

information that created a substantial doubt regarding his eligibility to hold a security clearance (Notification Letter) and that his security clearance had been suspended. Ex. 1. The Notification Letter explained that the derogatory information fell within the purview of the disqualifying criterion set forth in the security regulations at 10 C.F.R. § 710.8, subsection (l) (Criterion L). Criterion L refers to derogatory information indicating that an individual “[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).

Upon his receipt of the Notification Letter, the Individual exercised his right under the Part 710 regulations to request an administrative review hearing, and I was appointed the Administrative Judge in the case. The DOE submitted six Exhibits (Exs. 1-6) into the record for the hearing. At the hearing, The Individual presented eight Exhibits (Exs. A-H) and testimony from his former supervisor (Supervisor) and former manager (Manager). *See* Transcript of Hearing, Case No. PSH-15-0095 (“Tr.”).

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 (1998) (“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.* In considering these factors, the Administrative Judge also consults adjudicative guidelines that set forth a more comprehensive listing of relevant factors and considerations. *See 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).

III. The Notification Letter and the Security Concerns at Issue

As previously noted, the LSO cites Criterion L as the basis for suspending the Individual's security clearance. Conduct involving questionable judgment, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. Adjudicative Guidelines, Guideline E, at ¶ 15. From the Individual's own admissions regarding his misuse of his government computer and his other violations of security rules, I find that the LSO had ample ground to invoke Criterion L to suspend the Individual's security clearance.

IV. Findings of Fact

The Individual testified that the derogatory information contained in the Notification Letter was told to a DOE polygrapher in an attempt to reveal everything that could possibly be an issue before his polygraph examination. In 2007, he observed his mentor take a portable hard drive into a prohibited area. Tr. at 71. At the time, he did not know that such a drive should have been marked as government property and labeled with the classification level of information that could be stored on the drive. Tr. at 71. He did ask his mentor about whether the drive could be used in that area. Tr. at 71. The Individual's mentor gave the Individual a "wishy-washy" answer but the Individual decided to trust that his mentor, who had five years previous experience at the facility, was properly using the hard drive. Tr. at 71. The Individual testified that when he received his security clearance in 2007, he received a 30 minute briefing on the security rules along with subsequent yearly refreshing training. Tr. at 70. If the same situation happened today, he would first check to see if the hard drive had all of the required markings and he would have pressed his mentor for more definitive answers and would have then informed his supervisor. Tr. at 72.

The Individual further testified that he had escorted his spouse and son into a prohibited area in 2007 and 2008. Tr. at 74. He was informed by members of his management team that the prohibited area was "essentially an open area" and that if you had a proper badge you could escort anyone into the area. Tr. at 75. Later, the Individual spoke to another co-worker who informed him that employees were not allowed to escort others into the prohibited area. Tr. at 76. The Individual then

researched the correct policy on escorting non-employees and found that the co-worker was correct. Tr. at 76. The Individual informed his management team and his manager then sent an e-mail to his work team outlining the correct procedures. Tr. at 76-77.

The Individual stated that he also told the DOE polygrapher that, in 2012, he had taken his cell phone into a prohibited area.² Tr. at 78. He testified that other co-workers had advised him not to report the event since others who had self-reported underwent significant problems from officials. Tr. at 78-79. After this incident, the Individual disposed of his cell phone to avoid a similar incident. Tr. at 79-80.

The Individual testified that he had viewed pornography on two occasions, in January or February 2014, using his government issued laptop computer. Tr. at 92.³ On one occasion he connected to the internet to view pornography on his laptop and on the other he connected a personal flash drive to view pornography. Tr. at 92; *see* Ex. 5 at 13. The Individual stated that on the first occasion he viewed pornography, he sought to relieve extreme stress relating to a presentation he was to make at a conference before computer professionals. Tr. at 80-81, 97. The second occasion occurred shortly after his presentation while at home. Tr. at 93, 96; *see* Ex. 6 at 45. The Individual believes he now better handles stress. Tr. at 104. A primary technique to relieve stress is for the Individual to focus solely on a project and to delegate stressful tasks to others. Tr. at 106.

His decision to view pornography was influenced by his normal practice when taking a government-issued laptop to a conference or using it to access a public internet system, which was to completely reinstall the laptop's operating system thus restoring the laptop to a "clean state" and making the chance of infecting the DOE's facility's computer system small.⁴ Tr. at 81, 91, 95. The Individual knows he made a "bad decision" in viewing pornography on his government issued laptop. Tr. at 81.

