

their breakup, which he claimed to have done. Ms. P. showed the police a text message that she said was from the individual in which the individual allegedly took responsibility for the images being posted online. She also told the police that the individual told her that his cell phone was stolen and that the pictures were posted by somebody else. He also allegedly admitted that he was still in possession of some of the images. The individual denies having posted the images, and denies having sent Ms. P a text accepting responsibility for the images being posted.

Subpoenas were issued to at least one of the websites on which the pictures were posted, and to the individual's internet provider. Evidence obtained as a result of these subpoenas allegedly indicates that the images were posted using an account with an associated e-mail address that consisted in part of the individual's nickname and the year in which he was born, and that the Internet Protocol (IP) address from which the images were posted corresponds to one located at the individual's residence. The individual denies that this evidence exists.

During the course of their investigation, the police from the neighboring state had at least two telephone conversations with the individual. The content of those conversations is in dispute. According to police records, in December 2013, the individual told the police that he had lost his cell phone and that someone else had posted the pictures. In February 2014, the police discussed the case against the individual with him and the individual allegedly responded that he posted the nude photos on the internet as a joke and that he did not mean to hurt anybody. The individual denies that he told the police that he lost his cell phone and that someone else posted the pictures, and said that he was only repeating what the police told him when he stated that he posted the pictures as a joke, and that he made the statement sarcastically.

In April 2014, the individual was charged in the neighboring state with five counts of Harassment for allegedly posting 172 nude images of Ms. P. on 17 different websites without her knowledge or consent. The individual was arrested by Federal Marshals in October 2014, and a request for extradition was made. That request was withdrawn after the individual agreed to travel to the neighboring state voluntarily to face the charges. The charges were dismissed in June 2015 because Ms. P. declined to pursue the matter. Individual's Exhibit (Ind. Ex.) A.

Because this information raised security concerns, the local security office (LSO) summoned the individual for an interview with a personnel security specialist in November 2014. 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 9 exhibits into the record of this proceeding and presented the testimony of one witness. The individual introduced one exhibit and also presented the testimony of one witness, 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 (l) of the criteria for eligibility for access to classified matter or special nuclear material set forth at 10 C.F.R. § 710.8.

Criterion (l) 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, criminal behavior. In support of this criterion, the Notification Letter cites the individual's October 2014 Harassment arrest, and allegedly false or misleading statements that the individual made during his November 2014 PSI. Specifically, he stated that he was involved in a sexual relationship with Ms. P. until 2010, that he deleted all of the nude photos that she sent him within a few days of receiving them, and that he did not post them on the internet. However, the Letter cites police records that indicate that nude pictures of Ms. P were posted on the internet in October, November and December 2013, and traced back to the individual's IP address. The Letter also cites the individual's alleged admission to the police in February 2014 that he posted her nude photos online as a joke, and that he did not mean to hurt anybody.

These circumstances adequately justify the DOE's invocation of criterion (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. Moreover, criminal activity creates doubt about an individual's judgment, reliability and trustworthiness. *See Revised Adjudicative Guidelines for Determining Eligibility for Access to Classified Information, The White House (December 19, 2005), Guidelines E 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

A. The Individual’s Testimony

At the hearing, the individual testified that his relationship with Ms. P lasted for three or four years, and ended in 2010. It was at about that time that Ms. P. stopped sending pictures to the individual. He said that he did communicate with Ms. P. in 2013, around the time that the images were posted, and that those communications were pleasant, with no arguments or disagreements. Hearing transcript (Tr.) at 58-59, 118. He then described his telephone conversations with the police. He said that during the first conversation, the detective starting asking a lot of questions, but because of what he had learned at his jobsite regarding security, he declined to answer them. The police called back on several other occasions, “trying to get [him] to say stuff,” and, at times, yelling. Tr. at 60-61. As indicated earlier, he denied having told the police during one of these conversations that he lost his cell phone and someone else posted the pictures. Tr. at 79. Instead, he testified that he said “you know, people lose phones, people get hacked. I even recently lost a phone and I’ve upgraded. So is that where you got my information?” Tr. at 61-62. During a later telephone conversation with another detective, the detective said that “I know you did it, I know you did it, let’s get it over with Look, you know you did it, you know you did it, just say you did it as a joke.” Tr. at 64. The individual’s response “was like, ‘yeah, whatever, I did it as a joke.’” *Id.* He said this sarcastically, because that is what he believed the detective wanted to hear. Tr. at 64-65.

