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**United States Department of Energy
Office of Hearings and Appeals**

In the Matter of:	Personnel Security Hearing)	
)	
Filing Date:	September 27, 2016)	Case No.: PSH-16-0076
)	
_____)			

Issued: May 3, 2017

Administrative Judge Decision

Wade M. Boswell, Administrative Judge:

This Decision concerns the eligibility of XXXXXXXXXXXXXXXX (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 access authorization should be granted.

I. Background

The individual is employed by a DOE contractor in a position that requires him to hold a DOE security clearance. During the security investigation of the individual, the DOE received certain adverse information about the individual. As a result of this information, the Local Security Office (LSO) conducted three personnel security interviews (PSIs) with the individual, two in December 2014 and one in September 2015, on various topics of concern. *See* Exhibit 7, Exhibit 8, Exhibit 9.

While the PSIs resolved certain concerns raised during the security investigation of the individual, issues remained with respect to allegedly false or inaccurate information

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.

provided by the individual to the DOE. Therefore, the LSO informed the individual in a letter dated August 12, 2016 (Notification Letter), that it possessed reliable information that created substantial doubt regarding his eligibility to hold a security clearance. In the Notification Letter, the LSO explained that the derogatory information fell within the purview of one potentially disqualifying criterion set forth in the security regulations at 10 C.F.R. § 710.8, subsection (f) (hereinafter referred to as Criterion F).² See Exhibit 1.

Upon his receipt of the Notification Letter, the individual exercised his right under the Part 710 regulations by requesting an administrative review hearing. See Exhibit 2. The Director of the Office of Hearings and Appeals (OHA) appointed me the Administrative Judge in the case and, subsequently, I conducted an administrative hearing in the matter. At the hearing, the LSO presented no witnesses; the individual presented the testimony of two witnesses, including that of himself. The LSO introduced ten numbered exhibits into the record; the individual tendered one lettered exhibit (Exhibit A). 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 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 granting or restoring his or her 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 or her 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

² See Section III below.

³ OHA decisions are available on the OHA website at www.energy.gov/oha/office-hearings-and-appeals. A decision may be accessed by entering the case number in the search engine at www.energy.gov/oha/security-cases.

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.*

III. The Notification Letter and the Security Concerns at Issue

As previously noted, the LSO cited one criterion as the basis for denying the individual's security clearance: Criterion F. Criterion F refers to information that a person has "deliberately misrepresented, falsified, or omitted significant information from a Personnel Security Questionnaire, a Questionnaire for Sensitive National Security Positions, a personnel qualifications statements, a personnel 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 [Part 710 administrative review] proceedings...." 10 C.F.R. § 710.8(f). Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness, and ability to protect classified information. Any failure to provide truthful and candid answers during the security clearance process is of particular concern. *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). With respect to Criterion F, the LSO alleges that the individual falsely denied: (1) on Declarations for Federal Employment in 2012 and 2014 and on a Questionnaire for National Security Positions (QNSP) in 2014 that he had served in the United States military; (2) on his 2014 QNSP and during three PSIs that he had illegally possessed, transferred and/or sold a control substance while he was serving as a Military Police Officer; and (3) during three PSIs that he had ever used illegal drugs. Ex. 1 at 3-4.

In light of the information available to the LSO, the LSO properly invoked Criterion F.

IV. Findings of Fact and 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)⁴ and the Adjudicative Guidelines. After due deliberation, I have determined that the individual's access authorization should be granted. The specific findings that I make in support of this decision are discussed below.

Falsification Allegations With Respect to Military Service. In the Notification Letter, the LSO alleges as a Criterion F security concern that the individual gave false information on two Declarations for Federal Employment⁵ and a 2014 QNSP when, on each form, he responded "No" to the question "Have you ever served in the United States military?" Ex. 5 at 1; Ex. 6 at 1; Ex. 10 at 39. The Notification Letter states that the individual enlisted in the Army in 1978 and was discharged in 1984. Ex. 1 at 3.

While one would expect that the answer to this question would be a straight-forward factual matter, it is not in this case.