The Individual further testified that he now knows significantly more how security incidents are handled and that he is dedicated to reporting any breach of security rules. Tr. at 83. The Individual knows that the "horror stories" he was told by other employees are not true and that he tries to

² The Notification Letter and the PSI indicate that the Individual took his cell phone into a prohibited area on two other occasions although the Individual could not remember the dates. Ex. at 1; Ex. 6 at 25.

³ The Notification Letter refers to another two incidents identified as occurring in 2015. Ex. 1 at 1. However it is apparent that the interviewer in the PSI mistakenly substituted the date 2015 when asking about the 2014 incidents. *See* Tr. at 92-94. As a result of my examination of the transcript and the Individual's testimony I find that there were only two incidents where the Individual viewed pornography and that both occurred in 2014.

⁴ The Notification Letter alleges that the Individual "downloaded the pornography onto his personal flash drive from his personal computer so that the videos and images could be viewed on the government computer in incognito mode, which allowed him to download the images and videos onto the government computer without being stored or detected on the disk drive." Ex. 1 at 1; Tr. at 102; Ex. 6 at 50-51, 95-97. The Individual testified that he used incognito mode to protect the computer from possible contamination and that using incognito mode would not disguise the web sites that person visited. Tr. at 102-04. The Individual has submitted a letter from the Supervisor confirming that the use of incognito mode is a security best practice which protects a computer from malicious code but it does not "hide your tracks" and that the Individual would have known that fact. Ex. G at 1.

dispel fear from other employees when it comes to reporting security infractions and to encourage employees to come forward with security infractions. Tr. at 84. The Individual is now very cautious regarding actions if he does not know the security rules regarding those actions. Tr. at 85. Further, he feels free to ask to get security information and to have questions answered in writing. Tr. at 85.

The Individual testified that during the PSI, he stated that he likes to “push against the rules.” Tr. at 111-12. In making this statement, the Individual stated that he did not mean to give the impression that he wanted to challenge the rules but that he believed in determining what the rules actually meant as opposed to accepting the general opinion of other employees. Tr. at 111-13.

The Manager testified that he has known the Individual for six years. Tr. at 11. Prior to the suspension of the Individual’s clearance, the Manager worked with the Individual every day. Tr. at 18. The Manager testified that the facility has reviewed the problem of employees bringing their cell phones into prohibited areas and that he is unaware of any incident involving unauthorized disclosure of information. Tr. at 15-16. As a result, such incidents are not now considered to be “incidents” but now are handled by having a security official examine a phone brought into a prohibited area and then have the phone removed from the area. Tr. at 16. The Manager testified that the Individual is very focused and takes his work very seriously. Tr. at 19. Despite the Individual being moved to another position because of the suspension of his clearance, the Individual has continued to perform in a superior fashion. Tr. at 27. The Individual has mentored many other employees. Tr. at 19. As a result of the suspension of his clearance, the Manager believes that the Individual has been “very repentant” and has realized the seriousness of his errors. Tr. at 19-20, 25. The Manager has observed the Individual encouraging other employees to self-report incidents to security officials. Tr. at 20. The Manager testified that the fact that the Individual had a habit of “wiping” his government issued laptop clean after accessing the outside internet, when many other employees would not, showed computer security consciousness. Tr. at 22. He believes that the Individual has learned from this experience and that he will exercise good judgment in the future. Tr. at 25-26.

The Supervisor testified that, until he recently changed positions, he had been the Individual’s direct supervisor. Tr. at 39-40. The Supervisor testified as to the Individual’s extraordinary work performance. Tr. at 40. The Supervisor went on to testify that he encouraged all employees that took computers to conferences to “wipe their computer clean.” Tr. at 45. With regard to the viewing of pornography, the Supervisor and his management team considered the problem to be a management issue and not a computer threat issue.⁵ Tr. at 46. As for the issue of the Individual taking his phone to a prohibited area, the Supervisor stated that such an event is not a security incident. Tr. at 48. Further, such events are “kind of a common occurrence.” Tr. at 48. He went on to testify that many employees believe that there is a stigma attached to an event where one carries a phone into a classified area. Tr. at 48. At the time the facility changed its policy regarding phones carried into prohibited areas, the Supervisor observed a significant amount of confusion from

⁵ The Individual received workplace discipline for viewing pornography on his laptop. Ex. 5 at 3-4.

employees about the procedure for reporting such events. Tr. at 49. As for the incidents noted in the Notification Letter regarding the Individual improperly escorting his wife and child into a prohibited area, the Supervisor stated that the Individual had notified a supervisor about the incident and that such notification would have been the correct procedure for reporting the incident. Tr. at 61. He always encourages employees to report these occurrences to security. Tr. at 48. Further, the Supervisor has observed the Individual encouraging others to report possible security incidents. Tr. at 49.

