*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:	March 5, 2013	)
		) Case No.: PSH-13-0025
		)

Issued : July 11, 2013

Hearing Officer Decision

Wade M. Boswell, Hearing Officer:

This Decision concerns the eligibility of XXXXXXXXXXXXXXXXXXX (hereinafter referred to as "the individual") to hold an access authorization[1] under the Department of Energy's (DOE) regulations set forth at 10 C.F.R. Part 710, Subpart A, entitled, "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 not be restored at this time.

I. Background

The individual is employed by a DOE contractor in a managerial position that requires him to hold a DOE security clearance and participate in the Human Reliability Program (HRP).[2] The individual's manager received a report in November 2011 that the individual may have been engaging in practices prohibited by his employer's personnel policies. The manager's subsequent inquiries resulted in a decision by the manager and the employer's Human Resources Department to investigate the individual's workplace

[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.

[2] The HRP is a security and safety reliability program designed to ensure that individuals who occupy positions affording access to certain materials, nuclear explosive devices, facilities, and programs meet the highest standards of reliability and physical and mental suitability. *See* 10 C.F.R. § 712.

behavior. The individual was placed on "site access denial" in December 2011 and the individual and his employer entered into an agreement in February 2012 which provided the individual would receive a five-day retroactive disciplinary suspension and be allowed to return to work in another position. *See* Exhibit 15. Notwithstanding this agreement, the individual has not returned to work or had his site access restored.

The Local Security Office (LSO) commenced an independent investigation subsequent to the individual being placed on "site access denial" and conducted a personnel security interview (PSI) with the individual on May 30, 2012 (2012 PSI). *See* Exhibit 5. In addition to workplace matters, the LSO's investigation revealed a number of incidents involving local law enforcement, including incidents which occurred subsequent to the individual being placed on "site access denial."

On November 13, 2012, the individual's access authorization was suspended. The LSO informed the individual in a letter dated November 26, 2012 (Notification Letter), that it possessed reliable information that created substantial doubt regarding his eligibility to hold a security clearance and explained that the derogatory information fell within the purview of one potentially disqualifying criterion set forth in the security regulations at 10 C.F.R. § 710.8, subsection (l) (hereinafter referred to as Criterion L).[3] *See* Exhibit 1.

Upon his receipt of the Notification Letter, the individual exercised his right under the Part 710 regulations by requesting an administrative review hearing. The Director of the Office of Hearings and Appeals (OHA) appointed me the Hearing Officer in the case and, subsequently, I conducted an administrative hearing in the matter. At the hearing, the LSO presented the testimony of no witnesses; the individual presented the testimony of three witnesses, including that of himself and his wife. The LSO introduced 16 numbered exhibits into the record; the individual introduced ten lettered exhibits (Exhibits A – J) into the record. 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

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

[3] Criterion L relates to information that a person 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).

[4] OHA decisions are available on the OHA website at www.energy.gov/oha. A decision may be accessed by entering the case number in the search engine at www.oha.gov/search.htm.

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 his access authorization "will not endanger the common defense and security and will be clearly consistent with the national interest." 10 C.F.R. § 710.27(d). The individual is afforded a full opportunity to present evidence supporting his eligibility for an access authorization. The Part 710 regulations are drafted so as to permit the introduction of a very broad range of evidence at personnel security hearings. Even appropriate hearsay evidence may be admitted. 10 C.F.R. § 710.26(h). Thus, an individual is afforded the utmost latitude in the presentation of evidence to mitigate the security concerns at issue.

B. Basis for the Hearing Officer's Decision

In personnel security cases arising under Part 710, it is my role as the Hearing Officer 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 one criterion as the basis for suspending the individual's security clearance, Criterion L. The Notification Letter contains eight pages of single-spaced text describing the factual bases relied upon by the LSO; the events cited span from 1978 to 2012. The LSO alleges that these incidents demonstrate two patterns of behavior by the individual which trigger concerns under Criterions L: (1) a pattern of criminal behavior, and (2) a pattern of inappropriate behavior in the workplace and an inability to follow rules and regulations. Ex. 1. Further, the LSO alleges that the individual gave inaccurate responses on an Electronic Questionnaires for Investigations Processing dated March 23, 2011 (2011 e-QIP) to questions relating to both his police record and workplace misconduct. *Id.; see* Ex. 4. Conduct reflecting questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations raises questions about an "individual's reliability, trustworthiness and ability to protect classified information." *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).

