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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: September 26, 2017	)	Case No.: PSH-17-0069
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	)	

Issued: January 9, 2018

Administrative Judge Decision

William M. Schwartz, Administrative Judge:

This Decision concerns the eligibility of XXXXXXXXXXXX (hereinafter referred to as "the individual") to hold an access authorization[1] under the Department of Energy's (DOE) regulations set forth at 10 C.F.R. Part 710, Subpart A, entitled "Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material." As discussed below, after carefully considering the record before me in light of the relevant regulations and the *National Security Adjudicative Guidelines for Determining Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position* (June 8, 2017) (Adjudicative Guidelines), I have determined that the individual's access authorization should not be restored at this time.

I. Background

The individual is employed by a DOE contractor and has held a security clearance for several years. In May 2015, the individual was arrested for stalking. During a Personnel Security Interview (PSI) conducted in August 2015, the individual denied knowing the victim, following her, or taking videos or pictures of her. In October 2015, he pleaded guilty to stalking and was placed on a one-year probationary period. In a second PSI, conducted in January 2016, the individual admitted that he had not been truthful during the first PSI, in that he in fact had been aware of the victim for many years and had filmed her on numerous occasions. He also admitted that he had photographed other women in public places.

[1] Access authorization is defined as "an administrative determination that an individual is eligible for access to classified matter or is eligible for access to, or control over, special nuclear material." 10 C.F.R. § 710.5(a). Such authorization will be referred to variously in this Decision as access authorization or security clearance.

On August 14, 2017, the Local Security Office (LSO) sent a letter (Notification Letter) to the individual advising him that it had reliable information that created a substantial doubt regarding his eligibility to hold a security clearance. In an attachment to the Notification Letter, the LSO explained that the derogatory information fell within the purview of Guideline E of the Adjudicative Guidelines.

Upon receipt of the Notification Letter, the individual exercised his right under the Part 710 regulations to request an administrative review hearing, and on September 27, 2017, I was appointed the Administrative Judge in the case. At the hearing, the individual presented the testimony of four witnesses and testified on his own behalf. The LSO tendered 15 numbered exhibits into the record. The exhibits will be cited in this Decision as "Ex." followed by the appropriate numeric designation. The hearing transcript will be cited as "Tr." followed by the relevant page number.

II. Regulatory Standard

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 regulations require me, as the Administrative Judge, 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). 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 denials"); *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 evidence may be admitted. 10 C.F.R. § 710.26(h). An individual is thus afforded the utmost latitude in the presentation of evidence to mitigate the security concerns at issue.

III. The Notification Letter and the Security Concerns at Issue

As previously noted, the Notification Letter included a statement of derogatory information that raised concerns about the individual's continued eligibility for access authorization. The information in the letter specifically cites Guideline E of the Adjudicative Guidelines, which relates to security concerns arising from "[c]onduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations" as this "can raise questions about an individual's reliability, trustworthiness, and ability to protect classified

information. Of special interest is any failure to cooperate or provide truthful or candid answers during national security investigation or adjudicative processes." Guideline E at ¶ 15. Among the conditions set forth in that guideline that could raise a disqualifying security concern is "deliberately providing false or misleading information, or concealing or omitting information, concerning relevant facts to . . . [a] security official . . . ." Guideline E at ¶ 16(b). As a basis for invoking Guideline E, the Notification Letter cites to the individual's admissions during the January 2016 PSI that he was not truthful during his August 2015 PSI. Ex. 1.

These allegations adequately support the invocation of Guideline E, and they raise serious security concerns.

IV. Findings of Fact

The individual was arrested and charged with stalking in May 2015. Ex. 12 at 5. When the LSO questioned him about the arrest, during a PSI in August 2015, the individual reported that he was sitting in his parked car when a Corvette parked near him. He stated that he admired the car and took a video of it on his phone. He also stated that he was surprised when a woman got out of the car. Two police officers then approached him and told him he was stalking the woman. He told the police that he was a "car guy," and that the woman "just happened to . . . get out of the car and . . . be in part of the video." He denied knowing anything about the woman, but admitted he had taken photos of the car before. He later admitted to the police that he had been interested in the woman for over a year. He was arrested, taken to the local jail, and bailed out after several hours. *Id.* at 5, 7, 10, 11, 14-16. Nevertheless, later in the August 2015 PSI, he denied stalking, photographing, or following the woman. *Id.* at 22.

In October 2015, the individual pleaded guilty to stalking and was given a year of supervised probation in lieu of sentencing, the terms of which included no contact with the victim and having his phone subject to inspection. Ex. 13 at 6, 8.

During a second PSI conducted in January 2016, the individual at first denied again that he had been stalking the woman. *Id.* at 19-20. His reasoning was that he did not follow her; rather, he knew her schedule and arrived at places before she did. *Id.* at 21, 32-33, 87. After the LSO interviewer explained the concept of stalking in terms of the victim's fear arising out of certain behavior rather than the actor's intent, the individual admitted that he had been stalking her, and that he had photographed not only her car but her as well. *Id.* at 22-23, 29, 30, 34.

