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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: February 22, 2012) Case No.: PSH-12-0013
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_____)

Issued: June 7, 2012

Hearing Officer Decision

William M. Schwartz, Hearing Officer:

This Decision concerns the eligibility of XXXXXXXXXXXXXXXXXXXX (the individual) to hold an access authorization (also called a security clearance) 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.²

I. BACKGROUND

The individual works for a Department of Energy (DOE) contractor and holds a DOE access authorization, now in suspension. In 2007 through 2009, the individual provided inconsistent information to the Local Security Office (LSO) concerning his use of alcohol and failed to report an

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.

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>.

arrest that occurred in 2003. Because the LSO could not resolve these discrepancies and the reporting failure to its satisfaction, it determined that derogatory information existed that cast into doubt the individual's eligibility for access authorization. The LSO informed the individual of this determination in a Notification Letter that set forth the DOE's security concerns and the reasons for those concerns. Exhibit 1. 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 OHA, and I was appointed the Hearing Officer. The DOE introduced ten exhibits into the record of this proceeding and presented no witnesses at the hearing. The individual submitted no exhibits but presented the testimony of five witnesses in addition to his own testimony.

II. DEROGATORY INFORMATION AND THE ASSOCIATED SECURITY CONCERNS

The individual was arrested for Battery, Disorderly Conduct, Resisting Arrest, and Assault on February 23, 2003. He did not report the arrest to his employer for one to two months, as he was afraid that he would lose his security clearance and his job. Exhibit 9 (December 9, 2008, Personnel Security Interview (PSI)) at 28-29. According to the individual, when he did attempt to report it, a staff member of his employer's badging office informed him that he did not have to report an arrest unless he was convicted of the charge. *Id.* at 27. In completing a Questionnaire for National Security Positions (QNSP) in 2007, he indicated that he had never been "charged with or convicted of any offense(s) related to alcohol or drugs." Exhibit 7 at § 23(d). The individual offered a number of reasons for making that statement. In August of 2008, he stated that he had forgotten about the 2003 arrest, as the charges had been dropped. Exhibit 10 (August 7, 2008, PSI) at 7-8. In December 2008, however, he stated that he misunderstood the question on the QNSP and thought he was to list only convictions. Exhibit 9 at 69, 73. In the same interview, he also stated that perhaps he no longer recalled the arrest, *id.* at 72, and that he was clearly worried about losing his clearance. *Id.* at 75. Moreover, despite his statements on two occasions in 2008 that he had forgotten about the 2003 arrest, testimony at an administrative review hearing conducted in 2009 indicated that he then maintained that he had never stated that he had forgotten about the arrest. Exhibit 5 (Transcript of July 1, 2009, Hearing) at 101.

Additional inconsistent statements concerned the individual's use of alcohol. According to a 2007 note written by an Office of Personnel Management investigator, the individual reported to the investigator that although he drinks alcohol roughly six times a year, he never drinks to the point of intoxication, which he defined as not being in control of his actions. Exhibit 6 at Item 19. During one Personnel Security Interview (PSI) in 2008, however, he stated that he had been intoxicated once or twice a year, Exhibit 10 at 29, and during a second interview four months later he stated both (a) that he did not recall claiming that he never became intoxicated, and (b) that he had not been honest with the investigator. Exhibit 9 at 24-26, 92-93.

The individual's inconsistent statements raise national security concerns under paragraph (f) of the criteria for eligibility for access to classified matter or special nuclear material set forth at 10 C.F.R. § 710.8. Criterion F concerns arise when the LSO learns that the individual "[d]eliberately misrepresented, falsified, or omitted significant information from" a QNSP, a personnel interview, in statements made in response to an official inquiry regarding a determination of eligibility for DOE

access authorization, or during administrative review proceedings. 10 C.F.R. § 710.8(f). As support for invoking this criterion, the Notification Letter cites the occasions on which the individual made statements that, being logically inconsistent, cannot all be truthful.

This derogatory information adequately justifies the DOE's invocation of Criterion F and raises significant security concerns. 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. *See Revised Adjudicative Guidelines for Determining Eligibility for Access to Classified Information*, The White House (December 19, 2005) (Adjudicative Guidelines), at Guideline 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 and unfavorable, that has a bearing on the question of whether granting or restoring the individual's 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 (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

I find that the individual has not mitigated the security concerns set forth in the Notification Letter. The first two concerns the LSO raises in the Notification Letter relate to an earlier administrative review hearing conducted in July 2009. The LSO alleges first that the individual denied at the 2009 hearing ever stating that he had forgotten about his 2003 arrest. Exhibit 1 at Paragraph B. The LSO contends that this statement contradicted the individual's statement during an August 2008 PSI that he had forgotten about his 2003 arrest at the time when he was completing his QNSP in 2007. *Id.* I have reviewed the transcript of the 2009 hearing and find that the individual did not in fact deny at the hearing that he had ever stated he had forgotten about his 2003 arrest. It was rather his attorney who made that representation to the Hearing Officer, after consultation with the individual. The

attorney declined the DOE Counsel's suggestion to have the individual testify on the matter. Exhibit 5 (Transcript of 2009 Hearing) at 101, 102. While the individual's attorney was not under oath, he made this representation on behalf of his client, and the individual himself did not attempt to correct the statement. Despite his contentions at the hearing I held in the present proceeding, I am not convinced that the individual has been entirely straightforward in his representations on this matter, and find that he has not mitigated this concern.

The second concern relates to the Hearing Officer's unfavorable decision issued after the 2009 hearing. Exhibit 1 at Paragraph A. Specifically, the Hearing Officer determined that the individual had not been completely honest throughout the investigative and administrative review processes. Exhibit 4 at 5. In reaching this conclusion, the Hearing Officer assessed the individual's demeanor, relied on the individual's testimony, and considered the attorney's statement discussed above as one factor. I am not convinced that the Hearing Officer in the 2009 hearing erred in making his credibility determination, and therefore find that the individual has not mitigated this concern.