In light of the information available to the LSO, the LSO properly invoked Criterion L.

IV. 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)[5] and the Adjudicative Guidelines. After due deliberation, I have determined that the individual's access authorization should not be restored. I can not find that restoring the individual's DOE security clearance will not endanger the common defense and security and is clearly consistent with the national interest. 10 C.F.R. § 710.27(a). The specific findings that I make in support of this decision are discussed below.

At the hearing, the individual and his wife both testified that the individual had had numerous surgeries in the prior year which resulted in his taking prescribed narcotics for pain. Tr. at 22, 24, 118 – 120. Additionally, the individual takes prescribed medications for anxiety and depression; he began taking medication for anxiety in 2009. *Id.* at 42, 46, 156. According to the individual, the psychotropic medications, combined with stress, have resulted in him having memory deficiencies. *Id.* at 56, 156. The individual's wife testified that their marriage counselor had diagnosed the individual with a psychological disorder (separate from anxiety and depression), one of the symptoms of which is reduced memory.[6] *Id.* at 27, 30.

Notwithstanding the foregoing, I note that the LSO cited no security concerns arising from illness or mental conditions.[7] *See* Ex 1. Accordingly, I have limited my analysis herein to Criterion L and Guideline E of the Adjudicative Guidelines, which are to the two standards specifically cited by the LSO in the Notification Letter.

The individual's wife was present throughout the hearing at the request of the individual, not only as a support person, but because the individual recognizes that he has memory deficiencies and he had requested his wife be present to help him "with some of those gaps." Tr. at 56. In those instances where the individual was relying on his wife's "memory" of events to which she was not a participant, I have accorded less weight to such testimony than I would to the testimony of a participant in the events. In those instances noted below where the individual's testimony was contradictory to written

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[5] 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, 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.

[6] With respect to the diagnosis of a psychological disorder by the marriage counselor, the individual testified that he has only heard that diagnosis from his wife and does not believe such a diagnosis has been formally made by a mental health practitioner. Tr. at 155 – 156.

[7] See Criterion H which relates to information that a person has "[a]n illness or mental condition of a nature which, in the opinion of a psychiatrist or a licensed clinical psychologist, causes, or may cause, a significant defect in judgment or reliability . . ." 10 C.F.R. §710.8(h).

documents that were either prepared contemporaneously to an event at issue or in close proximity to an event, I have accorded greater weight to those documents. I do not doubt the sincerity of the individual's testimony; however, in light of the inconsistencies in the record and the individual's acknowledged memory issues, I found him to be an unreliable reporter of events.

A. Hearing Officer Evaluation of Evidence and Findings of Facts: Pattern of Criminal Behavior

The LSO cited events occurring between 1978 and 2012 to demonstrate a pattern of criminal behavior by the individual. The individual has correctly noted that the criminal charges brought against him were largely dismissed prior to prosecution and, since becoming an adult, he has not been convicted of any criminal offense. However, any examination under Criterion L focuses on the underlying behavior of an individual; security concerns are not mitigated by the disposition of a matter by a court or prosecutor. This focus on underlying behavior recognizes that (1) the government's burden of proof in a criminal matter is markedly different from the individual's burden in an administrative review proceeding[8] and (2) determinations by local governments on whether to prosecute or dismiss a specific matter may be less influenced by the merits of a case than dictated by the necessity to allocate financial and human resources.

1. Teenage Behavior

The Notification Letter cites four incidents which occurred before the individual's eighteenth birthday: damaging a vehicle belonging to a friend's father which he was driving with permission; fighting at a sporting event; consuming alcohol he knew had been stolen; and assault and destruction of property at a girlfriend's house. Ex. 1 at 2 – 4. The individual does not deny that these events occurred. Subsequent to the latest of these events, the LSO cites no other incidents during the next 27 years.

