*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:	February 20, 2014	)	
		)	Case No.: PSH-14-0015
		)	

Issued : July 11, 2014

Administrative Judge Decision

Wade M. Boswell, Administrative Judge:

This Decision concerns the eligibility of XXXXXX (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 position that requires him to hold a DOE security clearance and participate in the Human Reliability Program (HRP).[2] He has been employed by the DOE contractor for approximately 29 years. As a holder of access authorization, the individual is required to report certain occurrences to the DOE through his employer and, in December 2011, the individual reported that he had been fined $700 under a "super speeder" law for driving 93 miles per hour (mph) in a 55 mph zone.

[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.

See Ex. 10. When the Local Security Office (LSO) examined the individual's driving record, it discovered that the individual had numerous traffic violations, most of which were below the reporting threshold[3] and not previously reported to the DOE by the individual. To address concerns about the individual's history of traffic violations, the LSO conducted a personnel security interview (PSI) with the individual on March 27, 2012. During that interview the individual volunteered that his taking a defensive driving class and not getting any traffic tickets in the future would demonstrate to the DOE that he had changed his driving habits. Exhibit 9 at 12, 13.

The individual completed a "driver improvement" class one month later, as he had agreed during the 2012 PSI; however, the following year, he received a traffic citation. *See* Exhibits 6 and 8. The individual reported the new citation promptly after its issuance (and prior to any determination of his culpability or a fine thereunder). Following the individual's self-report of his 2013 traffic citation, the LSO conducted another PSI with the individual on June 13, 2013. The 2013 PSI focused primarily on the individual's most recent traffic citation, but also addressed a reprimand the individual had received from his employer in 2010 for negligent operation of a vehicle while performing his work assignments. *See* Exhibit 4.

Since the PSI did not resolve the security concerns arising from the individual's driving history or other matters that surfaced during the LSO's inquiry, the LSO informed the individual in a letter dated January 16, 2014 (Notification Letter), that it possessed reliable information that created substantial doubt regarding his eligibility to hold a security clearance. In an attachment to the Notification Letter, the LSO explained that the derogatory information fell within the purview of two potentially disqualifying criteria set forth in the security regulations at 10 C.F.R. § 710.8, subsections (f) and (l) (hereinafter referred to as Criterion F and Criterion L, respectively).[4] *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. *See* Exhibit 2. The Director of the Office of Hearings and Appeals (OHA) appointed me the Administrative Judge in the case and, subsequently, I conducted an administrative hearing in the matter (Hearing). The LSO introduced 58 numbered exhibits into the record of the case and presented the testimony of two witnesses, including that of an LSO personnel security specialist. The individual, represented by counsel, introduced two lettered exhibits (Exhibits A and B) into the record and presented the testimony of two witnesses, including that of himself. 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.[5]

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[3] Traffic violations for which a fine of up to $300 is imposed are not required to be reported, unless the violation is alcohol-or drug-related. DOE Order 472.2, Attach. 4 at 1 (July 21, 2011).

[4] See Section III below.

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

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 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 restoring 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 Administrative Judge's Decision

In personnel security cases arising under Part 710, it is my role as the Administrative Judge to issue a Decision that reflects my comprehensive, common-sense judgment, made after consideration of all the relevant evidence, favorable and unfavorable, as to whether the granting or continuation of a person's access authorization will not endanger the common defense and security and is clearly consistent with the national interest. 10 C.F.R. § 710.7(a). I am instructed by the regulations to resolve any doubt as to a person's access authorization eligibility in favor of the national security. *Id.*

III. The Notification Letter and the Security Concerns at Issue

As previously noted, the LSO cited two criteria as the bases for suspending the individual's security clearance: Criterion F and Criterion L. Criterion F refers to information that a person has "deliberately misrepresented, falsified, or omitted significant information from a Personnel Security Questionnaire for Sensitive National Security Positions [(QNSP)], a personnel qualifications statements, a personnel security interview, written or oral statements made in response to official inquiry on a matter that is relevant to a determination regarding eligibility for DOE access authorization or [Part 710 administrative review] proceedings…" 10 C.F.R. § 710.8(f). Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness, and ability to protect classified information. Any failure to provide truthful and candid

answers during the security clearance process is of particular concern. S*ee* Guideline E of the *Revised Adjudicative Guidelines for Determining Eligibility for Access to Classified Information*, issued on December 29, 2005, by the Assistant to the President for National Security Affairs, The White House (Adjudicative Guidelines). With respect to Criterion F, the LSO alleges deficiencies in the individual's reporting of traffics violations and of an employment matter on five security questionnaires that he completed between 2009 and 2012. Ex. 1 at 6 – 7.

