

* 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: August 9, 2012)
)
)
_____)

Case No.: PSH-12-0106

Issued: December 13, 2012

Decision and Order

Robert B. Palmer, Hearing Officer:

This Decision concerns the eligibility of XXXXXXXXXXXXXXXXXXXX (hereinafter referred to as “the individual”) to hold an access authorization under the regulations set forth at 10 C.F.R. Part 710, entitled "Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material.”¹ For the reasons set forth below, I conclude that the individual’s security clearance should not be restored at this time.²

I. BACKGROUND

The individual is employed by the Department of Energy (DOE), and was granted a security clearance in connection with that employment. On December 13, 2011, the local security office (LSO) learned that the individual had been arrested on December 10, 2011, for “Assault/Family/Household Member w/Previous Conviction” and Interfering with an Emergency Call. Because this information raised security concerns, the LSO summoned the individual for

¹An access authorization is an administrative determination that an individual is eligible for access to classified matter or special nuclear material. 10 C.F.R. § 710.5. Such authorization will also be referred to in this Decision as a security clearance.

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

interviews with a personnel security specialist in January and April 2012. After reviewing the transcripts of these Personnel Security Interviews (PSIs) and the rest of the individual's personnel file, the LSO determined that derogatory information existed that cast into doubt the individual's eligibility for a security clearance. 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. I will hereinafter refer to this letter as the Notification Letter. The Notification Letter also informed the individual that he was entitled to a hearing before a Hearing Officer in order to resolve the substantial doubt concerning his eligibility for access authorization.

The individual requested a hearing on this matter. The LSO forwarded this request to the Office of Hearings and Appeals, and I was appointed the Hearing Officer. The DOE introduced 34 exhibits into the record of this proceeding. Although the individual did not submit exhibits, he did testify at the hearing, and presented the testimony of four other witnesses.

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

As indicated above, the Notification Letter included a statement of derogatory information that created a substantial doubt as to the individual's eligibility to hold a clearance. This information pertains to paragraph (l) of the criteria for eligibility for access to classified matter or special nuclear material set forth at 10 C.F.R. § 710.8.³

As support for this criterion, the Letter cites information indicating that the individual has either been arrested, had warrants for his arrest issued, or been the subject of a court-imposed protective order on six occasions in the last five years, and on seven occasions since 1989. These occurrences are described in section IV.A below.

The individual generally does not contest the allegations set forth in the Notification Letter. This derogatory information adequately justifies the DOE's invocation of criterion (l) and raises significant security concerns. Illegal activity creates doubt about a person's judgement, reliability and trustworthiness. By its very nature, it calls into question a person's ability or willingness to comply with laws, rules and regulations. Conduct involving questionable judgement, lack of candor, or dishonesty can also raise questions about an individual's reliability, trustworthiness and ability to protect classified information. *See Revised Adjudicative Guidelines for Determining Eligibility for Access to Classified Information, The White House (December 19, 2005), Guidelines J and E.*

III. REGULATORY STANDARDS

³ Criterion (l) defines as derogatory information indicating that the individual has "engaged in any unusual conduct or is subject to any circumstances which tend to show that he is not honest, reliable, or trustworthy; or which furnishes reason to believe that he may be subject to pressure, coercion, exploitation or duress which may cause him to act contrary to the best interests of the national security." Such conduct includes, but is not limited to, criminal behavior. 10 C.F.R. § 710.8(l).

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 or unfavorable, that has a bearing on the question of whether granting or restoring a security clearance would compromise national security concerns. Specifically, the regulations compel me to consider the nature, extent, and seriousness of the individual’s conduct; the circumstances surrounding the conduct; the frequency and recency of the conduct; the age and maturity of the individual at the time of the conduct; the absence or presence of rehabilitation or reformation and other pertinent behavioral changes; the likelihood of continuation or recurrence of the conduct; and any other relevant and material factors. 10 C.F.R. § 710.7(c).

A DOE administrative proceeding under 10 C.F.R. Part 710 is “for the purpose of affording the individual an opportunity of supporting his eligibility for access authorization.” 10 C.F.R. § 710.21(b)(6). Once the DOE has made a showing of derogatory information raising security concerns, the burden is on the individual to produce evidence sufficient to convince the DOE that granting or restoring access authorization “will not endanger the common defense and security and will be clearly consistent with the national interest.” 10 C.F.R. § 710.27(d). *See Personnel Security Hearing*, Case No. VSO-0013, 24 DOE ¶ 82,752 at 85,511 (1995) (*affirmed* by OSA, 1996), and cases cited therein. The regulations further instruct me to resolve any doubts concerning the individual’s eligibility for access authorization in favor of the national security. 10 C.F.R. § 710.7(a).

IV. FINDINGS OF FACT AND ANALYSIS

A. The Individual’s Legal Problems

Most of the individual’s legal issues have arisen from conflicts between the individual and those most close to him; specifically, his girlfriend, his now ex-wife, and his son. The individual’s most recent arrest occurred on December 10, 2011. The individual testified that he was intoxicated and has little memory of the events of that evening that led to his arrest. Hearing Transcript (Tr.) at 93-94. Consequently, the following facts about that evening are derived from the testimony of the individual’s girlfriend at the hearing and from the police report.

