

United States Department of Energy
Office of Hearings and Appeals

In the Matter of Personnel Security Hearing)

)

Filing Date: May 19, 2016)

Case No.: PSH-16-0040

)

)

Issued: August 19, 2016

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 should not be granted a security clearance at this time.²

I. BACKGROUND

The following facts are undisputed. The individual is employed by a Department of Energy (DOE) contractor, who requested a security clearance on his behalf. In response to this request, the Local Security Office (LSO) initiated an investigation of the individual. As part of that investigation, he completed and signed a Questionnaire for National Security Positions (QNSP) on May 2, 2015. On

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>.

****This document contains information which is subject to withholding from disclosure under 5 U.S.C. § 552.****

the QNSP, he indicated that he had previously been charged with a criminal offense involving alcohol or drugs, and he described that offense as “DUI” (Driving Under the Influence). DOE Exhibit (DOE Ex.) 5 at 39. In his description of the offense, he mentioned his consumption of alcohol preceding the arrest, but he did not mention any usage or possession of illegal drugs or any charges involving such usage or possession. *Id.* at 45. During an interview with an Office of Personnel Management (OPM) investigator on July 15, 2015, the individual told the investigator that his July 29, 1992, arrest was for DUI, that he consumed approximately a pitcher of beer with his girlfriend at dinner preceding the arrest, and that he did not believe that he was drunk. DOE Ex. 7 at 59. Again, he initially did not mention any illegal drugs or any charges relating to illegal drugs. However, records obtained from the jurisdiction in which the arrest took place indicate that the individual was charged with Criminal Possession of Marijuana, Failing to Keep to the Right of the Road, Driving While Intoxicated by Drugs (DWI-Drugs), and Driving While Ability Impaired. The individual pled guilty to one count of DWI, and paid a fine. DOE Ex. 7 at 65; Individual’s Exhibit 6.

Because this information raised security concerns, the LSO summoned the individual for an interview by a personnel security specialist. After this Personnel Security Interview (PSI) failed to adequately address these concerns, the LSO determined that derogatory information existed that cast into doubt the individual’s eligibility for access authorization. The individual was informed 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 seven exhibits into the record of this proceeding. The individual introduced six exhibits and presented the testimony of four witnesses at the hearing, in addition to testifying on his own behalf.

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

As indicated above, the Notification Letter included a statement of derogatory information that created a substantial doubt as to the individual’s eligibility to hold a clearance. This 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) defines as derogatory 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. As support for its invocation of this criterion, the Letter refers to the information set forth in the preceding section of this Decision. The Letter also alleges that the individual admitted during the PSI that he knowingly provided false accounts of his July 29, 1992, arrest on the QNSP and to the OPM investigator.

This information adequately justifies the DOE's invocation of criterion (I) and raises significant security concerns. Conduct involving dishonesty or lack of candor can raise questions about an individual's reliability, trustworthiness, and ability to protect classified information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process. *See Revised Adjudicative Guidelines for Determining Eligibility for Access to Classified Information, The White House (December 19, 2005), Guideline E.*

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. Mitigating Evidence

At the hearing the individual attempted to demonstrate, through his own testimony and that of a co-worker, a colleague, a friend, and a neighbor, that he is an honest person who can be trusted to safeguard classified information. At the outset, the individual testified about his 1992 arrest. He said that after attending a dinner party with his girlfriend, he was driving home when he was stopped by the police because he had inadvertently swerved slightly out of his lane. While one officer was administering a field sobriety test to the individual, the other officer approached the individual's vehicle, in which his girlfriend was seated. She then reached under the front seat, removed a bag of marijuana, and put it in her pants pocket. The officer asked her if she had anything to declare, and she

then presented the bag of marijuana to the officer. They were both then arrested. The final result of this arrest, the individual continued, was that he was charged with DWI, and that the other charges against him were expunged from the record. Hearing Transcript (Tr.) at 49-50.

The individual then testified about his QNSP and his PSI. Regarding the QNSP, he indicated that he provided information about this arrest, that he did not intend to provide false information, and that he answered the questions on the form to the best of his ability. Tr. at 51. He felt “pressured” to fill out the form expeditiously, and said that if he had had more time, he would have provided more complete and accurate answers. Tr. at 70. He then denied the allegations in the Notification Letter that he admitted to providing false accounts of the arrest during his PSI. The individual told the OPM investigator that he was charged with DWI as a result of his 1992 arrest, and that he believed that the remaining charges, which he outlined to the investigator, had been expunged from his record. Tr. at 54-55. He further testified that he had been completely cooperative with the investigation, and that he did not lie or intentionally omit any relevant information. Tr. at 55-56.

