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**United States Department of Energy
Office of Hearings and Appeals**

In the Matter of Personnel Security Hearing)

Filing Date: May 15, 2013)

Case No.: PSH-13-0060

Issued: August 22, 2013

Hearing Officer Decision

Kimberly Jenkins-Chapman, Hearing Officer:

This Decision concerns the eligibility of xxxxxxxxxxxx (hereinafter referred to as “the individual”) for access authorization 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 have determined that the individual’s access authorization should be restored.²

I. BACKGROUND

The individual is an employee of a DOE contractor and held an access authorization until the DOE suspended it. On January 3, 2013, and March 13, 2013, as part of a background investigation, the Local Security Office (LSO) conducted a Personnel Security Interview (PSI) with the individual in order to address concerns about his pattern of criminal conduct. Exhibits 20, 21. On April 15, 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).³

¹ An access authorization is an administrative determination that an individual is eligible for access to classified matter or special nuclear material. 10 C.F.R. § 710.5. Such authorization will be referred to in this Decision as access authorization or a security clearance.

² Decisions issued by the Office of Hearings and Appeals (OHA) are available on the OHA website located at <http://www.energy.gov/oha>.

³ Criterion L relates to information that a person has “[e]ngaged in any unusual conduct or is subject to any

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 two additional individuals. The DOE introduced 22 exhibits into the record of this proceeding.

II. REGULATORY STANDARDS

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

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. NOTIFICATION LETTER AND ASSOCIATED SECURITY CONCERNS

As previously noted, the LSO cites one potentially disqualifying criterion as the basis for suspending

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).

the individual's security clearance, Criterion L. To support its reliance on Criterion L, the LSO alleges that the individual was charged for various hunting violations and other related violations beginning in 1994, up until as recently as February 2013. Moreover, the LSO cited the individual's arrests and charges for Driving While Intoxicated (DWI) in 1994 and 1996. 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

The individual, a 53-year old man, has held a security clearance since 1981 and worked for a DOE laboratory for approximately 32 years. Exhibit 15. On October 4, 2012, the individual was charged with accessory to unlawful killing of elk with a rifle during a bow only hunt, unlawful possession of an elk, accessory to waste of game and operating an off-highway vehicle on Public Bureau of Land Management land without a registration. Exhibits 1 and 4. This information prompted DOE to conduct PSIs of the individual on January 3, 2013 and March 13, 2013. At his PSI on March 13, 2013, the individual admitted that on February 2, 2013, he also was charged with littering and with having an open container. Exhibit 20 at 5-7.

During the PSIs, and in his response to the Notification Letter, the individual further admitted that on January 8, 2008, he was charged with killing big game out of season and waste of game. Exhibit 2. Moreover, on February 4, 2005, he was investigated for allegedly killing and possessing bulk elk in 2003, and guiding and outfitting without being registered in 2004. *Id.* The record also indicates that on March 17, 2006, a source reported the individual for illegal hunting and possession, alleging that the individual killed 185 scoring buck in December 2005, took a hunter in January 2006 to kill a trophy buck out of season for \$2,000, and killed a deer illegally. *Id.*; Exhibit 4. On December 10, 2011, the individual was also suspected but not charged for the unlawful killing of big game. *Id.*; Exhibit 4. Finally, the individual was arrested and charged on April 26, 1996, and April 6, 1994, for DWI, and on March 3, 1994, for criminal trespass and hunting violations. *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)⁴ and the Adjudicative Guidelines.

Among the factors listed in the Adjudicative Guidelines that could serve to mitigate the security concerns raised by the individual's pattern of criminal conduct are the following: (1) so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances,

⁴ 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, or duress, the likelihood of continuation or recurrence, and other relevant and material factors.

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). Many of these mitigating factors apply in this case.

After due deliberation, I have determined that the individual's access authorization should be restored. I 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). Moreover, I find that the individual has sufficiently mitigated the concerns associated with his alleged criminal conduct.

While the record cites many incidents of alleged criminal conduct, as a preliminary matter, I will address the individual's previous DWIs. As those occurred in 1996 and 1994, over 15 years ago, I conclude that any concerns regarding this criminal conduct have been mitigated. In view of the time elapsed since those incidents, I find that they do not cast doubt on the individual's reliability, trustworthiness, or good judgment. *Adjudicative Guideline J* at ¶ 32(a). As explained below, I also find that the remaining concerns regarding his conduct associated with gaming and hunting, have been adequately mitigated.