The individual's youth and lack of maturity at the time of these events, together with the passage of 27 years without the recurrence of similar behavior, would normally mitigate security concerns arising from these events. *See* 10 C.F.R. § 710.7(c). However, the individual has engaged in conduct beginning in 2007 (see below) which raises concerns that this teenage behavior is part of a continuing pattern of the same behavior. *Cf.* Adjudicative Guidelines, Guideline E at ¶ 17(c). I cannot find that the individual's youthful behavior has been mitigated, absent the mitigation of the security concerns arising from his behavior in more recent years.

2. Battery of a Child (2007)

In 2007, the individual was charged with the battery of his six-year-old daughter following spanking her for lying about breaking items in the individual's home. Tr. at 97. The charge was deferred to allow the individual to engage in four months of counseling

[8] See discussion above at Section II A. Individual's Burden.

(eight sessions) and, following the completion of counseling, the charge was dismissed. Ex. 13, Ex 10 at 6. The individual characterized the battery as two or three "swats" to his daughter's "bum"; the charge as a frivolous action brought at the instigation of a bitter and angry former spouse; and the counseling as voluntarily agreed upon on his part. Tr. at 97, 98, 235; Ex. 5 at 22, 36, 37, 40. The individual's characterization of the incident is inconsistent with the record. The individual acknowledges that photographs taken one or two days after the incident show the skin on his daughter's buttocks being red, though he said he could not see the welts or bruises in the photographs as claimed by his former spouse. *Id.* Even if the photographs showed only redness of skin a day or two after the incident, it suggests that the individual's characterization of having given his daughter two or three "swats" minimized the severity of the incident. The letter from the prosecutor offering deferred prosecution in return for the individual entering counseling states that his former wife had been consulted before the proposal had been made and indicated the prosecutor would move immediately to trial if the individual did not accept the proposal. Ex. 13 at 1, 2. From the written record, the individual's characterization that the counseling was voluntarily agreed upon by him seems a distortion of the prosecutor's offer to dismiss the criminal charge.

The hearing did not clarify the individual's present method of disciplining his children. In discussing the impact of the counseling he had undertaken, the individual stated, "I can tell you right now I don't spank my kids anymore, and I don't support it." Tr. at 102. Subsequently, the DOE counsel referred to the individual's approach to parenting and discipline and that it no longer included spanking and the individual responded. "I wouldn't say does not, but I'd say it's pretty limited. I try not to." *Id.* at 123. This later comment was in the context of the individual's testimony on an audio tape that his current wife had played for the local police which purported to document the individual striking or slapping his younger child on the head. When asked if such slapping on the head was behavior that still occurred towards his younger children (age three and under), the individual demonstrated a thumping motion with his hand as to what he still does, "It's not anything harsh . . . It's an attention getter . . . Well, when they're ignoring me, I like to . . . I use it to get their attention." *Id.* at 124.

Notwithstanding the individual's counseling following the 2007 battery charge and the additional training he testified that he had undertaken in the prior year on parenting, I do not believe the individual has acknowledged the severity of the underlying behavior or removed doubt that behavior similar to the 2007 incident will not recur. *Cf.* Adjudicative Guideline, Guideline E at ¶17(d).

3. Criminal Complaints Lodged by Former Wife

Local police records document three incidents between the individual and his former wife in 2011 through 2012: the individual was charged with trespassing on his former wife's property (September 2011) and with custodial interference and battery (January 2012), and his former wife filed a civil complaint for failure to return their daughter as agreed (October 2012). With respect to the trespass charge, the individual testified that he had called his former wife before he drove up her driveway with their daughter so that their daughter could retrieve some items for school and that the police report documented that

he never left the vehicle. Tr. at 106 – 107, 245 – 246. At the hearing, I agreed to hold open the record for additional time to allow the individual to submit the police report to document his assertions. *Id.* at 270. To date, the individual has not been submitted the police report to either me or DOE's counsel.