According to the individual’s girlfriend, after an evening of heavy drinking by the individual at two parties, she and the individual began arguing during their return to the girlfriend’s house about whether the girlfriend should have stopped to render assistance at the site of an automobile accident that they witnessed. The argument continued until they reached her house, when the conflict shifted to the question of whether or not the girlfriend was dating another man. After arguing this issue for a while, the girlfriend asked the individual to leave. After he refused to do so, the girlfriend threatened to call the police, and the individual attempted to take her phone away from her. Eventually, the girlfriend had to trick the individual into leaving by offering to go back to the accident scene, and then closing and locking her door behind the individual after he stepped out of the house. She then called the police, who responded and arrested the individual. Tr. at 44-51. The

individual's girlfriend chose not to pursue this matter, and the charges were ultimately dismissed.

According to the police report concerning this arrest, when the girlfriend told the individual that she was going to call the police, the individual pushed her into a wall and began striking her repeatedly in her left breast, which he knew to be tender due to a cyst that was located there. When these actions failed to deter the girlfriend from attempting to call the police, the individual grabbed her arms, wrestled with her, and then bit her thumb until she relinquished control of the phone. Since she could no longer summon help, the girlfriend attempted to calm the individual down. She eventually persuaded the individual to drop the phone, and she deceived him into leaving her home. She then closed and locked the door behind the individual, and called the police. After the police arrested the individual on charges of Assault Family/Household Member w/Previous Convictions and Interfering with an Emergency Call, an officer asked the girlfriend, who was trembling uncontrollably, if she wanted to go to the hospital to have her thumb evaluated. DOE Exhibit (Ex.) 17.

The next incident cited in the Notification letter occurred on December 18, 2008. On that date, the individual met his son for a counseling session at a local counseling center. After the session, the two were leaving the office when they encountered the individual's ex-wife, who had brought the individual's son to the counseling center. Although, according to the individual, he was to have custody of his son during the Christmas holidays, the individual's ex-wife angrily insisted that their son was remaining with her. The individual stated that, as he and his son were getting into the individual's car, the ex-wife ran to the passenger's side, grabbed their son, pulled him to her car, and placed him in the back seat. The individual followed the ex-wife to the driver's side door, stood in the open doorway, and asked the ex-wife what she was doing. The ex-wife then allegedly started the vehicle and put it in reverse, causing the open car door to slam into the individual's back, pinching him between the car door and the frame of the car, and dragging him approximately 10 feet. The individual was then able to reach into the car, turn it off, and extricate himself from between the door and the rest of the vehicle. The individual then called the police, waited for them to arrive, and then went to a local hospital for x-rays after reporting the incident. DOE Ex. 22. On January 7, 2009, a warrant was issued for the individual's arrest on charges of Assault, and on February 6, 2009, the individual was arrested for violation of probation imposed after an earlier offense. Both the warrant and the probation violation charge were based on the individual's involvement in the December 18th incident, and both charges were later dismissed. DOE Ex. 13 at 4.

In 2007, the individual was charged with Harassment, Assault and Invading the Use of a Cell Phone to Call 911. These charges arose from the individual's separation, and eventual divorce, from his ex-wife. In February 2007, the individual and his ex-wife separated. The individual's understanding of this separation was that it was temporary, and that the two would eventually reconcile. In approximately July 2007, the individual began to hear rumors that his ex-wife was seeing other men. He began to call her incessantly in an attempt to determine if these rumors were true. DOE Ex. 11 at 3. During one seven-day period, the individual called his ex-wife approximately 66 times. In August 2007, the individual confronted his ex-wife with her cell phone bill, which he believed confirmed that his wife was dating another man. This confrontation resulted in pushing and shoving, during which the individual grabbed her sunglasses and scratched her face. The individual pled no

contest to the Assault charge and guilty to the interference with an emergency call charge, and was required by the court to participate in anger management counseling. DOE Ex. 13 at 4.

The earliest arrest set forth in the Notification Letter occurred in 1989, when the individual was detained for Criminal Mischief. This arrest resulted from an incident during which the individual was accompanying a friend who vandalized a girlfriend's car. He allegedly did not participate in the vandalism, and was exonerated by a polygraph test. The charges were dismissed. *Id.*, see also DOE Ex. 27.

Finally, the Notification Letter cites protective orders that were issued against the individual in March 2011 and July 2008. These orders resulted from an altercation between the individual and his son in February 2011, and from an incident of corporal punishment of the son in June 2008, respectively. The February 2011 altercation occurred when the individual's then-16 year old son, who was angry that the individual refused to buy him a baseball glove, struck the individual several times. The individual responded by wrestling the son to the ground and holding him there until he calmed down. *Id.* This account was largely corroborated by the testimony of the individual's son at the hearing. Tr. at 9-10, 16. According to the individual, in June 2008, he discovered that his son had committed shoplifting at a local store. As punishment for this offense, the individual struck his son "two or three times" with his belt. DOE Ex. 13 at 4.

