

United States Department of Energy
Office of Hearings and Appeals

In the Matter of Personnel Security Hearing)
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Filing Date: April 7, 2014)
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Case No.: PSH-14-0034

Issued: July 22, 2014

Administrative Judge Decision

Robert B. Palmer, Administrative Judge:

This Decision concerns the eligibility of XXXXXXXXXXXX (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 individual’s security clearance should not be restored at this time.²

I. BACKGROUND

The individual is employed by the Department of Energy (DOE), and was granted a security clearance in connection with that employment. During a background investigation of the individual, the local security office (LSO) obtained information that raised security concerns. In order to address those concerns, the LSO summoned the individual for an interview with a personnel security specialist in July 2012. After this Personnel Security Interview (PSI) failed to resolve the concerns, the LSO referred the individual to a local psychiatrist (hereinafter referred to as “the DOE psychiatrist”) for an agency-sponsored evaluation. After reviewing the DOE psychiatrist’s report and the rest of the individual’s personnel security file, the LSO determined that derogatory information existed that cast into doubt the individual’s eligibility for access

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

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

authorization. It informed the individual of this determination in a letter that set forth the DOE's security concerns and the reasons for those concerns. I will hereinafter refer to this letter as the Notification Letter. The Notification Letter also informed the individual that he was entitled to a hearing before an Administrative Judge in order to resolve the substantial doubt concerning his eligibility for access authorization.

The individual requested a hearing on this matter. The LSO forwarded this request to the Office of Hearings and Appeals, and I was appointed the Administrative Judge. The DOE introduced 23 exhibits into the record of this proceeding. The individual introduced three exhibits and presented the testimony of five witnesses at the hearing, in addition to testifying himself.³

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

As indicated above, the LSO concluded in the Notification Letter that derogatory information exists that creates a substantial doubt as to the individual's eligibility to hold a security clearance. That information pertains to paragraphs (f), (g) and (l) of the criteria for eligibility for access to classified matter or special nuclear material set forth at 10 C.F.R. § 710.8. For purposes of clarity, I will first set forth the Notification Letter's concerns under criterion (l).

Under criterion (l), information is derogatory if it indicates 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 which furnishes reason to believe that he may be subject to pressure, coercion, exploitation or duress which may cause him to act contrary to the best interests of national security. Such conduct includes, but is not limited to, criminal behavior. 10 C.F.R. § 710.8(l). The criterion (l) concerns cited in the Notification Letter fall into three categories. The first category has to do with illegal acts by the individual. Specifically, the Notification Letter alleges that he:

- Received three speeding citations from local police in 2005, for travelling at 105 miles per hour (mph), 81 mph, and 86 mph in 55 mph zones, for which he was fined \$240, \$160, and \$226, respectively;⁴
- Was arrested for Reckless Driving in May 2009 when he was detected driving at 102 mph in a 55 mph zone. He pled guilty, was sentenced to 180 days in jail (with 160 days suspended), was fined \$250, and his driver's license was suspended for six months;
- Was arrested for Driving While Intoxicated (DWI) in June 2011;⁵

³ Two of the exhibits, the DOE psychiatrist's report and the individual's 2006 QNSP, have already been entered into the record as DOE Exhibits (DOE Ex.) 3 and 12, respectively. The remaining exhibit, Individual's Exhibit 1, consists of his answer to the allegations set forth in the Notification Letter.

⁴ At the hearing, the individual testified that he received one of these citations in 2001 and the other two in 2005. Hearing transcript (Tr.) at 113.

⁵ The arrest was actually for Driving Under the Influence (DUI). *See* DOE Exhibit (Ex.) 5, 6.

- Received three additional citations in 2008, 2009 and 2012 for speeding or reckless driving, with the 2012 citation occurring while the individual was driving in violation of restrictions that had been placed on his license after the 2011 DWI; and
- Was found guilty of Riding a Train Without Payment in August 2007, June 2008 and July 2009.

The second category concerns the individual's failure to follow applicable rules, regulations and security requirements. According to the Notification Letter, the individual:

- Provided his password to his unclassified government computer to another employee on two occasions, with the last such occurrence taking place in 2010;
- Logged onto a classified government computer in December 2010, left it unattended, and allowed his logon to be used by others;
- Took home a 10 page classified document in 2009 to prepare for a briefing, brought it back to work the next day, and shredded it;
- Inadvertently took home one page of another classified document;
- Deliberately carried his personal cell phone into a secure area on approximately five to ten occasions, with the last such instance taking place in December 2011;
- Regularly stored draft reports and interoffice material on an unapproved flash drive when he travelled for work;
- Failed to report any of the security violations outlined above; and
- Failed to report his September 2009 arrest for Reckless Driving within five working days, as required by the Security Acknowledgment Form he signed in February 2006.

The third category of criterion (l) concerns cited in the Notification Letter relates to the individual's alcohol consumption. Specifically, the Letter refers to the individual's 2011 DWI arrest and to information that the individual provided about his alcohol usage during his 2011 PSI.