With respect to the October 2012 civil complaint that the individual failed to return his daughter as agreed upon with her mother, the police report indicates that the individual misrepresented to his former wife statements made by the police to the individual. Specifically, the individual purported to state to his former wife that the police had "suggested" to him that he keep their daughter an extra night. Ex. 8 at 13. When asked about the police report during the hearing, the individual did not recall the report or the underlying statements, but also did not seemed troubled by a police report that he may have misrepresented statements made by the police. Tr. at 243 – 244. Such dishonesty constitutes security concerns under Criterion L.

The individual testified that his daughter did not feel safe at her mother's home. In January 2012, he attempted to get an emergency injunction to gain custody and, after instituting that process, enrolled his daughter at a new school closer to his home. The injunction was never granted. *Id.* at 110 – 112. The individual testified that his former wife has been subsequently charged with "injury to a child" for injuring their daughter and that custody of their daughter has informally been transferred to the individual. *Id.* at 138 – 143. The individual submitted a letter from a local prosecutor notifying the individual and his daughter of a pretrial conference on the criminal charge against his former wife. *See* Ex. A. Protecting one's child from legitimate danger would mitigate security concerns arising from these related criminal charges or complaints; however, the documentation provided on this matter was quite sparse. The individual indicated that he had "volumes of police reports" relating to the charging of his former wife for injury to a child. *Id.* at 229. Again, I agreed to hold open the record to receive these materials and none were submitted to either me or DOE's counsel. *Id.* 229 – 230, 270. Without additional documentation, I lack sufficient information to find that the individual has mitigated that security concerns arising with respect to these incidents.

4. Criminal Complaints Lodged by Current Wife

During October 2012, the local police had a number of interactions with the individual and his current wife. See Ex. 8. The following facts are not disputed: that the individual's wife reported a domestic battery; that the individual held her against the wall while instructing his daughter to remove his two younger children from their home; and that, on the following day, the individual took the phone from his wife while she was trying to call the police. Tr. at 21 – 24, 31 – 33, 117 – 118, 124 – 125. Unclear is whether the individual was aware that his wife was calling 911 when he took her phone and disconnected the call. The contemporaneous police reports indicate he acknowledged knowing she was making a 911 call; he has subsequently denied such knowledge at the time. Ex 8 at 5; Tr. at 241 – 243. Also unclear is whether he struck his wife's hand with his fist when she attempted to retrieve her phone from his pocket; the individual testified that he had no memory of doing so, but testified that it seemed "reasonable" that he would have done so if she was trying to get a phone from his pocket. *Id.* at 33, 127. The

individual was subsequently charged with intentional damage to a telecommunication device for interfering with the 911 call. Ex 10 at 1 – 2.

Subsequently, the individual's wife obtained a restraining order and a three-month protective order which required the individual to return their children to his wife and vacate their home. Tr. at 38 – 40. They reconciled in December 2012. *Id.* at 58 – 59. The individual's wife has undertaken training for victims of domestic violence and the individual has taken classes at an abuse clinic. *Id.* at 42; Ex. B. Together they have engaged in marriage and family counseling and other therapeutic programs with a clear intent to create a healthy and functional family unit. Both credibly testified as to changes they have made to the depth and method of their communication and the manner in which they handle conflict when it arises. Tr. at 42 – 51, 149 – 159. The individual presented information on the training he was taking and continuing to take. Ex. B.

The individual and his wife are to be commended for the steps that they have taken to modify their behavior within their marriage. Mitigation of security concerns arising under Criterion L is permitted when an "individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that caused the . . . inappropriate behavior, and such behavior is unlikely to recur." Adjudicative Guidelines, Guideline E at ¶17(d). While the individual has commenced appropriate steps to mitigate the concerns arising from the incidents with his current wife, in order to show sufficient rehabilitation his counseling needs to be accompanied by a substantial period of time during which the inappropriate behavior does not recur. As of the date of the hearing, the individual and his wife have been reconciled for approximately five months. This is insufficient time to demonstrate adequate rehabilitation.