Although the individual acknowledges that he voluntarily entered the U.S. Army in 1978 and, subsequently, received an official discharge document from the Army in 1984, he credibly testified that he *believes* that he was never legally in the military. Tr. at 15-21. The individual testified that, in 1979, he was informed by the Army Captain who was in charge of his unit that, due to clerical or other errors in the individual's induction process, the individual had never been legally inducted into the Army. *Id.* at 15, 17. Shortly after receiving such information, the individual was injured in an off-duty vehicular accident and left the Army for medical reasons. *Id.* at 17, 21. No record of any military discharge for 1979 was admitted into the record of this case. Thereafter, the individual established a

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 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.

⁵ Criterion F relates to a deliberate misrepresentation or falsification of significant information "from a Personnel Security Questionnaire, a Questionnaire for Sensitive National Security Positions, a personnel qualifications statements, a personnel 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). All of the documents specifically named in Criterion F are documents which are utilized by the DOE in assessing a person's eligibility for access authorization; the generic reference to "written or oral statements" at the conclusion of Criterion F is similarly limited to statements made as part of the access authorization process. The LSO acknowledged at the hearing that Declarations for Federal Employment are completed as part of "the *employment* personnel process" and "not the personnel *security* process;" however, the LSO could not confirm the specific context in which the individual completed his Declarations of Federal Employment. Tr. at 67 (emphasis added). As such, it is not clear that the individual's Declarations for Federal Employment are within the scope of Criterion F, notwithstanding the LSO's argument at the hearing that Declarations for Federal Employment are "personnel qualification statements" of the type referred to in Criterion F. *See Id.* However, this distinction does not affect the ultimate disposition of this case as the individual's allegedly false statement in each of his Declarations for Federal Employment was repeated in his 2014 QNSP, which is a document completed by the individual as part of the access authorization process and is clearly within the scope of Criterion F. *See* Ex. 10 at 27.

civilian life, including civilian employment, and married and had children. *Id.* at 18, 21. In 1984, the individual was ordered by the Army to report to a military installation because, according to the individual's testimony, his 1979 military discharge had not been properly processed. *Id.* at 18-19. When he reported to the military installation, he was informed that not only had his 1979 discharge been improperly processed but another Army captain informed him that his original induction had been defective and that he had never legally been in the military. *Id.* at 19. The individual subsequently received documentation (DD Form 214) that he had been discharged from the Army, effective October 1984. *See* Ex. 3. The DD Form 214 states the individual served in the Army for five years, ten months, notwithstanding that he had had no military duties or activities and had lived as a civilian during most of the period between 1978 and 1984. Ex. 3 at 6.

The individual credibly testified that because he had been informed that he had never legally been in the military by different Army captains on two separate occasions, once in 1979 and once in 1984, he believes he was not legally in the military and, consequently, he has never claimed any veteran's status or benefits. Tr. at 19, 21, 23, 25. He testified that, in light of the statements made by the two Army captains, he believed it would have been erroneous for him to have responded "Yes" to the questions about military service on the forms he completed for DOE. *Id.* at 23.

Although the facts are unusual, the individual provided a cohesive explanation that supports his denial of military service in answering two Declarations for Federal Employment and the 2014 QNSP. The individual convincingly testified that from his understanding of his "military service," he believed he was providing correct responses on the questionnaires. For a security concern to arise under Criterion F, an individual must have *deliberately* provided false information to DOE during the access authorization process. *See* 10 C.F.R. § 710.8(f). In this case, the individual established that he legitimately believed that he was providing the most accurate information that he could under the circumstances. For these reasons, the individual has resolved the Criterion F security concerns alleged with respect to his denial of military service on the three questionnaires that he completed for DOE.

Falsification Allegations With Respect to Involvement with Controlled Substances. In the Notification Letter, the LSO alleges as a Criterion F security concern that the individual provided false information (1) on his 2014 QNSP and during three PSIs when he denied illegal use or involvement with a drug or controlled substance while serving as a Military Police Officer and (2) during the three PSIs when he repeatedly denied ever using a controlled substance. Ex. 1 at 4.

