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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 21, 2012) Case No.: PSH-12-0133
)
_____)

Issued: March 5, 2013

Hearing Officer Decision

Kimberly Jenkins-Chapman, Hearing Officer:

This Decision concerns the eligibility of xxxxxxxxxxxx (hereinafter referred to as “the individual”) to hold an access authorization¹ under the Department of Energy’s (DOE) regulations set forth at 10 C.F.R. Part 710, Subpart A, entitled, “General Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material.” As fully discussed below, after carefully considering the record before me in light of the relevant regulations and Adjudicative Guidelines, I have determined that the individual’s access authorization should not be granted.

I. Background

The individual is employed by a DOE contractor in a position that requires him to hold a DOE security clearance. In May 2012, as part of a background investigation, the Local Security Office (LSO) conducted a Personnel Security Interview (PSI) of the individual to address concerns about the individual’s misrepresentations and misuse of information on a company

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

computer. On September 7, 2012, the LSO sent a letter (Notification Letter) advising the individual that it possessed reliable information that created substantial doubt regarding his eligibility to hold an access authorization. In an attachment to the Notification Letter, the LSO explained that the derogatory information fell within the purview of two potentially disqualifying criteria set forth in the security regulations at 10 C.F.R. § 710.8, subsections (f) and (l) (hereinafter referred to as Criteria F and L, respectively).²

Upon receipt of the Notification Letter, the individual filed a request for a hearing. The LSO transmitted the individual's hearing request to the Office of Hearings and Appeals (OHA), and the OHA Director appointed me as the Hearing Officer in this case. At the hearing that I convened, the individual presented his own testimony and that of four witnesses. The DOE counsel did not present any witnesses. The DOE presented a number of written exhibits prior to and after the hearing.

II. Regulatory Standard

A. Individual's Burden

A DOE administrative review proceeding under Part 710 is not a criminal matter, where the government has the burden of proving the defendant guilty beyond a reasonable doubt. Rather, the standard in this proceeding places the burden on the individual because it is designed to protect national security interests. This is not an easy burden for the individual to sustain. The regulatory standard implies that there is a presumption against granting or restoring a security clearance. *See Department of Navy v. Egan*, 484 U.S. 518, 531 (1988) ("clearly consistent with the national interest" standard for granting security clearances indicates "that security determinations should err, if they must, on the side of denial"); *Dorfmont v. Brown*, 913 F.2d 1399, 1403 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991) (strong presumption against the issuance of a security clearance).

The individual must come forward at the hearing with evidence to convince the DOE that granting his access authorization "will not endanger the common defense and security and will be clearly consistent with the national interest." 10 C.F.R. § 710.27(d). The individual is afforded a full opportunity to present evidence supporting his eligibility for an access

² Criterion F pertains to information that a person has "[d]eliberately misrepresented, falsified, or omitted significant information from a Personnel Security Questionnaire, a Questionnaire for Sensitive (or National Security) Positions, a personnel qualifications statement, a personal security interview, written or oral statements made in response to official inquiry on a matter that is relevant to a determination regarding eligibility for DOE access authorization, or proceedings conducted pursuant to § 710.20 through § 710.31." 10 C.F.R. § 710.8(f). Criterion L relates to information that a person has "[e]ngaged in any unusual conduct or is subject to any circumstances which tend to show that the individual is not honest, reliable, or trustworthy; or which furnishes reason to believe that the individual may be subject to pressure, coercion, exploitation, or duress which may cause the individual to act contrary to the best interests of the national security . . ." 10 C.F.R. § 710.8(l).

authorization. The Part 710 regulations are drafted so as to permit the introduction of a very broad range of evidence at personnel security hearings. Even appropriate hearsay may be admitted. 10 C.F.R. § 710.26(h). Hence, an individual is afforded the utmost latitude in the presentation of evidence to mitigate the security concerns at issue.

B. Basis for Hearing Officer's Decision

In personnel security cases arising under Part 710, it is my role as the Hearing Officer to issue a Decision that reflects my comprehensive, common-sense judgment, made after consideration of all the relevant evidence, favorable and unfavorable, as to whether the granting or continuation of a person's access authorization will not endanger the common defense and security and is clearly consistent with the national interest. 10 C.F.R. § 710.7(a). I am instructed by the regulations to resolve any doubt as to a person's access authorization in favor of the national security. *Id.*

III. The Notification Letter and the Security Concerns at Issue

As previously noted, the LSO cites two potentially disqualifying criteria as bases for denying the individual's security clearance, Criteria F and L. To support its reliance on Criterion F, the LSO alleges that the individual deliberately omitted information from a Questionnaire for National Security Positions (QNSP) regarding a reprimand he received from a previous employer for violating company policy as well as a termination from employment. From a security standpoint, false statements made by an individual in the course of an official inquiry regarding a determination of eligibility for DOE access authorization raise serious issues of honesty, reliability and trustworthiness. The DOE security program is based on trust, and when a security clearance holder breaches that trust, it is difficult to determine to what extent the individual can be trusted again in the future. *See* Guideline E of the *Revised Adjudicative Guidelines for Determining Eligibility for Access to Classified Information* issued on December 29, 2005, by the Assistant to the President for National Security Affairs, The White House (*Adjudicative Guidelines*).

