

*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: May 1, 2013) Case No.: PSH-13-0056
)
)
_____)

Issued: August 13, 2013

Hearing Officer Decision

Richard A. Cronin, Jr., Hearing Officer:

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

I. BACKGROUND

The individual is a contractor employee at a DOE facility and held an access authorization until it was suspended. In October 2012, the DOE discovered that the individual’s government-issued computer contained sexually explicit material. Exhibit 7 at 1. Subsequently, on January 23, 2013, the Local Security Office (LSO) conducted an interview (PSI) with the individual in order to address issues surrounding his government-issued computer misuse, his sexual behavior, and his previously disclosed history of depression. Exhibit 9. The LSO referred the individual to a DOE-contractor psychologist (DOE psychologist) for a forensic examination in February 2013. Exhibit 4. In a March 2013 report (Report), the DOE psychologist opined that the individual suffers from Dysthymic Disorder, Major Depressive Disorder, Recurrent (Moderate, without Psychotic Features) and Partner Relational Problem. *Id.* On April 2, 2013, the LSO issued a

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

² Decisions issued by the Office of Hearings and Appeals (OHA) are available on the OHA website located at <http://www.energy.gov/oha>.

Notification Letter informing the individual that it possessed reliable information that created a substantial doubt about the individual's continued eligibility for access authorization and it was therefore suspending the individual's security clearance. Exhibit 1. The Notification Letter also informed the individual that he was entitled to a hearing before a Hearing Officer.

The individual requested a hearing in this matter. The LSO forwarded this request to OHA, and the OHA Director appointed me the Hearing Officer. The DOE introduced nine exhibits into the record of this proceeding. The individual introduced one exhibit and presented the testimony of six witnesses, in addition to his own testimony.

II. FINDINGS OF FACT AND ASSOCIATED SECURITY CONCERNS

The Part 710 regulations require that I "make specific findings based upon the record as to the validity of each of the allegations" in the Notification Letter. 10 C.F.R. § 710.27(c). In this case, the Notification Letter describes the listed derogatory information as falling within paragraphs (h) and (l) of the criteria for eligibility for access to classified matter or special nuclear matter set forth at 10 C.F.R. § 710.8.³ Exhibit 1. The individual essentially does not dispute the factual allegations contained in the Notification Letter. I set forth my factual findings regarding the allegations in the Notification Letter below.

A. Criterion H

In the Notification Letter, the LSO relies on the DOE psychologist's opinion to support its reliance on Criterion H. In her Report, the DOE psychologist diagnosed the individual as suffering from Dysthymic Disorder, Major Depressive Disorder, Recurrent (Moderate, without Psychotic Features) and Partner Relational Problem. Exhibit 4. In making these diagnoses, she described her clinical findings and noted the individual's history of depressive illness and his intermittent and unsuccessful attempts to use antidepressant medications to treat his condition. Exhibit 4 at 3-4. She further concluded that these conditions have caused and may continue to cause a significant defect in the individual's judgment and reliability given the fact that, in her opinion, the individual has not managed his treatment of these disorders very well. Exhibit 4 at 6.

I find that there was adequate information to justify the DOE's invocation of Criterion H. It is well settled that an emotional, mental, and personality condition can impair judgment, reliability, or trustworthiness. *See Revised Adjudicative Guidelines for Determining Eligibility for Access to Classified Information issued by the Assistant to the President for National Security Affairs, The White House (December 29, 2005) (Adjudicative Guidelines), Guideline I; Personnel Security Hearing, Case No. PSH-12-0045 (2012).*

³ Paragraph (h) describes derogatory information indicating that an individual has "[a]n 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. § 708.8(l). Paragraph (l) describes derogatory information indicating that an individual has "[e]ngaged in any unusual conduct or is subject to any circumstances which tend to show that the individual is not honest, reliable, or trustworthy; or which furnishes reason to believe that the individual may be subject to pressure, coercion, exploitation, or duress which may cause the individual to act contrary to the best interests of the national security." 10 C.F.R. § 708.8(l).

