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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: October 15, 2015) Case No.: PSH-15-0080
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Issued: March 10, 2016

Administrative Judge Decision

Kimberly Jenkins-Chapman, Administrative Judge:

This Decision concerns the eligibility of XXXXXXXXXXXX (hereinafter referred to as “the individual”) to hold an access authorization¹ 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 request for access authorization should not be granted.

I. Background

The individual is employed by a DOE contractor in a position that requires him to hold a DOE security clearance. In April 2015, as part of a background investigation, the Local Security Office (LSO) conducted a Personnel Security Interview (PSI) of the individual to address concerns about the individual’s misrepresentations and criminal conduct. On August 27, 2015, the LSO sent a letter (Notification Letter) advising the individual that it possessed reliable information that created substantial doubt regarding his eligibility to hold an access authorization. In an attachment to the

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.

Notification Letter, the LSO explained that the derogatory information fell within the purview of 50 U.S.C. § 3343 (c) (1) (A) (the Bond Amendment) and 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 Criteria F and L, respectively).²

Upon receipt of the Notification Letter, the individual filed a request for a hearing. The LSO transmitted the individual's hearing request to the Office of Hearings and Appeals (OHA), and the OHA Director appointed me as the Administrative Judge in this case. At the hearing that I convened, the individual presented his own testimony and that of five witnesses, including the individual's son, his two brothers, his girlfriend and a personal friend. The DOE counsel did not present any witnesses. The LSO submitted 10 exhibits into the record; the individual tendered 13 exhibits. 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.³

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 denial"); *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 at the hearing with evidence to convince the DOE that granting his access authorization "will not endanger the common defense and security and will be clearly

² Criterion F pertains to information that a person has "[d]eliberately misrepresented, falsified, or omitted significant information from a Personnel Security Questionnaire, a Questionnaire for Sensitive (or National Security) Positions, a personnel qualifications statement, a personal 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 proceedings conducted pursuant to § 710.20 through § 710.31." 10 C.F.R. § 710.8(f). Criterion L relates to information that a person has "[e]ngaged in any unusual conduct or is subject to any circumstances which tend to show that the individual is not honest, reliable, or trustworthy; or which furnishes reason to believe that the individual may be subject to pressure, coercion, exploitation, or duress which may cause the individual to act contrary to the best interests of the national security . . ." 10 C.F.R. § 710.8(l).

³ OHA decisions are available on the OHA website at www.energy.gov.

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 may be admitted. 10 C.F.R. § 710.26(h). Hence, an individual is afforded the utmost latitude in the presentation of evidence to mitigate the security concerns at issue.

B. Basis for 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 in favor of the national security. *Id.*

III. The Notification Letter and the Security Concerns at Issue

As previously mentioned, the Notification Letter included a statement of derogatory information that raised concerns about the individual’s continued eligibility for access authorization. The information noted in the letter specifically cites to the Bond Amendment and Criteria F and L.

The Bond Amendment provides, in pertinent part, that a Federal agency may not grant or renew a security clearance for a covered person who has been convicted of a crime, was sentenced to imprisonment for a term exceeding one year for the crime, and was incarcerated as a result of that sentence for not less than one year. 50 U.S.C. § 3343(c)(1)(A). As support of its invocation of this amendment, the Notification Letter cites the individual’s conviction of a probation violation for Possession of a Controlled Substance on March 24, 1992. As a result, the individual was imprisoned at a state prison for 18 months.

To support its reliance on Criterion F, the LSO alleges that the individual deliberately omitted information from a September 2014 Questionnaire for National Security Positions (QNSP) regarding the status of his previous employment and his March 1992 conviction of a probation violation for Possession of a Controlled Substance. From a security standpoint, false statements made by an individual in the course of an official inquiry regarding a determination of eligibility for DOE access authorization raise serious issues of honesty, reliability and trustworthiness. The DOE security program is based on trust, and when a security clearance holder breaches that trust, it is difficult to determine to what extent the individual can be trusted again in the future. *See* 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*).