Criterion (f) refers to information indicating that an individual has deliberately misrepresented, falsified, or omitted significant information from a Questionnaire for National Security Positions (QNSP), a PSI, or written statements made in response to official inquiry on a matter that is relevant to a clearance eligibility determination. In support of this criterion, the Notification Letter cites the individual's failure to report his 2005 traffic citations on his 2006 QNSP. The Notification Letter also refers to the individual's 2010 and 2011 PSIs, during which he indicated that he had never been involved in any incidents during which a failure to properly safeguard classified information had taken place. However, the letter alleges that during a 2012 polygraph examination, the individual admitted to the security violations set forth above.

Under criterion (g), information is derogatory if it indicates that an individual has failed to protect classified matter, or violated or disregarded security or safeguards regulations to a degree which would be inconsistent with national security, or violated or disregarded regulations, procedures or guidelines pertaining to classified or sensitive information technology systems. As support for its invocation of this criterion, the Notification Letter purports to incorporate by reference two earlier paragraphs, enumerated I.E and I.H. However, paragraph I.E discusses the individual's alleged convictions for Riding a Train Without Payment, and there is no paragraph

I.H in the Letter. Nevertheless, it is apparent that the LSO intended to incorporate by reference paragraphs I.D and I.G in support of this criterion. These paragraphs describe the security violations identified above.⁶

For the most part, the individual does not contest these allegations. They adequately justify the DOE's invocation of criteria (f), (g) and (l), and raise significant security concerns. Conduct involving lack of candor or dishonesty can raise questions about an individual's reliability, trustworthiness and ability to protect classified information, as can deliberate or negligent failure to comply with rules and regulations for protecting classified or other sensitive information or information technology systems. Moreover, unwillingness to obey the law can also raise questions about an individual's judgment, reliability, trustworthiness, and ability to protect classified information. *See Revised Adjudicative Guidelines for Determining Eligibility for Access to Classified Information, The White House (December 19, 2005), Guidelines E, J, K and M.*

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

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

⁶ The individual did not object to this irregularity at the hearing, nor did he indicate any uncertainty as to the basis for the LSO's reliance on this criterion.

IV. ANALYSIS

At the hearing, the individual attempted to demonstrate, through his own testimony and that of two friends, two supervisors and a co-worker, that his behavior has changed, and that he is an honest and reliable person who can be trusted with access authorization. During the individual's testimony, he first addressed the charges of Riding a Train Without Payment. He explained that passengers on his commuter train were required to pre-pay fares for multiple rides, and to have their tickets "validated" before each trip, during which one of the pre-paid fares would be used. On the three occasions cited in the Notification Letter, he failed to have his ticket validated before boarding the train. This was not due, he continued, to any attempt to deprive the train line of compensation, but was instead caused by his haste to board trains that were soon to depart. On two occasions, he said, he simply forgot to have his ticket validated, and on the third, he made a conscious decision to forgo validation, believing that that process would cause him to miss a departing train and therefore to miss an important meeting at work. The individual testified that he has alleviated this problem by buying monthly passes, which do not require validation. Tr. at 80-83.

Next, the individual addressed his speeding citations and his DUI arrest. He said that he never made a conscious decision to break the law, but that he had "a problem with open road," *i.e.*, that when faced with that situation, he would succumb to an impulse to travel at excessive rates of speed. Tr. at 84. He addressed this issue with the instructor of a Driver Improvement class that he was required to take after his May 2009 Reckless Driving incident. The instructor "really got to the root of [his] problem," and made the individual realize that "even though the road is empty," there is still the potential for a life-altering or -ending accident. Tr. at 85. After the class, the individual continued, he made a conscious decision to change his driving habits and obey the speed limit. Tr. at 86. The individual claims that he was not arrested on the day of the Reckless Driving incident, but instead received a citation, and therefore did not report it to the DOE within five days. He further stated that when he was informed, a couple of months later, that the jurisdiction in which he received the citation would seek to impose a heavy fine and jail time, he reported the incident to the DOE "that next work day." Tr. at 87-88. Regarding his 2011 DUI arrest, the individual testified that he was pulled over for running a stop sign one evening after having consumed "four or five drinks." Tr. at 116-117. His blood alcohol content was measured at .11. DOE Ex. 7. The individual attributed this arrest to a "poor decision," rather than to a problem with alcohol. Tr. at 90.