He further stated that although the police reports refer to the pictures being traced back to his IP address, neither he nor his attorneys were ever provided with any evidence corroborating that contention. In fact, he claimed that “in the pre-hearings and all that stuff, all they could say is that my IP address was linked to viewing that website, it was never linked to posting anything on it.” Tr. at 68. He went on to say that the District Attorney didn’t have any evidence that the images were uploaded from the individual’s IP address, and only had evidence that he viewed the website. *Id.* He admitted to having visited some internet sites with pornographic content. He said that he wasn’t sure which sites he had visited, because when he “clicked” on one, others would automatically “pop up.” Tr. at 69. The wi-fi setup at his house was not secure in 2013, he continued, which meant that anyone could access it. Tr. at 70. He denied having posted the images online, and said that he had no reason to do so because he bore no ill will towards Ms. P. On cross-examination, he testified that the e-mail account linked to the images was actually created by Ms. P. so that the two of them could remain in touch. He did, however, have the password to that account and could use it to send messages. Tr. at 76-78.

B. Administrative Judge's Determination

Despite this testimony, I find that serious security concerns remain under criterion (I) regarding the individual's conduct. This is primarily because of my conclusion that the police reports are more credible and reliable than the unsupported and self-serving accounts of the relevant events offered by the individual.

At the hearing, the individual testified that he did not tell the detective that he lost his cell phone and that the offending images were posted by someone else. Tr. at 79. Yet earlier in his testimony, he admitted that he did tell the detective that he lost his cell phone. Tr. at 61-62. Moreover, given the fact that he has steadfastly maintained that he did not post the pictures, it is likely that he made that contention to the detective as well. More importantly, the individual also claims that the police reports erroneously state that the evidence establishes that the pictures were linked to the individual's IP address. However, the specificity and detail with which that information is conveyed in one of the reports supports its validity. The report dated January 13, 2014, states, in pertinent part, that "I received [the website's] reply to the subpoena I had had [an employee] mailed (*sic*) them. . . . The pictures of [Ms. P] were posted on [website's URL]. The account was created on 2012-01-11 23:27:23 EST. The posting (*sic*) were placed on:

2013-12-28 17:48:36 EST from XX.XXX.XX.XXX (XX-XX, US) [IP address 1]
 2013-11-07 21:31:32 EST from XX.XXX.XX.XX ([Individual's state and city],
 US) [IP address 2]
 2013-10-22 22:38:07 EST from XX.XXX.XX.XX ([Individual's state and city],
 US) [IP address 2]
 2013-10-13 23:29:31 EST from XX.XXX.XX.XX ([Individual's state and city],
 US) [IP address 2]
 2013-10-01 21:31:26 EST from XX.XXX.XX.XX ([Individual's state and city],
 US) [IP address 2]"

DOE Ex. 4 at 15. Absent a concerted effort on the part of the police to falsely implicate the individual in this incident, it is difficult to imagine how the police records could be so inaccurate. The individual and his wife both testified that at the time that the images were posted, the individual's wi-fi connection was not secure, and that anyone in the vicinity of their residence could have posted them. They did not attempt to explain, however, how a third party would have come into possession of the images, or why he or she would choose to upload them from the individual's residence. I did not find the possibility of unauthorized use of the individual's internet connection to be a plausible explanation.

Even if the pictures could not be tied directly to the individual's IP address, there is sufficient additional information in the police reports to support the Notification Letter's allegation of illegal behavior. Specifically, according to those reports, the account from which the images were posted had an e-mail address associated with it that included the individual's nickname and the year of his birth. *Id.* The individual admitted that he had access to this account. Moreover, Ms. P told the police that "some of the post tags" end in the same number that the individual wore on his soccer uniform. DOE Ex. 4 at 4.

Finally, Individual's Exhibit A establishes that the charges against him were dismissed. However, that document, a Motion to Dismiss submitted by the District Attorney in the neighboring state, says that "Probable cause existed to indict defendant. Victim no longer desires to pursue charges." Ind. Ex. A. As it is the behavior of the individual that raises doubts about his judgment and reliability, I do not find the dismissal of the charges to be a significant mitigating factor in this case. The individual has not successfully addressed the DOE's security concerns under criterion (l) regarding unlawful behavior.

Accordingly, I also find that the individual was not being truthful during his 2014 PSI when he denied having posted the images and stated that he deleted them shortly after receiving them. Towards the end of that Interview, when the individual was inquiring about what would happen if his case went to Administrative Review, he said "I do remember this guy coming up to me and, oh, let me see your phone, you know. Or, hey, can I borrow your computer, you know, stuff like that." It is not clear why the individual would have been concerned about these things had he deleted the images, as he had earlier stated. Significant security concerns remain under criterion (l) regarding the individual's honesty and trustworthiness.

V. CONCLUSION

For the reasons set forth above, I find that the individual has not adequately addressed the DOE's concerns under criterion (l). Consequently, he has not demonstrated 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: October 2, 2015