

*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: October 16, 2015)
) Case No.: PSH-15-0081
)
_____)

Issued : May 10, 2016

Administrative Judge Decision

Wade M. Boswell, Administrative Judge:

This Decision concerns the eligibility of XXXXXXXXXXXX (hereinafter referred to as “the individual”) to hold an access authorization¹ under the Department of Energy’s (DOE) regulations set forth at 10 C.F.R. Part 710, Subpart A, entitled, “General Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material.” As fully discussed below, after carefully considering the record before me in light of the relevant regulations and Adjudicative Guidelines, I have determined that the individual’s access authorization should be restored.

I. Background

The individual is employed by the DOE in a position that requires him to hold a security clearance. In September 2014, the Local Security Office (LSO) was contacted by a woman who stated that her daughter was in a relationship with the individual and that the woman had concerns about the individual’s judgment and reliability. *See* Exhibit 17. The woman alleged that the individual was volatile and abusive and she had concerns about her daughter’s safety. *Id.* Subsequently, the LSO received what it believed was corroborating information of the woman’s concerns and, in October 2014, conducted a personnel security interview (PSI) with the individual. *See* Exhibits 9, 12 and 17.

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.

Since the PSI did not resolve concerns about the individual's behavior, the LSO referred the individual for evaluation by a DOE consulting psychologist, who conducted a psychological evaluation of the individual approximately ten days following the PSI. The individual expressed concerns about the professionalism of the DOE psychologist and, by agreement of the individual and the LSO, the LSO referred the individual for a *de novo* evaluation by a DOE consulting psychiatrist, who conducted a psychiatric evaluation of the individual in May 2015.² *See* Exhibit 11.

Since neither the PSI nor the DOE psychiatrist's evaluation resolved the security concerns, the LSO informed the individual in a letter dated September 1, 2015 (Notification Letter), that it possessed reliable information that created 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 three potentially disqualifying criteria set forth in the security regulations at 10 C.F.R. § 710.8, subsections (f), (h) and (l) (hereinafter referred to as Criterion F, Criterion H and Criterion L, respectively).³ *See* Exhibit 4.

Upon his receipt of the Notification Letter, the individual exercised his right under the Part 710 regulations by requesting an administrative review hearing. *See* Exhibit 5. The Director of the Office of Hearings and Appeals (OHA) appointed me the Administrative Judge in the case and, subsequently, I conducted an administrative hearing in the matter. At the hearing, the LSO introduced 19 numbered exhibits into the record of the case and presented the testimony of two witnesses, an LSO personnel security specialist and the DOE consulting psychiatrist. The individual, represented by counsel, introduced 13 lettered exhibits (Exhibits A-M) into the record and presented the testimony of eight witnesses, including that of himself and of a forensic psychologist. The exhibits will be cited in this Decision as "Ex." followed by the appropriate numeric or alphabetic designation. The hearing transcript in the case will be cited as "Tr." followed by the relevant page number.⁴

II. Regulatory Standard

² The LSO and the individual agreed that all findings and reports of the DOE consulting psychologist (i.e., from the initial mental health evaluation) are excluded from consideration in this administrative review proceeding. *See* Boswell, Administrative Judge, Memo of Prehearing Conference, Nov. 24, 2015 at 5.

³ *See* Section III below.

⁴ OHA decisions are available on the OHA website at energy.gov/oha/office-hearings-and-appeals. A decision may be accessed by entering the case number in the search engine at energy.gov/oha/security-cases.

A. Individual's Burden

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 standard in this proceeding 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 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 with evidence to convince the DOE that granting or restoring his or her 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 or her 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). Thus, an individual is afforded the utmost latitude in the presentation of evidence to mitigate the security concerns at issue.

B. Basis for the Administrative Judge's Decision

In personnel security cases arising under Part 710, it is my role 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). I am instructed by the regulations to resolve any doubt as to a person's access authorization eligibility in favor of the national security. *Id.*

III. The Notification Letter and the Security Concerns at Issue

As previously noted, the LSO cited three criteria as the bases for suspending the individual's security clearance: Criterion F, Criterion H and Criterion L. Criterion F refers to information that a person has “deliberately misrepresented, falsified, or omitted significant information from a Personnel Security Questionnaire for Sensitive National Security Positions, a personnel qualifications statements, a personnel security interview, written or oral statements made in response to official inquiry on a matter that is relevant to a determination regarding eligibility for DOE access authorization or [Part 710 administrative review] proceedings....” 10 C.F.R. § 710.8(f). 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. Any failure to provide truthful and candid answers

during the security clearance process is of particular concern. *See* Guideline E of the *Revised Adjudicative Guidelines for Determining Eligibility for Access to Classified Information*, issued on December 29, 2005, by the Assistant to the President for National Security Affairs, The White House (Adjudicative Guidelines). With respect to Criterion F, the LSO alleges the individual made false statements with respect to six different topics discussed in the PSI. Ex. 4, Encl. 1 at 1-6.

Criterion H concerns information that a person 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). It is well established that “certain emotional, mental, and personality conditions can impair judgment, reliability, or trustworthiness.” *See* Adjudicative Guidelines at Guideline I. Conduct influenced by such psychological conditions can raise questions about an individual’s ability to protect classified information. With respect to Criterion H, the LSO relied upon the May 2015 written evaluation of the DOE consulting psychiatrist in which he concluded that the individual met the criteria set forth in the *Diagnostic Statistical Manual of the American Psychiatric Association, Fifth Edition (DSM-5)*, for both Paranoid Personality Disorder and Antisocial Personality Disorder and that each of these is an illness or mental condition which causes, or may cause, a significant defect in judgment or reliability. Ex. 4, Encl. 1 at 7; Ex. 11 at 14.