When the Supervisor saw the Individual after the polygraph examination, he believed that the Individual was quite distraught. Tr. at 50. During their conversation, the Individual kept trying to think if he had withheld anything from the DOE polygrapher. Tr. at 50. The Supervisor believes that the Individual revealed anything that could be a security issue during the polygraph examination and did not try to hide anything. Tr. at 50-51. He also believes that the Individual has learned from his mistakes and will not repeat them. Tr. at 51. Since the 2014 polygraph examination, the Supervisor has not seen any indication that the Individual has violated security regulations; the Individual has been conservative, in fact, in interpreting security procedures. Tr. at 52. In this regard, the Supervisor testified “he’s not toeing the line anywhere. [h]e’s way inside of it.” Tr. at 52. Overall, the Supervisor believes that the Individual is a very honest, trustworthy, person who will not put the security of the nation at risk. Tr. at 54.

V. 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) and the Adjudicative Guidelines. After due deliberation, I have determined that the Individual’s DOE security clearance should be restored. I 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.

1. Improperly Escorting Spouse and Son into a Prohibited Area

In evaluating the evidence regarding these allegations, I found the testimony of the Individual, the Manager and the Supervisor to be credible. The two incidents involving the Individual improperly escorting his spouse and son into a prohibited area occurred almost nine years ago in 2007 and 2008. The Individual has submitted a letter from the now Chief Information Officer (CIO) at the facility who was his direct supervisor at the time of the incidents. Ex. G. In the Letter, the CIO states that the Individual reported these events to him. Ex. G at 3. He also stated that other employees would escort non-security cleared individuals into the area for personal purposes. This practice ended when all of his employees received clarification that such escorting was not permitted. Ex. G at 3.

Given the testimony of the witnesses and the written statement from the CIO, and the fact that the Individual had just gained employment at the facility in 2007 and was thus a relatively new employee, I do not find that the Individual's escorting of his wife and son represented intentional security lapses. In making this finding, I have considered that the Individual allegedly admitted that he knew this action violated security regulations. Ex. 1 at 2. The transcript of the PSI indicates that the Individual stated that he was unsure about the escort procedures. Ex. 6 at 37 ("I thought I was and I was not (in compliance)"). The Individual's written account of the incident prepared for the facility again states that he was informed by his then supervisor (the CIO) that such escorting was allowed and that later he and his fellow employees were informed that such escorting violated security procedures. Ex. 5 at 24. While it is possible the Individual may have been uncertain as to the proper policy, the evidence establishes that he did not intentionally violate security procedures in the two occasions he escorted his spouse and son into a prohibited area. I find that the mitigating factors contain in the Adjudicatory Guideline K (Handling Protected Information) ¶ 35 (b) and (c) apply in this case and that the Individual has resolved the security concerns raised by these incidents.⁶

2. Carrying a Phone into a Prohibited Area

The Individual carried a cell phone several times into a prohibited area in 2012. Ex. 5 at 22. The Individual has submitted a letter from the Supervisor stating his opinion that there was significant confusion as to the policy to be employed regarding such incidents. Ex. G at 2. This supervisor stated that in some work groups the standing policy was to merely report the incident to a manager who would make the appropriate notifications, other groups thought that the facility's security organization needs to examine the phone, yet other groups required notification of the facility's computer security organization. Ex. G at 2. I find it significant that the Individual no longer owns a cell phone in order to prevent future incidents. Given the testimony and documentary evidence before me I find that the Individual's inadvertent carrying of a cell phone into a prohibited area and failure to notify the facility's security organization was unintentional. I also find that Adjudicative Guideline mitigating factors Adjudicatory Guideline K (Handling Protected Information) ¶ 35 (a) and (b) apply in this case.⁷ Given the evidence before me I find that the Individual has resolved the Criterion L security concerns raised by his improper carrying of a cell phone into a prohibited area.

