



information falls within the potentially disqualifying criterion in the security regulations at 10 C.F.R. § 710.8; subsection (l) (Criterion L).<sup>2</sup>

After the individual received the Notification Letter, he invoked his right to an administrative review hearing. On April 25, 2012, the Director of the Office of Hearings and Appeals (OHA) appointed me Hearing Officer, and I conducted the hearing. The individual testified on his own behalf and called a former supervisor, his current supervisor, a co-worker, a student minister, and a longtime friend. Each side offered several exhibits.

## **II. The Notification Letter and the Security Concerns**

The LSO supported its Criterion L security concern with the following allegations:

- In August 2011, the individual used his government computer to search for adult entertainment for his friend's bachelor party;
- From August 2011 to November 2011, the individual used his government computer for internet searches that included pornography. He did so two days a week between 5:00am and 6:00am, when he was alone; and
- In a February 2012 PSI, the individual admitted that he knew that viewing pornography on his government computer violated security rules.

Ex. 1.

I find that the above information constitutes derogatory information that raises questions about the individual's conduct under Criterion L. Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness, and ability to protect classified information. Guideline E, STEPHEN J. HADLEY, THE WHITE HOUSE, ADJUDICATIVE GUIDELINES FOR DETERMINING ELIGIBILITY FOR ACCESS TO CLASSIFIED INFORMATION (2005) 7. Further, noncompliance with rules, procedures, guidelines, or regulations pertaining to information technology systems may raise security concerns about an individual's reliability and trustworthiness, calling into question the willingness or ability to properly protect sensitive systems, networks, and information. Guideline M, *id.* at 16.

## **III. Regulatory Standard**

An administrative review 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

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<sup>2</sup> Criterion L includes "unusual conduct" and "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." *Id.* at § 710.8(l).

standard 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 standard implies a presumption against granting or restoring an access authorization. *See Dep't of Navy v. Egan*, 484 U.S. 518, 531 (1988) (“security determinations should err, if they must, on the side of denials”); *Dorfmont v. Brown*, 913 F.2d 1399, 1403 (9th Cir. 1990) (strong presumption against the issuance of a security clearance).

#### **A. The Individual’s Burden**

The individual must present evidence to convince the DOE that granting an 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 Part 710 regulations permit the individual wide latitude to present evidence to resolve the security concerns. Even appropriate hearsay evidence may be admitted. *Id.* at § 710.26(h). The individual must present evidence to corroborate his or her efforts to resolve a security concern. *Personnel Security Hearing*, Case No. TSO-0693 (2009).

#### **B. The Basis for the Hearing Officer’s Decision**

The Hearing Officer must issue a Decision that reflects his or her comprehensive, common-sense judgment, after considering all relevant evidence, favorable and unfavorable, whether granting or restoring an individual’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). The Hearing Officer must resolve doubt in favor of the national security. *Id.*

To reach a common-sense judgment, the Hearing Officer must consider the factors listed in 10 C.F.R. § 710.7(c)<sup>3</sup> (the “whole person concept”) and the Adjudicative Guidelines. The Adjudicative Guidelines contain “conditions” or circumstances that may mitigate the allegations supporting each type of security concern.

### **IV. Findings of Fact**

The individual graduated college in August 2001. *Tr.* at 19. After September 11, 2001, he was hired in a national security position, given an access authorization, and deployed overseas. Since then, he has worked at more than eight U.S. military and civilian bases. *Id.* at 19, 22, 23.

In April 2011, a DOE contractor hired the individual, and he was granted a DOE access authorization. *Ex.* 6 at 11-12. By late August 2011, two days a week he arrived at work

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<sup>3</sup> These factors include the nature, extent, and seriousness of the conduct; the circumstances surrounding the conduct, including knowledge and participation; the frequency and recency of the conduct; the age and maturity of the individual at the time of the conduct; the voluntariness of participation; the absence or presence of rehabilitation or reformation and other pertinent behavior 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. *Id.* at § 710.7(c).

at 5:00am as part of a flexible schedule that allowed him to work and attend school. Tr. at 14; Ex. 3. On those days, before 6:00am, he spent 5-10 minutes viewing sexually explicit material on his government computer. Tr. at 15, 26; Ex. 3. After an internet search, he scrolled over a thumbnail image of a video to preview it. Tr. at 16; Ex. 3. During his misconduct, he was alone. Tr. at 26.

The individual's first misuse of his government computer occurred when he sought to obtain prices of exotic dancers for a friend's bachelor party. Tr. at 24-25. The individual's conduct segued into viewing sexually explicit material because his wife had medical problems that prevented intimacy. *Id.* at 13-14. On November 29, 2011, the individual's management received notice of his misconduct, and his misconduct ceased. *Id.* at 34; Ex. 5.