The individual’s co-worker, colleague, friend and neighbor all testified that the individual is honest and trustworthy. Tr. at 13, 21, 32, 38. The individual’s colleague and co-worker, both of whom hold security clearances, also testified that they believe that he is capable of adequately safeguarding classified information. Tr. at 24, 41.

B. Administrative Judge’s Findings

Despite this testimony, I find that the individual deliberately attempted to mislead the DOE concerning the true nature of his 1992 arrest. As mentioned above, the individual did indicate on his QNSP that he had previously been “charged with an offense involving alcohol or drugs.” DOE Ex. 5 at 39. However, for each such offense, the individual was instructed to “provide all the charges brought against you . . . , and the outcome of each charged offense (such as found guilty, found not-guilty, or charge dropped or “nolle pros,” etc.)” If he was found guilty of or pleaded guilty to a lesser offense, he was to “list both the original charge and the lesser offense separately.” *Id.* The only charge listed by the individual was “DUI.” In his description of the sentence imposed for this offense he wrote “Was arrested for DUI . . . , [p]aid a large fine, restricted license and school for a few months. No jail time, conditional discharge (no DUI) and no further issues.” *Id.* As “Additional Comments” on this arrest, the individual wrote “In 1992 was likely I had too much beer at dinner with my girlfriend, but didn’t feel drunk or act drunk, but blew .005 into the meter. I didn’t serve any jail time and I don’t drink and drive.” *Id.* at 45.

Although the individual was clearly instructed to “provide all of the charges brought” against him, he failed to mention any charge relating to the possession or usage of marijuana. Moreover, his “Additional Comments” mentioned alcohol use and not marijuana, even though he admitted during the hearing that the arrest was related only to marijuana, and not to alcohol, and that he was aware of that fact at the time that he filled out the QNSP. Tr. at 60, 63. It is evident from this that the individual tried to convey the erroneous impression that this arrest was related to alcohol usage, and not to marijuana. The individual repeatedly explained, both at the hearing and during his PSI, that he did not mention the marijuana-related charges because he believed that they had been expunged from his

record. However, the QNSP instructed the individual to “report information regardless of whether the record in [his] case has been sealed, expunged, or otherwise stricken from the court record, or the charge was dismissed.” DOE Ex. 5 at 38. Based on the record in this case and the individual’s testimony at the hearing, it is evident that he is an intelligent and well-educated man. I therefore did not find credible his claim that he found this language to be confusing. Instead, I conclude that the individual intentionally provided incomplete and misleading information about his 1992 arrest on his May 2015 QNSP.

I reach a similar conclusion with regard to the individual’s July 2015 interview with the OPM investigator. As previously mentioned, he initially indicated that his arrest involved alcohol consumption, with no mention of marijuana. It was only after the investigator brought up the charges that were brought against him that the individual admitted that the arrest was related to marijuana. Tr. at 66.

As was the case with the QNSP, I find that the individual intentionally provided incomplete and misleading information to the OPM investigator. The individual testified that he initially provided incomplete information to the investigator because he believed that the drug-related charges had been expunged from his record. Tr. at 66. However, even if the individual erroneously believed that he did not need to mention charges that had been expunged, this did not justify his intentional provision of misleading information about the charge that was not expunged. Significant security concerns remain under criterion (I).³

V. CONCLUSION

For the reasons set forth above, I find that the individual has not resolved the DOE’s security concerns under criterion (I). Consequently, he has failed to convince me that granting him access authorization would not endanger the common defense and would be clearly consistent with the national interest. Accordingly, I conclude that the DOE should not grant the individual a 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: August 19, 2016

³ The individual pointed out, both in his pre-hearing submission and at the hearing that the arrest in question occurred approximately 24 years ago. While this would certainly be a mitigating factor if the DOE’s primary concern was about illegal activity, *see Adjudicative Guidelines*, ¶ 32(a), the security issues in this case have to do with the individual’s honesty and trustworthiness. As his misrepresentations on the QNSP and to the OPM investigator occurred in 2015, the passage of time is not a mitigating factor in this case.