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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: November 28, 2012))	Case No.: PSH-12-0136
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Issued: March 1, 2013

Hearing Officer Decision

Steven J. Goering, 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 conclude that the DOE should not restore the individual’s access authorization at this time.²

I. BACKGROUND

The individual is an employee of a DOE contractor and holds a suspended access authorization. In June 2012, the individual was arrested and charged with Aggravated Driving While Intoxicated (DWI). Exhibits 7, 8. Because of the concern this arrest raised, a Local Security Office (LSO) summoned the individual for an interview (PSI) with a personnel security specialist on July 30, 2012. Exhibit 16 (PSI Transcript). After the PSI, the LSO referred the individual to a local psychologist (hereinafter referred to as “the DOE Psychologist”) for an agency-sponsored evaluation. The DOE Psychologist prepared a written report, setting forth the results of that evaluation, and sent it to the LSO. Exhibit 4 (Psychological Assessment). Based on this report and the rest of the individual’s personnel security file, the LSO determined that derogatory information

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.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>.

existed that cast into doubt the individual's eligibility for access authorization. Exhibit 3 (Case Evaluation Sheet). The LSO informed the individual of this determination in a letter that set forth the DOE's security concerns and the reasons for those concerns. Exhibit 1. The Notification Letter also informed the individual that he was entitled to a hearing before a Hearing Officer in order to resolve the substantial doubt concerning his eligibility for access authorization.

The individual requested a hearing in this matter. The LSO forwarded this request to OHA, and I was appointed the Hearing Officer. The DOE introduced 18 exhibits into the record of this proceeding and presented the testimony of the DOE Psychologist. The individual introduced eight exhibits and presented the testimony of three witnesses, in addition to his own testimony.

II. REGULATORY STANDARDS

The criteria for determining eligibility for security clearances set forth at 10 C.F.R. Part 710 dictate that in these proceedings, a Hearing Officer 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 restoring the individual's 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). 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).

III. FINDINGS OF FACT AND ASSOCIATED SECURITY CONCERNS

The Notification Letter cited derogatory information within the purview of two potentially disqualifying criteria set forth in the security regulations at 10 C.F.R. § 710.8, subsections (h) and (l) (hereinafter referred to as Criteria H and L, respectively). Exhibit 1.³ Under Criterion H, the LSO cited the report of the DOE Psychologist, in which he identified tendencies of poor judgment and reliability in the individual, discussed in more detail below, and concluded that "these tendencies

³ Criterion H defines as derogatory information indicating that the individual has an "illness or mental condition of a nature which, in the opinion of a psychiatrist or licensed clinical psychologist, causes or may cause, a significant defect in judgment or reliability." 10 C.F.R. § 710.8(h). Under Criterion L, information is derogatory if it indicates that the individual has "[e]ngaged in any unusual conduct or is subject to any 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).

compose a mental condition that cause serious defects in his judgment and reliability.” Exhibit 4 at 10. Under Criterion L, the Notification Letter cited a “history of criminal conduct” and listed the following:

- a July 16, 2012, arrest and charge of aggravated driving while intoxicated (DWI), driving with high beams on, expired registration, and no license;
- an August 28, 2010, citation for no insurance;
- an April 16, 2010, citation for no seatbelt;
- an April 7, 2006, citation for speeding;
- an October 21, 2004, arrest and charge of aggravated DWI;
- an August 28, 2004, arrest and charge of simple battery;
- an April 26, 2004, arrest and charge of battery, criminal damage to property, and disorderly conduct;
- the individual’s admission in his 2012 PSI that he was cited for dog abandonment in 2004;
- a May 29, 2001, citation for speeding; and
- the individual’s admission in his 2008 and 2012 PSIs that he was arrested and charged with DWI in 1995 (at age 16).

Exhibit 1 at 2.

The individual denies that he was arrested in connection with the charges in April and August of 2004, Hearing Transcript (Tr.) at 44-45, 49, 50-51. Based on my review of the record, I find that the allegations that the individual was arrested on these two occasions is supported by the evidence in the record, and are therefore valid allegations. Exhibit 11 (excerpt from 2006 OPM report describing contemporaneous records); *see* 10 C.F.R. § 710.27(c) (requiring that Hearing Officer “make specific findings based upon the record as to the validity of each of the allegations” in the Notification Letter).⁴ The individual does not dispute the other allegations in the Notification Letter and, with two exceptions,⁵ I find them to be valid and well supported by the record in this case.