B. Hearing Officer's Analysis and Conclusions

The information set forth above indicates that, on at least six occasions during the 10 years that the individual has had a security clearance, the individual has either been arrested, had arrest warrants issued against him, or has been the subject of protective orders. Although the individual has presented evidence of mitigating factors, I find that they are not sufficient to adequately address the legitimate concerns raised by his conduct.

As an initial matter, I note that much of the conduct at issue occurred in the context of the individual's contentious separation from, and eventual divorce of, his ex-wife. I recognize that such situations seldom bring out the best in human behavior, and although I am skeptical that the individual is as blameless as his accounts of the incidents set forth above would suggest, the record does indicate that the ex-wife's conduct played a significant role in the individual's involvement with the police and the judicial system.

However, this factor does nothing to explain or mitigate the individual's most recent incident of domestic violence, his assault against his girlfriend in December 2011. During this incident, the individual struck his girlfriend repeatedly in an area that he knew would be most painful, and bit her thumb to the extent that the police officer who responded to her phone call inquired as to whether the girlfriend wanted to have her injury evaluated by a physician. The level of violence exhibited by the individual during this incident therefore appears to be more severe than that demonstrated

during his confrontations with his ex-wife. This pattern of escalation calls the individual's judgement and reliability into serious question.

At the hearing, the individual also presented testimony from a clinical psychologist that he is undergoing counseling regarding his anger management issues, Tr. at 21-40, and testimony from his son and girlfriend that the individual's behavior has improved since his December 2011 arrest. Tr. at 12-13, 54-56. Nevertheless, the record in this matter indicates that the individual also received counseling for anger management and for issues relating to his divorce from January 2007 until June 2008. DOE Ex. 13 at 4. Given the fact that a year-and-a-half of counseling did not prevent the individual from assaulting his girlfriend, I am not confident that the "several months" that the individual has been seeing the clinical psychologist, Tr. at 24, will be sufficient to prevent a similar episode in the future.

Moreover, even discounting the incidents during his separation and divorce that may have been instigated or exacerbated by his ex-wife, the individual has demonstrated a disturbing inability or unwillingness to conform his conduct to applicable rules, regulations and laws. Prior to his employment with the DOE contractor, the individual worked for a transportation company from 1999 until 2002. During this time, the individual committed several unspecified violations of the company's internal safety rules and was given a 10-day suspension and three years of probation. DOE Ex. 13 at 3. Furthermore, in November 2009, the DOE contractor suspended the individual for misconduct and absenteeism. Specifically, the contractor alleged that the individual misused sick leave, was slow to return from breaks and from lunch and otherwise "loafed," and did not return his supervisor's digital pages. DOE Ex. 13 at 4-5.

I am also concerned about the individual's alcohol usage. After the December 2011 incident, which involved the excessive use of alcohol, the individual was referred by the DOE to a local psychologist (hereinafter referred to as "the DOE psychologist") for an agency-sponsored evaluation. Although the DOE psychologist concluded that the individual was not currently suffering from any condition that would be likely to cause a significant defect in his judgement or reliability, she did conclude that he suffered from Alcohol Abuse from 1990 to 1998, a period during which the individual reported having regularly driven while intoxicated. DOE Ex. 13 at 8. The DOE psychiatrist recommended that the individual refrain from all future alcohol use, at least in part because "drinking can seriously disinhibit his anger." DOE Ex. 13 at 9. She noted that, although the individual informed her of his intention to quit drinking permanently, she expressed doubt as to whether the individual could maintain his abstinence, and said that "should he begin to drink, even in moderation, that would be an indication that his self control . . . is weakening." *Id.* At the hearing, the individual's girlfriend testified that, approximately one month previously, the individual consumed two drinks one evening while they were out on a date. Tr. at 62. Indeed, during his testimony, the individual did not express an unequivocal intent to completely abstain, stating that "right now, it's permanent," but that he was unwilling to say that "I'm not going to have a drink ever." Tr. at 119. I believe that a return to drinking by the individual would represent an unacceptable risk of a recurrence of the type of irresponsible behavior that he has previously exhibited while intoxicated.

The record in this matter reveals a long-standing problem with anger management on the part of the individual. Indeed, he himself testified that he has spent the last 40 years of his life being angry. Tr. at 97. Given this history, I do not believe that the 10 months that have passed, apparently without incident, between the December 2011 incident and the date of the hearing, and the “few months” of counseling the individual participated in during that period, are sufficient to adequately address the DOE’s security concerns.

V. CONCLUSION

For the reasons set forth above, I find that the individual has not successfully addressed the DOE’s security concerns under criterion (1). I therefore conclude that he has not demonstrated that restoring his access authorization would not endanger the common defense and would be clearly consistent

with the national interest. Accordingly, I find that the individual’s security clearance should not be restored at this time. The individual may seek review of this Decision by an Appeal Panel under the procedures set forth at 10 C.F.R. § 710.28.

Robert B. Palmer
Hearing Officer
Office of Hearings and Appeals

Date: December 13, 2012