At the time that the individual was subject to "move out" or protective order, his employer reported being contacted by the local police. According to a contemporaneous memo prepared by his employer, the police stated (1) that a person was only permitted to remove weapons from his home during a "move out" if the weapons were required for performance of his job, and (2) that the individual indicated he needed to retrieve his weapon from his house because it was required for his job. The employer informed the police officer that the individual is not required to use his personal weapons in the performance of his job and, at the time of the "move-out," the individual had been on "site access denial" for nearly ten months. Ex. 7. At the hearing, the individual testified that he had no recollection of these conversations, but stated that if he had wanted to remove a gun from his house it was his prerogative to do so. Tr. at 237 – 238. I found the documentation of the employer to be credible. This is another example of dishonesty that is disqualifying under Criterion L. No mitigation was presented.

B. Hearing Officer Evaluation of Evidence and Findings of Facts: Pattern of Inappropriate Workplace Behavior and an Inability to Follow Rules and Regulations

The LSO cited events occurring between 2005 and 2011 to demonstrate a pattern of inappropriate workplace behavior and an inability to follow rules and regulations. Ex. 1 at 7 – 9.

1. Harassment of Co-Worker – Arm Twisting (2005)

An employee filed a harassment complaint against the individual, claiming that he had physically grabbed her arm and either pulled or twisted it behind her on three separate occasions during a one month period of time. The individual was in a managerial position at the time and the other employee was not (though she was not under his direct supervision). At the hearing, the individual testified (and confirmed) that this happened on only one occasion, not three, and it arose because the employee had asked the individual to demonstrate a certain procedure on her. Tr. at 168, 245. This testimony contradicts earlier statements made by the individual in the 2012 PSI in which he stated that it had occurred on three occasions (as the employee reported) and relied upon it occurring three times before the employee complained as evidence that it was non-objectionable, friendly interaction between two co-workers. Ex 5 at 69 – 70. At other times, the individual describes the co-worker as someone he had a difficult relationship with and who was unhappy because he had reprimanded her for her inappropriate behavior in the workplace. *Id.* at 64 – 70; Tr. at 164 – 172. At times, the individual has also expressed regret that the incident occurred, but blamed the culture of the workplace. Ex. 5 at 68 – 69.

From the evidence presented, I conclude that the behavior occurred on three separate occasions and appears to have been intended to intimidate an employee whose behavior he found inappropriate. This conclusion is consistent with his employer's verbal counseling of the individual as a result of the complaint. Ex. 15 at 12. Even setting aside the reliability issues raised by the individual's differing accounts of the incident(s), the testimony offered by the individual to mitigate the behavior appeared to be an attempt to minimize the seriousness of his behavior, as opposed to an acknowledgement of the inappropriateness of the behavior. *Cf.* Adjudicative Guidelines, Guideline E at ¶ 17(c). The physical harassment incident cited by the LSO under Criterion L has not been mitigated.

2. Employee Reported Feeling Threatened (2006)

The individual interviewed an employee about a security infraction the employee allegedly committed. The employee reported that he had felt threatened during the interview; the employee's supervisor who was present throughout the interview corroborated the employee's concerns. The individual received a letter of counseling for the event and, subsequently, submitted a letter of rebuttal. His employer rejected the arguments advanced in the rebuttal and sustained the letter of counseling. Ex. 11.

In mitigation of this matter, the individual testified that this was the first time in his career that he had been disciplined for doing his job properly. Tr. at 162, 178. Management's sustaining the letter of counseling reinforced, in the individual's mind, his view that his management was inept and highlighted the need for his work unit to become autonomous. *Id.* at 185 – 188. This incident and the individual's explanation raise concerns the individual's ability and willingness to follow rules and regulations, particularly in situations where he may disagree with governing authority. The individual failed to mitigate the security concerns arising from this incident.

3. Harassment of Subordinates (2011)

The individual's manager received a report in November 2011 that the individual may have been engaging in sexual harassment and retaliation in violation of his employer's personnel policies. The report was not from one of the individual's subordinates, but from an employee in another work unit who had observed the individual's conduct. The manager's subsequent inquiries resulted in a decision by the manager and the employer's Human Resources Department to investigate the individual's workplace behavior. Ex. 15 at 4 – 10. The investigation resulted in the individual being placed on "site access denial" and, several months later, entering into a "Last Chance Agreement" with his employer which provided for a five-day disciplinary suspension, removal from his position and return to work in a new position. *Id.* at 13 – 16. As of the date of the hearing, the individual had not returned to work.