On March 3, 1994, the individual was arrested for criminal trespass and hunting violations. Exhibit 21 at 29. While someone reported him for illegal hunting, he asserts that he did not engage in criminal conduct. Exhibit 12 at 30-32. Rather, he stated that he legally hunted and killed deer in the fall of 1993 and that there was no evidence to charge him with a criminal offense. *Id.* There is nothing in the record to suggest that he was charged with any criminal offense for that alleged incident. However, in the record is an incident report indicating that on March 3, 1994, an arrest warrant was issued for the individual's failure to appear to court for criminal trespass and hunting violations. Exhibit 14. He was subsequently booked, and paid a \$600 cash bond to be released. *Id.* There is no further information in the record as to the disposition of that matter.

More than ten years later, on February 4, 2005, the individual was again investigated for hunting-related incidents that occurred in 2003 and 2004, which the individual claims were unsubstantiated. Exhibit 4. The details of the events surrounding those investigations are in a Case Report Form, dated February 7, 2005. *Id.* The individual was investigated because during a search of another person's home, journals were seized, which described illegal hunting activities that allegedly involved the individual in 2003 and 2004. *Id.* When the individual was interviewed concerning those incidents, he denied the events described in the journal. *Id.* During the hearing, the individual again denied any involvement in the killing and possession of bulk elk in 2003. Tr. at 38. The record does not indicate that the individual was ever charged for those alleged activities. *See* Exhibit 2.

Regarding the report by a source on March 17, 2006, of illegal gaming behaviors, the individual stated during his March 13, 2013, PSI that the allegations were unsubstantiated, and that he was never charged for any criminal activity. Exhibit 20 at 51-58. He did not know anything about the source's report and denied all the allegations that were made against him. *Id.* at 53-55. Indeed, the

March 17, 2006 Case Report detailing the source's allegations against the individual regarding illegal killing of multiple buck, indicates that the case was disposed as closed, specifying: "Not prosecuted because: no violation found." Exhibit 4 (emphasis in original).

Furthermore, the individual testified about his January 4, 2008, charge for killing game out of season and waste of game, which allegedly occurred on December 6, 2007. Exhibit 20 at 35. A caller reported him for allegedly illegally hunting deer; however, the individual denied that he shot deer, and when he went to court, the charges against him were dropped because there was no evidence against him. *Id.* at 39-40; Exhibit 21 at 24. He stated that while he did not engage in illegal behavior, he forfeited his rifles that were confiscated because he did not want to pay the legal fees and court costs of about \$4,000 in order to keep his rifles. *Id.* at 28; Tr. at 35.

The LSO further stated that DOE possessed information that on December 10, 2011, the individual was a suspect in the unlawful killing of big game, where someone reported that he killed a deer and took portions of it and left the carcass. However, the individual denied that he killed a deer. Exhibit 20 at 50. He stated that an officer came up to him and his friend while they were in his truck, saying that someone reported hearing gun shots, and that when he checked the trunk, the officer did not find anything. *Id.* at 47. At the hearing, the individual reiterated that he was never cited for unlawful killing of big game at that time, and that the officers suspected him because the caller reported that the suspect had the same color vehicle as the individual's. Tr. at 37-38; 46-47.

In response to the reports by various sources that led to the above-mentioned investigations or charges against him, the individual stated "all this is people call in, it's all hearsay or false accusations. . . . I've been charged a couple of times, never been convicted of any of this stuff. I've been hunting a long time, and you're out there, you get stopped all the time." Tr. at 39. Indeed, upon my review of the report and consideration of the individual's testimony, it appears that those incidents and allegations were unsubstantiated and did not conclude in any unfavorable disposition against the individual.

Rather, the only charges that the record indicates were substantiated concern the October 2012 and February 2013 incidents. The individual explained that in September 2012, he camped with his son and his girlfriend, and while his girlfriend stayed in the cabin, he and his son walked out to scout for elk. Exhibit 21 at 7-8. At the time, they did not have a license to hunt; only the girlfriend had a license. *Id.* at 10. After he and his son parted ways, he received a phone call from his son that he had shot an elk and that he needed him to help him bring it back to the truck. *Id.* at 8. He said that when he drove to his son, his son had already deboned the elk, and that he proceeded to help him "bring [the meat] out to the truck [and] put it in the coolers." *Id.* The individual had no intent to shoot any elk himself during that trip; in fact, he saw many elk, but did not shoot any. *Id.* at 13. After he helped his son put the elk into the truck, he was stopped by an officer and arrested. *Id.* at 14. The individual pled not guilty to the charges against him, stating that he was not an accessory to the unlawful killing of the elk with a rifle as he was not present when his son killed the elk. *Id.* at 17. As to the unlawful possession charge, he states that he did not possess anything and just helped bring the meat into the truck. *Id.* Finally, with regard to the accessory waste of game charge, the individual believed that his son had most of the elk meat and did not waste any portions of it; however, he acknowledged that his four-wheeler was not registered when he helped his son pick up the elk meat. *Id.* at 17-18.