⁴The individual’s denial of his arrest on these charges may be due to his understanding of the term “arrest.” *See* Tr. at 46, 50 (testimony by individual with regard to April 2004 charge that, although he was “booked and released,” he “never did get arrested. I never really did get taken into jail. . . . I just had to go to court on it.”); Tr. at 45 (testimony by individual regarding August 2004 charge that he “could have went in for -- you know, they book and release you -- they take your fingerprints, book you and release you right away. Might have been that.”)

⁵The Notification Letter states that the individual was arrested and charged with Aggravated DWI on July 16, 2012, while the evidence in the record indicates that this occurred on June 16, 2012. Exhibit 7; Exhibit A. In addition, although the Notification Letter cites an April 26, 2004, arrest and charge of battery, criminal damage to property, and disorderly conduct, the record cited in the Notification Letter identified only a charge of disorderly conduct (trespass) with respect to that arrest. Exhibit 11. It is possible that this is due to confusion with a separate record of charges of

I further find that the allegations in the Notification Letter adequately justify the DOE's invocation of Criteria H and L, and raise significant security concerns. Under Criterion L, the undisputed criminal charges against the individual cited in the Notification Letter create doubt about his judgment, reliability and trustworthiness, as they call into question her ability or willingness to comply with laws, rules and regulations. *See Revised Adjudicative Guidelines for Determining Eligibility for Access to Classified Information (Adjudicative Guidelines)*, The White House (December 19, 2005) at Guideline J.

As for Criterion H, certain emotional, mental, and personality conditions can impair judgment, reliability, or trustworthiness. *Adjudicative Guidelines* at ¶27. In the present case, unlike in most prior cases of this office applying Criterion H, *see, e.g., Personnel Security Hearing, Case No. PSH-12-0077* (2012), the DOE Psychologist has not concluded that the individual meets the criteria for a specific disorder set forth in the Diagnostic and Statistical Manual of the American Psychiatric Association, 4th edition, Text Revision (DSM).

However, the text of Criterion H does not require a formal diagnosis of a disorder under the DSM, but rather a finding by a psychiatrist or licensed clinical psychologist of a "mental condition" that "causes or may cause a significant defect in judgment or reliability." 10 C.F.R. § 710.8(h); *see also Adjudicative Guidelines* at ¶ 27 (formal diagnosis of a disorder is not required for there to be a concern under this guideline). The DOE Psychologist, whose expertise is not in dispute, has made such a finding in this case. Tr. at 91, 100; Exhibit 4; Exhibit 5.

In his hearing testimony, the DOE Psychologist described his understanding of the phrase "mental condition" as "enduring mental tendencies. That is, it is over time, they are repeated. It represents something more than just a mistake that the person has made. That is a mental condition." Tr. at 90-91. He stated that it has been his "experience in federal court that there are times when we have to use that phrase, and there seems to be a general consensus of understanding about" its meaning among "psychologists that do formal psychological assessments and have been trained specially for that." *Id.* at 92-93.

Taking into account this testimony, and prior OHA decisions office where Criterion H concerns have been found justified by expert findings of mental conditions in the absence of a current diagnosis of a disorder under the DSM, I conclude that the opinion of the DOE Psychologist in this case raises valid security concerns under Criterion H. *See, e.g., Personnel Security Hearing, Case No. TSO-0626* (2008) (psychological trauma associated with two sexual assaults); *Personnel Security Hearing, Case No. TSO-0301* (2006) (significant lapses in judgment, possibly caused by head injury); *Personnel Security Hearing, Case No. TSO-0191* (2006) ("Occupational Problem," described as "not a mental illness or psychiatric disorder *per se*," but "a condition that is a focus of clinical attention").

IV. ANALYSIS

A. Criterion H

battery, criminal damage to property, and disorderly conduct in connection with an incident resulting in the individual's arrest on June 9, 2005. Exhibit G. The 2005 arrest is not cited in the Notification Letter.