Criterion L concerns information that an individual has engaged in conduct "which tends to show that the individual is not honest, reliable, or trustworthy…." 10 C.F.R. § 710.8(l). 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." Adjudicative Guidelines at Guideline E. With respect to Criterion L, the LSO cites the individual's history of traffic violations, conduct in the workplace, undisclosed extra-martial affair, and failure to honor his verbal commitments to the DOE. Ex. 1 at 3 – 6.

IV. Findings of Facts and Analysis

I have thoroughly considered the record of this proceeding, including the submissions tendered in this case and the testimony of the witnesses presented at the hearing. In resolving the question of the individual's eligibility for access authorization, I have been guided by the applicable factors prescribed in 10 C.F.R. § 710.7(c)[6] and the Adjudicative Guidelines. After due deliberation, I have determined that the individual's access authorization should not be restored at this time. I cannot 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.

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

With respect to Criterion F, the Notification Letter alleges that the individual failed to report required traffic violations on four of his QNSPs and improperly characterized a workplace disciplinary matter on five QNSPs. At the beginning of the Hearing, the individual and the LSO entered into an oral stipulation to delete from the Notification Letter the five items alleging mischaracterization of the workplace matter. The stipulation also deleted from the Notification Letter the allegations that the individual had failed to make required disclosures relating to a 2007 traffic violation.[7] Tr. at 8 – 10.

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

[7] The Notification Letter includes allegations that a 2007 traffic violation was required to be disclosed on the QNSP based upon the maximum fine authorized by statute for the violation. The fine actually imposed

After giving effect to the stipulation of the parties, there remain three factual allegations with respect to the Criterion F security concern:

- on the individual's QNSP dated March 13, 2011, he failed to list his 2006 traffic violation;
- on the individual's QNSP dated August 11, 2011, he failed to list his 2006 traffic offense with a fine of $324.00; and
- on the individual's QNSP dated August 9, 2012, he failed to list his 2011 traffic offense with a fine of $700 and failed to list a traffic violation with a 12-month probation disposition.

Based on my examination of the record, I find as a factual matter that the individual omitted his 2006 traffic violation from the two QNSPs which he completed in 2011. Ex. 11, Ex. 12. Additionally, I find that the individual reported his 2006 traffic violation to his employer on March 11, 2006,[8] after being assessed a fine in excess of the reporting threshold. Ex. 22. The 2006 traffic violation was also reported by the individual on his QNSPs dated August 11, 2006, August 11, 2007, and February 12, 2009.[9] Ex. 21, Ex. 20, Ex. 15. Criterion F security concerns arise when a person *deliberately* falsifies or omits *significant* information in an attempt to mislead the government with respect to granting or continuing a security clearance. 10 C.F.R. § 710.8(f) (emphasis added). In light of the individual's reporting of his 2006 traffic violation in 2006 as required, and disclosing it on three subsequent security questionnaires, I find that the individual's omissions of the 2006 traffic violation in 2011 lacked *deliberativeness* to mislead the government and, as this information had been previously disclosed, it also lacked *significance.* I find that the individual has mitigated the Criterion F security concerns with respect to his omission of his 2006 traffic violation from his two 2011 QNSPs.

As noted above, the Notification Letter alleges Criterion F security concerns on the individual's 2012 QNSP for both "fail[ing] to list his 2011 traffic offense with a fine of $700.00 and fail[ing] to list a traffic violation with a 12 month probation disposition." Ex. 1 at 6 (Item II.A.4). With respect to the first concern, upon examination of the individual's 2012 QNSP, I find that the QNSP disclosed a traffic violation which matches the description of the individual's 2011 traffic violation, but lists the violation as occurring in 2012. Ex. 7. The LSO has not alleged any similar traffic violation in 2012 and the individual testified that his entry on the 2012 QNSP refers to his 2011 traffic

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upon the individual for the 2007 violation was $180 (per the stipulation of the parties) and, therefore, below the reporting threshold for traffic violations. Tr. at 9 –10, 153. *See* DOE Form 5631.18 and DOE Order 472.2, Attach. 4 at 1.

[8] The sentencing date for this violation is listed in documents provided by the LSO as May 10, 2006. Ex. 23 at 1.

[9] In reaching this conclusion, I note that on the individual's QNSP dated February 12, 2009, the date of the traffic violation disclosed is partially obliterated by a hole-punch; however, the information that is visible is consistent with the individual's 2006 traffic violation and the LSO raised no concerns regarding the inconclusiveness of this QNSP. Ex. 15; Ex.1.

violation. Ex. 1; Tr. at 116 – 117. In light of the foregoing, I find that the individual did not omit his 2011 traffic violation from his 2012 QNSP, although he listed it with an erroneous date. The 2011 traffic violation had been previously reported by the individual to his employer on December 22, 2011, after being assessed a fine in excess of the reporting threshold. Ex. 10. Such error lacks both the deliberativeness and significance required by Criterion F.