At the hearing, the individual provided a letter from the district attorney's office, dated July 22, 2013, regarding the October 2012 charges. Exhibit A. In that letter, the Pre Prosecution Director stated that the individual is participating in the Pre Prosecution Diversion Program (PPD), and she noted that the individual "was not present when the elk was shot, and when he arrived at the scene his son placed the head of the elk in his pickup truck to transport." *Id.* If the individual completes the PPD, his charges will be dropped. *Id.*

Finally, with regard to the February 2, 2013, charges for littering and having an open container, the individual explained that after hunting, he and his friends went back to the truck to eat a sandwich while the truck was parked. While seated in the truck, the individual opened up a beer, when a sheriff came up to the vehicle and cited him and his friends for having an open container. Exhibit 20 at 7. They were also cited for littering because a few cans of beer were found on the road; however, the individual stated that the cans were not his because he did not bring any alcohol with him while hunting. *Id.* at 12-13. He did not challenge the open container charge, even though he claims to not have violated any rules, stating that it was cheaper to plead and mail the \$90.00 fine, rather than take off work and drive four hours to contest the charge. *Id.*: Tr. at 26.

He also testified that in the 32 years he has worked for the DOE laboratory, he has never had a security infraction, and he follows all the rules and procedures. Tr. at 39, 55. Two employees of the laboratory testified regarding the individual's reliability and trustworthiness to secure sensitive classified information. His colleague testified that he knew the individual for 29 years and has no concerns with his trustworthiness or ability to follow rules. Tr. at 11. He further testified that the individual is one who goes "out of his way to make sure people are following the security rules." Tr. at 14. Moreover, the individual's supervisor of three years testified, stating that the individual follows security rules and that he has no concerns with his ability to follow rules. Tr. at 17.

In consideration of the mitigating factors outlined in the Adjudicative Guidelines and the evidence and testimony during the hearing, I conclude that the individual sufficiently mitigated the concerns with regard to the alleged criminal conduct. The most recent incidents cited by the LSO – the 2013 and 2012 charges – occurred under unusual circumstances. *Adjudicative Guideline J* at ¶ 32(a). The individual explained that when he arrived to assist his son during their September 2012 trip, the elk was already deboned and he merely helped load the meat onto the truck. Tr. at 13-17. He states that he did not realize what was happening at that time, yet he was stopped and arrested because he was with his son at the time. Tr. at 33; *see Adjudicative Guidelines* ¶ 2(a)(2) ("In evaluating the relevance of an individual's conduct, the adjudicator should consider . . . the circumstances surrounding the conduct, to include knowledgeable participation.") Furthermore, he contests the open container charge and littering charges, explaining that he was in a parked vehicle eating his lunch and drinking a beer when he was cited for having an open container, and that he never littered, yet paid the fine to avoid the inconvenience and fees for challenging those charges. Tr. at 20. As to the other incident reported by sources, based on the record and the individual's testimony, it appears that those reports were unsubstantiated.

From a purely common sense perspective, I find that the individual adequately explained what occurred in each of these situations where he was either charged, arrested or investigated for criminal conduct, to mitigate the concerns associated with them. At most, there is a basis to conclude that the individual engaged in criminal conduct by having an open container, being an unintentional accessory to waste of game when he was with his son, and operating an off highway

vehicle on Public Bureau of Land Management land without registration. However, those charges are not of such seriousness to conclude that the individual will endanger the national defense and security. *See Adjudicative Guidelines* ¶ 2(a)(1) (“In evaluating the relevance of an individual’s conduct, the adjudicator should consider . . . [t]he nature, extent and seriousness of the conduct.”).

In the end, the decision as to whether the risk of future behavior presenting a security concern is low enough to warrant the grant or restoration of a clearance is based on a common-sense determination. *Personnel Security Hearing*, Case No. TSO-0209 (2006) (citing 10 C.F.R. 710.7(c)). Taking into account the evidence that was presented in this matter and the testimony provided by the individual’s colleague and supervisor, I conclude that the individual’s access authorization should be restored.

VI. CONCLUSION

For the reasons set forth above, I conclude that the individual has resolved the DOE’s security concerns raised in this case. Therefore, the individual has 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 DOE should restore the individual’s security clearance at this time. Review of this decision by an Appeal Panel is available under the procedures set forth at 10 C.F.R. § 710.28.

Kimberly Jenkins-Chapman
Hearing Officer
Office of Hearings and Appeals

Date: August 13, 2013