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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: January 2, 2014)
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Case No.: PSH-14-0061

Issued: September 10, 2014

Administrative Judge Decision

Robert B. Palmer, Administrative Judge:

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

I. BACKGROUND

The individual’s employer, a Department of Energy (DOE) contractor, requested a security clearance on the individual’s behalf. The ensuing background investigation revealed information about the individual that raised security concerns. In an attempt to resolve those concerns, the

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>.

local security office (LSO) summoned the individual for an interview with a personnel security specialist in December 2013. After this Personnel Security Interview (PSI) failed to resolve the concerns, the LSO determined that derogatory information existed that cast into doubt the individual's eligibility for access 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 six exhibits into the record of this proceeding. The individual introduced eight exhibits and presented the testimony of six witnesses, in addition to testifying on his own behalf.

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 paragraph (I) of the criteria for eligibility for access to classified matter or special nuclear material set forth at 10 C.F.R. § 710.8.

Criterion (I) refers to information indicating 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, illegal behavior or a pattern of financial irresponsibility. The Notification Letter refers to two separate concerns under this criterion: that the individual has not been financially responsible, and that he has engaged in illegal activity. Regarding the individual's finances, the Notification Letter alleges that he:

- Has not filed or paid his federal or state income taxes for 2012;
- Owes state taxes of \$296.37 for 2010 and \$45.96 for 2011; and
- Has two charged off accounts totaling \$5,667.

Regarding illegal activity, the Notification Letter alleges that the individual:

- Was arrested in December 2012 for Aggravated Driving While Intoxicated (DWI) and Wrong Way on a One-Way;
- Knowingly violated court-ordered probation requirements stemming from this arrest by consuming alcohol on two occasions;
- Used marijuana on two occasions in 2004, daily from October 2009 to January 2010, and two times a week from January 2010 until August 2011;
- Illegally used steroids once a week for eight weeks beginning in March 2010;
- Was arrested in December 2006 for DWI and Refusing to Obey; and
- Was arrested in March 2006 for Minor in Possession of Alcohol.

These circumstances adequately justify the DOE's invocation of criterion (I), and raise significant security concerns. Failure or inability to live within one's means, satisfy debts, and meet financial obligations may indicate poor self-control, lack of judgment, or unwillingness to abide by rules and regulations, all of which can raise questions about an individual's reliability, trustworthiness, and ability to protect classified information. Moreover, illegal activity, by its very nature, calls into question a person's ability or willingness to comply with laws, rules and regulations. *See Revised Adjudicative Guidelines for Determining Eligibility for Access to Classified Information, The White House (December 19, 2005), Guidelines F and J.*

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).

IV. ANALYSIS

The individual attempted to establish, both through the testimony presented at the hearing and through his exhibits, that his financial difficulties were due to factors that were beyond his control, that he has since resolved those difficulties, and that he is now a law-abiding and reliable person who can be trusted to follow all applicable security requirements and to properly safeguard classified material. For the reasons that follow, I conclude that the individual has resolved the DOE's security concerns regarding his finances, but that substantial concerns remain regarding his history of illegal activity.

A. The Individual's Finances

Although the record in this matter contains some evidence of irresponsibility, it appears that the individual's financial woes were caused primarily by factors that were beyond his control. Those difficulties began in 2009, when the individual was seriously injured in a motorcycle accident, and then lost his job two weeks later. DOE Exhibit (DOE Ex.) 2; Hearing transcript (Tr.) at 63, Individual's Exhibit (Ind. Ex.) 6. He "sought financial assistance for his hospital bills, got on welfare," and went looking for work as soon as he was able. DOE Ex. 2. From 2009 through the end of 2011, when the individual enrolled in school, he could only find sporadic, part-time employment. Tr. at 62. It was during the period from 2009-2012 that he incurred the debts described in the Notification Letter. DOE Ex. 2. The individual's Employee Assistance Program (EAP) counselor, from whom the individual sought help in creating a budget, testified that the individual had been spending unwisely on dating and on attending rodeos, Tr. at 31, but that she could not remember any specific items that the individual had purchased that he could not afford, and that the individual "was ready to be financially responsible and was already on his way to financial responsibility" when she met with him. Tr. at 29, 31. With the assistance of the EAP counselor, the individual has established a realistic and sustainable budget. Tr. at 28; Ind. Ex. 5. Moreover, the individual has resolved all of the debts set forth in the Notification Letter, has established a checking account from which his bills are automatically paid, and is up-to-date on all of his payments. Ind. Ex.s 1,2,3,5; Tr. at 72. For these reasons, I find that the individual has adequately addressed the DOE's criterion (l) concerns regarding his finances.