As for Criterion L, the LSO alleges that the individual, during a PSI, admitted that from 2002 through 2007, he violated company policy by sending and receiving inappropriate e-mails. He further admitted that on previous employment applications, he did not list that he was terminated from an employer in 2007 for misuse of information technology. The individual's vulnerability to blackmail, exploitation, and duress calls into question the individual's judgment, reliability, trustworthiness and his ability to protect classified information. *See id.* at Guideline E.

IV. Findings of Fact

On December 20, 2011, the individual completed a QNSP certifying that he had not received a written warning, been officially reprimanded, suspended, or disciplined for misconduct in the workplace, such as a violation of a security policy. However, during a PSI conducted on May 24, 2012, he admitted that he was officially reprimanded due to misuse of information while employed with a company in 2007. Specifically, the individual admitted that from 2002 through 2007, he violated company policy for an hour each day, when he sent and received racist e-mails, political e-mails, pornographic photographs and video e-mails, and viewed adult websites on his company computer. The individual admitted that he did not list this information on the QNSP and answered the questions incorrectly because he did not want to get caught and did not want anyone to know about this information. He admitted that it was his intent to mislead the DOE.

During his 2011 QNSP, the individual also certified that he had not been fired in the last seven years. However, during his 2012 PSI, he admitted that he was terminated due to misuse of information while employed with a company in 2007. Again, he admitted that he did not list this information on the QNSP because he did not want to get caught and did not want anyone to know about the information. In addition, during his 2011 QNSP, the individual certified that he has not introduced, removed, or used hardware, software, or media in connection with any information technology system without authorization, when specifically prohibited by rules, procedures, guidelines or regulations. However, as stated earlier, the individual admitted to sending and receiving inappropriate e-mails on his company computer, typically once a day or ten times per week from 2002 until 2007.

V. Analysis

I have thoroughly considered the record in this proceeding, including the submissions tendered in this case and the testimony of the witnesses presented at the hearing. In resolving the question of the individual's eligibility for access authorization, I have been guided by the applicable factors prescribed in 10 C.F.R. § 710.7(c)³ and the Adjudicative Guidelines. After due deliberation, I have determined that the individual's access authorization should not be granted. I cannot find that granting the individual's DOE security clearance will not endanger the common defense and security and is clearly consistent with the national interest. 10 C.F.R. § 710.27(a). The specific findings that I make in support of this decision are discussed below.

³ Those factors include the following: the nature, extent, and seriousness of the conduct, the circumstances surrounding the conduct, to include knowledgeable participation, the frequency and recency of the conduct, the age and maturity at the time of the conduct, the voluntariness of his 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.

A. Criterion F

During the hearing, the individual was asked why he answered “No” on his 2011 QNSP regarding whether he had ever had a received a written warning, been officially reprimanded, suspended, or disciplined for misconduct in the workplace. Transcript of Hearing (Tr.) at 56. He testified that he answered “No” because he did not want anyone to know this information. *Id.* The individual further testified that he purposefully misrepresented this information, although he also testified that he did not really remember that he had been officially reprimanded for misuse of information at a previous employer. *Id.* at 57. He later testified, however, that he was not honest when answering this question because he was worried about his job and admits that his answer on the QNSP shows his deceitfulness. *Id.* at 59 and 60. With respect to the question on his QNSP related to whether he had been fired in the last seven years, the individual testified that he answered “No” to this question because his employer at the time told him that he was not fired, although the individual acknowledged that his badge was removed from him. *Id.* at 61. The individual acknowledged that he “left [the employer] by mutual agreement” which is the actual wording in the QNSP. *Id.* at 62 and 70. He again testified that he intentionally answered this question incorrectly because he was embarrassed and because he wanted to remain employed. Finally, with respect to the portion of the QNSP that refers to the individual’s certification that he has not introduced, removed, or used hardware, software or media in connection with any information technology system without authorization, the individual testified that he answered “No” to this question because he believed the question was referring to whether he had ever physically damaged a computer. *Id.* at 71-73. He asserted that, with respect to this question on the QNSP, he did not intentionally misrepresent information, but rather he did not understand the question at the time he filled out the form. *Id.* Based on the foregoing, I find that the individual deliberately falsified at least two questions on his QNSP.

