* The original of this document contains information which is subject to withholding from disclosure under 5 U.S.C. 552. Such material has been deleted from this copy and replaced with XXXXXX's.

United States Department of Energy
Office of Hearings and Appeals

In the Matter of:	Personnel Security Hearing	)	
		)	
Filing Date:	February 14, 2012	)	
		)	Case No.: PSH-12-0009
		)	

Issued: May 14, 2012

Decision and Order

David M. Petrush, Hearing Officer:

This Decision considers the eligibility of XXXXXXX (the individual) to hold an access authorization[1] under the regulations at 10 C.F.R. Part 710, entitled "Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material." As I explain below, the Department of Energy (DOE) should not restore the individual's access authorization.

I. Background

The individual began his DOE-related job in August 2006. Ex. D at 19, 53, 70-71. In a September 2007 personnel security interview (PSI), the individual stated that he had been charged with Possession of Marijuana in December 1995 and Minor in Possession in July 2001. *See* Ex. 8 at 20, 78-79. On his September 2011 QNSP, he denied that he had ever been charged with or convicted of an alcohol or drug-related offense. Ex. 11. In a November 2011 Letter of Interrogatory, the local security office (LSO) asked the individual why he had not acknowledged his December 1995 charge for Possession of Marijuana and his July 2001 charge for Minor in Possession. Ex. 9. In response, the individual indicated that he had been charged with Possession of Marijuana. But he denied having been charged with Minor in Possession; he claimed that his brother had been charged and had used his identity. *Id.*

[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.

In December 2011, the LSO called the individual to a PSI to explain his responses to the Letter of Interrogatory. *See* Ex. 7. The individual continued to deny that he had been charged with Minor in Possession, even after the LSO confronted him with his September 2007 PSI testimony where he admitted that he had. *Id*. at 50-51, 54.

In January 2012, the LSO issued the individual a Notification Letter advising him that it possessed reliable information that created a substantial doubt about his eligibility to hold an access authorization. Ex. 1. In an attachment, the LSO explained that the derogatory information falls within the purview of the potentially disqualifying criteria set forth in the security regulations at 10 C.F.R. § 710.8; subsections (f) (Criterion F) and (l) (Criterion L).[2]

After the individual received the Notification Letter, he invoked his right to an administrative review hearing under the Part 710 regulations. On February 14, 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 co-worker, his supervisor, a friend, his brother-in-law, and his sister. Each side offered several exhibits.

II. The Notification Letter and the Security Concerns

The LSO supported its Criterion F security concern with the following allegation:

- In August 2006, the individual signed a statement acknowledging that if he deliberately falsified or omitted significant information during the access authorization process, he might lose his access authorization. The individual deliberately provided false information at a December 2011 PSI when he stated that during a September 2007 PSI, he lied when he admitted to being charged with Minor in Possession in July 2001. He stated that he was not charged with that crime and that at the September 2007 PSI, he had fabricated the story to take the blame for his brother.

Ex. 1; Tr. at 207.

I find that the above information constitutes derogatory information that raises questions under Criterion F. "Conduct involving . . . dishonesty . . . 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

[2] Criterion F relates to information that a person "has deliberately misrepresented, falsified, or omitted significant information from a Personnel Security Questionnaire." *Id*. at § 710.8(f). 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).

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

- In March 2008, the individual's employer suspended him for one day because he clocked in and out of a gym without working out. At the December 2011 PSI, he admitted that he knew that once he clocked in, company policy required him to stay and work out; and

- In August 2010, the individual's employer suspended him for three days because while he was on duty, he had horseplayed with a weapon. The employer also suspended him because during the investigation, he had submitted a false statement about the incident.

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, ADJUDICATIVE GUIDELINES at 7.

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 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 mitigate the security concerns. Even appropriate hearsay evidence may be admitted. *Id*. at § 710.26(h).

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 the granting or continuing of 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)[3] (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

In December 1995, the individual was charged with Possession of Marijuana. Ex. 7 at 71; Ex. 8 at 78-79; Ex. D at 65-66. In July 2001, he was charged with Minor in Possession. Ex. 8 at 20; Ex. A.