With respect to the second concern raised regarding the individual's 2012 QNSP, the Notification Letter did not identify a specific violation with respect to the allegation that "a traffic violation with a 12 month probation disposition" was omitted from the QNSP. At the Hearing, both the DOE Counsel and the LSO's personnel security specialist identified the 2011 traffic violation (discussed in the preceding paragraph) as also resulting in a "12 month probation disposition" which the individual omitted from his 2012 QNSP.[10] Tr. at 59. After the individual's counsel pointed out that no documentary evidence had been submitted showing that the disposition of 2011 traffic violation included probation, the personnel security specialist testified that the probationary period was attached to an earlier traffic violation. *Id.* at 62 – 64. The fine assessed on that earlier ticket ($168) was below the reporting threshold for traffic tickets. Ex. 23 at 2. Ultimately, the personnel security specialist testified that she was uncertain as to which traffic violation the Notification Letter intended to allege was omitted from the individual's 2012 QNSP.[11] Tr. at 65. As a result of the ambiguity in both the Notification Letter and the testimony presented by the LSO, the LSO has failed to sufficiently articulate an "omission" from the individual's 2012 QNSP. Even if the Notification Letter intended to refer to the earlier traffic ticket, the fine assessed on that ticket was below the threshold for reporting traffic violations and, therefore, the individual's omission of this violation from his 2012 QNSP was not required under the wording of DOE Order 472.2 *See* Note 3, *supra.* At the time that the individual completed his 2012 QNSP, he knew that DOE was aware of this earlier ticket (including the fine and probation assessed) as it was discussed with him during an earlier PSI. Ex. 9 at 7. Based upon the foregoing, I find that the LSO has not shown that a Criterion F security concern exists with respect to the individual's 2012 QNSP.

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

The Notification Letter cites the individual's history of traffic violations, conduct in the workplace, undisclosed extra-martial affair, and failure to honor his verbal commitments

[10] DOE Counsel: "Is it your understanding, that associated with that [2011] ticket was a 12 month probationary period?" Tr. at 59.

Personnel Security Specialist: "Correct." *Id.*

[11] Individual's Counsel: "Well, it appears from the records, the $700 one, probation wasn't attached to that. You're now pointing to a different ticket that probation was attached. I'm really asking you to clarify which ticket is it where he failed to list a probation period. He apparently listed the $700 for the ticket in '12, but then are you saying that's the same ticket, the failure to list probation, or is that a different ticket? Now I'm getting clarification. I originally thought you meant it was the same ticket, but you pointed us to a different ticket." Tr. at 65.

Personnel Security Specialist: "I don't know, I'm sorry." *Id.*

to the DOE to support the security concern that the individual has engaged in unusual conduct or is subject to circumstances which tend to show that he is not honest, reliable or trustworthy or furnishes reason to believe that the individual may be subject to pressure, coercion, exploitation or duress which may cause him to act contrary to the best interests of national security. *See* Ex. 1 at 3 – 6. As noted previously, at the beginning of the Hearing, the individual and the LSO entered into an oral stipulation and that stipulation also modified certain of the Criterion L security concerns set forth in the Notification Letter. Tr. at 8 – 10. I will refer to the stipulation where relevant in addressing the various categories of concerns raised by the LSO with respect to Criterion L.

1. Traffic Violations[12]

Findings of Fact. The Notification Letter states that the individual has been charged with 34 traffic offenses since 1987. The parties stipulated at the beginning of the Hearing as to the accuracy of 32 of those traffic citations:

November 9, 1987: Speeding
June 16, 1992: Speeding
June 14, 1992: Speeding
January 17, 1996: Speeding
November 29, 1996: Speeding
September 30, 1998: Speeding
February 2, 1999: Speeding
August 1, 1999: Speeding
August 18, 1999: Speeding
November 28, 1999: Speeding
April 10, 2001: Speeding
April 30, 2001: Speeding
November 25, 2001: Speeding
December 18, 2001: Speeding
January 23, 2002: Speeding
June 2002: Speeding
January 22, 2003: Speeding
September 7, 2005: Speeding
January 18, 2006: Speeding
February 9, 2006: Speeding
November 30, 2007: Speeding (fine of $180, per stipulation)
September 17, 2008: Failure to Obey Person Directing Traffic
January 2, 2009: Speeding
March 19, 2009: Speeding
August 9, 2009: Speeding[13]

[12] This section addresses the Criterion L security concerns raised in Section I.A. and I.D. of the Summary of Security Concerns attached to the Notification Letter. See Ex. 1 at 3 – 6.