Among the examples of the individual's poor judgment and reliability, the DOE Psychologist cited the individual's

failures to comply with DOE's rule of abstinence (judgment), his carelessness in completing sworn government documents (. . . judgment and reliability), his poor memory, his difficulty admitting faults and mistakes (poor judgment), . . . and his apparent difficulty in grasping the seriousness of his situation during the evaluation (judgment)

Exhibit 4 at 10. The DOE Psychologist concluded that "these tendencies compose a mental condition that cause serious defects in his judgment and reliability. If an incident arose at work in which he was involved, I would not have confidence that he would tell the truth." *Id.*

The individual presented letters from a staff psychologist and a licensed professional clinical counselor (LPCC) at his place of work, both of which addressed the DOE Psychologist's conclusion regarding the individual's memory. The letter from the staff psychologist stated that he did not "recall ever having read a report that reached a conclusion about a possible neuropsychological deficit on the basis of a single test." Exhibit C. He concluded that "while the presence of a verbal memory deficit is possible for [the individual], I believe there is insufficient evidence to support such a conclusion at this point in time." *Id.*

The LPCC's letter stated that the individual "is a very kinesthetic learner with auditory processing difficulties. I also believe that he has problems with sequencing and abstraction resulting in 'concrete and literal thinking.' Behaviorally he is also symptomatic of someone with ADHD." Exhibit B. Like the staff psychologist, the LPCC concluded that he did not "think that one verbal memory test is sufficient to arrive at the conclusion that has been reached." *Id.*

In his testimony, the DOE Psychologist described the memory test at issue, the Babcock Story Recall test, comprised of 24 "memory units." Tr. at 77. He explained that "[m]ost people get between 14 and 18 memories [The individual] got three. That struck me as it could be some kind of brain -- organic brain deficit, or it could be a product of anxiety. I concluded it certainly was a product of anxiety, whatever else it was, . . ." *Id.* The DOE Psychologist agreed with the statement of the staff psychologist that "you can't diagnose organic behavior with one test." *Id.* at 78. He added, however, that if the individual "cannot be trusted to be reliable to do what he is supposed to do or to tell the truth, it doesn't matter whether it is hormonal or he's got a brain tumor or whether he has a character disorder, the bottom line is he can't be trusted to -- I can't feel confident in what he says." *Id.* at 81-82.

I find that the two letters offered by the individual provide little in the way of mitigation of the concern raised in this case under Criterion H. First, the individual's "poor memory" was only one of several bases for the DOE Psychologist's conclusion. Second, I agree with the opinion of the DOE Psychologist that, assuming an individual has a mental condition that compromises his reliability, that condition poses a concern regardless of the cause of the condition.

The most salient example of this is the DOE Psychologist's observation that the individual has been careless in completing sworn government documents, in this case Questionnaires for National Security Positions (QNSPs) the individual completed in 2006 and 2012. In both QNSPs, the

individual was asked whether he had “ever been charged with or convicted of any offense(s) related to alcohol or drugs?” Both QNSPs required the individual to list all such occurrences, but on both QNSPs, the individual only listed his 2004 DWI charge, omitting the DWI charge brought against him in 1995. Exhibit 14 at 10; Exhibit 15 at 25-27.

When this omission was brought to the individual’s attention in his 2008 PSI, the individual responded that the question only referred to “your last ten years.” Exhibit 17 at 391. When the interviewer reminded the individual that the question asked if he had “ever” been charged with such offenses, the individual stated that he “mustn’t have understood the, you know, question correctly. The wording I guess, you know, it’s tricky I guess, I didn’t understand it.” *Id.* at 391-92. Nonetheless, the individual omitted the same offense from the QNSP he completed in 2012. At the hearing, the individual stated that he “obviously forgot to put it. It is not because I am hiding it. I forgot to put it in there.” Tr. at 69.

There are, in addition, other criminal charges that the individual omitted from his 2006 QNSP. The questionnaire asked him to list all occurrences of arrests or charges in the last seven years related to any offense. Exhibit 15 at 25. Other than his October 2004 DWI charge, the individual listed only a June 2005 charge of domestic violence, *id.* at 25-27, despite the undisputed fact that he was charged with disorderly conduct in April 2004 and battery in August 2004.

