekly sessions, he has learned that his fundamental problem is his isolation from others. He has also learned that he should avoid spending time viewing and downloading any pornography or erotic images, whether legal or not, as it is a distraction and an obstacle that blocks him from engaging in “real social contact.” *Id.* at 177-78. He has not viewed any images of teenage girls since February 2011, nor has he viewed any adult material since being counseled not to do so. *Id.* at 178.

Other witnesses at the hearing testified about the individual’s general nature. A co-worker and two managers, who have known the individual for between seven and 15 years, vouched for his cautious adherence to rules and requirements in the workplace. They further testified that he is an excellent worker and has a reputation for honesty and integrity. *Id.* at 94-115. His two close friends, both of whom shared housing with the individual at various times, also testified. In addition to speaking favorably of the individual’s honesty, candor, reliability, and adherence to rules, they also stated that they both rely on his excellent judgment and integrity to guide their lives. *Id.* at 19-20, 52. They explained that the individual is cerebral and not confident with women. *Id.* at 31. While they lived near the individual, they took charge of the individual’s social life, and after they left in 2008, they were concerned about his being alone. *Id.* at 83-86.

B. Hearing Officer’s Evaluation of the Evidence

1. Criminal Conduct

As a starting point, I recognize that I cannot review the actual images the individual viewed, downloaded or stored on his home computer, as he deleted them long before this proceeding began. Instead, I have for consideration only the individual’s description of the offending images in both categories and his representation that the images in Exhibit A truly represent the range of images within the “nude” category. In light of the highly favorable testimony of the individual’s friends and co-workers regarding his reputation for honesty and reliability, my own observations of his demeanor, and the absence of any evidence to the contrary, I find the individual’s testimony on this issue to be credible. I therefore accept his representations regarding the descriptions of the images of teenage girls that he viewed, downloaded and stored.

The Notification Letter does not specify how the individual’s viewing, downloading, and storing of images of underage teenage girls constitutes criminal conduct. In preparation for the hearing, the DOE Counsel determined that the LSO had identified the federal statute prohibiting child

pornography as applicable to the facts of this case. To the extent that this provision applies here, a person who knowingly receives child pornography by computer is subject to criminal penalties. 18 U.S.C § 2252A(a)(2). “Child pornography” is defined generally as a visual depiction of an identifiable minor engaging in sexually explicit conduct. 18 U.S.C § 2256(8). “Sexually explicit conduct” in turn is defined as actual or simulated sexual intercourse, bestiality, masturbation, sadistic or masochistic abuse, or “lascivious exhibition of the genitals or pubic area of any person.” 18 U.S.C § 2256(2)(A). On the basis of the individual’s description of the images of underage teenage girls he viewed, downloaded and stored on his home computer, which has not been challenged in this proceeding, it is clear that the only form of “sexually explicit conduct” that might possibly have been depicted in the images at issue is “lascivious exhibition of the genitals or pubic area of any person.”

At the hearing, the DOE Counsel questioned the individual about the content of the images contained in Exhibit A. Reviewing the individual photographs reproduced in Exhibit A, the DOE Counsel and the individual agreed that many of the subjects were of indeterminate age and might not have been minors. Tr. at 209-11. In addition, the subject matter and the setting of the images were not sexually suggestive. *Id.* at 211-212; *see also id.* at 128 (nor were the images of fully clothed teenage girls). In his summation, the DOE Counsel expressed his opinion that, provided the images contained in Exhibit A are truly representative of the images the individual was viewing, there was no evidence to support the LSO’s concern based on criminal conduct. *Id.* at 276. As stated above, I have found that Exhibit A is an accurate representation of the range of images the individual had been viewing on his home computer. Moreover, the LSO has produced no additional evidence that demonstrates that the federal child pornography statute applies to the circumstances of this proceeding. Given the paucity of the evidence regarding the statute’s applicability here, I am not convinced that the individual engaged in criminal conduct by violating this statute. Because I have determined that the individual did not engage in criminal conduct, I find that the individual has mitigated the LSO’s concerns related to criminal conduct. *See* Adjudicative Guidelines at Guideline J, ¶ 32(c).

2. Questionable Judgment

Regardless whether an individual in fact engages in criminal conduct, an additional and discrete security concern arises where an individual knows or believes an activity in which he is engaging is illegal or possibly illegal, yet nevertheless engages in that activity.

Certain responses the individual provided to questioning during his February 2011 OPM interview and his July 2011 PSI raised the security concerns on which the LSO based its Notification Letter. The first was his use of the term “child pornography” at the end of his OPM interview. I have considered the individual’s testimony explaining his declaration, as well as the testimony of other individuals who have attested to his general cautious, rule-abiding nature. I am convinced that he over-reacted to the OPM representative’s request for a lengthy, private interview, scrambled for an explanation and, in so doing, convinced himself that his viewing of images of teenage girls was a concern for OPM. His response to the investigator’s curiosity about why he had initially declined the interview was a demonstration of his fear but also of his innate honesty and forthrightness.

As for the individual's responses during the PSI, which the LSO later interpreted to indicate that he engaged in an activity knowing that it was illegal or possibly illegal, I make a similar finding. In the example provided in section IV.A.2 above, the individual explained at the hearing that his frame of mind regarding the possible illegality of his viewing preferences changed over time; when he was viewing the images, he believed he was on safe ground, but after the OPM representative contacted him in February 2011, he questioned his confidence in that belief. In that example, as well as in his other explanations, I note that the actual words recorded in the transcript of that conversation support his position. In responding to questions about potential illegality and whether child pornography is illegal, the individual answered, "I don't know [what the law is and whether my pictures violated the law]". His use of the present tense indicates he was responding with his contemporaneous opinion; if he had intended to convey his opinion about illegality at the time he was viewing the images, he would have responded, "I *didn't* know" His careful explanation of each statement on which the LSO relied in reaching its conclusion about his alleged risky behavior convinces me that the individual's explanation of his state of mind both before and after February 2011 is accurate. Consequently, I do not find that the individual's responses during the PSI demonstrate that he engaged in an activity knowing that it was possibly illegal.

Given his general law-abiding nature, his honesty and candor in his interactions with OPM and the LSO, and his explanations at hearing, I conclude that the individual was not engaged in an activity with an awareness that it might be illegal. Because I have determined that the individual did not in fact engage in behavior that demonstrates questionable judgment or an unwillingness to follow rules, I find that the individual has mitigated the LSO's concerns related to such behavior. *See* Adjudicative Guidelines at Guideline E, ¶ 17(c).³

V. Conclusion

As explained in this Decision, I find that the local DOE security office properly invoked 10 C.F.R. § 710.8(l) in suspending the individual's access authorization. For the reasons described above, I find that the individual has sufficiently mitigated those security concerns. I therefore find that restoring the individual's access authorization would not endanger the common defense and security and would be consistent with the national interest. Accordingly, I have determined that the individual's access authorization should be restored at this time. The parties may seek review of this Decision by an Appeal Panel under the regulations set forth at 10 C.F.R. § 710.28.

William M. Schwartz
Hearing Officer
Office of Hearings and Appeals

Date: March 2, 2012

³ As stated above, the DOE psychiatrist who evaluated the individual found many factors that indicated that the individual would not likely resume this activity. Furthermore, the individual is voluntarily participating in professional counseling to address underlying issues that formerly caused him to an activity that he now recognizes as not beneficial to his social well-being.