



address concerns about the individual's pattern of criminal conduct. On March 5, 2013, 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 one potentially disqualifying criterion set forth in the security regulations at 10 C.F.R. § 710.8, subsection (l) (hereinafter referred to as Criterion L).<sup>2</sup>

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 his supervisor. The DOE counsel did not present any witnesses. The DOE and the individual presented a number of written exhibits prior to 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 (9<sup>th</sup> 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.

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<sup>2</sup> 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 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 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 and charged with Driving Under the Influence (DUI). The LSO also alleges that, in January 2004 and in April 2002, the individual was arrested and charged with DUI and Hit and Run. Criminal activity creates doubt about a person's judgment, reliability, and trustworthiness and by its very nature, it calls into question a person's ability or willingness to comply with laws, rules and regulations. *See* Guideline J 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 4, 2012, the individual was arrested and charged with Driving Under the Influence (DUI). He was given three years of probation, his license was suspended for a year and he was ordered to install an ignition interlock device (IID). The individual was also ordered to attend a 3-month DUI class and perform 60 hours of community service in addition to paying \$1,924 in fines. This information prompted DOE to conduct PSIs of the individual on November 15, 2012, and December 11, 2012. During these interviews, the individual admitted that he had not installed the IID and continues to drive with a suspended license. DOE Exh. 1. The individual also admitted that in April 2002 and January 2004, he was arrested and charged with DUI. In addition to these admissions during his PSIs, during an Office of Personnel Management interview in August 2011, the individual indicated that he never intends to drink and operate a vehicle again. Despite this statement, he was charged with DUI in May 2012. *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)<sup>3</sup> 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 that the individual was arrested and charged with three separate DUIs in 2002, 2004 and 2012, respectively. As a consequence of his 2012 DUI, the individual was given three years probation, his license was suspended for a year and he was ordered to install an IID. He later admitted that he had not installed the IID and continued to drive on a suspended license.

During the hearing, although the individual acknowledged that he was charged with three DUIs, he stated, however, that he was only convicted of the 2002 DUI and that the charges for the 2004 and 2012 DUIs were reduced to charges of Wet and Reckless due to his blood alcohol content at the time. Transcript of Hearing (Tr.) at 20 and 21. Nevertheless, the individual testified that he was embarrassed by his conduct. With respect to his May 2012 arrest, the individual testified that he was fined, asked to complete 60 hours of community service and complete three months of a DUI program. According to the individual, as of the date of the hearing, he has completed nine months of DUI classes (as required by the local Department of Motor Vehicles (DMV)), completed 60 hours of community service and is on track to pay off his fine on or before the due date of January 20, 2014. *Id.* at 22, *Indiv. Exh. A*. The individual acknowledged that he did not immediately install an IID, but explained that he was given conflicting information when he called DMV about the process of installing the IID so that he could obtain a restrictive license. *Id.* at 23. According to the individual, he installed the device in February 2013, about nine months after his arrest. *Id.* at 31. He further admitted that he drove on a suspended license on

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<sup>3</sup> 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.

occasion before installing his IID, but felt that he had to in order to get to work which was over 22 miles away. *Id.* at 25. The individual testified that he understands the importance of following rules. His supervisor, who testified on his behalf during the hearing, stated that the individual is a reliable employee who follows rules in his workplace. Finally, the individual testified that he has learned his lesson from these arrests and has no future intention of drinking and driving. He stated that his license suspension will end in about a month, and that he has fulfilled one year of his three-year probationary period. *Id.* at 41.

Among the factors which could serve to mitigate the security concerns raised by the individual's pattern of criminal conduct are (1) so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment; (2) the person was pressured or coerced into committing the act and those pressures are no longer present in the person's life; (3) evidence that the person did not commit the offense; and (4) there is evidence of successful rehabilitation; including but not limited to the passage of time without recurrence of criminal activity, remorse or restitution, job training or higher education, good employment record, or constructive community involvement. *Adjudicative Guideline J* at ¶ 32 (a)-(d). None of these mitigating factors apply in this case. First, during the hearing the individual acknowledged and accepted full responsibility for his criminal conduct. Second, the individual's May 2012 DUI was recent and there has not been a sufficient passage of time since the criminal behavior occurred. Third, although he has fulfilled some of the terms of his sentence, by completing 60 hours of community service and completing a DUI program, there is no evidence of successful rehabilitation at this time. The individual has only served one year of a three-year probationary period. Given that the individual's third alcohol arrest is relatively recent and that he has only fulfilled one year of a three year probationary period, 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 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: July 26, 2013