[13] The Notification Letter listed that the citations dated August 9, 2009, February 14, 2010, May 28, 2010, and November 4, 2010, as being for both Speeding and "Repeat Serious Commercial Disqualification." Although the stipulation of the parties did not address the aspect of the citations with respect to "Repeat

February 14, 2010: Speeding
May 28, 2010: Speeding
June 7, 2010: Speeding
October 5, 2010: Speeding
November 4, 2010: Speeding
October 20, 2011: Speeding
April 6, 2013: Speeding

The LSO stipulated to the deletion of the remaining two traffic offenses from the security concerns raised in the Notification Letter. Tr. at 8 – 10; Ex. 1 at 3 – 4.

Although the stipulation by the parties does not include the amount of the fines assessed for each of these traffic violations, the vast majority of these citations were assessed fines in amounts below the reporting threshold for traffic violations. While the LSO had conducted PSIs with the individual in 1985, 2004 and 2009, the PSI conducted in 2012 is the first that addresses the individual's driving record. The 2012 PSI followed the individual's self-report of his 2011 violation, where he was fined $700 as a "super speeder" for traveling 93 mph in a 55 mph zone. At the time of that PSI, the LSO was aware that the individual had received 16 traffic violations, all for speeding, between 1992 and 2011. Ex. 9 at 11. During the 2012 PSI, the individual accepted responsibility for his driving record and stated that he had changed his driving habits. When asked what would convince the DOE that he had changed his behavior, the individual suggested that one could take a defensive driving class (similar to one he had taken years earlier) and not get any more tickets. *Id.* at 12 – 13. This response forms the basis of an oral commitment by the individual to the DOE.

In April 2013, slightly more than one year after the 2012 PSI, the individual was cited for speeding. He self-reported this ticket to his employer within four calendar days of receiving the ticket, although he did not know at that time whether the fine would be above the reporting threshold. In June 2013, the LSO conducted another PSI with the individual which focused on the individual's most recent speeding ticket and a 2010 workplace incident which involved a vehicular collision with a stationary object.

The 2013 PSI occurred one week after the individual had had a scheduled court date on his April ticket. Unlike the earlier PSI in which the individual accepted responsibility for violating traffic laws, the individual characterized his 2013 ticket as unjust and inappropriate. He had been cited as he was descending a hill that has a steep incline. He stated that until he was stopped by the police, he was unaware that the speed limit was 45 mph on that section of the road. He criticized the speed limit by stating that the hill had "a very steep incline, and to ride 45 up that incline will strain your engine…." Ex. 4 at 8. With respect to descending the hill, the individual was also critical of the speed limit, stating "You'd have to be riding your brakes. That doesn't even [make] sense. Mechanical sense to the car." *Id.* The record is inconsistent as to whether the individual was cited for traveling 61 mph or 69 mph in a 45 mph zone; for the purposes of my analysis, this inconsistency does not need to be reconciled.

Serious Commercial Disqualification," the individual's driver's record stated that these were "withdrawn" and I have removed them from the list of violations. *See* Ex. 3 at 3 – 4.

During the 2013 PSI, the individual reported that he had retained an attorney to represent him on the April 2013 traffic ticket because he felt the citation had been unfair. The individual had not previously utilized legal counsel on a traffic citation. He reported that his attorney had appeared in court the week before and entered a plea of not guilty on the charge. He reported that the not guilty plea was sufficient for the judge and that the judge had found him not guilty, with no assessment of a fine, points or court costs. At the same time that the individual described his attorney as having succeeded in securing a not guilty verdict, the individual quoted his attorney as saying "Wait for the jury trial and be given a writ." *Id.* at 6.

The individual anticipated that the DOE would need documentation on the disposition of the April 2013 traffic citation and stated that he was trying to get it from his attorney. At the end of the 2013 PSI, the individual signed a certificate agreeing that, within two weeks, he would provide the LSO with (1) his driving history from his state's department of motor vehicles (DMV) and (2) documentation from the court showing that the April 2013 speeding ticket had been dropped with no assessment of fines, court costs or points.

On or about July 1, 2013, the individual submitted to the LSO a handwritten note that the DMV would only provide a seven-year driving history (a ten-year driving history had been requested during the 2013 PSI) and that the driving history did not show the court disposition of his April 2013 ticket. Contemporaneously, the individual also submitted a letter from his attorney stating that, three days prior to the 2013 PSI, the individual had "entered a plea of not guilty with a demand for a jury trial" with respect to the April 2013 traffic citation. Ex. 3 at 5.