B. Criterion L

The Criterion L allegations contained in the Notification Letter center around the individual's misuse of a government-issued computer to view sexually explicit materials. On October 4, 2012, the DOE received an allegation that the individual was misusing his government-issued computer. Exhibit 7 at 2. A subsequent investigation determined that the individual had stored 227 sexually explicit photos and video/movie clips on his government-issued computer. Exhibit 7 at 7. During the January 23, 2013, PSI, the individual admitted that the DOE had found sexually explicit material on his government-issued computer in October 2012. Exhibit 6. The individual also admitted that he, in fact, had downloaded, viewed and stored sexually explicit material on his computer.⁴ Exhibit 6. He stated that he knew that viewing such material was against DOE policy. Exhibit 9 at 27. Further, the individual stated during the PSI that, in 1998, he had used his government-issued computer to view a website containing sexually explicit material and was consequently formally reprimanded and his annual raise was withheld. Exhibit 9 at 25-26; Exhibit 8. On January 28, 2013, the individual was reprimanded for the recent misuse of his government-issued computer and was suspended for two weeks. Exhibit 6.

Given the evidence before me, I find that the LSO had ample grounds to invoke Criterion L. The improper use of a government-issued computer for viewing sexually explicit material raises security concerns about an individual's reliability and trustworthiness, calling into question the willingness or ability to properly protect sensitive systems, networks, and information. *See Adjudicative Guidelines*, Guideline M, ¶ 39; *Personnel Security Hearing*, Case No. PSH-12-0098 (2013). Therefore, the individual's viewing of sexually explicit material at his workplace also raises significant questions about his reliability, trustworthiness and his ability to protect classified information. Accordingly, the LSO properly invoked Criterion L.

III. REGULATORY STANDARDS

The criteria for determining eligibility for security clearances set forth at 10 C.F.R. Part 710 dictate that in these proceedings, a Hearing Officer must undertake a careful review of all of the relevant facts and circumstances, and make a "common-sense judgment . . . after consideration of all relevant information." 10 C.F.R. § 710.7(a). I must therefore consider all information, favorable and unfavorable, that has a bearing on the question of whether restoring the individual's security clearance would compromise national security concerns. Specifically, the regulations compel me to consider the nature, extent, and seriousness of the individual's conduct; the circumstances surrounding the conduct; the frequency and recency of the conduct; the age and maturity of the individual at the time of the conduct; the absence or presence of rehabilitation or reformation and other pertinent behavioral changes; the likelihood of continuation or recurrence of the conduct; and any other relevant and material factors. 10 C.F.R.

⁴ The individual contested the LSO's assertion in the Notification Letter that he admitted that from 2005 until October 2012, he viewed sexually explicit material on his government computer up to twice a day. *See* Exhibit 2. Rather, he claims that beginning in 2007 or 2008, he checked his personal email approximately twice a day, and that only sometimes he received and viewed sexually explicit material that was in his inbox. When he checked his personal email, he often did not view any sexually explicit material. Upon review of the January 23, 2013, PSI, I find that the individual admitted checking his emails once or twice a day but did not admit that on each occasion he would view pornographic materials. *See* Exhibit 9 at 23.

§ 710.7(c). In considering these factors, the Hearing Officer also consults the *Adjudicative Guidelines* that set forth a more comprehensive listing of relevant factors.

A DOE administrative proceeding under 10 C.F.R. Part 710 is “for the purpose of affording the individual an opportunity of supporting his eligibility for access authorization.” 10 C.F.R. § 710.21(b)(6). Once the DOE has made a showing of derogatory information raising security concerns, the burden is on the individual to produce evidence sufficient to convince the DOE that granting or restoring access authorization “will not endanger the common defense and security and will be clearly consistent with the national interest.” 10 C.F.R. § 710.27(d). The regulations further instruct me to resolve any doubts concerning the individual’s eligibility for access authorization in favor of the national security. 10 C.F.R. § 710.7(a).

IV. ANALYSIS

At the hearing, the individual presented testimony to establish that the Criteria H and L concerns have been resolved through his participation in therapy to treat his underlying psychological problems. Nonetheless, as explained below, I cannot find that the individual has adequately mitigated the Criteria H and L security concerns raised by the derogatory information contained in the Notification Letter.