From April 2004 to July 2005, the individual was a police officer with a local police department. Ex. D at 23. He met a woman who gave him her business card, and he took that as an invitation to socialize. Ex. 8 at 33-34; Ex. D at 64. He stopped by her house while still in his police uniform. Ex. 8 at 34. A man answered the door, and the individual panicked and gave a false reason for why he was there. *Id*. at 34, 36. The police department disciplined the individual. *Id*. at 33.

The individual began his DOE-related job in August 2006. Ex. D at 19. In March 2008, he was disciplined because he had clocked in and out of his employer's gym without doing the required work out. Tr. at 30-31; Ex. 5; Ex. 7 at 62-63. In July 2010, the individual was on duty around midnight. Ex. 4. Two co-workers observed him try to sneak up on a third co-worker while he had his service weapon in a "low ready" position. The second co-worker heard the individual say, "You guys are quick; I was trying to sneak up on [another employee]." In a written statement, the individual falsely denied trying to sneak up on a co-worker. When two members of management interviewed him about the incident, he acknowledged that he had snuck up. The individual was disciplined for horseplay and for submitting a false written statement. *Id*.

In November 2011, the individual completed a QNSP as part of a routine background investigation. Ex. 9. In it, he failed to acknowledge his charge for Possession of Marijuana and his charge for Minor in Possession. *Id*. (He also failed to acknowledge either on his August 2009 QNSP. Ex. 11. On his August 2006 QNSP and his March 2008 QNSP, he acknowledged the Possession of Marijuana but not the Minor in Possession. Ex. 10; Ex. D at 42-43.)

[3] These factors include witness demeanor and credibility; the authenticity and accuracy of the documentary evidence; 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 of 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).

The LSO sent the individual a Letter of Interrogatory so that he could explain his failure to acknowledge the two charges. Ex. 9. When he received it, he was on notice that the LSO wanted information on these topics, and he had time to think about it. Tr. at 58-67. In his response, he falsely claimed that he had not received the 2001 charge for Minor in Possession. Ex. 9. He claimed, rather, that his brother had been charged and had used his name. *Id*. (The individual's brother was incarcerated from 2002 to 2008 and 2009 through the time of the hearing. Tr. at 52.) At the follow-up PSI in December 2011, he repeated his story. Ex. 7 at 16, 43, 50, 52-53, 55-56, 72. For support, he showed the PSI interviewer a 2009 police report from when his brother had previously passed his personal information to someone who had misappropriated it. *Id*. at 22-23, 38-40.

Then the PSI interviewer confronted him with the fact that at the September 2007 PSI, he had acknowledged the charge of Minor in Possession. Ex. 7 at 54. The individual panicked and deliberately made a series of false statements. He claimed that in 2007, he intended to mislead the LSO to take the blame for his brother. *Id*. at 55, 60-61, 57, 72, 77, 79. He claimed that he first learned of the charge for Minor in Possession in 2004, during his police training. *Id*. at 41-42. He also claimed that during a routine background investigation in October 2006, he gave the same story to an investigator. *See* Ex. D at 64-67.

Shortly after the 2011 PSI, the individual's sister advised him to call the PSI interviewer to correct his statements. Tr. at 181-82, 192; *see id*. at 194.

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 Guideline E of the Adjudicative Guidelines – Personal Conduct.[4]

[4] Guideline E contains the following relevant mitigating conditions:

> (a) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before confronted with the facts;
>
> . . .
>
> (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 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

A. Falsification

The individual now acknowledges having received the 2001 charge for Minor in Possession. Tr. at 54-57. He argues that he had not deliberately provided false statements about it in the November 2011 Letter of Interrogatory and in the December 2011 PSI because he forgot that he had received it. *Id*. at 26, 28, 117, 129, 121-22. He forgot about it because having received it was not a "big deal." *Id*. at 114-15. (It was not an important incident in his life, he says, until he walked out of the December 2011 PSI. *Id*. at 45, 116.) Then he got "sucked into" the notion that his brother had stolen his identity. *Id*. at 116. After the interviewer confronted him with his September 2007 PSI statements, he began to lose his composure. *Id*. at 118, 129. He got "so mixed up," he says, and "confused." *Id*. at 125, 129-30. He has "a problem" with "negative verbal confrontation." *Id*. at 27. He tried to "diffuse" the situation. *Id*. at 124. He admitted to lying because he could not think of anything else to say. *Id*. at 122. After the December 2011 PSI, he realized that his brother was not involved with his 2001 charge for Minor in Possession. *Id*. at 22-24, 72, 76. He called the LSO to correct his mistake and left a message. *Id*. at 72-73. He claims that the LSO did not call him back. *Id*.