In September 2013, the individual changed his plea on his April 2013 traffic citation to "guilty" upon the instructions of his attorney. He was assessed a fine of $285, which is below the current threshold for reporting traffic violations. Tr. at 111 – 112. Since April 2013, he has not been cited for any other traffic violations. *Id.* at 113.

Analysis. A security concern arises under Criterion L when a person has engaged in unusual conduct or is subject to circumstances which tend to show that the person is not honest, reliable or trustworthy. 10 C.F.R. § 710.8(l). Any criminal conduct *a priori* creates doubts as to a person's judgment, reliability and trustworthiness. Adjudicative Guidelines, Guideline J at ¶ 30. Even though the DOE security regulations require a holder of access authorization to report only those traffic violations on which assessed fines are $300 or greater, any traffic violation constitutes a violation of the criminal laws. The individual and the LSO agree that the individual has violated the traffic laws 32 times over the period from 1987 through 2013, a period of 36 years. While some may argue that infractions of traffic laws are less serious than the violation of other laws, the inability or unwillingness to comply with traffic laws raises doubts about one's ability and willingness to comply with rules and regulations in general and, in in the national security context, with those rules and regulations which exist to safeguard classified materials. In the case of the individual, he has an established pattern of violating traffic laws. Such a pattern of criminal behavior suggests that a person may believe they are entitled to decide whether or not to comply with a law and it raises concerns about whether a person will choose to disregard security regulations with which they disagree

or find inconvenient. In light of the individual's pattern of traffic violations, a legitimate security concern exists under Criterion L.

The individual argues in mitigation of this security concern that he has changed his driving habits and is careful to be aware of the speed limit when he is driving. He notes that since October 2011 he has only received one traffic ticket. I agree that the individual has taken steps to change his driving habits and that a single ticket in nearly two-and-one-half years is an improvement over his prior pattern. However, once a person has established a pattern of behavior that creates a security concern, he or she must cease the behavior *and* establish a pattern of appropriate behavior in order to mitigate the security concern. Here the behavior most recently occurred 13 months prior to the Hearing and the individual had received another citation approximately 18 months prior to that citation. In examining the individual's history of citations, I note that he has been "citation-free" in 1997, 2000, 2004 and 2012 and, after each period of legal compliance, has lapsed into non-compliance. *Cf.* Adjudicative Guidelines at Guideline J ¶ 32(a) (mitigation possible if so much time has elapsed since the criminal behavior happened that it is unlikely to recur or does not cast doubt on the individual's reliability, trustworthiness or judgment). In light of the individual's long history of non-compliance, together with his proven ability to periodically exhibit "reformed" behavior by being "citation-free," I find his current period of receiving no citations within the prior 13 months is insufficient to demonstrate reformation of his patterns of violating the law.

With respect to the individual's most recent traffic citation, he attempted to justify his non-compliant behavior by attacking, as inappropriate, the speed limit that he had violated. With respect to his earlier violations, he had accepted responsibility. His attempt to rationalize the speed at which he was traveling at the time of his most recent violation, rather than mitigating the security concern, suggests that the individual is unaccepting of legal authority. *Cf.* Adjudicative Guidelines at Guideline J, ¶ 32(d) (mitigation is appropriate where there is evidence of successful rehabilitation, including showing remorse).

For these reasons, the individual has not mitigated the security concerns arising from his 32 traffic violations.

With respect to the Criterion L security concerns, the Notification Letter also cites commitments made by the individual during the 2012 PSI and 2013 PSI. During his 2012 PSI, the individual was asked what would convince the DOE that he had changed his behavior with respect to violating traffic laws. He answered, "By taking [a defensive driving] class and not getting any more tickets." Ex. 9 at 13. The individual then clearly committed to take a defensive driving class. Subsequent to the 2012 PSI, the individual completed a defensive driving class and submitted a certificate of completion to the LSO. With respect to the individual stating that "getting no more tickets" would convince the DOE that he had changed, there is no actual language in the 2012 PSI where the individual directly commits to not getting traffic tickets in the future. *See* Ex. 9. Notwithstanding the lack of a direct commitment, a fair reading of the transcript from the 2012 PSI is that the individual committed to changing his driving habits so that he would receive no tickets in the future. Any doubt about whether the individual made such a commitment is resolved by the 2013 PSI during which the individual confirmed that in

the earlier PSI he had committed to receiving no future citations. Ex. 4 at 10. This was an absolute commitment to receive *no* tickets, not a commitment (as argued by the individual's counsel at the Hearing) to make a good-faith effort to receive no future tickets. At a minimum, it was a commitment to drive responsibly, which the individual failed to adhere to by driving either 61 mph or 69 mph in a 45 mph zone. The individual voluntarily made such commitment expecting that the DOE would rely upon it in resolving the security concern that had led to the PSI and that such resolution would result in the DOE continuing his access authorization. Approximately 12 months after making this commitment, the individual breached it when he received another speeding citation. While unlikely that the individual intended to receive this citation, it nonetheless demonstrates the individual's inability to honor his commitments to the DOE and reinforces concerns with respect to his reliability and trustworthiness.