Criterion L concerns information that an individual has engaged in conduct “which tends to show that the individual is not honest, reliable, or trustworthy....” 10 C.F.R. § 710.8(l). In the Notification Letter, the LSO limited the scope of the Criterion L concerns to criminal conduct. “Criminal activity creates doubt about a person’s judgment, reliability, and trustworthiness. By its very nature, it calls into question a person’s ability or willingness to comply with laws, rules and regulations.” Adjudicative Guidelines at Guideline J. With respect to Criterion L,⁵ the LSO cites a domestic violent incident report naming the individual, which the individual’s former girlfriend filed with local law enforcement. Ex. 4, Encl. 1 at 8-9; Ex. 15.

IV. Findings of Facts and Analysis

I have thoroughly considered the record of this proceeding, including the submissions tendered in this case and the testimony of the witnesses presented 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)⁶ and the Adjudicative

⁵ The Notification Letter alleges eight instances of criminal conduct on the part of the individual; however, prior to the hearing, the LSO stipulated that seven of those instances did not fall within Guideline J of the Adjudicative Guidelines and that the administrative review proceeding, with respect to Criterion L, should be limited to the review of the security concern arising from a single instance of alleged domestic violence that was reported to local law enforcement by the individual’s former girlfriend. Tr. at 10; Ex. 4, Encl. 1 at 8-9.

⁶ Those factors include the following: the nature, extent, and seriousness of the conduct, the circumstances surrounding the conduct, to include knowledgeable participation, the frequency and recency of the conduct,

Guidelines. After due deliberation, I have determined that the individual's access authorization should be restored. The specific findings that I make in support of this decision are discussed below.

**A. Administrative Judge Evaluation of Evidence and Findings of Fact:
Criterion F Security Concerns**

The LSO commenced a security investigation of the individual after being contacted by the parents of the individual's then-girlfriend (TGF) who stated that they had concerns about the individual's judgment and reliability. For the subsequent eight months, TGF's parents maintained regular contact with the LSO regarding their concerns. Ex. 17. During that period, TGF's parents provided the LSO with what they purported were (1) 65 e-mail or text communications from TGF to her mother and (2) six audio files, including portions of two conversations between the individual and TGF, which had been recorded by the TGF without the knowledge of the individual. Ex. 13; Ex. 14. At no point during its investigation did the LSO speak directly with TGF. Tr. at 45.

Attached to the Notification Letter is a nine-page statement of security concerns, the first six of which describe the Criterion F security concerns. Criterion F concerns arise when a person has *deliberately* misrepresented, falsified, or omitted *significant* information to the DOE on a matter that is relevant to a determination regarding the person's eligibility for DOE access authorization. 10 C.F.R. § 710.8(f). With respect to the individual, the LSO cites six specific statements (or series of statements) made by the individual during the PSI as constituting security concerns under Criterion F; most of the information cited by the LSO to evidence the individual's falsifications or omissions is information that was derived, directly or indirectly, from TGF's parents.

Each of these six will be examined separately.

Individual's Presence on University Campus. In September 2014, TGF's parents met with the LSO and expressed their concerns that their daughter was in an abusive relationship; they said they feared for her safety and local law enforcement was not listening to them. Ex. 17; Tr. at 19-20. They also believed that the individual was following their daughter at the university she attended. The LSO suggested that the parents contact the university's police department; the LSO then contacted the university's police directly to advise them that a concerned parent might be calling them. Ex. 17; Tr. at 124, 40-41. Several days later, the parents contacted the LSO to report that they had contacted the university police. Ex. 17.

The next day, the university police observed the individual in a hallway of a classroom building. They approached him and, upon ascertaining that he was not a student, advised

the age and maturity at the time of the conduct, the voluntariness of his participation, the absence or presence of rehabilitation or reformation and other pertinent behavioral 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.

him that he was trespassing and that he would be arrested if he returned to the campus, other than for a public event. Ex. 12; Tr. at 175-176. The university police did not advise the individual that they had received a specific complaint that he had been stalking his TGF. The individual first learned that a complaint had been placed against him with the university police many months later as a result of the LSO's investigation. *Id.* at 175-179, 207-208.

Approximately two weeks after the individual had been given a trespassing warning by university police, the LSO conducted a PSI with the individual. In the Notification Letter, the LSO states that the individual stated during the PSI that "the reason [he was] escorting [his] girlfriend to [the university] was because there had been reports that rapes were occurring on campus, and [he was] there for her safety." Ex. 4, Encl. 1 at 1. The LSO alleges that this is a false statement, citing seven separate bases. Five of these are statements made by TGF to third parties, one during an interview with a university police officer and four in e-mails or text messages to her mother; all report or suggest abusive conduct by the individual. *Id.* at 1-2.

However, the individual's statement in the PSI is different in significant ways from that attributed to him in the Notification Letter. His actual statement was: "... recently I was actually at the [university] with my girlfriend. Uh, they had been sending out a bunch of messages saying, a bunch of rapes were occurring on campus. And I had the day off, and she said, 'Hey why don't you come to the lab with me, sit outside the lab, and we'll go get something to eat afterward?' I said, 'Okay, sure, not a problem.'" I guess that's not allowed I did not know that, and she did not know that. And a [university] guy came up and he said, 'You know, we got a call about a suspicious person you mind coming with me.'" Ex. 9 at 32.