I find, moreover, that the individual has not mitigated the remaining concerns set forth in the Notification Letter. The supporting facts for each of these concerns are discrepant statements the individual provided to the LSO in three factual areas: his failure to report his 2003 arrest in a timely manner, his failure to list his 2003 arrest on his 2007 QNSP, and his discrepant statements regarding his history of alcohol intoxication. The specific supporting facts relied upon in the Notification Letter are set out in Section II above. At the hearing, he offered clarifications of his previous explanations and, in some cases, new explanations, some of which themselves are inconsistent with his earlier statements. After considering all of the evidence before me, I am not convinced that the individual did not intentionally falsify information he provided to the LSO.

With respect to his failure to report his arrest in a timely manner, the individual's testimony at the hearing is incompatible with information he had previously supplied the LSO. Although the individual admitted at the December 2008 PSI that he had delayed reporting the 2003 arrest for about a month because he feared he would lose his job, at the hearing he testified that he had not delayed making the report more than a day or two. *Id.* at 93; Exhibit 9 at 26-29. Because his employer's badging office, at which he claims he presented himself to report his arrest, did not record his appearance, he can produce no evidence of the date he went to that facility, let alone whether he ever in fact did so. Consequently, this issue cannot be resolved. Instead, I am left questioning why the individual has provided inconsistent information regarding this matter, and am confident only in that his reporting of facts is not reliable.

I now turn to the three different explanations the individual has provided to explain his failure to list his 2003 arrest on his 2007 QNSP: forgetting he was arrested, receiving incorrect advice about his reporting obligations, and fearing that reporting the incident would result in the loss of his security clearance and ultimately his employment. As discussed above, at an August 2008 PSI, the individual told the LSO interviewer that he had forgotten he had been arrested at the time he was completing the QNSP, some four years later. At a second PSI four months later, the individual stated that perhaps he had forgotten the arrest, but also offered two other reasons. The first was that, when he did report his arrest to the badging office in 2003, a female staff member at that office told him that he should not report an arrest unless he was convicted of the charge. Exhibit 9 at 26-29. Because the charges were dropped in this arrest, he understood from her that he need not report it to security or on any future QNSP. Tr. at 95. Whether correctly or not, the individual relied on her

advice, and did not report his arrest on the QNSP.³ The other reason the individual offered for not listing his arrest on the QNSP was that he was afraid that reporting it would cause him to lose his security clearance and his job. Exhibit 9 at 70, 75.

At the hearing, the individual asserted that he both relied on incorrect advice and feared for his job security when he did not list his 2003 arrest. *Id.* at 101. Even if I accept his assertion that these two explanations are not mutually incompatible, I cannot align these two explanations with his third explanation: that he had forgotten about the arrest. I cannot accept that one can forget a fact, yet rely on incorrect advice about reporting it, nor can I accept that one can forget a fact and at the same time fear reporting it. Regardless which of these explanations truly explain his failure to report his arrest on his QNSP, he has provided all of them to the LSO, and thus given both truthful and untruthful accountings for his behavior. His lack of candor makes it difficult to ascertain the truth of his statements and renders him unreliable, at least in his dealings with the LSO. *See Personnel Security Hearing, Case No. TSO-1091 (2011); Personnel Security Hearing, Case No. TSO-0212 (2007).*

Finally, I face a similar unresolved concern related to the individual's discrepant statements about his history of alcohol intoxication. The OPM investigator's notes of his 2007 interview with the individual indicate that he denied ever being intoxicated, while at both 2008 PSIs, he admitted to infrequent intoxication. At the hearing, the individual sought to explain the inconsistency by stating that he had different definitions of "intoxication" in mind in 2007 and 2008: the OPM investigator's notes state that the "subject defined intoxication as not being in control of one's actions," Tr. at 107, Exhibit 6 at 2, but, as a holder of a commercial driver's license at the time of the LSO interviews, the individual maintained he would have considered any breathalyzer reading above .04 to constitute intoxication. Tr. at 108-10. While that explanation may in fact be true, it was not the explanation he offered when questioned about the inconsistency at the December 2008 PSI. Instead, he stated at that time that he had not been honest with the OPM. Exhibit 9 at 92-93. This admission alone demonstrates that the individual intentionally misrepresented the truth during an "official inquiry regarding a determination of eligibility for DOE access authorization." Criterion F.

Stepping back from the details presented in this case, and applying common sense, I reach a conclusion that there are simply too many unresolved questions about how and why the individual provided the information he did regarding his access authorization. Despite the individual's reputation among his peers for trustworthiness and reliability, Tr. at 12, 14, 15, 28-29, 37, 42, 49-50, and despite his many protestations at hearing that he never intended to mislead security, *id.* at 70, 88, 107, 117, I am left with doubts regarding the individual's candor, at least in his interactions with the LSO. Because he has not resolved these doubts, the individual has not sufficiently mitigated the Criterion F concerns raised by the LSO regarding deliberate falsification of the information he provided to the LSO on various occasions.

³ A number of the witnesses testified that employees generally rely on the advice they receive from the badging office. *Id.* at 53, 62-65.

VI. CONCLUSION

For the reasons set forth above, I conclude that the individual has not resolved the DOE's security concerns under Criterion F of 10 C.F.R. Part 708, and therefore 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. The individual may seek review of this Decision by an Appeal Panel under the procedures set forth at 10 C.F.R. § 710.28.

William M. Schwartz
Hearing Officer
Office of Hearings and Appeals

Date: June 7, 2012