The individual's initial attempt to justify his driving speed at the time of his 2013 citation raises additional concerns, as noted above, with respect to his acceptance of authority. The individual subsequently pleaded guilty to this traffic violation and such plea undermines any justification that the individual may have previously offered. The individual has not mitigated the security concern arising from his 2012 commitment to the DOE and his subsequent breach of such commitment.

Additionally, the LSO points to other statements made by the individual during the 2012 PSI as establishing additional verbal commitments by the individual. Those statements primarily concern the individual engaging in better time management in order to arrive on time to work and that he is willing to arrive late if he has mismanaged his time or is delayed en route. Those statements appear unrelated to the individual's 2013 traffic citation and I find no separate security concern arising from them.

During the 2013 PSI, the individual reported that he had retained a lawyer to represent him on his 2013 traffic citation, that the lawyer had entered a not guilty plea and, on the basis of the plea, the citation had been dismissed. He also described his lawyer as saying to "wait for the jury trial and be given a writ." Ex. 4 at 6. The individual stated during the 2013 PSI that he had emphasized to his lawyer that the DOE would want documentation on the dismissal. At the end of the 2013 PSI, the individual signed a certificate to provide the LSO with an official driving history from his state's DMV and documentation on the dismissal of his 2013 traffic citation.

The individual had not previously engaged legal representation on traffic citations. During the 2013 PSI, the individual provided inconsistent information with respect to his conversations with his attorney (e.g., his attorney had told him that the citation had been dismissed and also had told him to wait for the jury trial) and appears not to have understood those conversations with his attorney. Subsequent to the 2013 PSI, the individual submitted to the LSO (by the deadline specified in his signed undertaking) a letter from his attorney stating that the citation was still pending and that the individual had entered a plea of not guilty on the traffic citation with a demand for a jury trial. While the individual did not provide documentation as to the dismissal of the citation (which was not possible since he was mistaken as to the citation having been dismissed) and one can fault his lack of sophistication on legal matters, he did provide accurate information on the status of the citation by the date requested. He clearly acted in good

faith to correct the information he had erroneously provided during the 2013 PSI and it is difficult to fault his submission to the LSO. Accordingly, I find the individual has sufficiently mitigated the security concern arising from his mis-statement by providing corrected information on a timely basis.

The undertaking that the individual signed at the end of the 2013 PSI also required that the individual submit to the LSO an official driving history which he would need to obtain from his state's DMV. The Notification Letter states that the individual provided a "driving history (three years), which showed more offenses than [he] reported to DOE." Ex. 1. The driving record submitted by the individual was actually a *seven*-year history (not *three*-year) and does not contain the amount of any assessed fines with respect to his traffic violations. The LSO has not identified which of the tickets on the driving history had not been previously reported to the DOE or the fines on such tickets, which would be necessary to determine whether the individual had a reporting obligation with respect to such violations. I therefore find no security concern with respect to this factor.

2. Extra-Marital Affair

In the Notification Letter, the LSO cites as a Criterion L security concern that, during the 2009 PSI, the individual acknowledged having had "a 13 year affair with his current wife and while having numerous past opportunities to disclose this information, he did not." Ex. 1. This behavior is cited with respect to the individual's honesty and integrity.

Facts. During the 2009 PSI, the individual was questioned about a number of issues relating to his divorce. He acknowledged that he had had an extra-marital affair and that he was at that time (and continues today) to live with the woman with whom he had had the affair. He is not married to the woman, but he had notified the LSO of their cohabitation when such arrangement commenced.

At the Hearing, the personnel security specialist testified that the statement in the Notification Letter that he had had numerous opportunities to acknowledge the affair was not an acknowledgment by the individual, but a conclusion of the LSO. She testified that those opportunities were presented during PSIs when the individual was asked at the end of each interview "Is there anything in your background that could be [sic] susceptible to blackmail, coercion, or pressure?" Tr. at 38. According to the testimony, the individual "had been interviewed several times" prior to the 2009 PSI in which he had acknowledged the affair. *Id.*

The individual's extra-marital affair was between 1995 and 2008 based upon information in the record. The only PSI with the individual during that time frame that was submitted into the record of this Proceeding occurred in 2004. When I asked the personnel security specialist at the Hearing about other PSIs conducted with the individual, she testified that if a PSI transcript was not submitted as an exhibit by the LSO then no other PSI was conducted. *Id.* at 70. The 2009 PSI did not contain any background question about the individual's susceptibility to blackmail, coercion or pressure. *See* Ex. 27.