The individual and TGF ended their relationship approximately eight months after the occurrence at the university and, as of the date of the hearing, they had had no contact with one another for seven months. TGF testified at the hearing pursuant to a subpoena issued at the request of the individual. During her testimony, TGF confirmed that on the date the individual had been given a trespassing warning at the university, she had suggested that he come to the university with her and she had driven them to and from the campus in her car. Tr. at 259-260, 312. Her testimony is consistent with an email that she had written her mother a couple of months after the occurrence at the university, after her mother had complained that TGF had not supported her parents' story when TGF spoke to university officials. In the email, TGF wrote that the day the individual was given a trespassing warning "is the day that I invited him to be there. I actually said, 'Hey, why don't you come with me so we can eat and stuff afterwards?'" Ex. D at 3. In light of the lack of a present relationship between the individual and TGF and the general animosity towards the individual that TGF expressed during her testimony, I find this aspect of her testimony credible.

Based on the foregoing, I conclude that the individual's statements in the PSI are factually correct with respect to his presence on the university campus on the date he received a

trespassing warning and, therefore, any Criterion F security concerns alleged with respect to such statements are resolved.

Individual's Flexible Work Schedule. In the Notification Letter, the LSO cites two additional statements made by the individual in the PSI in conjunction with the occurrence at the university as the bases for Criterion F security concerns.

First, the LSO states in the Notification Letter that the individual was scheduled to work on the day he received the trespassing warning from the university and it was not his "Alternative Work Schedule Day," as he had said it was during the PSI. Ex. 4, Encl.1 at 2. However, the individual's supervisor confirmed in writing and in testimony at the hearing that, although there had been an issue with the timekeeping records, the day in question was an "Alternative Work Schedule Day" for the individual and, therefore, he was not scheduled to be at work at the time he was questioned by university police. Ex. B at 1; Tr. at 55, 208.

Second, the Notification Letter states that during the PSI the individual "went on to say that [he] had actually brought work with [him] that day to [the university], and [he was] conducting telephone calls to persons on a call log.... [He] stated [his] supervisor was aware that [he does] this away from work, and [he] will often leave work early but make up the hours at home calling persons on the list at night. According to [his] supervisor, [name] and, [name], [manager], this is not a true statement. [He was] not authorized to have a flexible schedule as [he] stated." Ex. 4, Encl. 1 at 2. The Notification Letter does not cite any documentation with respect to the assertion that the individual's supervisor and manager disputed the individual's statements about his flexible work schedule. During a prehearing conference, I noted the absence of such documentation and the need for support for the assertion in the Notification Letter. None was provided. Additionally, the individual's supervisor (who was named in the Notification Letter as one of the sources of the LSO's assertion) testified at the hearing that, due to the nature of the individual's project, he and the individual had agreed to an informal flexible work arrangement that was consistent with that described by the individual during the PSI. Tr. at 59-61. Further, the supervisor confirmed in writing and during his testimony at the hearing that he had *not* spoken with anyone from security with respect to the individual's attendance or flexible schedule. Ex. B at 1; Tr. at 62.

Based on the foregoing, I conclude that the individual's statements in the PSI with respect to his flexible work schedule are factually correct and, therefore, any Criterion F security concerns alleged with respect to such statements are resolved.

Conflicts with Co-Workers. The Notification Letter states that during the PSI the individual was asked if he had ever had any kind of conflicts with a *co-worker* or had interactions with *co-workers* that could be perceived by someone as making them feel uncomfortable and the individual responded, "Not that I'm aware of, no." To evidence that this statement by the individual constitutes a Criterion F security concern, the Notification Letter then refers to "an email made available to DOE from [TGF] to her mother," in which TGF discussed the individual's reaction to a co-worker telling the individual that "the manager

of ... [a] company that didn't get the job to work for DOE [was] trashing him to everyone at DOE." Ex. 4, Encl. 1 at 3.

To demonstrate the individual's misrepresentation in the PSI, the Notification Letter relies on a statement purportedly made by the individual to his TGF (which she then purportedly repeats to her mother in an email); however, even assuming the individual made the statement and it was accurately reported, the statement does not relate to the question the LSO asked of the individual during the PSI. Even though the PSI question was very broad, it specifically focused on "*co-workers*;" the allegedly contradictory statement by the individual was not about a *co-worker*, but, rather, a manager of a company which had unsuccessfully bid on a contract for work with DOE.⁷ This does not constitute a Criterion F security concern.

Conflict with DOE Contractor Employee. The Notification Letter states that after the individual contemplated the LSO's question about conflicts with co-workers, he described an interaction with a DOE contractor employee. Ex. 4, Encl. 1 at 3. During the PSI, the individual stated that TGF had told him that a DOE contractor employee had texted her a request for nude photographs and, subsequently, the individual made several attempts to telephone the DOE contractor employee, left one voicemail, and received a return text from the contractor employee stating he would not be contacting TGF again, and, thereafter, the individual left a follow-up voicemail for the contractor employee. These events all took place on a single day. Ex. 9 at 23-26.