As for Criterion L, the LSO alleges that the individual is not honest, reliable and trustworthy and further that the individual made a number of misrepresentations regarding his employment history and criminal conduct. The LSO also alleges that the individual has a pattern of criminal conduct, citing 51 charges and arrests. The individual's vulnerability to blackmail, exploitation, and duress calls into question the individual's judgment, reliability, trustworthiness and his ability to protect classified information. *See id.* at Guideline E.

IV. Findings of Fact

The individual has an extensive history of criminal conduct which includes about 51 charges and arrests beginning in 1981, when he was charged with Felony Possession of a Controlled Substance at the age of 16 or 17 years old. According to the individual, he began using marijuana and cocaine as a teenager, estimating that he used marijuana for approximately six months to a year, every day to every other day. In addition, the individual admits that he started using cocaine when he was about 19 years old. He stated that he started using this drug because it was the "thing" to do in his neighborhood at the time. It was during this time period that the individual began exhibiting a pattern of criminal conduct. From 1981 through 1993, the individual was arrested ten times on charges related to drugs, including charges of Possession of a Controlled Substance and Sale of a Controlled Substance. While in prison for one of his charges, in 1992, as a result of being convicted of a probation violation for Possession of a Controlled Substance, the individual's sentence was extended and he was incarcerated for 18 months, from January 1991 through February 1993. During the 1981-1993 time period, the individual was also arrested on various other charges including Driving on a Suspended License, Obstruction of a Police Officer, and Assault with a Deadly Weapon and Battery on a Spouse. In 1994, the individual was arrested twice on a warrant for Battery Domestic Violence and was arrested and charged with Battery Domestic Violence in 1995. In 1999, the individual was cited for Ex-Con Failure to Register; he was cited for Illegal Dumping in 2002; and in 2006, the individual was charged with Spilling Load on Highway and Refusal to Stop. Ex. 1.

In 2008, the individual was arrested and charged with DUI, Operating an Unregistered Vehicle, Improper Turn, Failure to Pay Full Attention to Driving and Basic Speed. According to the individual, he and a group of co-workers had gone to a bar because a number of them had just been laid off. While at the bar, the individual consumed approximately two 12 ounce cans of beer and was later pulled over for speeding. His blood alcohol content registered at .08. The individual, who admitted to first consuming alcohol in his teen years, stated that he has not consumed any alcohol since this DUI in 2008. In addition to this charge, in 2008, the individual was charged with Commercial Vehicle Securing Heavy Vehicle/Equipment and Aggregate Load Limit. He had

three charges and arrests in 2009: Use of Cancelled, Revoked, Suspended Registration and Driving on a Cancelled, Revoked or Suspended Driver's License; Battery Constituting Violence-Strangulation (felony) and Battery Constituting Domestic Violence, as well as being arrested on two warrants for Battery Domestic Violence. The individual's last charge occurred in February 2012 when he was charged with Hazmat Local Law. *Id.*

In addition to his criminal conduct, the individual omitted or misrepresented information concerning his previous employment and numerous charges and arrests on a September 2014 QNSP. Specifically, on his 2014 QNSP, the individual certified that in the last seven years he had not been fired from employment. However, during his April 2015 PSI, he admitted that he answered the question incorrectly because he failed to list that he was terminated from his employment with a company in October 2008. Likewise, he certified that, other than the incidents he previously listed, he had not received a written warning, been officially reprimanded, suspended, or disciplined for misconduct in the workplace. However, during his PSI, he admitted that he answered the question incorrectly because he failed to list that he received a written warning and three-day suspension in April 2013, while employed at a company. In addition, the individual certified that he has never been convicted in any court of the United States of a crime, sentenced to imprisonment for a term exceeding one year for that crime, and incarcerated as a result of that sentence for not less than one year. However, during his PSI, the individual admitted that he answered incorrectly because he failed to list that on March 24, 1992, he was convicted of a probation violation for Possession of a Controlled Substance, and was imprisoned for 18 months. In addition to these misrepresentations, the individual certified on his QNSP that he had not been arrested in the past seven years. However, he later admitted during his PSI that he was arrested on November 3, 2009, for two warrants for Battery Domestic Violence-Strangulation. He also certified that he had no additional employment history to enter on the QNSP. However, he later admitted that he was employed with a company from September 2007 until he was terminated in September 2008, following his DUI arrest. Finally, the individual certified that, other than the information previously listed on his QNSP, he had never been charged with an offense involving alcohol and drugs. He later admitted, during his PSI, that he was charged with at least seven additional offenses. *Id.*

