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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: December 15, 2014)

Case No.: PSH-14-0108

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Issued: April 23, 2015

Administrative Judge Decision

Robert B. Palmer, Administrative Judge:

This Decision concerns the eligibility of XXXXXXXXXXXXX (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 conclude that the individual should be granted a security clearance.²

I. BACKGROUND

The individual’s employer, a Department of Energy (DOE) contractor, requested a security clearance on the individual’s behalf. During the ensuing background investigation, the local security office (LSO) obtained information about the individual that raised security concerns. In an attempt to resolve those concerns, the LSO summoned the individual for an interview with a

¹An 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 also be referred to in this Decision as a security clearance.

² Decisions issued by the Office of Hearings and Appeals (OHA) are available on the OHA website located at <http://www.oha.doe.gov> . The text of a cited decision may be accessed by entering the case number of the decision in the search engine located at <http://www.oha.doe.gov/search.htm>.

personnel security specialist in February 2012. After this Personnel Security Interview (PSI) failed to resolve the concerns, the LSO determined that derogatory information existed that cast into doubt the individual's eligibility for access authorization. It informed the individual of this determination in a letter that set forth the DOE's security concerns and the reasons for those concerns. I will hereinafter refer to this letter as the Notification Letter. The Notification Letter also informed the individual that he was entitled to a hearing before an Administrative Judge in order to resolve the substantial doubt concerning his eligibility for access authorization.

The individual requested a hearing on this matter. The LSO forwarded this request to the Office of Hearings and Appeals, and I was appointed the Administrative Judge. The DOE introduced seven exhibits into the record of this proceeding. The individual introduced eight exhibits and presented the testimony of three witnesses, in addition to testifying on his own behalf.

II. THE NOTIFICATION LETTER AND THE DOE'S SECURITY CONCERNS

As indicated above, the Notification Letter informed the individual of the LSO's determination that derogatory information exists that creates a substantial doubt as to his eligibility to hold a security clearance. That information pertains to paragraph (f) of the criteria for eligibility for access to classified matter or special nuclear material set forth at 10 C.F.R. § 710.8.

Under criterion (f), information is derogatory if it indicates that an individual has deliberately misrepresented, falsified, or omitted significant information from a PSI, a Questionnaire for National Security Positions (QNSP), or from written or oral statements made in response to official inquiry on a matter that is relevant to a clearance eligibility determination. In support of this criterion, the Notification Letter alleges that the individual was unable to pass four polygraph examinations administered to him by another federal agency in 2003 and 2004, that in an interview with that agency in 2003, the individual admitted to lying on a 1999 QNSP about his illegal drug usage, and that during his 2012 PSI, the individual admitted that he "didn't fully disclose everything" during his first polygraph. DOE Exhibit (DOE Ex.) 7 at 24-25.

These circumstances adequately justify the DOE's invocation of criterion (f), and raise significant security concerns. Conduct involving lack of candor or dishonesty can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. *See Revised Adjudicative Guidelines for Determining Eligibility for Access to Classified Information, The White House (December 19, 2005), (Adjudicative Guidelines), Guideline E.*

III. REGULATORY STANDARDS

The criteria for determining eligibility for security clearances set forth at 10 C.F.R. Part 710 dictate that in these proceedings, an Administrative Judge must undertake a careful review of all of the relevant facts and circumstances, and make a "common-sense judgment . . . after consideration of all relevant information." 10 C.F.R. § 710.7(a). I must, therefore, consider all information, favorable and unfavorable, that has a bearing on the question of whether granting or restoring a security clearance would compromise national security concerns. Specifically, the regulations compel me to consider the nature, extent, and seriousness of the individual's conduct; the circumstances surrounding the conduct; the frequency and recency of the conduct; the age

and maturity of the individual at the time of the conduct; the absence or presence of rehabilitation or reformation and other pertinent behavioral changes; the likelihood of continuation or recurrence of the conduct; and any other relevant and material factors. 10 C.F.R. § 710.7(c).

A DOE administrative proceeding under 10 C.F.R. Part 710 is “for the purpose of affording the individual an opportunity of supporting his eligibility for access authorization.” 10 C.F.R. § 710.21(b)(6). Once the DOE has made a showing of derogatory information raising security concerns, the burden is on the individual to produce evidence sufficient to convince the DOE that granting or restoring 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). *See Personnel Security Hearing*, Case No. VSO-0013, 24 DOE ¶ 82,752 at 85,511 (1995) (affirmed by OSA, 1996), and cases cited therein. The regulations further instruct me to resolve any doubts concerning the individual’s eligibility for access authorization in favor of the national security. 10 C.F.R. § 710.7(a).

IV. ANALYSIS

A. Mitigating Information

The allegations in the Notification Letter concern an earlier attempt to obtain access authorization from another federal agency and the individual’s alleged provision of false information concerning his illegal drug usage during that process.³ At the hearing, the individual attempted to demonstrate, through his testimony and that his brother, a co-worker, and a supervisor, that he is now an honest and trustworthy person who can be relied upon to adequately safeguard classified information.

