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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:	March 21, 2013)	Case No.: PSH-13-0038
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_____)

Issued: June 26, 2013

Hearing Officer Decision

Janet R. H. Fishman, Hearing Officer:

This Decision concerns the eligibility of XXXXXXXXXXXXXXXX (hereinafter referred to as “the Individual”) to hold an access authorization^{1/} 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 at this time.

I. Background

The Individual is employed by a DOE contractor in a position that requires him to hold a DOE security clearance. After reviewing the Individual’s Questionnaire for National Security Positions (QNSP), the Local Security Office (LSO) conducted a personnel security interview (PSI) with him. As a result of the PSI, the Individual was evaluated by a DOE psychologist, who diagnosed him as having a mental condition which causes or may cause a significant defect in judgment and reliability.

^{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.

On February 26, 2013, the LSO sent a letter (Notification Letter) to the Individual advising him that it possessed reliable information that created a substantial doubt regarding his eligibility to hold a security clearance. 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 (h) and (l) (hereinafter referred to as Criterion H and Criterion L).^{2/}

Upon his receipt of the Notification Letter, the Individual exercised his right under the Part 710 regulations by requesting an administrative review hearing. The Director of the Office of Hearings and Appeals (OHA) appointed me the Hearing Officer in the case and I subsequently conducted an administrative hearing in the matter. At the hearing, the LSO presented the testimony of a DOE psychologist; the Individual presented his own testimony and the testimony of three witnesses. The LSO submitted 11 exhibits into the record.

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 denials”); *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 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 evidence may be admitted. 10 C.F.R. § 710.26(h). Thus, an Individual is afforded the utmost latitude in the presentation of evidence to mitigate the security concerns at issue.

^{2/} Criterion H concerns information that a person has “[a]n illness or mental condition of a nature which, in the opinion of a psychiatrist or a licensed clinical psychologist, causes or may cause, a significant defect in judgment or reliability.” 10 C.F.R. § 710.8(h). 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).

B. Basis for the 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 eligibility in favor of the national security. *Id.*

III. The Notification Letter and the Security Concerns at Issue

As previously noted, the LSO cites two criteria as the bases for suspending the Individual's security clearance, Criteria H and L. The Individual's diagnosis by a DOE psychologist that the Individual has a mental condition which causes or may cause a significant defect in judgment and reliability raises a security concern under Criterion H because "[c]ertain emotional, mental, and personality conditions can impair judgment, reliability, or trustworthiness." See Guideline I 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).

To support the Criterion L security concern, the LSO relies on the Individual's unreliable behavior, which includes ten arrests. "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." Adjudicative Guideline J at ¶ 30. The Individual's failure to file income taxes from 2002 to 2007^{3/} involves "[c]onduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations." Adjudicative Guideline E at ¶ 15. Such conduct "can raise questions about an individual's reliability, trustworthiness and ability to protect classified information." *Id.* Finally, the Individual's false statements to the OPM investigator raise a concern because "any failure to provide truthful and candid answers during the security clearance process" suggests that an individual lacks candor and truthfulness. *Id.*

IV. Findings of Fact

During a routine background investigation, the LSO found inconsistencies in the Individual's statements regarding his alcohol use. DOE Ex. 3 at 1. Because of these inconsistent statements, the LSO sent the Individual to a DOE psychologist for evaluation. DOE Ex. 3 at 1. The DOE psychologist did not tender a diagnosis with

^{3/} The LSO did not allege that the Individual was financially irresponsible because he failed to file his state and federal income taxes. At the hearing, the Individual's wife testified that he is currently making payments to the Internal Revenue Service on a payment plan and is current with his taxes, otherwise. Tr. at 35; see DOE Ex. 4 at 2.

respect to the Individual's alcohol use, but diagnosed an unspecified mental illness. DOE Ex. 4 at 9. At the hearing, the DOE psychologist asserted that the Individual has a "trait, an enduring personality tendency, that continues to make me feel that [he is] unreliable." Tr. at 84. To support his diagnosis, the DOE psychologist pointed to the Individual's five DWI arrests to show that the Individual did not learn from his previous behavior of drinking and driving but continued that behavior on at least four subsequent occasions. Tr. at 77. Further, the DOE psychologist highlighted the Individual's failure to follow the law and file his state and federal income taxes, not because it indicates that he is financially irresponsible, but because his failure to file shows that he does not follow rules. Tr. at 77. Finally, the DOE psychologist emphasized the Individual's false statements to both the OPM investigator and the Personnel Security Specialist (PSS) during the PSI. The DOE psychologist stated that these false statements show that the Individual is not rehabilitated from his unreliable behavior of the past since these statements occurred during the current administrative review process. Tr. at 89.