To determine whether the individual has mitigated the Criterion F concerns, I considered the relevant factors set forth in Adjudicative Guideline E. I find that none of the relevant factors apply in this case. Specifically, the individual did not meet ¶ 17(a) because the individual did not make prompt, good-faith efforts to correct his omission, concealment, or falsification before being confronted with the facts during his 2012 PSI. He did not meet ¶ 17(c) because the individual’s falsifications were serious and relatively recent. The individual’s behavior did not occur under such unique circumstances that it is unlikely to recur. In addition, the individual did not meet ¶ 17 (e) because he has not demonstrated that he has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress.⁴ *See Adjudicative Guidelines* at

⁴ Guideline E Paragraph17 outlines the conditions that could mitigate security concerns raised under Criterion F. Paragraph 17(c) states that “the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual’s reliability, trustworthiness, or good judgment.” Paragraph 17(d) states that “the individual has acknowledged the behavior . . . or taken other positive steps to alleviate stressors, circumstances, or factors that caused untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur.” Finally, Paragraph 17(e) states

Guideline E. Considering this, and the entirety of the record, I must conclude that the very serious concerns raised under Criterion F have not been resolved.

B. Criterion L

The key issue under Criterion L is whether the individual has brought forward sufficient evidence to demonstrate that he is reliable and trustworthy, and that he is no longer subject to pressure, coercion, exploitation or duress. For the reasons set forth below, I find that the individual has not provided sufficient information to resolve the Criterion L concerns at issue.

The DOE's concerns under Criterion L are that 1) during his 2012 PSI, he admitted that from 2002 through 2007, he violated company policy for an hour each day, when he sent and received inappropriate e-mails on his company computer, and 2) he admitted that on previous employment applications he did not list that he was terminated from an employer in 2007 due to misuse of information technology, but instead listed that he left to pursue better opportunities.

During the hearing, the individual acknowledged that from 2000 to 2007, he received, viewed and forwarded inappropriate e-mails, thus violating company policy. Tr. at 74. He further admitted that his behavior was "stupid" and testified that he did not believe he would get caught. *Id.* at 77. However, the individual testified that he now regrets this behavior. He admitted that he made a mistake and asserted that he has not engaged in this sort of behavior since 2007. *Id.* The individual testified that he no longer receives inappropriate e-mails from friends and has told friends not to send the e-mails to him. He testified that he has matured and that he is now a better person. According to the individual, it took losing his job to realize that his previous behavior is not something he should do. *Id.* With respect to his admission that he did not list his 2007 termination on previous employment applications, the individual testified that he intentionally misrepresented this information on his employment applications because he did not want to jeopardize his opportunity to obtain a job. *Id.* at 81. He testified that the last time he misrepresented an employment application by not listing his 2007 termination was in September 2011. The individual further testified that in the future he intends to be honest. *Id.* at 85.

Among the factors which could serve to mitigate the security concerns raised by the individual's behavior in violating company policy as well as his misrepresentation on his employment applications are (1) the passage of time, the infrequency of the behavior, or that the behavior happened under such unusual circumstances that it is unlikely to recur in the future; (2) the individual has acknowledged the behavior or has taken positive steps to alleviate the factors that caused untrustworthy, unreliable behavior and such behavior is unlikely to recur and (3) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation or duress.

that "the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress." The *Adjudicative Guidelines* at Guideline E.

Adjudicative Guidelines E at ¶ 17 (c) and (d). In this case, the individual has acknowledged his behavior with respect to receiving, viewing and forwarding inappropriate e-mails in violation of company policy. He testified that he is remorseful and has not engaged in this behavior since 2007. Due to the passage of time and the individual's acknowledgement of his behavior, I am convinced that the individual's behavior is unlikely to recur. However, with respect to the individual's admission that he did not list his 2007 termination on his employment applications, I find this behavior to be recent. During the hearing, the individual testified that he last misrepresented information on an employment application in September 2011. Although the individual has acknowledged this behavior, I am not yet convinced by the individual's testimony that he completely understands the importance of being honest. Given that the individual's behavior with respect to his dishonesty on his employment applications is relatively recent, I am not yet convinced that the individual's behavior is unlikely to recur. After considering the "whole person," I am not convinced that the DOE can rely on the individual's ability to make sound judgment calls regarding the safeguarding of classified information. See *Adjudicative Guidelines* at (2)a. I therefore find that the individual has not sufficiently mitigated the LSO's concerns under Criterion L.

VI. Conclusion

In the above analysis, I have found that there was sufficient derogatory information in the possession of the DOE that raised serious security concerns under Criteria F and L. After considering all the relevant information, favorable and unfavorable in a comprehensive common-sense manner, including weighing all the testimony and other evidence presented at the hearing, I cannot find that the individual has brought forth convincing evidence to mitigate the security concerns associated with Criteria F and L. I therefore cannot find that granting the individual's access authorization would not endanger the common defense and security and would be consistent with the national interest. Accordingly, I find that the individual's access authorization should not be granted. The parties may seek review of this Decision by an Appeal Panel under the regulations set forth at 10 C.F.R. § 710.28.

Kimberly Jenkins-Chapman
Hearing Officer
Officer of Hearings and Appeals

Date: March 5, 2013

