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**United States Department of Energy
Office of Hearings and Appeals**

In the Matter of:	Personnel Security Hearing)	
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Filing Date:	August 22, 2013)	Case No. PSH-13-0099
)	
_____)

Issued: November 7, 2013

Hearing Officer Decision

Diane DeMoura, Hearing Officer:

This Decision concerns the eligibility of XXXXXXXXXXXX (“the Individual”) to hold a Department of Energy (DOE) 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 detailed below, I find that the DOE should not restore the Individual’s access authorization at this time.

I. BACKGROUND

The Individual is employed by a DOE contractor and currently holds a suspended DOE access authorization. DOE Exhibit (“Ex.”) 3. In November 2012, the Individual timely reported to the Local Security Office (LSO) that he was arrested and charged with two felonies: False Voting and Forgery. DOE Exs. 5, 6. This information prompted the LSO to request that the Individual participate in a Personnel Security Interview (PSI) in January 2013, in order to discuss the circumstances underlying the Individual’s arrest and the resulting criminal charges. DOE Ex. 10. In March 2013, the LSO informed the Individual that there existed derogatory information that raised security concerns under 10 C.F.R. § 710.8(l) (Criterion L).² See DOE Ex. 1 (Notification

¹ Access authorization, also known as a security clearance, is an administrative determination that an individual is eligible for access to classified matter or special nuclear material. 10 C.F.R. § 710.5.

² Criterion L pertains to conduct tending to show that the Individual was “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).

Letter, March 5, 2013). The LSO also notified the Individual that he was entitled to a hearing before a Hearing Officer in order to resolve the security concerns. *Id.*

The Individual requested a hearing on this matter. The LSO forwarded his request to the Office of Hearings and Appeals, and I was appointed the Hearing Officer. At the hearing, the Individual, represented by counsel, presented his own testimony, as well as the testimony of the following five witnesses: his manager, his mentor, a current co-worker, a former co-worker, and a friend. The Individual also tendered fourteen exhibits into the record (Indiv. Exs. A-N). The DOE Counsel submitted eleven exhibits (DOE Exs. 1-11), and presented no witnesses. *See* Transcript of Hearing, Case No. PSH-13-0099 (hereinafter cited as “Tr.”).

II. REGULATORY STANDARD

The regulations governing the Individual’s eligibility for access authorization are set forth at 10 C.F.R. Part 710, “Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material.” The regulations identify certain types of derogatory information that may raise a question concerning an individual’s access authorization eligibility. 10 C.F.R. § 710.10(a). Once a security concern is raised, the individual has the burden of bringing forward sufficient evidence to resolve the concern.

In determining whether an individual has resolved a security concern, the Hearing Officer considers relevant factors, including “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 of the individual at the time of the conduct; the voluntariness of 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,” and the impact of the foregoing on the relevant security concerns. 10 C.F.R. § 710.7(c). In considering these factors, the Hearing Officer also consults adjudicative guidelines that set forth a more comprehensive listing of relevant factors and considerations. *See* 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).

Ultimately, the decision concerning eligibility is “a comprehensive, common-sense judgment made after consideration of all relevant information, favorable and unfavorable” 10 C.F.R. § 710.7(a). In order to reach a decision favorable to the individual, the Hearing Officer must find that “the grant or restoration of access authorization to the individual will not endanger the common defense and security and is clearly consistent with the national interest.” 10 C.F.R. § 710.27(a). “Any doubt as to an individual’s access authorization eligibility shall be resolved in favor of the national security.” *Id.* *See generally Dep’t of the Navy v. Egan*, 484 U.S. 518, 531 (1988) (the “clearly consistent with the interests of national security” test indicates that “security clearance determinations should err, if they must, on the side of denials”).

III. FINDINGS OF FACT

The facts at issue in this case, which took place during the November 2012 Presidential election, are essentially undisputed. During the early voting period, the Individual went to a local polling station and intentionally voted in his son's name. DOE Ex. 10 at 66; *see also* DOE Ex. 6. The Individual took this action with his son's knowledge and consent.³ *Indiv. Ex. A*; DOE Ex. 10 at 63-64. It was not a spontaneous decision. The Individual and his son decided that the Individual would vote as the son at least a few days in advance of the Individual's first visit to the polls. DOE Ex. 10 at 59-64. The Individual expected that he would be successful in voting as his son because the poll staffers "are not allowed to ask for [identification]." DOE Ex. 10 at 63. During the process of voting for his son, the Individual expressly represented to poll workers that he was his son. At various times during the voting process, he provided his son's name, address (the same as the Individual's address), and social security number as if they were his own, and signed an electronic signature pad with his son's name. *Tr.* at 62-63; DOE Ex. 10 at 66-68. When asked for a poll worker for identification, the Individual, aware that identification could not be required as a condition of voting, responded that he did not have his with him because he did not have one with show his likeness and his son's name. *Id.* at 66-67. The Individual was permitted to vote. However, at some point, his appearance aroused suspicion among the poll workers, likely because he did not appear to be the age listed on his son's voter registration. The staff at the polling station investigated the matter, learning that another male voter – the Individual – was registered at the Individual's address. Consequently, the Individual's voter registration was flagged. DOE Ex. 10 at 82-85. A few days later, the Individual visited a different polling station in order to vote again – this time as himself. *Id.* at 93. However, because his registration had been flagged, the Individual was provided a provisional ballot on which to cast his vote. *Id.* at 95-100. Unbeknownst to the Individual at that time, the matter was turned over to local law enforcement for investigation of possible voter fraud. Within two weeks, a warrant was issued for the Individual's arrest. *Id.* at 111-12. He was charged with two felonies, False Voting and Forgery. *Id.* at 34-35.