Prior to the PSI, the parents of TGF reported to the LSO that the DOE contractor employee (who was a friend of TGF's father) had received a "veiled threat" from the individual. Ex. 17. The LSO had interviewed the contractor employee prior to the PSI with the individual. The information provided by the contractor employee during that interview with respect to the events which occurred⁸ largely parallels the responses by the individual during the PSI with respect to the interaction between the individual and the contractor employee. *Id.*

The individual stated in the PSI that he had not threatened the contractor employee and the contractor employee stated in his interview with the LSO that he had not felt threatened by the individual.⁹ Ex. 9 at 26; Ex. 17. At the hearing, the contractor employee was called as a witness by the individual. Both the individual and the contractor employee testified that they had never seen one another prior to the day of the hearing and had had no prior contact

⁷ Further, at the hearing the individual's supervisor testified that he was aware of the situation involving the manager of the unsuccessful bidder, that he and the individual discussed it, and that the supervisor felt the individual's conduct which had actually occurred with respect to the situation had been appropriate for the workplace. Tr. at 56-59.

⁸ The differences in the two narratives are primarily related to assumptions about one another's motivations and intentions and to differences in memories with respect to the number of calls made (but uniform in terms of the number of messages left).

⁹ The file notes of the LSO erroneously names TGF's father as the person not feeling threatened; however, the personnel security specialist testified at the hearing that this was an error and should have referred to the DOE contractor employee. Tr. at 46-47.

other than the exchange of messages previously described which had occurred during the course of a single day. Tr. at 186, 215, 244-245. The contractor employee's testimony confirmed his prior statements to the LSO, including that he had not felt threatened by the messages that the individual had left him. *Id.* at 251-252.

The Notification Letter's summary of the individual's statements during the PSI about these events does not appear to be *significantly* different from the summary of the contractor employee's description of these events which is also contained in the Notification Letter. Criterion F security concerns are triggered when a person *deliberately* misrepresents or omits *significant* information during an inquiry with respect to one's eligibility for DOE access authorization. Therefore, to demonstrate that doubt as to a person's eligibility for access authorization arises under Criterion F, a notification letter (as a minimum) needs to identify both a *deliberate* statement made by a person which is allegedly false and to state the reason that the statement is believed false with respect to *significant* information. The Notification Letter does not contain this information in any readily identifiable way and, therefore, I conclude that no Criterion F security concern is alleged in the Notification Letter with respect to these events.

Threats Respect the Use of Weapons. The Notification Letter recites that the individual was asked during the PSI if he had ever indicated that he would be willing to use his rifles as sniper rifles.¹⁰ The Notification Letter also states that the individual confirmed the name of TGF's ex-boyfriend, which was followed by the LSO talking about DOE's concerns about violence in the workplace. During that discussion the individual stated "Ok. No I haven't made any, any threats against any of them, and I know he hadn't either." To evidence the falsity of this statement, the Notification Letter cites a number of statements made by the individual during a conversation with TGF, which TGF had recorded without the individual's knowledge. Ex. 4, Encl. 1 at 4-5. This recording was subsequently provided to the LSO by the parents of TGF.

The audio recording is one of six recordings submitted into the record by the LSO. *See* Ex. 14. The quality of these recordings is generally poor, with significant portions being indecipherable. These recordings were accompanied by a transcript prepared by the LSO; even with the poor quality of the recordings, the transcript is noticeably inaccurate. Both DOE's counsel and consulting psychiatrist commented during the hearing that the transcript was inaccurate. Tr. at 51, 336-337. As a result, the LSO agreed at the hearing that the court reporter would prepare new transcripts of these recordings. These transcripts were submitted separately from the hearing transcript, are more accurate than the LSO's original transcripts, and I have admitted them into the record as Exhibit 19 for ease of reference. The original transcript (which was included as part of Exhibit 14) is superseded by Exhibit 19.

¹⁰ The Notification Letter next includes a series of statements made by the individual in the PSI about not having threatened TGF's father. The Notification Letter does not refer to any information suggesting that these are false statements; and, therefore, I conclude that the LSO included these statements as narrative, but not as a separate Criterion F allegation. *See* Ex. 4, Encl. 1 at 4 (¶ I. F.).

The LSO contends that Audio Recording One records the individual making a plan to murder TGF's ex-boyfriend and to do so in a way that he would not get caught. The individual testified that it was not a plan or a threat to TGF's ex-boyfriend, but a conversation that took place following a number of conversations in which TGF talked about wanting to get back together with her ex-boyfriend (who was married and living out of state) and TGF making comments about killing the individual's ex-girlfriend because he had had contact with her. The individual recalled the conversation was his weaving together aspects of these earlier conversations to show how silly these themes had been. Tr. at 181-184.

Notwithstanding the poor quality of the audio recordings, my conclusion from listening to Audio Recording One is that TGF and the individual seemed to be engaged in intellectual banter, as opposed to criminal plotting. The alleged "plotting" is interrupted by the individual talking to, and attending to, one of his dogs that became ill and a tangent where the individual and TGF appear to banter about him sharing his pretzel with his dog, but not with TGF. The LSO takes as a serious threat that the individual is heard on the tape saying the he would blow the ex-boyfriend's head up like a watermelon. However, the transcript reveals the individual's initial comment, shortly after TGF commenced recording the on-going conversation, was that he would kill the ex-boyfriend by twisting his head until it "pops right off." Ex. 19. Based on the context and tone of the conversation, that does not sound like a plot to commit a murder. It is then TGF who first introduces weapons and shooting into the conversation: "To sit there and say that you would shoot somebody in the head while you're sitting there eating... bullets in the head, you said you'd kill him, I assume you meant shoot him." *Id.* At which point the individual appears to take up her suggestion in a bantering way: "Why, yeah, shoot him in the head. Blow his fucking head up like watermelon. Poof! I assume there's nothing but a void there instead of brains (indiscernible) blow him up. [Name] head everywhere. About the consistency of my pretzel..." *Id.* At no point during the conversation does either party appear to get angry or emotionally charged¹¹ as one might expect if people were actually discussing the potential murder of someone that the individual is being portrayed as viewing as a rival. At some point during the conversation, the individual became aware that TGF was recording the conversation and at the end of the conversation says to TGF: "Or did you decide to sit there and record that entire conversation?" To which TGF responded: "I don't have a voice recorder." *Id.* If the individual had actually been discussing a potential murder, his tone and choice of words would have been substantially different if he believed it was being recorded.

