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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: December 19, 2012) Case No.: PSH-12-0142
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Issued: March 22, 2013

Hearing Officer Decision

Kimberly Jenkins-Chapman, Hearing Officer:

This Decision concerns the eligibility of xxxxxxxxxxxxxxxxxxxx (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 restored.

I. Background

The individual is employed by a DOE contractor in a position that requires him to hold a DOE security clearance. In June 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 pattern of criminal conduct. On August 23, 2012, the LSO sent a letter (Notification Letter) advising the individual that it possessed reliable information that

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.

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 one potentially disqualifying criterion set forth in the security regulations at 10 C.F.R. § 710.8, subsections (l) (hereinafter referred to as Criterion L).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. The DOE counsel did not present any witnesses. Both the DOE and the individual 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 restoring 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 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

² 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).

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 one potentially disqualifying criterion as the basis for suspending the individual's security clearance, Criterion L. To support its reliance on Criterion L, the LSO alleges that, in May 2012, the individual was arrested after he was involved in a physical altercation with his wife. In June 2012, the individual was formally charged with felony Battery (Domestic Violence)-Strangulation. The LSO also alleges that during a June 2012 PSI, the individual admitted that prior to his arrest for Battery in May 2012, he and his wife were involved in a physical altercation. Furthermore, the LSO alleges that the individual has a history of criminal conduct including Disorderly Conduct in 2000 and a number of speeding citations from 2003 to 2010. The individual's unwillingness to abide by rules and regulations as well as his vulnerability to blackmail, exploitation, and duress call into question the individual's judgment, reliability, trustworthiness and his ability to protect classified information. *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*).

IV. Findings of Fact

On May 16, 2012, the individual and his wife were involved in a physical altercation. According to incident reports received by the LSO on May 17 and May 24, 2012, the individual's wife pushed him, he grabbed her arms and they both fell to the ground. DOE Exh. 3. When on the ground, the individual held an arm against his wife's body and he threw his step-son off of him when he tried to intervene. *Id.* Based on statements provided by the individual's wife, her son and marks of physical abuse on the individual's wife, the individual was determined to be the aggressor and was arrested. *Id.* He was formally charged with Battery (Domestic Violence)-Strangulation on June 5, 2012. *Id.* This information prompted a PSI of the individual in June 2012. During the PSI, the individual confirmed that he did restrain his spouse and throw his step-son off of his back when he tried to intervene. *Id.* He also confirmed that a restraining order was placed against him for one year as a result of the arrest. *Id.*

During the June 2012 PSI, the individual also admitted to a number of speeding citations and incidents of criminal conduct. *Id.* On August 12, 2000, the individual was charged with Disorderly conduct after throwing a roll of toilet paper onto a playing field while attending a soccer game. *Id.* He admitted to receiving two citations in 2003 while stationed at a military base. One citation was for speeding and the other was for a Red Light Violation. *Id.* The individual was issued another speeding citation in October 2006. In November 2006, he was also issued a warrant for his arrest for an unpaid citation for Failure to Yield. The individual received two more speeding citations in 2007. *Id.* With regard to his second citation in 2007, the individual was delinquent in paying the penalty assessment and a warrant was issued for his arrest. Finally, the individual was issued citation for speeding in March 2008 and July 2010. *Id.*

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 restored. I cannot find that restoring 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.

Criterion L

The DOE's concerns under Criterion L are 1) the individual's May 2012 arrest and formal charge of felony Battery (Domestic Violence) - Strangulation, and 2) the individual's history of criminal conduct, including numerous citations for speeding.

During the hearing, the individual, who is now divorced, testified about his May 2012 arrest for felony Battery. He testified and provided documentary evidence that the restraining order issued at the request of his wife as a result of the 2012 arrest was dissolved on December 20, 2012. Transcript of Hearing (Tr.) at 11. The individual further testified that on December 14, 2012, he negotiated with the State regarding his felony charge and entered a "No Contest" plea to a Disorderly Conduct charge. According to the individual, in exchange for the No Contest plea and the satisfaction of a number of requirements, including 48 hours of community service and

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.

26 hours of anger-management counseling program, the State will not proceed with any domestic charges against the individual and the case will be closed with only the Disorderly Conduct charge on his record. *Id.* at 12., *Indiv. Exhs. A and D.* In addition, the individual will not be required to serve a term of incarceration as part of this sentence. The individual testified that as of the date of the hearing, he has completed 20 hours of community service. The individual, who provided a written statement to the LSO after his arrest, denies the allegation that led to his arrest and testified that, although he takes some responsibility for the incident, he was defending himself during the altercation with his ex- wife. *Indiv. Exh. B, Tr.* at 13 and 17. He testified that he entered into a negotiation with the State based on the advice of his lawyer, who opined that it would be too “risky” to go to trial. *Id.* at 14. The individual is now attending anger-management counseling. *Id.* at 46. He believes the counseling has been helpful and has given him insight on how to handle stressful situations. The individual testified that he expects to complete his anger-management classes in about four months. *Id.* at 30.

With respect to the incidents of criminal conduct cited by the LSO, including the individual’s numerous citations for speeding, the individual readily acknowledged all of the incidents. He testified that a number of his speeding citations occurred because he had a long (45-minute) commute to work and he was travelling a long stretch of a two-lane highway with very little traffic. *Id.* at 34. The individual explained that he was not accustomed to driving on the highway and did not realize how fast he was going. *Id.* at 24. He testified that he is now better able to control his speed and has not received a speeding citation since July 2010. *Id.* at 34. The individual also testified that he understands the importance of following rules and regulations. He further stated that his future intentions are to continue to control his speed and to abide by the rules. *Id.* at 36. Finally, the individual testified that he is a reliable, honest and trustworthy person. *Id.* at 46.

Among the factors which could serve to mitigate the security concerns raised by the individual’s criminal conduct 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. *Adjudicative Guidelines E* at ¶ 17 (c), (d) and (e).

With respect to the individual’s May 2012 arrest for felony Battery, I find that although the individual asserts that he was defending himself during this incident and entered a “No Contest” plea to a charge of Disorderly Conduct, the incident is relatively recent. In addition, he has not yet completed all of the requirements of his sentence for the Disorderly Conduct charge, i.e., the remainder of the 48 hours of community service and the 26 hours of anger-management

counseling. The recency of the arrest, coupled with the yet to be completed terms of his plea bargain, prevent me from finding mitigation regarding the individual's May 2012 arrest.

As for the numerous speeding violations occurring from 2003 to 2010 as well as the individual's 2000 charge for Disorderly Conduct, the individual has acknowledged these incidents. He testified that he has adjusted his behavior and understands the importance of complying with the law. He has not received a speeding citation since 2010. Due to the passage of time and the individual's acknowledgement of his behavior, I am convinced that the individual's behavior with respect to following rules and regulations is unlikely to recur. Therefore, I find that he has mitigated the security concerns associated with these incidents of criminal conduct. As set forth above, however, because the individual has not mitigated all of the security concerns associated with his past criminal conduct, I find that the individual's access authorization should not be restored.

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 Criterion 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 Criterion L. I therefore cannot 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 find that the individual's access authorization should not be restored. 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 22, 2013