A. Criterion H - Psychological Conditions

At the hearing, the Employee Assistance Program (EAP) counselor, who began seeing the individual on April 18, 2013, testified that the individual did not meet the criteria for Major Depressive Disorder. Transcript of Hearing (Tr.) at 41. She further stated that the individual does not satisfy all the criteria for Dysthymic Disorder or Partner Relational Problem. Tr. at 41. However, she was still “generally fine” with the DOE psychologist’s report, and she diagnosed the individual as experiencing “occupational problem[s].” Tr. at 31. The EAP counselor concluded that the individual has a positive prognosis because he has confronted his problems and sought adequate treatment. Tr. at 35.

A psychiatrist, who the individual employed to conduct an evaluation, also testified.⁵ Tr. at 48. He agrees with the DOE’s psychologist’s diagnosis of the individual as having Dysthymic Disorder, Major Depressive Disorder (not severe), and Partner Relational Problem. Tr. at 49. Moreover, it is his opinion that the individual’s mood problems have been recurrent for 20 years, which causes his depressive symptoms to worsen at times, but that “he acted appropriately each time by seeking proper medical attention,” which reflects his good judgment. Tr. at 50. He stated that the Dysthymic Disorder is chronic and that it could worsen at times. Tr. at 52. Furthermore, the psychiatrist explained that the individual is “committed to the treatment, he’s going regularly, and I think that’s a good sign.” Tr. at 53. He concluded that there are many indications that “even under stressful conditions, that [the individual] would tend to resort to more appropriate coping devices [than viewing pornography] and use good judgment.” Tr. at 64.

The individual’s psychotherapist, who he began seeing weekly beginning on June 6, 2013, testified that he agreed with the DOE psychologist’s report. He went on to explain that the individual is depressed and that his condition could be treated if he continues with therapy. Tr.

⁵ The psychiatrist was not employed to provide treatment to the individual.

at 70. However, he opined that the individual has not acquired all the “skills and tools . . . to manage [his] depression and mood disorder,” but that is due to the fact that he only had four sessions. Tr. at 71. With more therapy, he should develop those skills. Tr. at 71. While the psychotherapist stated that the individual’s prognosis is positive, he asserted that it would take a couple more months before he could learn to manage his depression and a few additional months of maintenance. Tr. at 71-72, 75. Further, he expressed that the individual’s problem with viewing sexually explicit material on his government-issued computer resulted from his depression not being treated. Tr. at 73. Finally, he recommended that the individual seek a second opinion from a psychiatrist, with regard to the possibility of being prescribed medication for his depression.⁶ Tr. at 77.

At the hearing, the DOE psychologist agreed that the individual should consult with a psychiatrist about being prescribed medication to treat his depression. Tr. at 119. In addition, she stated that the individual’s Major Depressive Disorder is in partial remission, and therefore, he currently does not meet the full criteria for that diagnosis. Tr. at 119. In all, while the individual’s treatment plan is effective, it is too soon for the DOE psychologist to conclude that his risk for relapse is low. Tr. at 120. She also testified that the individual should consider marriage counseling. Tr. at 123.

The individual testified that he intends to continue with therapy to treat his depression and that he has already learned techniques to recognize the symptoms of depression and to address them. Tr. at 97. He also acknowledges the mistakes that he has made in the past, explaining that he is now “much more aware” and “looking more diligently at alternatives to the old bad habits.” Tr. at 98.

While I commend the individual for seeking therapy and learning new ways to cope with his depression, the individual has not had enough therapy for me to conclude that the security concerns associated with Criterion H have been mitigated. Based on his testimony, it is clear that the individual understands the benefits of therapy for treating his depression and is committed to his treatment plan. Nonetheless, his psychotherapist and the DOE psychologist opined that the individual needs additional therapy, at least several more months, before they can conclude that there is a low probability of recurrence or exacerbation of his depression. Tr. at 71-72, 75, 120. Further, I find the testimony of the DOE psychologist, psychiatrist and psychotherapist more convincing on the issue on the state of the individual’s recovery than that of the EAP counselor. Given the expert testimony regarding the state of the individual’s recovery, I cannot conclude that his psychological problems are sufficiently under control to mitigate the Criterion H security concerns.