The individual testified that he did not disclose his illegal drug usage during his 1999 QNSP because he had been advised by a friend that if he did so, he would not be chosen for the internship he was applying for. Hearing Transcript (Tr.) at 42. He attributed his failure to disclose to immaturity, and said that if he had to do it over again, he would “just list all the information.” Tr. at 43. He added that he has since completed “five or six” other QNSPs, and has been completely truthful on all of them. *Id.*

The individual took the polygraphs initially to get the internship with the other federal agency “in the 1999-2000 time frame,” and that after graduating college, he tried to obtain a full time position. Hearing transcript (Tr.) at 38. The part of the examinations that he repeatedly had difficulty with concerned his usage of illegal drugs while in high school. *Id.* During his first polygraph, which the individual recalls as occurring in either 1999 or 2000, the individual

³ The Notification Letter does not raise the individual’s history of illegal drug usage as a separate security concern, and there is nothing in the record of this proceeding that contradicts the individual’s statement during his 2012 PSI that the last such usage occurred in 1997. DOE Ex. 7 at 29.

initially, and falsely, indicated that he had never used any illegal drugs.⁴ However, after the examiner “raised concerns” about the answer, the individual disclosed his prior usage to the best of his recollection. Tr. at 41. The individual continued to answer all questions on the succeeding polygraphs honestly and to the best of his recollection. He said that the only reason that he can think of as to why he did not pass the polygraphs was because his past drug usage “is a personally embarrassing subject” for him, implying that the physiological changes resulting from that embarrassment were misinterpreted by the examiner as evidence of deception. The individual concluded by saying that he is a “much different person” than the one who lied on his 1999 QNSP and during his first polygraph. He has “matured” and takes things “very seriously” now, whereas he did not always do so when younger. Tr. at 42, 64. The individual’s co-worker, brother and supervisor all attested to his honesty and trustworthiness, as did the authors of six out of the seven letters of recommendation submitted into the record by the individual. Individual’s Exhibit G.

B. Administrative Judge’s Determination

As set forth above, the Notification Letter cites as a security concern the individual’s inability to pass four polygraph examinations that were administered to him over 10 years ago. In previous cases, OHA Administrative Judges have addressed the issue of whether polygraph results should be considered in DOE Administrative Review proceedings, and what, if any, weight should be accorded to them. In *Personnel Security Hearing*, Case No. PSH-12-0117 (2012), the Administrative Judge observed that “there is no consensus that polygraph evidence is reliable. This lack of consensus is reflected in the disagreement among state and federal courts as to both the admissibility and reliability of polygraph evidence.” See *U.S. v. Scheffer*, 523 U.S. 303 (1998), and cases cited therein. However, the Administrative Judge did not find it necessary to decide whether polygraph evidence is *per se* inadmissible in DOE personnel security proceedings, because no foundation for the admission of such evidence had been established. Specifically, there had been no information presented concerning the qualifications and competence of the examiner, the type of equipment used, the examiner’s familiarity with that equipment, and other factors concerning the reliability and acceptance of polygraph examinations. Similarly, the record in this case is devoid of any foundation for the admission of the results of the polygraph examinations performed by the other federal agency, and I will therefore not consider those results in reaching my decision in this case. See also *Personnel Security Hearing*, Case No. PSH-12-0144 (2012) (polygraph evidence of “no probative value”); *Personnel Security Hearing*, Case No. TSO-1023 (2011) (OHA Hearing Officer declined to consider polygraph evidence because of questions concerning its reliability); *cf. Personnel*

⁴ There is a discrepancy between the individual’s testimony and the records obtained from the other agency concerning the dates of the four polygraph examinations. The individual testified that he was “a little fuzzy on the time frames,” but that to the best of his and his wife’s recollections, the first polygraph took place in “either late 1999 or early 2000,” and the remaining three in 2003, after he had graduated from college and was seeking a permanent position with the agency. Tr. at 39, 66. However, records from the agency indicate that it administered three polygraphs to the individual in 2003 and the fourth in 2004. The individual attributed the discrepancy to “a clerical error.” Tr. at 66.

Security Hearing, Case No. PSH-12-0098 (failed polygraph not security concern under Criterion G).

Consequently, I find that the evidence in this matter establishes two instances of dishonest behavior on the part of the individual: his failure to disclose his illegal drug usage on his 1999 QNSP and his admission that he did not disclose that use during the initial portion of his first polygraph examination, which records show occurred in 2003.⁵ I also find that substantial mitigating circumstances exist with regard to this behavior.

First, a significant amount of time has passed since these occurrences: approximately 16 years since the QNSP in question and approximately 12 years since the initial polygraph. Second, the individual's age is a mitigating factor. The record in this matter indicates that he was 19 years old when he failed to disclose his high school drug usage on the 1999 QNSP and 23 years old at the time of the first polygraph. The individual credibly testified that he has matured since then and his brother corroborated this testimony. Tr. at 24. Finally, these were isolated instances of dishonest behavior. There is no indication in the record that the individual was dishonest on any of his other QNSPs or during his 2012 PSI, and after observing his demeanor during the hearing, I found him to be open and forthcoming on that occasion as well. Also, each of his three witnesses and six of his seven letters of recommendation commented favorably on the individual's honesty and trustworthiness. I conclude that the individual has adequately addressed the DOE's security concerns under criterion (f). *See Adjudicative Guideline E, ¶ 17(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).

V. CONCLUSION

For the reasons set forth above, I find that no valid security concerns remain regarding the individual's trustworthiness or reliability, and I am convinced granting him access authorization would not endanger the common defense and security and would be clearly consistent with the national interest. Accordingly, I find that the DOE should grant the individual a security clearance. Review of this decision by an Appeal Panel is available under the procedures set forth at 10 C.F.R. § 710.28.

Robert B. Palmer
Administrative Judge
Office of Hearings and Appeals

Date: April 23, 2015

⁵ Regarding the date of this polygraph, I accord greater weight to the records obtained from the other federal agency than I do to the individual's unsupported testimony that it occurred in the 1999-2000 time frame. However, I believe that the individual's error was due to a faulty memory, and not to an intent to deceive.