In addition to the DOE psychologist's diagnosis, the Individual has demonstrated unreliable behavior as evidenced by his past arrests and contempt of court charges. The Individual was first arrested for DWI in 1989. DOE Ex. 11 at 45-47. Four other DWI arrests followed in 1990, 1992, 1994, and 2006. DOE Ex. 11 at 47-48, 48-49, 49-52, and 52-53. In addition to the DWI arrests, the Individual has been charged with a Battery Against a Household Member and a Battery/Domestic Violence, both of which were against his current wife. DOE Ex. 11 at 54-55, 56-57; Tr. at 31, 47-48, 54. However, both the Individual and his wife testified that she caused the events that led to his 2010 arrest. Tr. at 31, 48, 65-66. She began hitting him and he attempted to grab her but missed and hit her instead. Tr. at 31, 65-66. They both testified that the Individual was arrested because his wife was the primary caregiver for her disabled daughter, who was still in the home. Tr. at 48, 66. Finally in 2006 and 2009, the Individual was charged with contempt of court for failing to comply with court requirements assessed in previous convictions. DOE Ex. 11 at 88-89, 89-90.

In addition to his arrests and contempt of court charges, the Individual failed to file his state and federal income taxes for approximately five years, from 2002 through 2007.^{4/} DOE Ex. 11 at 18-19; DOE Ex. 4 at 2; Tr. at 32. Further, the Individual made false statements to the OPM investigator when he claimed that he stopped consuming alcohol in 2007. He exacerbated those false statements by stating to the PSS that there must have been a misunderstanding between him and the OPM investigator, because he did not tell the OPM investigator that he had not consumed alcohol since 2007. DOE Ex. 11 at 87. However, during the DOE psychologist's evaluation, the Individual admitted that he was dishonest about his alcohol consumption during the administrative review process by telling the OPM investigator that he had not consumed alcohol since 2007, and the PSS that there was a misunderstanding with the OPM investigator. DOE Ex. 4 at 6. When asked at the hearing why he told the OPM investigator that he had not consumed alcohol since 2007, he stated that he just lied. Tr. at 74.

^{4/} Again, the Criterion L concerns were not based on the Individual's financial irresponsibility but rather his failure to follow the law.

V. 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. 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)^{5/} and the Adjudicative Guidelines. After due deliberation, I have determined that the Individual's access authorization should not be restored. I cannot find that granting the Individual a security clearance would 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.

A. Criterion H

At the hearing, the DOE psychologist confirmed his diagnosis regarding the Individual's mental condition. Tr. at 76, 83. The DOE psychologist indicated that he has "less suspicion -- still some question, but much reduced suspicion about the 2010 . . . assault charge." Tr. at 76. The DOE psychologist opined that the Individual does not demonstrate self control. Tr. at 77. As an example, he pointed to the Individual's five DWIs and failure to file his taxes for five years. Tr. at 77. The DOE psychologist continued that the Individual did begin to correct his behavior when he got married and applied for the position at DOE. Tr. at 77, 89. The death of his step children^{6/} also helped the Individual's maturity. Tr. at 89. The DOE psychologist averred that the Individual getting the job at DOE helped him to mature. Tr. at 78. However, the DOE psychologist opined that lying is part of the Individual's character as represented by his failure to follow the law and pay his taxes and his failure to complete his court-ordered community service. Tr. at 80. The DOE psychologist asserted that the Individual's past behavior was further exacerbated by the Individual's falsifications to the OPM investigator. Tr. at 78-79. The DOE psychologist concluded that the Individual has a mental trait that makes him unreliable. Tr. at 84. The testimony at the hearing did not change the DOE psychologist's opinion. Tr. at 76, 83. The DOE psychologist stated that if the Individual and his wife would undertake joint therapy for six months, the Individual could be interviewed again. Tr. at 87. The DOE psychologist opined that the Individual could possibly be rehabilitated. Tr. at 87.

^{5/} 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.

^{6/} The Individual's step-son died in 2006 at age 17. Tr. at 37; DOE Ex. 10 at 25. His step-daughter died in 2010 at age 16. Tr. at 37; DOE Ex. 10 at 25. Both children had a disability. Tr. at 36. The son died of his disability. Tr. at 37. The daughter had a genetic disease that caused her death. DOE Ex. 4 at 5.