In lieu of indictment and prosecution, the Individual was accepted into a pre-prosecution diversion program in August 2013, and he was placed on probation for a period of twelve to twenty-four months. *Indiv. Ex. N*. As of the hearing date, the Individual had successfully completed approximately two months of his probationary period. *Tr.* at 31.

IV. THE NOTIFICATION LETTER AND ASSOCIATED SECURITY CONCERNS

As stated above, the LSO issued a Notification Letter identifying security concerns under Criterion L of the Part 710 regulations. DOE Ex. 1. In support of its Criterion L concerns, the LSO cited the Individual's November 2012 arrest, and the underlying facts leading to the arrest. *Id.* It is well-established that criminal conduct raises security concerns under Criterion L. Such conduct "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." *See* Adjudicative Guidelines, Guideline J, ¶ 30; *see also* Guideline E, ¶ 15 ("Conduct involving questionable judgment . . . can raise questions about an individual's

³ The Individual's son was away at college at the time of the incident. He did not timely obtain an absentee ballot because he intended to return home to vote. *Indiv. Ex. A*. When the son unexpectedly decided not to return home during the voting period, the son and the Individual decided that the Individual would cast his vote. *Id.*

reliability, trustworthiness, and ability to protect classified information.”). Given the facts in this case, I find that the LSO had ample grounds to invoke Criterion L.

V. ANALYSIS

The Individual did not dispute any of the facts underlying the security concerns in this case. The only question remaining is whether the Individual has brought forward sufficient evidence to mitigate the security concerns. In making a determination regarding the Individual's eligibility for DOE access authorization, I have thoroughly considered the record in this proceeding, including the hearing testimony and the documentary evidence. For the reasons set forth below, I am unable to find that restoring the Individual's suspended DOE 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).

At the hearing, the Individual explained the events leading to his November 2012 arrest in detail. Tr. at 46-56. The Individual stated that he did not act with the intention to “steal a vote” or to commit a crime. Tr. at 49-50, 62. He acknowledged that when he voted, he was aware, generally, that voting for another person was illegal, but he was not thinking of his actions in that light when he voted for his son. Tr. at 47, 60. Rather, according to the Individual, he and his wife are admittedly overprotective of their children, and he was used to handling his son’s affairs, such as his banking and taxes. Therefore, when it appeared that his son would not return home in time to vote, the Individual discussed the matter with his son and, with his son’s consent, decided to cast his son’s vote for the candidate that his son selected. Tr. at 61; *see also* Indiv. Ex. A. The Individual believed that he was acting as “an extension” his son, representing his interests. *Id.* The Individual stated that he did not anticipate that he could face such severe consequences for his illegal act. Rather, he believed that the worst that could happen was that he would not be allowed to vote for his son. He never imagined that he would be arrested and charged with felony offenses. Tr. at 62.

Throughout the hearing, Individual expressed remorse for his behavior leading to his November 2012 arrest. He acknowledged that he should not have voted for his son simply because he believed that he could get away with doing so. Tr. at 28. He stated, “it was wrong, and I know that now, and that came out clear to me [during the PSI], you know, that I did it because I could do it, and that’s not what I believe, and that’s not what I teach my family to believe.” Tr. at 29. The Individual claimed that he is an “honest person” who made a “bad decision.” Tr. at 57. He further characterized his decision to vote for his son as “a dumb thing, a stupid mistake, that is really out of character” Tr. at 35. According to the Individual, such a mistake will not happen again in the future because he “couldn’t go through this again.” Tr. at 64. Specifically, he stated that he has gained humility and learned a great deal from the personal, professional, and financial consequences that he has faced as a result of the November 2012 incident. *Id.* As a result, he has changed the way he thinks about how he should comport himself, “not trying to get away with things just because [he thinks he] can” Tr. at 33.

The Individual averred that he cannot be subjected to blackmail or coercion as a result of his November 2012 arrest. Tr. at 24. He testified regarding the importance he places on national

security, and stated that he would immediately report any attempts to blackmail or coerce him to the appropriate officials, regardless of the potential consequences to himself. Tr. at 34, 71.