The individual then turned to his breaches of security protocol. He described his taking the 10 page classified document home in 2009 as "one of the worst decisions I've ever made in my life." Tr. at 93. The individual explained that he took the document home to prepare for a very important briefing the following day, a day that promised to be "uniquely stressful." *Id.* After the briefing, the individual was scheduled to appear in court regarding his Reckless Driving incident, which could have resulted in a prison sentence of up to six months. After this court appearance, he was scheduled to fly to New Mexico on business, and he took the classified document home the night before to prepare for the briefing because he wanted to ensure that at least one thing went well that day. *Id.* Regarding his unauthorized removal of one page of a classified document from his office, he explained that he was printing out the document for work, and what appeared

to be a blank page was also printed out. Believing that this page could be useful for taking notes, the individual folded it up and put it in his pocket. Days later, he discovered that the page had a "Classified" stamp on it, even though the rest of the page was blank. He shredded the page. Tr. at 96-97. As an explanation for his repeatedly entering a secure area with his cell phone, he offered that there were not enough lock boxes available to secure cell phones and other personal electronic devices, and that there was some ambiguity as to whether cell phones could in fact be taken into the secure area in question. Once the individual found out that cell phones could be taken into the secure area as long as the phone remained in an RF bag, he began using such a bag, and the problem was solved.⁷ Tr. at 97-98. Regarding the allegations that he logged on to a classified computer and allowed others to use his logon, that he provided his password to his unclassified government computer to another employee on two occasions, and that he regularly used an unapproved flash drive to store work-related documents during official travel, the individual said that he did not realize at the time of these actions that they were violations of DOE protocol or security regulations, that he took these actions in the performance of his duties, and that they were necessitated by difficulties he encountered in using classified computers and in accessing his work computer from a remote location, respectively, and that he would not do any of these things in the future. Tr. at 99-106.

Finally, the individual testified about his failure to list his speeding citations on his 2006 QNSP and his incorrect statements during 2010 and 2011 PSIs that he had never been involved in any incidents during which a failure to properly safeguard classified information had taken place. Regarding his 2006 QNSP, the individual stated that he misread the applicable question and erroneously believed that it required him to list only alcohol or drug-related arrests or citations for which the applicable fine exceeded \$150. Tr. at 110. The individual also said that he reported his security lapses during his polygraph examination, but not during the earlier 2010 and 2011 PSIs, because the questions asked during the examination were more specific, and jogged his memory to a greater extent than the more general questions posed during the PSIs. He further explained that during the PSIs, he failed to report his 2009 removal of the 10 page classified document from his workplace because his primary recollections of that day concerned his court appearance. Tr. at 94-95. The individual's co-worker, friends and supervisors generally testified that he is a reliable, honest and trustworthy person who has learned from his mistakes and can be counted on to adequately safeguard classified information in the future.

After reviewing this testimony and the record as a whole, I find that there is no indication that the individual has committed an illegal act, violated security requirements, or engaged in any other behavior that would call into question his honesty, reliability, or trustworthiness, since his last speeding citation in March 2012. I also found credible the individual's testimony that he was not arrested on the date of his 2009 Reckless Driving incident, and was therefore not required to report that incident to the LSO within five days. Finally, I note the favorable opinion of the DOE psychiatrist that the individual does not suffer from a diagnosable alcohol use disorder, and that he has "learned from his misbehaviors." DOE Ex. 3 at 3.

⁷ An RF bag is an enclosure formed by special materials that block radio waves and other static electrical fields. The purpose of this bag is to prevent the transmission of information from the secure area to the outside world.

Despite these mitigating factors, I harbor substantial doubts about the individual's suitability for access authorization. These doubts are based primarily on the number of instances of poor judgment demonstrated by the individual, and the nature of those instances. The record indicates that since 2001, the individual has been cited or arrested for breaking the law, has failed to adhere to security requirements, or has failed to disclose significant information to the DOE on at least 25 occasions. These instances include a DUI arrest and two citations for driving at over 100 mph in 55 mph zones. The individual cites as mitigation a 2009 Driver Improvement class that he was required to attend as a consequence of a Reckless Driving incident. However, subsequent to that class, the individual was arrested for DUI in 2011 and cited again for speeding in 2012. Moreover, the 2012 citation occurred while the individual was driving in violation of court-ordered restrictions that were imposed following the DUI arrest. The individual has demonstrated a disturbing inability or unwillingness to conform his behavior to legal requirements.

This inability or unwillingness to adhere to required norms of behavior has also manifested itself in the security area. On at least 11 occasions since 2009, the individual violated rules pertaining to classified or sensitive information or government technology systems. On most of those occasions, the individual either knew or should have known that his actions were not in accordance with security protocols. By their very nature, these transgressions raise serious doubts about the individual's ability to protect classified information.

I also found the individual's explanations for his omissions from his 2006 QNSP and for his false statements during his 2010 and 2011 PSIs to be unpersuasive. His self-serving and unsupported claims that he misunderstood the relevant portion of the QNSP and that during the PSIs he did not recall the removal of the 10 page classified document from his workplace are not sufficient to allay the DOE's legitimate concerns regarding the individual's candor and honesty.

V. CONCLUSION

For the reasons set forth above, I find that the individual has not adequately addressed the DOE's concerns under criteria (f), (g) and (l). Consequently, he has failed to convince me that restoring his access authorization would not endanger the common defense and would be clearly consistent with the national interest. Accordingly, I find that the DOE should not restore the individual's security clearance at this time. Review of this decision by an Appeal Panel is available under the procedures set forth at 10 C.F.R. § 710.28.

Robert B. Palmer
Administrative Judge
Office of Hearings and Appeals

Date: July 22, 2014