Analysis. The LSO's alleges the individual mislead the DOE by failing to honestly answer a broad question about his background that had been posed to him numerous

times. Even if I assume that asking "Is there anything in your background that could [make you] susceptible to blackmail, coercion, or pressure?" is sufficient to elicit the information sought by the LSO, I find no evidence that that question was asked of the individual during the relevant period of time. I therefore find no security concern with respect to this matter.

3. Reporting of Medication

In the Notification Letter, the LSO cites as a Criterion L security concern an incident that occurred in 2008 in which the individual did not report a medication that he was taking to the DOE site where he was working. The LSO cites this incident with respect to both the individual's failure to follow work-related rules and his honesty and integrity. Issues raised by the LSO with respect to this incident under the HRP regulations will not be considered in this Part 710 proceeding.

Facts. In 2008, the individual volunteered to work an overtime shift in an area that was not his regular work area. The individual had recently received a prescription for an additional pharmaceutical for asthma. He filled the prescription on the day that he reported for the overtime shift.[14] This overtime shift was a 12-hour night shift and at approximately 5:00 a.m. the individual experienced an asthma attack and used the new medication that he had picked up prior to starting his shift.

The individual and a union representative both credibly testified at the Hearing that the practice at the site in 2008 was to report new medications upon the next shift in an employee's regularly assigned area – if an employee started a new medication and next worked a shift outside of his or her normally assigned area, an employee waited to report the medication until returning to his or her regular area. The contractor provided written guidance in approximately 2011 to change the practice and require new medications to be reported immediately upon reporting to work at the site, whether or not reporting to one's regularly assigned area.

Analysis. The individual had worked at this DOE site for over 20 years at the time of this incident. Since this incident in 2008, he has been consistent in his description of his understanding of the reporting requirements at that time of this incident – that new pharmaceuticals were to be reported when an employee next returned to his or her regularly assigned area. The union has corroborated that this was the practice at the site and a union representative testified that the employer subsequently issued written guidance to change this practice. There are no other allegations that the individual has failed to report any use of pharmaceuticals at any other time during his 29 years working at the site. The individual's explanation adequately mitigates the concerns arising from this event. This mitigation is strengthened by his long history of being compliant with the regulations requiring the reporting of the use of pharmaceuticals.

[14] In a report on this incident prepared by the individual's employer, there is a statement that the individual had been taking the pharmaceutical for one week prior to the incident; however, at the Hearing the author of this report agreed that that statement was based on the individual's stating in response to a question that he had been *prescribed* the medication a week prior to the incident. Tr. at 144.

With respect to this incident, the LSO also alleges that the individual was inconsistent in his description of this situation during the 2009 PSI and that this raises a security concern with respect to the individual's honesty and integrity. The Notification Letter alleges that "…[the individual] indicated that he hadn't had an opportunity to report [his new asthma medication] to his shift, his area." Ex. 1. However, later during the PSI "[, the individual] indicated he reported it to his area." Ex. 1. In reviewing the statement by the individual that is alleged to be inconsistent with his earlier comments in the 2009 PSI, I find that his statement *is* consistent with his earlier statements in the 2009 PSI (as well as his testimony at the Hearing). The individual stated "Well, you know, I reported it to my area. I wasn't in that area. I'm assigned to [Area Alpha] and I worked [Area Bravo]." Ex. 13 at 45. From the context of the 2009 PSI as a whole, the individual's use of the pronoun "it" is a reference to new medications generally, not to the new asthma medication at issue in the 2008 incident. Any doubt as to his meaning can be resolved by his referring to the two different work areas – he has consistently said that at that time the practice at his site was that he reported new medications to his supervisor in his regularly assigned area ("Area Alpha"), but that this incident occurred when he was working an overtime shift in "Area Bravo" and that he was waiting to report the mediation until he had his next shift in his assigned "Area Alpha." I find no Criterion L security concern arising from this statement of the individual in the 2009 PSI.

4. Remaining Workplace Issues

In the Notification Letter, the LSO cites as Criterion L security concerns four other workplace incidents and two related concerns with respect to the individual's honesty and integrity. The workplace incidents all occurred between 2008 and 2010.

A third matter raised by the LSO with respect to the individual's honesty and integrity concerned the manner in which he characterized a workplace disciplinary matter on a 2009 QNSP; this item was deleted from the security concerns by a oral stipulation of the parties at the beginning of the Hearing.