¹¹ My conclusions with respect to the intent of the parties is also consistent with the comments made by the mental health experts with respect to Audio Recording One: (1) the written evaluation of the DOE psychiatrist states that TGF "seemed unusually comfortable with the interaction and had similar profane language" (Ex. 11 at 5); and (2) the individual's forensic psychologist testified that the individual and TGF seemed to be "fooling" with one another, that TGF did not seem to be afraid, and that no crime seemed to be being planned (Tr. at 111-112).

TGF contemporaneously¹² emailed her mother that TGF had recorded the individual telling her that he will kill her ex-boyfriend if she goes back with him and that, if the individual “messes” with her, she will give the recording to the police. Ex. 13 at 9. If this had been a serious threat to murder someone, a more appropriate response would have been to warn the potential victim or law enforcement of the threat, not a self-congratulatory comment for adding another arrow to her quiver.

For the reasons set forth above, I conclude that Audio Recording One is a bantering conversation and does not evidence threatening, plotting, or a propensity to commit a murder. Therefore, I accept as credible the individual’s explanation of the conversation and find that any Criterion F security concerns with respect to the individual’s statements in Audio Recording One are sufficiently resolved.

Attempting to Control TGF. The final Criterion F security concern set forth in the Notification Letter is based upon two of the individual’s statements during the PSI about his relationship with TGF: (1) TGF was realizing that the individual was “... not that bad of a person that she thought. Like I guess she thought I was trying to uh, control who she would talk to ...” and (2) in response to a question as to whether TGF is free to go anytime she pleases, “... I don’t go and check on her or anything like that, by no means.” To evidence that these are false statements, the Notification Letter cites portions of TGF’s comments to a university police officer, two emails TGF sent to her mother, and another audio recording of a conversation between the individual and TGF that TGF had secretly recorded. Ex. 4, Encl. 1 at 5-6.

A security concern arises under Criterion F when a person intentionally falsifies or omits *significant* information during the DOE access authorization process. The first statement cited in the Notification Letter is the individual’s conclusions about what his girlfriend thought about his behavior; the second statement concerns whether or not the individual “checks on” his girlfriend. Neither statement relate to *significant* information that is “relevant to a determination regarding eligibility for DOE access authorization.” 10 C.F.R. § 710.8(f).

Even if such statements related to significant information, the record does not support a conclusion that they were false. The Notification Letter largely relies on statements made by TGF outside of this administrative proceeding (i.e., TGF’s emails, which her mother delivered to the LSO and TGF’s statements made to a university police officer) to evidence the falseness of the individual’s statements. However, as a general matter, I could find no credible corroboration for TGF’s statements to her parents which they subsequently reported to the LSO; conversely, several credible witnesses provided testimony at the

¹² I have concluded that the email is contemporaneous (or nearly contemporaneous) with the recorded conversation notwithstanding the manner on which they have been dated by TGF or her mother. The email is dated June 13, 2014. Ex. 13 at 9. Audio Recording One is dated November 28, 2013; however, the individual contest the accuracy of that date and testified that the dog he refers to by name in the recording he did not have until the following April. Ex. 14; Tr. at 181.

hearing that contradicted information in TGF's hearsay statements to her mother.¹³ Additionally, TGF's testimony at the hearing on at least one significant matter was opposite the testimony of a more credible witness.¹⁴ For these reasons, I have concluded that TGF's statements are largely unreliable and I have assigned *de minimus* weight to those documents introduced into the record consisting of TGF's statements outside of the hearing. See 10 C.F.R. § 710.25(h).

The audio recording presents a conundrum. See Ex. 14. Similar to the audio recording previously discussed, Audio Recording Four is a portion of a conversation between the individual and TGF which TGF recorded without the individual's knowledge. It's unclear when the conversation occurred: the audio recording is dated on a date that the individual testified that he was out-of-state. See Ex. 14; Tr. at 201. The recording is of an argument between TGF and the individual which occurred on an evening on which TGF decided to go out with a friend rather than keeping a commitment she had made the prior week to go with the individual to the gym and out to eat. While the recording evidences the individual arguing and telling TGF when she needed to return home that evening, it presents stronger evidence that TGF felt perfectly safe to disregard the individual's wishes by breaking their plans and, instead, going out with her friend who had called earlier that evening. I also note the comment by the DOE psychiatrist in his written evaluation that in these audio recordings that TGF "seemed unusually comfortable with the interaction and had similar profane language [as the individual]." Ex. 11 at 5. However, even if I were to conclude that