The circumstances suggest, however, that the individual had not forgotten about his charge for Minor in Possession. First, he had recalled the event within the last five years – at the September 2007 PSI. Early in that interview, he volunteered that he had received the charge. Ex. 8 at 20. Later in the interview, he described the event with compelling detail. He recalled the time of day, who he was with, where he was, how he got there, what he was doing, the items in the room, why the police arrived, and what was said to the police. *Id*. at 54-58.

Second, before the December 2011 PSI, the individual had ample opportunity to recall what had happened. When the LSO sent him the Letter of Interrogatory, it put him on notice that it was aware of his charge and gave him an opportunity to explain himself in an unpressured, non-confrontational setting.

Third, even if the individual had blamed his brother in good-faith error, he did not acknowledge the truth after the PSI interviewer confronted him with it. Instead, he doubled down on his story. Had the story been an honest mistake, he probably would not have clung to it.

Fourth, when the individual clung to his story, he offered inconsistent, shifting details and a selective memory. At the December 2011 PSI, he claimed that he first learned of the charge for Minor in Possession when he applied for the police force in 2004. Ex. 7 at 42. He also insisted that in 2006, he told the investigator that the charge stemmed from his brother stealing his identity. *Id*. at 52-53. Both of those events would have occurred before 2009, when the individual said that he first learned that his brother had stolen his identity. Tr. at 29, 81; Ex. 7 at 40-41. At the hearing, he testified that he was sure that

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(f) the information was unsubstantiated or from a source of questionable reliability.

ADJUDICATIVE GUIDELINES at 8-9.

his charge for Possession of Marijuana had come up during his police application process, but he could not recall whether the Minor in Possession came up. Tr. at 98-102. At the hearing, the individual said that he had not told the investigator about his brother stealing his identity, and later he said that he could not remember whether he had. *Id*. at 87-89, 132.

Lastly, I cannot find that the individual called the LSO to correct his story. He says that he did, and his sister testified that she advised him to do so. If he had, however, the LSO would likely have called him back. Even if he had left a message, that effort alone – without further follow-up – does not mitigate the individual's pattern of falsification.

For these reasons, I find that the individual has not mitigated the allegations of falsification.

B. Employee Misconduct

The individual argues that in March 2010, he had not been sneaking up on another employee. He correctly reported this fact in his written statement, he says. Tr. at 36. He claims that the eyewitness-employees lied because they hold a grudge against him. *Id*. at 50, 105, 145, 162. He also claims that when his employer interviewed him about the incident, he meant his admission as a sarcastic and facetious response because he had been questioned again and again. *Id*. at 33-34, 105-06.

The circumstances suggest, however, that the individual had in fact sneaked up on another employee. The first eyewitness had little, if any, reason to lie because the individual did not even know him. Tr. at 34-35. The second eyewitness heard the first eyewitness broadcast a radio description of the individual sneaking, and the second eyewitness also saw it. The second eyewitness heard the individual state that he was trying to sneak up on a co-worker. Ex. 4. At the interview, the reporting supervisor and the manager each understood the individual's statement as an admission of fact, not as sarcasm. *See id*. Even the co-workers who testified for the individual could not conclude that the eyewitnesses had lied. Tr. at 148, 150, 164. I need not evaluate the co-worker's motivations in providing statements against the individual; the important point is that they show that the individual horseplayed and submitted a false written statement, both of which violated the company rules. Therefore, the individual has not mitigated this allegation.

Next, the individual acknowledges that in March 2008, he clocked in and out of a gym without completing the required workout. Tr. at 47; Ex. 7 at 63. He did so, he says, because he forgot his lunch and wanted to eat. Tr. at 48-49. He argues that he had only done that one time and that he will not do it again. *Id*. at 30-31.

I find that the individual has not mitigated this allegation. This incident falls in between his misconduct at the local police department (2004-2005) and his misconduct at his current employer (2010). Given the individual's pattern of employment misconduct, too little time has passed for the individual to have demonstrated proper conduct on the job.

VI. Conclusion

Because the individual has not resolved the Criterion F and Criterion L security concerns, 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: May 14, 2012