The other witnesses' testimony primarily served as an attempt to bolster the Individual's assertion that his criminal behavior in November 2012 was an isolated incident. For example, the witnesses testified that the Individual is honest, reliable, and of high integrity. Tr. at 108, 116, 132-33, 139-40. The Individual's friend and his former co-worker added that they were surprised when they learned of his arrest because the behavior was unlike something the Individual would do and "out of character" for him. Tr. at 110, 144. According to the witnesses, the Individual is someone who is devoted to his family, and a highly-regarded, high-performing professional, who is looked upon as a mentor to others. Tr. at 76, 93-94, 121, 123, 131-32, 139, 141; *see also* Individ. Exs. E-L (professional recognition awards), M (performance appraisals). They also stated that, when discussing his arrest, the Individual has been forthright about his conduct, accepted responsibility for his behavior, and expressed remorse for his poor judgment. Tr. at 117-19, 134. The Individual was actively involved in his community and church prior to November 2012, and has become even more involved in various volunteer capacities since his arrest. Tr. at 15-21. In recognition of his dedication to his community, the Individual has received the President's Volunteer Service Award on a number of occasions. Tr. at 21-22; *see also* Individ. Exs. B-D.

According to the Adjudicative Guidelines, among several factors that may serve to mitigate security concerns raised by an individual's past criminal behavior are that the criminal conduct was not recent, is unlikely to recur, and has been successfully rehabilitated. Adjudicative Guidelines, Guideline J, ¶ 32. Successful rehabilitation may include, but is not limited to, "the passage of time without recurrence . . . , remorse . . . , good employment record, or constructive community involvement." *Id.* at ¶ 32(d). Similarly, several conditions may serve to mitigate security concerns pertaining to an individual's questionable judgment. Adjudicative Guidelines, Guideline E, ¶ 17. Among them are that "the offense was so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment;" "the individual has acknowledged the behavior and . . . taken positive steps to alleviate the stressors circumstances, or factors that caused untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur;" and "the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress." *Id.* at ¶¶ 17(c), (d), (e).

In this case, there is no question that the Individual is a highly-educated, highly-accomplished professional with an excellent work record, and that he is dedicated to his family and active in several community organizations. In addition, he readily admits his criminal behavior, and has fully accepted the consequences of his actions and expressed his remorse for his conduct. After evaluating the Individual's demeanor throughout the hearing, I found him to be a candid and credible witness, and his testimony, particularly with respect to his remorse, was corroborated by the testimony of other witnesses. However, despite these positive factors, I cannot find that the Individual has mitigated the security concerns stemming from his considerable lack of judgment in November 2012, which ultimately caused him to commit a serious criminal offense for which he was arrested.

While the Individual has characterized his criminal behavior as an isolated lapse in otherwise good judgment that will not recur in the future, the very nature of that lapse, particularly its illegality, raises significant questions regarding the Individual's judgment and reliability. While there are no other incidents of criminal behavior or poor judgment documented in the record, I cannot readily attribute the November 2012 incident to an unexplained, uncharacteristic lapse in otherwise sound judgment. It is undisputed that the Individual planned in advance to vote for his son, that he was aware of the illegal nature of his plan, that he had multiple opportunities to rethink his decision and not go through with the plan, and that he affirmatively represented himself as his son to poll workers on multiple occasions during the voting process. The Individual is a highly-educated, well-established, civic-minded professional who is obviously knowledgeable of politics and the applicable laws and rules. Quite simply, he should have known better and his conduct was inexcusable. Moreover, this incident occurred slightly less than one year prior to the hearing. The Individual is still on probation for the offense, and is likely to remain so until at least August 2014. Therefore, he currently must refrain from further criminal behavior, and comply with the conditions of his probation, or face prosecution for his felony offenses. That the Individual remains on probation at this time is an important factor in my consideration of the likelihood of recurrence. Specifically, in assessing the length of time without recurrence of similar questionable conduct, I cannot begin to mark the Individual's period of responsible comportment until such time that he is off probation and no longer compelled to good behavior by the legal system, but rather behaves responsibly and exercises sound judgment on his own, unmotivated by the fear of additional legal or criminal consequences. Given these factors, I am unable to conclude at this time that the criminal behavior at issue here "is unlikely to recur or does not cast doubt on the Individual's reliability, trustworthiness, or good judgment[.]" See Adjudicative Guidelines, Guideline E, ¶ 17; Guideline J, ¶ 32. Consequently, I find that the Criterion L concerns cited in the Notification Letter remain unresolved.

VI. CONCLUSION

Upon consideration of the entire record in this case, I find that there was evidence that raised doubts regarding the Individual's eligibility for a security clearance under Criterion L of the Part 710 regulations. I also find that the Individual has not presented sufficient information to fully resolve those concerns. Therefore, I cannot conclude that restoring the Individual's suspended DOE access authorization "will not endanger the common defense and security is clearly consistent with the national interest." 10 C.F.R. § 710.7(a). Accordingly, I find that the DOE should not restore the Individual's suspended DOE access authorization at this time.

The parties may seek review of this Decision by an Appeal Panel, under the regulation set forth at 10 C.F.R. § 710.28.

Diane DeMoura
Hearing Officer
Office of Hearings and Appeals

Date: November 7, 2013