¹³ The information provided to the LSO by TGF's parents included both (1) emails and text messages from TGF to her mother and (2) conversations between TGF's parents and the LSO, which the LSO memorialized in the individual's security file. While the Part 710 Regulation permits me to admit such out-of-court statements (hearsay) into the record, it also requires that appropriate weight be accorded to such evidence. 10 C.F.R. § 710.25(h). The information that was received through TGF's parents included reports of conversations among TGF, the individual, and third parties. Three of those third parties testified as witnesses at the hearing (the individual's parents and his union representative) and my examination of them included an attempt to corroborate conversations, in which one or more of them had been a participant, that TGF reported to her mother. In each case, I was unable to corroborate the conversations. Most notably, TGF reported to her mother that she and the individual had met with the union representative and the union had agreed to retain separate attorneys for TGF and the individual. Ex. 17. The union representative testified that while he had met with the individual and TGF, that the conversation did not include any agreement for legal representation, that the union rarely retains counsels for its bargaining unit members and that, even if it did, TGF was not a member of the bargaining unit. Tr. at 128-131. Additionally, I have concerns about the authenticity of the email/messages forwarded to the LSO by TGF's mother. For example, on the date the individual was given a trespass warning for being on a university campus, there are two emails from TGF to her mother. The first thanked her parents for intervening and contacting the university about the individual coming to the campus (purported electronically date/time stamped that day at 8:31pm) and the second (purportedly electronically date/time stamped that same day at 10:10pm), informed her parents that the individual had had the day off and had come to class with her and apologized for the delay in responding to them, explaining that there had been a multi-fatality collision on the expressway and, after three hours, she had finally gotten home at 9:00pm. Ex. 13 at 30, 31. These two emails could not have been sent as purported, especially since TGF testified that she had driven her and the individual home from the university that night in her car. At the hearing, she agreed that it would not have made sense to have written both emails the same day, but offered no plausible explanation for inconsistencies. Tr. at 313.

¹⁴ See footnote 16, *infra*.

the individual was trying (unsuccessfully) to control TGF's behavior during this conversation, the question and response in the PSI are not specific enough to support a conclusion that the individual *deliberately* made a false statement during the PSI and, as noted earlier, the individual's response is not about *significant* information on a matter that is *relevant to a determination regarding eligibility for DOE access authorization*. See 10 C.F.R. § 710.8(f).

For the above reasons, I find that the individual has sufficiently resolved the Criterion F security concerns set forth the Notification Letter regarding his statements during the PSI about his relationship with TGF.

**B. Administrative Judge Evaluation of Evidence and Findings of Fact:
Criterion H Security Concerns**

Following the PSI, the individual was referred to a DOE consulting psychiatrist for a psychiatric evaluation. The DOE psychiatrist reviewed documents provided by the LSO prior to the evaluation, including the transcript of the PSI, the audio recordings, emails purportedly written by TGF that were provided to the LSO by her mother, and the LSO's summaries of contacts between the LSO and TGF's parents; additionally, the DOE psychiatrist conducted a one hour, 45-minute examination of the individual in May 2015. Following that examination, the DOE psychiatrist issued a written evaluation of the individual in which he concluded that the individual met the *DSM-5* diagnostic criteria for both Paranoid Personality Disorder and Antisocial Personality Disorder and that these are illnesses or mental conditions which cause, or may cause, a significant defect in the individual judgment or reliability. Ex. 11 at 14. This written evaluation is the basis for the Criterion H security concern set forth in the Notification Letter. Ex. 4, Enc. 1 at 7.

As a result of my review and analysis of the DOE psychiatrist's written evaluation, I have significant concerns about the evaluation itself. The testimony of DOE psychiatrist at the hearing amplified, rather than alleviated, my concerns. See Tr. at 319-352.

As an initial matter, the *DSM-5* diagnostic criteria for Paranoid Personality Disorder require a finding that a person exhibits a "*pervasive* distrust and suspiciousness of others such that their motives are interpreted as malevolent, *beginning by early adulthood* and present in a variety of contexts..." and, for Antisocial Personality Disorder, a finding that a person exhibits "a pervasive pattern of disregard for violation of the rights of others, *occurring since the age 15...*" *DSM-5* at 646, 659 (emphasis added). However, the DOE psychiatrist's written analysis in support of his diagnoses (labelled "Discussion" in his written evaluation) focuses exclusively on the period of the individual's life during which he was involved with TGF, a period of approximately two years preceding the evaluation, and contains no discussion of information from earlier periods of the individual's life. See Ex. 11 at 11-13. The DOE psychiatrist discussed the individual's relationship to TGF (and related individuals) and events occurring during the investigation of the individual's eligibility for access authorization, however, he did not discuss the individual's psychological functioning in any other context, such as work, social or family. See Ex. 11. The absence of data from across the individual's lifespan and from various contexts of his

life seems incompatible with a diagnosis of a personality disorder, which the *DSM-5* defines as “an enduring pattern of inner experience and behavior that deviates markedly from the expectations of the individual’s culture, is pervasive and inflexible, has an onset in adolescence or early adulthood, is stable over time, and leads to distress or impairment.” *DSM-5* at 645.

At the hearing, the DOE psychiatrist acknowledged that it “is absolutely right that in order to come up with a personality disorder, one should get ... [psychological data about an individual] longitudinally.” Tr. at 323. The DOE psychiatrist testified that the only way, in his opinion, to get such data is by “getting collateral history,” and that DOE policies prevented him from contacting such collateral sources. In response to my specific questioning, the DOE psychiatrist testified that there was nothing in his evaluation of the individual or that he had subsequently learned about the individual that allowed him to conclude the individual exhibited any of criteria of the personality disorders since early adulthood or age 15 and, further, he specifically testified that he had no actual findings that supported such conclusion. *Id.* at 347-348.