B. Criterion L – Misuse of a Government-Issued Computer

During the hearing, the individual admitted to using his government-issued computer to view sexually explicit material through his personal email account. Tr. at 96. The individual acknowledged that viewing the sexually explicit material on his government-issued computer was a “failure” on his part and a “stupid mistake.” Tr. at 96. He explained that he viewed the images out of habit of checking his personal email account at work and consequently, he deactivated the email account that contained the sexual images. Tr. at 102. Therefore, he claims

⁶ The individual was previously advised by a physician that he should not use prescription anti-depressants because of a pre-existing medical condition.

that he will not view such material on his computer again, and that he now recognizes the consequences for engaging in such behavior. Tr. at 103.

As additional mitigation, the individual presented testimony from experts asserting that his viewing of pornographic material at work is not a major concern and was a result of his depressive disorders. The individual's psychiatrist testified that pornography is not a significant coping device for the individual. Tr. at 56. While he believes it presents some questionable judgment on the part of the individual, it does not reflect a major concern and instead, presents a low indication that the individual does not exercise good judgment. Tr. at 57-59.

The individual's psychotherapist testified that after evaluating and treating the individual for four sessions, he believes that the individual's mood disorder, primarily depression, has been driving the recent lapses in judgment. Tr. at 69-70. The individual's depression, his inability to manage his depression and the individual's hopelessness and boredom drive his desire to view pornography. Tr. at 73. He opined that the individual does not suffer from any type of sexual addiction and thus he believes that he is unlikely to repeat a pattern of viewing pornography provided that the individual completes a course of treatment for his underlying depression. Tr. at 70-71.

None of the mitigating factors listed in *Adjudicatory Guidelines'* Guideline M (Use of Information Technology Systems) apply to the case before me. The individual's misuse of his government-issued computer is recent and his misuse was not an unintentional or inadvertent. See *Adjudicatory Guidelines, Guideline M*, ¶ 41(a), (c). Nor can I find that the individual's misuse of his computer was minor and done in the interest of organizational efficiency. *Id.* at ¶ 41(b).

I find that the individual's viewing of sexually explicit material on his government-issued computer is a result of his mood disorder. Tr. at 36. The psychotherapist's testimony is convincing on this issue and is supported by the individual's statements in the January 23, 2013, PSI indicating that he viewed pornography because of "boredom" or a desire to "escape from reality." Exhibit 9 at 37-38. Nonetheless, as discussed above, I find that the individual has not resolved the concerns raised by his mood disorder.

Because none of the *Adjudicatory Guidelines'* mitigating factors apply in this case and the individual's underlying psychological condition has not been resolved, I cannot find that the concerns associated with Criterion L have been sufficiently mitigated.⁷

V. CONCLUSION

I find that the Criteria H and L derogatory information described in the Notification Letter raises serious security concerns regarding the individual. After considering all the relevant information,

⁷ Even if the individual's poor judgment in viewing pornography at work is not intrinsically related to his depressive disorders, I could not find that the individual has mitigated the associated Criterion L concerns. The individual's conduct in viewing pornography using government-issued computers is of long duration and the individual has only a limited period of time demonstrating reformed behavior. Further, the DOE psychologist's Report is somewhat concerning given her finding that the individual has "no conscious thought behind it [viewing pornography]" and that the individual's lack of awareness makes him less likely to be able to control his behavior regarding viewing pornography at work. Ex. 4 at 5; see Ex. 9 at 58.

favorable and unfavorable, in a comprehensive common-sense manner, including weighing all the testimony and other evidence presented at the hearing, I also find that the individual has not brought forth sufficient evidence to mitigate the security concern raised by the Criteria H and L derogatory information. I therefore cannot find that restoring the individual's access authorization will not endanger the common defense and is clearly consistent with the national interest. Accordingly, I have determined that the individual's access authorization should not 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.

Richard A. Cronin, Jr.
Hearing Officer
Office of Hearings and Appeals

Date: August 13, 2013