The Individual did not present compelling evidence that would convince me to disregard the DOE psychologist's opinion. The Individual's witnesses testified that he is a reliable person who will help whenever asked. Tr. at 17. They testified that he is honest, straightforward, and trustworthy. Tr. at 18, 27. The Individual's wife testified that he was very responsible in the care of her children prior to their deaths. Tr. at 36-37. She stated that he was more of a father to them than their biological father. Tr. at 37. The Individual testified that his past behavior haunts him. Tr. at 56. He claimed that he hung with the "wrong crowd" in high school. Tr. at 58. He asserted that he turned his life around when he started working at DOE. Tr. at 59. When questioned why he lied to the OPM investigator, he responded, "I just lied. There is no reason behind it. I lied, and I shouldn't have, and that's why we're here right now, to resolve the situation. There is -- there is no explanation to it. I just lied." Tr. at 74-75.

In considering the evidence before me, I first looked to the Adjudicative Guidelines. As an initial matter, I find that the Individual has been diagnosed, in November 2012, by a qualified medical profession as having a mental condition which causes or may cause a significant defect in judgment or reliability. DOE Ex. 4 at 9. Therefore, I cannot find mitigation of the security concerns at issue here under Guideline I at ¶ 29(a)-(c), which states that the "identified condition is readily controllable with treatment, and the individual has demonstrated ongoing and consistent compliance with the treatment plan," "the individual has voluntarily entered counseling," and finally, the Individual has received a "recent opinion by a duly qualified mental health profession . . . that [his] previous condition is under control or in remission." While the DOE psychologist indicated that Individual is on the correct path, he would like to see six months of joint therapy with the Individual and his wife before he could possibly find that the Individual is rehabilitated from the mental condition. The Individual is not currently in counseling or a treatment program for his active mental condition. Therefore, I cannot find, based on the evidence before me, that the Individual has mitigated the Criterion H concern raised by his persistent lying and unreliable behavior.

Further, the Individual did not show that his past behavior, which continued to his interview with the OPM investigator and during the PSI, was the result of a temporary condition, as stipulated under Guideline I at ¶ 29 (d). Therefore, I cannot find that he has mitigated the Criterion H concern.

Finally, the Adjudicative Guidelines indicate that the concern could be mitigated by a showing that "there is no indication of a current problem." Adjudicative Guideline I at ¶ 29 (e). As shown above, the Individual falsified information to the OPM investigator and during the PSI, both of which occurred during the administrative review process. Therefore, I cannot find that the Individual has mitigated the Criterion H concern.

The testimony of DOE psychologist has convinced me that the Individual is still suffering from a mental condition with causes a significant defect in judgment or reliability. Based on all the foregoing, I find that the Individual has not mitigated the security concerns associated with Criterion H.

B. Criterion L

The Individual did not present any mitigating evidence regarding his past unreliable behavior, which included his ten arrests or his failure to follow the law and pay his taxes. His only statements regarding these issues were that his past “haunts me to this day.” Tr. at 56. Further, he claimed that he “just lied” to the OPM investigator when he made the false statements during the routine background check. Tr. at 74. Most of the events raised by the LSO as security concerns under Criterion L, when considered separately, may not be of sufficient importance to give rise to a valid security concern. However, when considered together, the events indicate that the Individual has a cavalier attitude toward his obligation to conform his behavior to legal requirements and to honor his commitments. Such behavior does not correspond with the behavior of a security clearance holder. *Personnel Security Hearing*, Case No. PSH-13-0015 (2013). The Individual has not adequately addressed the DOE’s security concerns regarding his personal conduct, especially given the recency of his false statements, which occurred during the security clearance process. Therefore, I cannot find that the Individual has mitigated the security concerns associated with Criterion L.

VI. Conclusion

In the above analysis, I have found that there was sufficient derogatory information in the possession of the DOE that raises serious security concerns under Criteria H 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 have found that the Individual has not brought forth sufficient evidence to mitigate these security concerns associated with Criteria H and L. I therefore cannot find that granting the Individual’s access authorization will not endanger the common defense and is clearly consistent with the national interest. Accordingly, I have determined 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.

Janet R. H. Fishman
Hearing Officer
Office of Hearings and Appeals

Date: June 26, 2013