At the hearing, the individual's mother, sister, and two of his supervisors testified. They presented a consistent impression of the individual as a shy, quiet, responsible person who is a conscientious worker. Tr. at 12-13, 23-24, 34, 42. The individual testified as well. When asked why he denied any knowledge of the stalking victim during his first PSI, he stated that he was embarrassed, frightened, not thinking straight, and concerned about possibly losing his job. *Id.* at 55, 58. He conceded that he did not feel comfortable about misleading the LSO, but he did nothing to correct his statements. *Id.* at 81. He also explained that at the time of that PSI, both he and the attorney representing him on stalking charge believed that his actions did not constitute stalking, and only after the LSO interviewer defined the term differently at the second PSI did he acknowledge that he had been stalking. *Id.* at 56-57. He further testified that he has not engaged in any stalking since

his arrest, even after successfully completing his probation, and has learned the importance of being forthright and candid in his interactions with the LSO. *Id.* at 58-59, 76-78. Finally, he demonstrated a clear understanding of how to protect classified materials, were he ever to find himself in that position. *Id.* at 69-74.

V. Analysis

I have thoroughly considered the record of this proceeding, including the submissions tendered in this case and the testimony of the witnesses 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) and the Adjudicative Guidelines. After due deliberation, I have determined that the individual's security clearance should not be restored at this time. 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.

The LSO's security concerns revolve around the individual's failure to truthfully and accurately respond to questions during his August 2015 PSI. After reviewing the facts presented in the exhibits and elicited at the hearing, I find that the security concern is appropriate. The individual's inaccurate responses during that PSI served to conceal potentially derogatory information, whether intentionally or unintentionally, placing him in a better light than he would have been had he answered the questions accurately.

At the hearing, the individual explained his rationale for his responses that raised security concerns in two mutually inconsistent manners. On one hand, he testified that, at the time of his August 2015 PSI, both he and his attorney believed he was not guilty of stalking, because he had not followed his victim before photographing her, but rather placed himself at locations where he predicted she would arrive. Tr. at 56. From my observations of the individual at the hearing, I find that he thinks in very concrete terms, and it is credible that he believed his actions did not constitute stalking at that time. On the other hand, when asked whether he understood his obligation to tell the truth at the personnel security interviews, he testified that he had understood that obligation but had not complied: "I know that I was just, for whatever reason, I wasn't really truthful [in the first interview]. Whether, like I said, I was embarrassed, I was afraid, or what, or a combination, I don't know." *Id.* at 57-58. By acknowledging that he was not truthful in the first interview, the individual implicitly admits that he was aware that his actions constituted stalking.

I have considered the mitigating factors set forth in Guideline E and cannot determine that the individual has resolved this security concern. After misrepresenting facts during the August 2015 PSI, the individual made no attempt to correct his statements prior to being confronted with his misinformation at the January 2016 PSI. Adjudicative Guidelines, Guideline E at ¶ 17(a). However, once he admitted the full extent of his actions, he cooperated fully with the LSO. *Id.* at ¶ 17(b). Of the remaining mitigating factors listed under Guideline E, only ¶ 17(c) is applicable to the facts of this case: "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." *Id.* at ¶ 17(c). From his testimony, the testimony of others, and his comportment at the hearing, I believe that the

individual will be extremely vigilant to avoid any actions that could possibly be viewed at stalking, now that he has a complete understanding of the offense. However, the security concern in this case lies not with the stalking incident itself but rather with the individual's failure to communicate fully and truthfully with the LSO about that incident. Complete candor with the LSO is not minor; it is crucial to the success of the access authorization program. Although some time has passed since the individual engaged in his misrepresentation, I am not confident how the individual would respond if faced with new challenges in the future. In particular, while I believe he would follow appropriate protocol with respect to handling classified material if he could clearly identify that need, I am not convinced that he would recognize the need to do so were he placed in a situation of some complexity. Moreover, if his behavior raised security concerns in the future, I am not confident that he would provide complete and accurate information to those investigating it.

I must resolve any doubt as to a person's access authorization eligibility in favor of the national security. For this reason, I conclude that the individual has not resolved the security concerns under Guideline E.

VI. Conclusion

Upon consideration of the entire record in this case, I find that there was evidence that raised concerns regarding the individual's eligibility for a security clearance under Guideline E of the Part 710 regulations. I further find that he has not succeeded in fully resolving the concerns raised under that guideline. Therefore, I cannot conclude that restoring the individual's DOE access authorization to the individual "will not endanger the common defense and security and is clearly consistent with the national interest." 10 C.F.R. § 710.7(a). Accordingly, I find that the DOE should not restore the individual's access authorization at this time.

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

William M. Schwartz
Administrative Judge
Office of Hearings and Appeals

Date: January 9, 2018