B. The Individual's History of Illegal Activity

I reach a different conclusion, however, with regard to the individual's history of illegal activity. At the hearing, the individual did not dispute the allegations in the Notification Letter that since 2006, he (i) has been arrested three times for alcohol-related offenses; (ii) has violated probation imposed after his 2012 DUI arrest by drinking alcohol on two occasions in 2013; and (iii) has engaged in illegal drug usage on over 100 occasions, with the last admitted usage occurring in August 2011. Regarding his 2013 probation violations, the individual testified that he was told by a probation officer that "we know that [people on probation] drink. Just don't try and time your drinking." Tr. at 75-76. The individual explained that the officer meant that probationers should not try to circumvent the interlock devices on their vehicles by drinking and then waiting what they determined to be a sufficient amount of time before blowing into the devices in an attempt to drive. While admitting that he should have disregarded what the officer said and "just not drank," he added that her statements led him to believe that consuming alcohol while on probation "wasn't taken as seriously as the rest of it." Tr. at 76. Assuming that these statements actually occurred, there is nothing in the record that would indicate that the officer had the authority to alter the terms of the individual's probation, or even that the individual believed that she had such authority. These 2013 violations raise substantial questions about the individual's ability or willingness to conform his behavior to required norms.

In attempting to explain his marijuana usage, the individual testified that he used the drug to relieve the physical pain caused by injuries suffered during his 2009 motorcycle accident, and then later to ameliorate the emotional pain caused by his breaking up with his girlfriend. He further observed that use of marijuana for medicinal purposes was permitted by state law in his jurisdiction. Tr. at 77-78. However, even if this observation is correct, and even if the individual

met the state requirements for such usage, the fact remains that marijuana usage is prohibited by federal law, and is therefore illegal throughout the United States. The individual's explanations do not adequately address the DOE's security concerns about his illegal drug usage.

The Notification Letter further alleges that the individual has not filed his federal or state taxes for 2012, as required by law. At the hearing the individual claimed that he was not required to file tax returns in 2012 because his 2011 income fell below the threshold at which such filings would be required.³ However, because the individual did not submit adequate evidence of his 2011 income, I am unable to conclude that he was not required to file 2012 tax returns. In support of his contention that his 2011 income fell below the filing threshold, the individual presented the testimony of someone who worked with the individual during the parts of 2011 where the individual was employed. However, this co-worker testified that although he made \$8,000 in 2010, 2011 or 2012 – he was not sure which year – and he assumed that the individual made the same amount of money, the co-worker admitted that he really did not know how much money the individual earned in 2011. Tr. at 43. The individual also testified that in order to ascertain whether he was required to file, he consulted with the bookkeeper for the company that he worked for in 2011. He said that the bookkeeper told him that “‘you don't have a tax liability. You can file. That doesn't mean you can't file taxes . . . you can, but . . . based on what you have, the IRS knows you don't need to.’” The co-worker's testimony and the somewhat ambiguous and unsupported statement allegedly made to the individual by a bookkeeper do not constitute adequate evidence of the individual's 2011 income. The individual has therefore not successfully refuted the allegation in the Notification Letter that he improperly failed to file his 2012 tax returns.

Finally, the individual testified that his earlier legal transgressions were due to immaturity, and that that began to change in August 2011 when he entered school. Tr. at 80. The record does indicate that the individual was 18 years old at the time of his first 2006 arrest. If his 2006 arrests were the extent of his legal difficulties, I might agree that the DOE's concerns in this area had been mitigated by the passage of time and by the individual's youth. However, that is not the case. If the individual's 2011 income exceeded the filing threshold, his failure to file his 2012 tax returns constitutes an ongoing violation of federal and state law. Moreover, even if he was not required to file 2012 returns, he has exhibited a rather extensive pattern of illegal behavior culminating in his 2013 probation violations. Given this pattern, the 13-month time period between the individual's last probation violation and the hearing is not sufficient to convince me that he will now be able to conform his behavior to legal and security-related requirements. The individual has not successfully addressed the DOE's criterion (I) concerns regarding his history of illegal activity.

V. CONCLUSION

For the reasons set forth above, I find that the individual has adequately addressed the DOE's concerns under criterion (I) regarding his finances, but that valid concerns remain under that

³ According to the Internal Revenue Service's Tax Guide for 2012, people whose filing status was “single,” and who were less than 65 years of age, were required to file a return if their gross income for 2011 was at least \$9,750. Ind. Ex. 4.

criterion regarding the individual's illegal behavior. Consequently, he has failed to demonstrate that granting him a security clearance would not endanger the common defense and would be clearly consistent with the national interest. Accordingly, I find that the DOE should not grant

the individual access authorization 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: September 10, 2014