3. Failure to Report an Unauthorized Hard Drive in a Prohibited Area

⁶ These mitigating factors refer to information that indicates "that the individual responded favorably to counseling or remedial security training and now demonstrates a positive attitude toward the discharge of security responsibilities" (Paragraph 35 (b)) and that "the security violations were due to improper or inadequate training" (Paragraph 35(c)).

⁷ These mitigating factors refer to information that indicates "so much time has elapsed since the behavior, or it happened so infrequently or under such unusual circumstances that it is unlikely to recur or does not cast doubt on the individual's current reliability, trustworthiness, or good judgment" (Paragraph 35 (a)) and "that the individual responded favorably to counseling or remedial security training and now demonstrates a positive attitude toward the discharge of security responsibilities" (Paragraph 35 (b)).

The Individual was a relatively new and inexperienced employee in 2007 when he observed his mentor taking a portable hard drive into a prohibited area. I find credible the Individual's testimony that he did ask his mentor about the propriety of having the hard drive in the area and that he now realizes that he should have reported the incident. Given these facts and the almost nine years that have elapsed from this incident, I find that Adjudicative Guideline K mitigating factors ¶ 35 (a), (b), and (c) apply in this case and that the Individual has provided sufficient evidence to resolve the security concerns arising from this incident.

4. Viewing Pornography on a Government Issued Laptop

The Individual admits that he exercised poor judgment in deciding to look at pornography on two occasions on a government issued laptop in 2014. In mitigation, the Individual has presented evidence of his renewed commitment to scrupulously follow all security rules and regulations. This testimony is supported by the testimony of the Manager and Supervisor. An examination by a DOE-contractor psychiatrist did not reveal any type of psychological pathology or addiction to pornography. Ex. 4. The Individual has also submitted a number of letters from friends and co-workers attesting to the Individual overall character and trustworthiness and his record of volunteering as well as his stellar performance as an employee. *See* Ex. G.

In other cases evaluating security concerns arising from viewing pornography on government-issued computers, Administrative Judges have noted some of the following factors in making a determination as to fitness for a security clearance: amount of time elapsed since last accessing pornography; counselling or psychiatric opinions indicating low probability of repeat of behavior; remorse of individual; realization of consequences to position if individual repeats viewing pornography on a government-issued system; and testimony and other evidence of good character. *See Personnel Security Hearing*, Case No. TSO-0541 (2008); *Personal Security Hearing*, Case No. TSO-0905 (2010).⁸

I note that the extent of the Individual's viewing of pornography, on two occasions, is relatively limited and occurred almost two years ago. The Individual's testimony, which I find credible, indicates that he has been shaken by the ordeal he has undergone by the Administrative Review process and fully understands the DOE concerns regarding this conduct. *See* Tr. at 88. The Individual also convincingly testified that he has taken this experience as a learning experience and seeks to help other employees not to have to go through this process. *Id.* The Individual has revealed the pornography incident to his co-workers and superiors and does not appear to be susceptible to blackmail. Tr. at 51, 53- 54. The Individual's otherwise outstanding character has been attested by the Manager and Supervisor as well as in the letters submitted by those who know the Individual. Ex. G. Given the evidence before me, I find that the Individual has resolved the security concerns raised by the two instances of viewing pornography on his government issued laptop.

⁸ These factors have been used in cases where an individual has been found not to suffer an addiction to pornography. In the present case the DOE-contractor psychiatrist made no finding that the Individual suffered from any psychological disorder.

VI. Conclusion

In the above analysis, I found that there was reliable information that raised substantial doubts regarding the Individual's eligibility for a security clearance under Criterion L of the Part 710 regulations. After considering all of the relevant information, favorable and unfavorable, in a comprehensive, common-sense manner, including weighing all of the testimony and other evidence presented at the hearing, I find that the Individual has presented sufficient information to resolve the cited security concerns. Therefore, I conclude that restoring the Individual's suspended DOE access authorization "will not endanger the common defense and is clearly consistent with the national interest." 10 C.F.R. § 710.7(a). Accordingly, I find that the DOE should restore the Individual's suspended DOE access authorization.

Richard A. Cronin, Jr.
Administrative Judge
Official of Hearings and Appeals

Date: March 1, 2016