2008 Suspension and One Year Probation. The most serious of the individual's workplace matters occurred near the end of the same overtime shift discussed above with respect to whether the individual had failed to properly report a new medication. At approximately 5:20 a.m., the individual appeared to be asleep when a DOE employee came upon him at his duty station. The individual has acknowledged that he "nodded off," as a possible side effect of the new medication that he took when he had had an asthma attack at around 5:00 a.m. At this site, a distinction is made between "sleeping on duty" which involves making a plan to sleep while at work and "inattention to duty" which includes inadvertent "nodding off." The individual has consistently acknowledged that he was inattentive, but has denied sleeping on duty.

There was an exchange between the DOE employee who discovered the individual "asleep." The record includes various accounts of this encounter and, for the purposes of this Decision, those discrepancies need not be resolved. The individual testified that the DOE employee asked the individual if he would report himself to his supervisor and, towards the end of their exchange, he agreed. In agreeing to report himself, his primary

intent appears to have been ending the conversation. He did not report himself before leaving at the end of his shift and, later that morning, the DOE employee notified the individual's supervisor of the incident. The employee was terminated and, following a review by his employer, the employer re-characterized the termination as a suspension and the individual was placed on probation for one year.

2009 Written Warning. When working outside of his normally assigned area, a malfunction required that certain equipment that was normally electronically operated needed to be manually operated. This required a two-step process and, at a certain point, the individual neglected to perform the second step of the manual process. He acknowledged his responsibility for the failure. *See* Ex. 24.

2010 Written Reprimand. While driving a vehicle on site, the individual dropped a lapel communications microphone and, when he attempted to retrieve it, the vehicle he was operating slid off the embankment, with resultant minor damage to the vehicle. He called in and reported the incident. *See Id.*

2010 Written Warning. The individual dropped an item of employer-supplied equipment that he was carrying when he went to stand up. He examined it to see if any items had fallen out of equipment and found nothing missing. When he returned the equipment, one item had fallen out and it was later found in the area where the individual had dropped the equipment. The individual acknowledged his responsibility for this failure. *See Id.*

Analysis. With respect to the 2008 Suspension, the LSO has raised two issues relating to his honesty and integrity. The first relates to his exchange with the DOE employee during which he agreed to report his being "asleep" to his supervisor. A review of the record as a whole on this incident leads to the conclusion that at the time he made that commitment, he likely did not intend to keep the commitment and was being deceitful in his conversation with the DOE employee. Even if such was not his intent, he nonetheless failed to perform the commitment and left work that morning knowing that he had failed to do so. Such conduct on the part of a holder of access authorization is unacceptable. He has subsequently acknowledged the inappropriateness of his behavior and has expressed remorse. Such expression of remorse, together with the passage of six years since the incident during which there is no other evidence that the individual has engaged in deceptive behavior, sufficiently mitigates the concern arising from this incident.

His employer's report on the investigation of the 2008 suspension states that the individual contacted a manager to admit responsibility and express regret shortly following the incident. The individual was purportedly more adversarial in a subsequent interview and the Notification Letter alleges that this inconsistency raises security concerns with respect to his honesty and integrity. The employer's report of investigation was submitted by the LSO as an exhibit, without exhibits, and, although the author of the report was called as a witness, his testimony was subject to a stipulation that his testimony would be limited to a single item – unrelated to this issue. The record reflects that the individual has consistently acknowledged inattentiveness to duty, while denying sleeping on duty; therefore, his purported acknowledgment to the company's manager of responsibility is consistent with his acknowledgement that he was inattentive while on

duty. Based upon the foregoing, I find that there is insufficient evidence in the record to determine whether a Criterion L security concern arises from this matter.

With respect to the four workplace disciplinary matters as a reflection of the individual's inability to follow workplace rules and regulations, I note that all four of these incidents took place within a two-year period during the individual's 29 years of employment at the site and that the most recent occurred approximately four years ago. No other workplace infractions during the individual's career are alleged. In mitigation of these matters, the individual offers his acknowledgment of responsibility for these acts, the lack of any workplace incidents in the last four years and the confinement of these events to a brief period of time. The latter three all appear to be inadvertent behaviors by the individual in the course of his job performance. If these were continuous or more recent in occurrence, I would agree that they represented a Criterion L security concern which had not been mitigated; however, under these circumstances the individual has mitigated the concerns arising from these incidents.

V. Conclusion

In the above analysis, I have found that the individual has sufficiently mitigated the security concerns arising under Criterion F and certain of the matters alleged with respect to Criterion L. Notwithstanding the foregoing, other derogatory information in the possession of the DOE raises additional security concerns under Criterion L and, 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 all these security concerns. 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
Administrative Judge
Office of Hearings and Appeals

Date: July 11, 2014