V. Analysis

I have thoroughly considered the record in 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)⁴ and the Adjudicative Guidelines. After due deliberation, I

⁴ 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

have determined that the individual's access authorization should not be granted. The specific findings that I make in support of this decision are discussed below.

A. Criterion F and Criterion L Regarding Omissions

The key issue under Criterion F is whether the individual has brought forward sufficient evidence to demonstrate that he can now be trusted to be consistently honest and truthful with the DOE. In considering this question, I found that the nature of the individual's misrepresentations was serious. The individual's lack of candor concerning his criminal history and conduct, as well as his lack of candor concerning his employment history, particularly his disciplinary incidents, could increase his vulnerability to coercion or blackmail and raises important security concerns. The DOE must rely on individuals who are granted access authorization to be honest and truthful. This important principle underlies the criteria set forth in 10 C.F.R. § 710.8(f).

During the hearing, the individual acknowledged the misrepresentations on his September 18, 2014 QNSP. However, he asserted that he took the QNSP seriously, but overlooked and misread questions on it. Tr. at 65. He further asserted that he was not attempting to hide any information from his past. The individual also asserted that he asked individuals to assist him and that he was told to be open and honest. Specifically, with respect to his certification that in the last seven years he had not been fired from employment, the individual testified that he did not list an employment company because he was not fired from the company, but rather laid off. The individual submitted documentary evidence to corroborate his assertion. *Id.* at 67; Ex. B.

Likewise, with respect to his certification that he had not received a written warning, reprimand, suspension, or disciplinary action for misconduct in the workplace, the individual testified that he unintentionally bent a rim on his truck after hitting something on the road while driving for a company and that it was common practice to "get three days off" until drug testing could be completed. Tr. at 75 and 79. He asserted that he did not view this as a disciplinary action and thus did not list it on his QNSP. The individual further testified that he did not remember receiving any written warning from this employment company. As documentary evidence, he submitted a letter from the company corroborating his testimony that he did not receive any disciplinary actions during his employment. Ex. C. With respect to his certification that he has never been convicted of a crime, sentenced to imprisonment for a term exceeding one year, and incarcerated as a result of that sentence for not less than one year, the individual testified that he thought he responded affirmatively to this question. Tr. at 81. He explained again that he gave the security official a copy of his police report which included the charge at issue "just in case [he] missed something." The individual reiterated that he was not trying to hide or misrepresent his criminal past record. He further explained that it took him three or four times to complete his QNSP while he was at

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.

work because the LSO returned it to him a few times due to incompleteness. *Id.* at 83. Again, he testified that he was not trying to hide or misrepresent information.

Based on the foregoing, I find that the individual did not deliberately falsify information regarding his employment history and 1992 conviction on his September 2014 QNSP. However, to determine whether the individual has sufficiently mitigated Criterion F concerns, I considered the relevant factors set forth in the Adjudicative Guideline E. Some of the conditions that could mitigate security concerns raised under Criterion F include the following: (1) the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment; (2) the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that caused untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur; (3) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress. See Guideline E at ¶ 17 (c), (d) and (e). I find that all of these relevant factors apply in this case.