To make meaningful determinations regarding a person’s eligibility for access authorization, the DOE must rely upon applicants to provide accurate information in response to any questions it may have. As such, regardless of its cause, the individual’s omission of these criminal charges from his QNSPs raises serious issues regarding his reliability. To the extent that such behavior is the product of a mental condition, the individual could mitigate the concern raised by the condition by demonstrating that the condition is treatable and is successfully being treated, that it was a temporary condition, that there is no indication of a current problem, or if, in the opinion of “a duly qualified mental health professional employed by, or acceptable to and approved by the U.S. Government . . . that an individual's previous condition is under control or in remission, and has a low probability of recurrence or exacerbation.” *Adjudicative Guidelines* at ¶ 29.

The DOE Psychologist opined that the individual “is amenable to treatment. I believe he is basically a good man. I think he gets his back up at times, he gets defensive, he doesn't put the energy in. He doesn't have the good judgment to realize the times when he really needs to be truthful, and that can cause problems.” Tr. at 98. There is, however, no evidence that the individual had received such treatment, and the DOE Psychologist testified that the individual’s condition is not in remission and that its risk of recurrence or exacerbation is “probably high.” *Id.* at 98-99.

Considering all of the above, I cannot find that the individual has resolved the concerns raised in this case under Criterion H.

A. Criterion L

The Adjudicative Guidelines list four conditions that could mitigate security concerns raised by criminal conduct. *Adjudicative Guidelines* at ¶ 32. Two of these conditions, that a person was pressured or coerced into committing a criminal act, *id.* at ¶ 32(b), or evidence that the person did

not commit the offense, *id.* at ¶ 32(c), are clearly not applicable in the present case. The other two conditions concern whether there is evidence of successful rehabilitation, *id.* at ¶ 32(d), or whether “so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances that it is unlikely to recur or does not cast doubt on the individual's reliability, trustworthiness, or good judgment.” *Id.* at 32(a).

Regarding the time elapse since the most recent criminal behavior in this case, the individual's most recent charges, including aggravated DWI, occurred on July 16, 2012, less than seven months prior to the hearing in this matter. The individual has presented evidence that these charges were since dismissed due to an officer's failure to appear in court. Exhibit A. He testified at the hearing, however, that he was with friends and “had a few drinks” on that day, that he made a “bad decision,” and that he “never should have even got behind the wheel.” Tr. at 60-61.

Thus, regardless of the outcome of the most recent criminal proceeding against him, the individual clearly exercised poor judgment on that occasion. Moreover, the incident report filed by the arresting officer three days after the event states that the officer smelled a “strong odor” of alcohol from the individual's vehicle and on the individual's breath, that his speech was slurred, that he was “very unstable” when exiting his vehicle, that he failed the field sobriety tests administered on the scene, and that he refused to take a blood or breath alcohol test. Exhibit 7 at 4-5. The individual admitted in his 2012 PSI that he refused a Breathalyzer test, and when asked why, stated, “I don't know (Laughs.) I'm, I, maybe I should've just took it, I don't know. I, like I said, I was, I didn't take it, though.” Exhibit 16 at 24.

Taken as a whole, the undisputed allegations in the Notification Letter clearly present a longstanding pattern of criminal conduct, including ten incidents in the last twenty years and eight in the last ten years. On the other hand, a number of these incidents involve relatively minor offenses (*e.g.*, speeding), and the most recent serious offense prior to the June 2012 DWI occurred over eight years ago. Nonetheless, the individual's record includes charges and convictions for serious crimes, including disorderly conduct and battery in 2004.

As for rehabilitation, the concern here is not only the likelihood of future criminal behavior, but his ability or willingness to comply with laws, rules and regulations, generally, and in particular those designed to protect the national security. *See Adjudicative Guidelines* at ¶ 30. Given the long history of conduct in this case, the most recent of which occurred in the last year, I am not convinced that the individual has resolved the Criterion L concerns in this case. Moreover, the concerns discussed above under Criterion H regarding the individual's failure to report prior criminal activity raise additional doubts regarding whether the record before me contains all pertinent derogatory information that could raise concerns under Criterion L.

V. CONCLUSION

For the reasons set forth above, I conclude that the individual has not resolved the DOE's security concerns under Criteria H and L. Therefore, the individual has not 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 not 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.

Steven J. Goering
Hearing Officer
Office of Hearings and Appeals

Date: March 1, 2013