The investigation documented the following behavior by the individual: directing derogatory comments, epithets and slurs towards subordinates (although the comments referred to sexual orientation, they were not directed to individuals who were thought to be gay); heavily targeting those comments towards subordinates that the individual thought had made complaints to management which were the basis for a pending reorganization; directing subordinates not to speak to his management without speaking to him first (notwithstanding prior counseling that such a requirement was inappropriate under his employer's policies); and inappropriate physical contact with subordinates. *Id.* at 11 – 12. The investigation cited the following as inappropriate physical contact: a locker room incident in which the individual inserted a name tag in the crevice of a subordinate's buttocks and making physical contact with a subordinate while holding a knife in his hand. *Id.* at 6, 7.

The employer's investigation concluded that individual had violated the following Rules of Conduct maintained by the employer: (1) fighting or acts of physical violence, including pranks or horseplay; (2) failure to fully cooperate with the company or governmental officials during an investigation; (3) threatening or indecent conduct, abusive or threatening language, sexual or workplace harassment or discrimination of any kind; and (4) retaliation against an individual because the individual has raised a concern, filed a complaint or participated in an investigation or proceeding. *Id.* at 1.

The individual acknowledges that much of the reported behavior occurred (including the locker room incident) and he had no memory of some of the others (including the knife

incident). He believes that some of the behavior that was found objectionable resulted from his heeding advice in prior performance evaluations that he needed to be more relaxed with his subordinates and become "one of the guys." Ex. 5 at 83, 90; Tr. at 197. He testified that the behavior was embarrassing and that he regretted it. Notwithstanding his embarrassment and regret, the individual did not seem to acknowledge personal responsibility for the behavior. *Id.* at 196 – 197, 201. In addition to blaming his behavior on guidance given to him in prior performance evaluations, the individual excused his behavior as consistent with the behavior of the workplace and argued that he was being inappropriately singled out for common place behavior. Ex. 5 at 81.

To the individual's credit,[9] prior to the investigation he had apologized to a subordinate who had communicated through others that the individual's anti-gay slurs had become excessive. Ex. 15 at 5. During the investigation, employees who had been subjected to physical contact indicated that they had not been offended and had participated in similar activities themselves. *Id.* at 5 – 8.

This does not, however, negate that a subordinate was placed in a position of seeking an apology for verbal harassment by a manager or that a manager failed to establish an atmosphere of compliance with an organization's rules. At the hearing, I confirmed that the individual had received training in his employer's rules and policies; however, it was unclear whether he viewed the training or the rules with much seriousness. Tr. at 250 – 252. While the individual was vocal in his unhappiness over his management lack of understanding (in his view) of the requirements of his job work and encouraging his subordinates (in his view) to break the "chain of command" in by-passing him to speak to management about their concerns, the individual did not appear accepting of requirements that his behavior needed to conform to his employer's rules and regulations. The chain of command seemed to apply more towards those below him than to himself.

An employer has a legitimate expectation that its rules and regulations will be followed. This is necessary to ensure that goals of the organization are met, that order is maintained in the workplace and that liability will be contained. Managerial personnel (such as the individual) need to be relied upon to follow and implement those rules and regulations regardless of their personnel views or the behavior of others in the organization. In this case, the individual chose not to follow or implement rules and now complains that he should not be held accountable while since his workplace culture was one of non-compliance. This view neglects that each person is responsible for his or her own compliance and that a manager (such as the individual) is entrusted with the responsibility of ensuring the compliance of those reporting to him or her and as well as setting an example for subordinates.

National security is premised upon those with access authorization complying with rules and regulations, accepting that such rules and regulations may be necessary for reasons

[9] The individual presented the testimony of one character witness and submitted eight written character references. The written references are consistent in praising the individual's patriotism and diligence, but many suggested workplace tensions and reinforced the desirability of a reassignment for the individual. I have assigned a neutral weight to these submissions.

unknown to them. A view excusing non-compliance based upon the behavior of others is not compatible with holding of access authorization.