First, the individual credibly testified that he “overlooked” and misread questions when completing his September 2014 QNSP. He testified that he attempted to ask for help in completing his QNSP, but was just told to be open and honest. The individual also testified that he is not a “strong” reader and that his QNSP was returned several times due to incompleteness. He stated that he provided a police report with his QNSP just in case he missed any information and testified that he did not intentionally seek to mislead or omit any information. With respect to his employment history, the individual also credibly testified that he was laid off from a previous employment company as opposed to being fired from the position and that he did not remember receiving a written warning or any disciplinary action with another employer, and provided documentation to support his testimony. Exs. B and C. In light of his testimony, I believe that the individual misrepresented and omitted information on his QNSP under such unique circumstances that it is unlikely to recur and does not cast doubt on his current reliability, trustworthiness, or good judgment. Second, the individual has readily acknowledged his misrepresentations and is working on being a more responsible person as he serves as a role model for his teenage son. I believe he now understands the importance of accurately completing security questionnaires. I was convinced by the individual's credible testimony that he was not seeking to hide pertinent information about his extensive past history, but rather did not remember details. Third, the individual demonstrated that he has taken positive steps to reduce or eliminate his vulnerability to exploitation or duress. He has been candid about his criminal conduct and past history with his family and friends, and is striving to serve as a role model for his teenage son. For these reasons, I find that the individual has resolved the security concerns associated with Criterion F.

Similarly, I find that the concerns raised under Criterion L relating to the individual's misrepresentations or omissions on his QNSP occurred under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment. With respect to his certification that he had never been charged with an offense involving alcohol or drugs as well as his certification that he had not been arrested in the past seven years and his certification regarding his employment history, the individual again testified that he forgot about one of his jobs with an employment company and simply could not remember all of his past charges and arrests. He reiterated that he was not trying to hide his past employment history or his criminal record and that he supplied a copy of his police report to the LSO just in case he missed some information. The individual acknowledged that he made mistakes on his QNSP and testified again that he attempted to "fix" it on several occasions when it was returned for being incomplete. He also described himself as not being a "strong" reader. Again, the individual testified that he did not intend to hide his criminal past or his employment history. Guideline E at ¶ 17(c).

B. The Bond Amendment and Criterion L Regarding Criminal Conduct

At the hearing, the individual did not dispute the allegations in the Notification Letter pertaining to his misrepresentations on his QNSP and his criminal conduct. Instead, he attempted to demonstrate, through his testimony and that of his witnesses, that this behavior is unlikely to recur.

During the hearing, the individual readily acknowledged his 51 charges and arrests including his 1992 conviction of a probation violation which extended a previous sentence and led to an 18-month incarceration. The individual explained that his first charge for Felony Possession of a Controlled Substance occurred in 1981 around the age of 16 or 17 years old. Tr. at 94. He explained that this was the start of a "bad" time in his life and acknowledges that he had a very "ugly" past. *Id.* at 96. He testified that he was living a "fast" life and was using and purchasing drugs, including marijuana and cocaine. From 1981 to 1991, the individual explained that he was young and had no direction in his life. He testified that he lived in a neighborhood where young people like himself looked up to the neighborhood drug dealer as being successful. *Id.* at 108. The individual testified that he did not realize that drugs and drug dealing led to a path to "nowhere." He stated that his lifestyle led him into a vicious cycle which included domestic violence. He noted that he never engaged in physical confrontations or was ever convicted of domestic violence, but acknowledged the numerous arrests which he stated were brought on by yelling and cursing. *Id.* at 114. The individual could not remember his February 1989 charge and arrest for Assault with a Deadly Weapon. He testified that he attempted to obtain information from the court regarding this charge, but was unsuccessful. Exs. F, G, and L. However, the individual does not dispute the charges.

The individual acknowledged that he had a drug habit during this time period from 1981 to 1991 and described himself as a “functional addict” because he was able to work at this time. Tr. at 110. He testified that he last used drugs sometime before he went to prison in 1991. *Id.* The individual testified that a change occurred in his life and that he found strength in the Bible to quit using drugs. *Id.* at 111. He discussed his 2008 DUI and testified that this incident was an “eye-opener” for him. *Id.* at 121. After this alcohol incident, the individual stated that he stopped drinking, “cold turkey,” on his own. *Id.* at 122. He testified that he started to mature in his late 20s and 30s and began to realize that he does not have to react to his environment. He is trying to serve as a role model for his teenage son as he does not want him to follow the same wrong path in life. According to the individual, he no longer associates with individuals from his past, but rather he now lives a simple life taking care of his son and socializing with family. He testified that he has no desire to engage in the behavior of his past lifestyle and reiterated that he wants to “practice what he preaches” to his son.