The individual admitted that security rules forbade his misuse of the government computer, but he had not thought of the rules when he violated them. Tr. at 15, 17. The individual has since taken responsibility for his misconduct. *Id.* at 16, 34. Now he better understands the LSO's concerns with cyber security, has not repeated his misconduct, and intends not to do so. *Id.* at 17, 28, 51-52. (The individual had not previously used a government computer to access inappropriate material. *Id.* at 16, 22, 43, 48, 56.)

The individual has reflected on his misconduct. Tr. at 34. During the week of the hearing, he spoke with a student minister for one hour. *Id.* at 32-33. The student minister gave him scriptures and counseled him about making mistakes, having a clean heart, and starting over. *Id.* at 33-34; *see* Ex. E. The individual saw that he was on the wrong path and felt the need to re-direct his life. Tr. at 36, *see id.* at 62.

## V. Analysis

To determine whether the individual has mitigated the allegations and therefore resolved the security concern, I will consider the relevant factors from 10 C.F.R. § 710.7(c) and the relevant mitigating conditions from the Adjudicative Guidelines, Guideline E (Personal Conduct) and Guideline M (Use of Information Technology Systems).<sup>4</sup>

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<sup>4</sup> Guideline E contains the following mitigating conditions:

- (a) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before confronted with the facts;
- (b) the refusal or failure to cooperate, omission, or concealment was caused or significantly contributed to by improper or inadequate advice of authorized personnel or legal counsel . . .;
- (c) 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;
- (d) the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that caused the

I assign positive weight to several factors. The individual presented evidence suggesting that he has a low likelihood of continuing his misconduct. His current and former supervisors both vouched for him. The former supervisor of six or seven years testified that he never had a problem with the individual. Tr. at 43-44. The current supervisor trusts him and feels that he has been punished and can move on. *Id.* at 49. The individual may be able to do so. He has had a successful career with an access authorization, and since he was confronted, he has not repeated his misconduct. He testified with a striking sincerity and candor.

No factor or series of factors is dispositive, but in this case, the negative factors do outweigh the positive factors. The individual deliberately violated the security rules. The extent and frequency of the misconduct show a pattern – he violated the security rules twice a week for three months (approximately 24 times), at a time chosen to evade detection (before 6:00am). And he did so knowingly and voluntarily, as a mature, sophisticated adult. The individual’s supervisor knows of his misconduct, which lessens his potential for pressure, coercion, exploitation, and duress. But the individual failed to corroborate his testimony that his wife and family also know of his misconduct.<sup>5</sup> He also

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untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur;

- (e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress; and
- (f) the information was unsubstantiated or from a source of questionable reliability.

ADJUDICATIVE GUIDELINES at 8-9.

Guideline M contains the following mitigating conditions:

- (a) so much time has elapsed since the 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;
- (b) the misuse was minor and done only in the interest of organizational efficiency and effectiveness . . .; and
- (c) the conduct was unintentional or inadvertent and was followed by a prompt, good-faith effort to correct the situation and by notification of supervisor.

*Id.* at 16-17.

There is no requirement that any particular number of factors or conditions be proved or that a majority of them point one way or the other. The relevance of each factor and condition depends on the facts. In this case, certain factors and conditions may demonstrate mitigation, but in other cases, other factors and conditions may do so. Adjudicatory review is not a mechanical point-counting device – the Hearing Officer looks at the totality of the circumstances to make a common-sense, reasoned judgment whether the individual has mitigated the allegations to resolve the security concern or concerns raised by the agency.

<sup>5</sup> At the pre-hearing conference on May 3, 2012, the individual was told that he must provide corroboration. Corroboration may take the form of testimony (in person or via telephone), an affidavit, or other documentary evidence.

failed to corroborate that a circumstance that had contributed to his misconduct – his impaired relationship with his wife – has improved. Most importantly, the individual committed his misconduct only recently – six months before the hearing.

The individual has not shown any mitigating conditions outlined in Guideline E or Guideline M (see note 4, above). Of those not already addressed, he made no prompt, good-faith effort to correct his misconduct. His misconduct was not caused by improper or inadequate assistance of counsel. It was not done in the interest of organizational efficiency and effectiveness.

Lastly, on the issue of reformation, the individual had one meeting with a student minister, who counseled him. The meeting shows goodwill and a commendable beginning effort. The individual's earnest, sincere testimony showed that he has begun to internalize the student minister's guidance and apply it to his life. Too little time has passed since the meeting, however, to determine whether the guidance will have a lasting impact.

## **VI. Conclusion**

Because the individual has not resolved the Criterion L security concern, I find that he has not demonstrated that restoring his access authorization would not endanger the common defense and would be clearly consistent with the national interest. Therefore, I find that the DOE should not restore his access authorization.

The parties may seek review of this Decision by an Appeal Panel, under the regulation set forth at 10 C.F.R. § 710.28.

David M. Petrush  
Hearing Officer  
Office of Hearings and Appeals

Date: June 22, 2012