The security concerns raised under Criterion L arising from the individual's treatment of his subordinates has not been mitigated.

C. Hearing Officer Evaluation of Evidence and Findings of Facts: Individual's 2011 e-QIP

The LSO raised security concerns with respect to Criterion L[10] based on two of the individual's responses on his 2011 e-QIP.

Section 22 of the e-QIP requires disclosure of information, *inter alia*, on any summons, citation or ticket to appear in court in a criminal proceeding within the prior seven years, regardless of whether the charge was dismissed. The individual responded "no" to this question, notwithstanding his being charged in 2007 for battery of his daughter. Ex. 4 at 31. During the 2012 PSI, the individual said he had omitted it because "it was a frivolous charge that was dropped." Ex. 5 at 21 – 22. The individual's response ignores the plain language of the question and is a questionable characterization of a charge for which prosecutors required four months of counseling prior to dismissing. Ex. 13. At the hearing, the individual provided a different explanation. He stated that his office maintains a file of prior e-QIP's which individuals refer to when they are subject to re-investigation; that the form is long and that he erred in merely copying information from his prior form. Tr. 231 – 233. This response does not seem credible since the individual answered the immediately preceding section of the e-QIP with information about his counseling in 2007 that was required by the local prosecutor. Ex. 4 at 30. The individual further minimized his inaccurate response by testifying that he had reported the 2007 incident to the appropriate personnel at the time he was charged and, therefore, the DOE already had the information. Tr. at 234. This ignores the importance of holders of access authorization providing complete, accurate information when requested as part of the security clearance process.

Section 13C of the e-QIP requires disclosure of any written warning, official reprimand, suspension or discipline for misconduct within the prior seven years. The individual responded "no" to this question, notwithstanding the disciplinary action in 2006 after an employee had felt threatened by him.[11] Ex. 4 at 14. During the 2012 PSI, he stated that he did not feel that the incident was within the parameters of the question notwithstanding that he had received a letter of counseling on the matter and had submitted a written rebuttal. Ex. 5 at 18 – 20. The letter of counseling was sustained by his employer

[10] The LSO brought no security concerns under Criterion F and no finding in this Decision is made under Criterion F. Criterion F relates to information that a person as "deliberately misrepresented, falsified, or omitted significant information from 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… ." 10 C.F.R. § 710.8(f).

[11] Although the individual responded "no" to this question, he did describe the 2006 complaint elsewhere in Section 13C of the 2011 e-QIP. [14-15]

following a review of the matter. Notwithstanding the rejection of his rebuttal, the individual justified his response on the 2011 e-QIP during the 2012 PSI by stating with respect to the incident that "there was no misconduct on my part." *Id.* at 19.

I find the individual's comments during the 2012 PSI reflective of his state of mind when responding to these questions on the 2011 e-QIP. In both answers, he chose to provide responses that ignored the plain meaning of the question and minimized his conduct (i.e., a criminal charge doesn't count if he concluded it was frivolous and workplace discipline doesn't count if he believed he didn't commit misconduct). These responses indicate a view that the individual's beliefs and conclusions supersede existing rules and regulations and suggest an unwillingness to conform one's behavior to rules and regulations that are personally inconvenient.

Additionally, these 2011 e-QIP responses do not reflect the candor and reliability required of holders of access authorization. Lack of candor during the security clearance process raises concerns that an individual may be unwilling or unable to comply with required security procedures and regulations and raises questions about the individual's character, reliability, trustworthiness and judgment. Based on the foregoing, the individual has not mitigated the security concerns associated with Criterion L with respect to his honesty, reliability and trustworthiness.

V. Conclusion

In the above analysis, I have found that there was sufficient derogatory information in the possession of the DOE that raises serious security concerns under 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 not brought forth sufficient evidence to mitigate the security concerns associated with Criterion L. Accordingly, I have determined that the individual's access authorization should not be restored at this time. 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
Hearing Officer
Office of Hearings and Appeals

Date: July 11, 2013