The DOE psychiatrist testified that he had understood earlier guidance from DOE as requiring that he reach a conclusion on cases sent to him. DOE counsel asked, absent that understanding, did he feel he could “make a diagnosis with what [he had] here?” The DOE psychiatrist responded. “No, I don’t.” *Id.* at 350. Notwithstanding, the DOE psychiatrist testified that he was not withdrawing his diagnosis. *Id.* at 351. His final comment on the witness stand was that he could not make a definitive diagnosis. *Id.* at 352. Common-sense judgment precludes the reconciliation of these responses by the DOE psychiatrist. *See* 10 C.F.R. § 710.7 (a).

Additionally, I cannot reconcile the diagnoses of two significant personality disorders (i.e., disorders which are defined in the *DSM-5* as “pervasive and inflexible” (*DSM-5* at 645)) with the DOE psychiatrist’s prognosis, which was elicited through direct questioning by DOE counsel at the hearing, that the individual “is a pretty solid guy” and has “a relatively good prognosis ... given a more stable woman.” Tr. at 333. This assessment of the individual is far more consistent with the conclusions of the individual’s forensic psychologist, which are discussed below.

The DOE psychiatrist’s written evaluation states that “the vast majority of the conclusions [contained therein] are made on the basis of gathered information and not based in the evaluation interview per se.” Ex. 11 at 11. He testified that this was “not a bit normal. Like I said, I felt like I was given this pile of information, make a judgment on the basis of everything that you have access to, for the betterment of the country and national security. And try to be definitive about doing it. And I didn’t get much from our interview. I had to patch it together with the little bit of information I had from other sources. And that is the best I could come up with.” Tr. at 341. Amongst the concerns that this raises is that the psychiatrist accepted as valid information from third parties which is of questionable credibility (e.g., the TGF’s emails and text messages provided by her mother and her mother’s reports to the LSO) and that he may have misunderstood his role in a Part 710 proceeding.

In the written evaluation, the DOE psychiatrist concludes that the individual met various of the sub-criteria for each of the diagnosed personalities disorders; however, the written evaluation does not correlate the criterion found by the psychiatrist to be present in the individual to specific psychological data. Even the general discussion, which is intended to support these findings, raises concerns. For example, the evaluation states that “there are glaring issues that form the basis of concern” and that “the first is that of truthfulness.” Ex. 11 at 11. Cited as the most notable example is that the subject stated during the psychiatric interview that he had been granted permission to have a union representative present during the psychiatric interview, but had declined that opportunity. *Id.* at 9, 11. The psychiatrist characterized this as “blatantly false.” *Id.* at 11-12. This conclusion is contradicted by emails between DOE counsel and the individual’s counsel that were admitted into the record; the individual’s characterization was actually correct. *See* Ex. C.

In the written evaluation, the DOE psychiatrist noted that the individual “admitted to consulting with attorney, [name].” Ex. 11 at 9. When I asked the DOE psychiatrist at the hearing as to the relevance of this information, he testified that “it is kind of a relevant thing to know the level of his suspicion or his paranoia or his litigiousness.” Tr. at 345. Here, the individual’s exercise of his right to legal representation in a Part 710 proceeding is being used to evidence a personality disorder that forms a basis of the Part 710 proceeding. This is unacceptably tautological. We cannot validate such logic in an administrative review hearing as it could exert an inappropriate and chilling effect on individuals exercising their right to representation under the Part 710 regulation.

For these reasons, I find that the DOE psychiatrist’s written evaluation of the individual is unpersuasive. However, the individual, who had had no mental health evaluations or treatments prior to the commencement of the LSO’s investigation, engaged a forensic psychologist to evaluate him following his receipt of the DOE psychiatrist’s written evaluation. Ex. A; Tr. at 199. The individual’s forensic psychologist is a duly qualified mental health expert, whose experience includes work for a state corrections system performing psychological evaluations of life-term inmates with respect to their suitability for parole. Ex. A at 1. The forensic psychologist conducted an evaluation of the individual, which included administration of psychological testing. The individual’s psychological test results scored as valid and indicated that the individual has no somatic, cognitive, thought, or behavioral dysfunctions and is less likely than most individuals to act out anger. *Id.* at 8. The forensic psychologist concluded that the individual is free from psychopathy and, at the hearing, he testified that the individual did not have an illness or mental condition which causes, or may cause, a significant defect in judgment or reliability. *Id.*; Tr. at 126. The written evaluation and testimony of the individual’s forensic psychological were credible and persuasive.

Based on the forgoing, the individual has sufficiently resolved the Criterion H security concerns.

**C. Administrative Judge Evaluation of Evidence and Findings of Fact:
Criterion L Security Concerns**

The Notification Letter cites eight instances of conduct by the individual as constituting a history or pattern of criminal activity that creates doubt about the individual's judgment, reliability and trustworthiness. Ex. 4, Encl. 1 at 7-9. Prior to the hearing, DOE stipulated that seven of those instances did not fall within Guideline J (Criminal Conduct) of the Adjudicative Guidelines and should not be considered in this administrative review proceeding. Tr. at 10. As a result, there is a single incident cited by the LSO as the basis for the Criterion L security concerns.¹⁵

In May 2015, an altercation occurred between the individual and TGF at the individual's residence. The altercation occurred at approximately 7 a.m. as the individual was preparing to leave for work. Both the individual and TGF agree that the altercation related to TGF's cell phone, TGF's preventing the garage door from opening so that the individual could leave for work, and a device (which may or may not have been a weapon) which the individual pointed at TGF. *Id.* at 195-198, 221-224, 235, 268-275. Subsequently, both the individual and TGF left the residence at different times and went to their respective places of employment. *Id.* at 273.