The individual presented the testimony of two brothers, his girlfriend, a personal friend and his son. Both brothers testified that the individual is reliable, honest and trustworthy. *Id.* at 20, 30. They were also both aware of his illegal drugs in his past and of his incarceration. *Id.* at 14, 28. The individual’s brothers also testified that he is a dedicated, hard worker who is trying to live a better life. *Id.* at 13, 30. His girlfriend, who has known the individual for five years, testified that she is aware of the individual’s incarceration and DUI and stated that as long as she has known the individual, she is not aware of any other charges or arrests. *Id.* at 55. She noted that the individual has made a number of changes in his life, he no longer drinks and has separated himself from the surroundings of his past. The girlfriend reiterated that the individual is trying to better himself and stated that he attends church regularly. *Id.* at 57. She has never observed any aggression or violence exhibited by the individual. Likewise, his personal friend who attends the same church, testified that she sees the individual once a week and that he is a reliable person who exercises good judgment. *Id.* at 45. Finally, the individual’s son testified that his father is a reliable and trustworthy person who is dedicated to his work. *Id.* at 33. He testified that his father has discussed his past with him, particularly growing up in troubled neighborhood. *Id.* at 35. The individual’s son stated that his father wants him to learn from his mistakes and to take responsibility for his actions. *Id.* at 38.

As previously stated, under the Bond Amendment, a person is disqualified from holding an access authorization if they have been convicted of a crime, sentenced to imprisonment for a term exceeding one year for that crime, and incarcerated as a result of that sentence for not less than one year. 50 U.S.C. § 3343(c)(1)(A). In this case, it is clear that a significant amount of time has elapsed since the individual’s conviction relevant to the Bond Amendment, as well as most of the other cited criminal conduct. The conviction and imprisonment relevant to the Bond Amendment occurred in 1992, almost 25 years ago. Moreover, with the exception of a 2012 minor charge with Hazmat Local Law where his truck fuel tank was inadvertently pierced and began leaving fuel on

the road, seven years have elapsed since the individual's most recent criminal conduct – the November 2009 arrest on two warrants for Battery Domestic Violence. Aside from the passage of time, the individual testified persuasively that, he has turned his life around for the better. While he was accountable for his past criminal conduct and did not blame the environment in which he lived as a child and teenager, the environment in which he lived certainly contributed to his troubled path in life. The individual has convinced me that he has learned from his mistakes and is striving to be a good role model for his teenage son. All of the individual's witnesses persuasively testified to the individual's present honesty, reliability and trustworthiness. Although a number of the individual's criminal charges are not recent and although there is clear evidence of rehabilitation, this must be weighed against the individual's extensive criminal background, including more than 51 charges and arrests in total. While a significant number of these charges occurred when the individual was a teenager and in his 20s and 30s, there are a number of charges that occurred just eight years ago, including an arrest on two warrants for Battery Domestic Violence, when the individual was in his 40s and a more mature adult. I applaud the individual for the positive changes he has made in his life and for his commitment to raising his son on the right path. However, in light of the individual's long pattern of criminal behavior, I do not believe the individual has demonstrated a sufficient period of rehabilitation yet to convince me of his ability to make sound judgment calls regarding the safeguarding of classified information. Therefore, I cannot find that the individual has resolved the security concerns arising from his past criminal conduct. Guideline J, ¶ 32 (a), (d).

VI. Conclusion

I find that the security concerns regarding Criterion F have been resolved. However, I find that there are valid security concerns that remain regarding the Bond Amendment and Criterion L. I therefore conclude that the individual has not demonstrated that granting his access authorization would not endanger the common defense and would be clearly consistent with the national interest. Accordingly, I find that the individual's request for access authorization should not be granted. The parties may seek review of this Decision by an Appeal Panel under the regulations set forth at 10 C.F.R. §710.28.

Kimberly Jenkins-Chapman
Administrative Judge
Officer of Hearings and Appeals

Date: March 10, 2016