Unbeknownst to either the individual or TGF, the individual's parents (both of whom testified at the hearing) had arrived from out of state that day and were parked waiting for TGF to leave for work and their son to return from work. *Id.* at 136-137, 144. When the individual and TGF had visited his parents approximately six months earlier, TGF had used his mother's computer and not logged out of an email account. *Id.* at 138, 159-160. As a result, TGF's email account continued to open on the computer and, through the emails between TGF and her mother, the individual's mother was aware of the nature of the communication about her son that was occurring between TGF and her mother. *Id.* at 138-139. Recent emails had indicated that TGF planned to vacate the individual's residence the following week and to involve the police to "supervise" her move. As a result, the individual's parents arrived unannounced to intervene and provide orderly assistance for TGF to vacate the individual's home. *Id.* at 136, 144-146. While TGF was at work, the individual's parents packed all of TGF's belongings so that she could move that evening. *Id.* at 136-138, 157-158.

Three and one-half days later, TGF filed a domestic violence report with a local law enforcement agency based upon the altercation between her and the individual prior to his parents' staged intervention. *See* Ex. 15. Both TGF and the individual agree that the police did not investigate the incident and that the police did not contact the individual regarding the report. Tr. at 199, 225, 234-235, 276, 283-284.

¹⁵ The sole Criterion L security concern to be considered in the administrative review hearing, based upon DOE's stipulation, is Item III. H. in the Notification Letter. *See* Ex. 4, Encl. 1 at 8-9; Tr. 10.

The individual and TGF disagree on many of the details of the altercation. As previously noted, TGF testified at the hearing pursuant to a subpoena requested by the individual; prior to the hearing they had had no contact following TGF's moving from the individual's residence, other than a single exchange of emails (initiated by TGF) on the weekend following her move (seven months prior to the hearing). Ex. D-1; Tr. at 198-199, 277-281, 316. Although I acknowledge that the circumstances of her appearance at the hearing were undoubtedly stressful for her, TGF's testimony frequently lapsed into the theatrical, including overly dramatic gestures. Her testimony itself differed from that of the individual on many points beyond those related to their final altercation, which would not be unexpected under the circumstances. More troubling is that her testimony differed from others, including that of the DOE contractor employee,¹⁶ to such an extent that I believe portions of her testimony were knowingly untruthful. For these reasons, I have concluded that her testimony was generally not credible and, therefore, on contested factual matters I have given her testimony *de minimus* weight. In light of my concerns about TGF's credibility, I accept the individual's version of their final altercation as factually correct.

Even in the individual's version, he acknowledges that he pointed a device at TGF when she was preventing his garage door from opening and his leaving for work. He testified that it was a stun gun that had never been charged and was incapable of harming her. *Id.* at 223-224. The LSO, while limiting the Criterion L concerns to criminal activity, presented no authority that such action constitutes criminal behavior in the relevant jurisdiction. Additionally, TGF testified that, after she had blocked the individual from leaving his garage and he had pointed what she believed was a weapon at her, she said "you better shoot me then because you are not leaving" and, accompanying this testimony, demonstrated that she had flung her arms outwards. *Id.* at 272. TGF stated that after leaving the garage, they continued their argument inside the house. Ex. 15 at 2. Based on TGF's testimony, I cannot conclude that she felt in imminent danger from the individual's pointing a device at her and, therefore, I conclude the incident alleged in the Notification Letter does not likely constitute criminal conduct. To the extent that pointing a device that looks like a weapon is a criminal offense in the relevant jurisdiction, I note that this occurred in the course of a tumultuous relationship that has now ended without any evidence of similar conduct in any of the individual's other relationships. I therefore find that it is conduct that is unlikely to recur and, therefore, does not cast doubt on the individual's reliability, trustworthiness or judgement. *Cf.* Adjudicative Guidelines at Guideline J, ¶ 32(a).

¹⁶ TGF testified that she filed a formal sexual harassment complaint against the DOE contractor employee with a DOE employee concerns program (ECP) and that she was notified by the ECP that the officer was reprimanded. Tr. at 265, 295, 310-311. The security officer, while acknowledging having sent a text message to TGF that was sexually suggestive and an email request for a nude photograph and having been the subject of a sexual harassment claim while working for a prior employer decades earlier, credibly testified that no claim had been filed against him with respect to sexually harassing TGF. *Id.* at 242-243, 252-253. To accept TGF's testimony as accurate, I would need to both reject the highly credible testimony of the DOE contractor employee and conclude that the DOE ECP violated policy by both accepting a complaint from someone not employed in the DOE complex and subsequently discussing disciplinary action taken against an employee. I cannot reach those conclusions.

Based on the foregoing, the individual has sufficiently resolved the Criterion L security concerns.

V. Conclusion

In the above analysis, I have found that there was derogatory information in the possession of the DOE that created a reasonable basis on which to raise security concerns under Criterion F, Criterion H and Criterion L. After considering all the relevant information, favorable and unfavorable, in a comprehensive common-sense manner, including weighing all the testimony and other evidence presented at the hearing, I have found that the individual has brought forth sufficient evidence to resolve the security concerns associated with Criterion F, Criterion H and Criterion L. Accordingly, I have determined that the individual's access authorization should be restored. The parties may seek review of this Decision by an Appeal Panel under the regulations set forth at 10 C.F.R. § 710.28.

Wade M. Boswell
Administrative Judge
Office of Hearings and Appeals

Date: May 10, 2016