In 1979, the individual was a lower grade (E-2) Army Military Police Officer. He testified that, as part of his assignments, he had participated in a controlled sale of marijuana at the request of one of his superiors. Tr. at 31-39. During the LSO's investigation of the individual, the LSO received an Army Criminal Investigation Division Report (CIDR), dated July 31, 1979, which stated the reverse: that the individual had been the subject of such an investigation during which he had transferred and sold marijuana and, subsequent

to such sale, had been apprehended and arrested with additional marijuana in his possession. Ex. 4.

While written reports prepared by law enforcement agencies in the ordinary course of law enforcement activities are routinely accepted by Administrative Judges to establish the veracity of the matters described therein, the accuracy of such reports can be refuted and an Administrative Judge determines the relative weight of all evidence introduced into the record. Here, the individual denied that he had ever sold marijuana, had ever been physically searched, had ever been apprehended by law enforcement, or had ever signed a written confession with respect to selling controlled substances, all events described in the CIDR. Ex. 4; Tr. at 39-41, 42, 51. The copy of the CIDR submitted by the LSO is heavily redacted and critical attachments, including the individual's alleged signed confession, were omitted. *See* Ex. 4. The individual testified that the superior who had recruited him to participate in the controlled sale had been the subject of a complaint that the individual had filed as a result of physical injuries the individual sustained during a hazing incident. *Id.* at 55, 59. This complaint was filed shortly before the first of the controlled substances transfers that were described in the CIDR. The individual's testimony regarding the hazing event is corroborated by infirmary records for treatment of his injuries and a contemporaneous affidavit by one of his platoon members. Ex. A at 1-7. The redactions to the CIDR introduced into the record removed the names of all other personnel from the report, including the names of the investigator and the report's author.

The record provides no evidence of the individual receiving any discipline while in the military. The individual's DD Form 214, which was issued in 1984, states the individual was discharged from the Army under honorable conditions. Ex. 3 at 6.

During two of the PSIs, the LSO noted that the individual's alleged involvement with controlled substances in 1979 would be "easy to mitigate" (Ex. 7 at 33) on several bases,⁶ including the amount of time that has passed since the alleged incident and there being no evidence of the individual having subsequent involvement with controlled substances. Ex. 7 at 33-47; Ex. 9 at 119-120. The LSO's assertions with respect to mitigation are in accord with the Adjudicative Guidelines and, consistent with those assertions, the Notification Letter is limited to security concerns arising from alleged falsification and raises no security concerns with respect to any underlying drug usage and criminal conduct. *See* Adjudicative Guidelines at Guideline H, ¶26(a); Adjudicative Guidelines at Guideline J, ¶32(a), (d); Ex. 1. Even though the individual was assured that his agreeing to the accuracy of the CIDR would result in the matter being mitigated by the LSO during the investigation process, the individual declined to change his explanation of the incident because he stated that endorsing the facts set forth in the CIDR would constitute a lie. Ex. 9 at 121, 125-126. The individual declining the opportunity to revise his explanation illustrates his commitment to the accuracy of the information that he had provided during the PSIs.

⁶ While it is possible that an interviewer could make such an assertion merely as an investigation strategy, here the LSO's statement is in accord with mitigation factors for both drug involvement and criminal activity. *See* Adjudicative Guidelines at Guideline H, ¶26(a); Adjudicative Guidelines at Guideline J, ¶32(a), (d).

For a matter to constitute a Criterion F security concern, an applicant must have “*deliberately* misrepresented, falsified, or omitted significant information” during the access authorization process. 10 C.F.R. § 710.8(f) (emphasis added). In this case, the challenge to the truthfulness of the information provided by the individual comes from a highly redacted report that is nearly 40 years old, the accuracy of which the individual contested and which stands in contrast to the individual’s lack of any history of military discipline, his discharge under honorable conditions, and his testimony (with corroboratory contemporary documentary evidence) of his adversarial relationship with a superior. For these reasons, I have accorded limited evidentiary weight to the CIDR and find that the individual did not deliberately provide the LSO with false or misleading information with respect to his involvement in the transfer or sale of controlled substances while he was a Military Police Officer in 1979. Therefore, I conclude that the individual has adequately resolved the Criterion F security concerns alleged with respect to such information.

Additionally, the LSO alleges that the individual falsely denied that he had ever used a controlled substance during the three PSIs. Ex. 1 at 4. The LSO notes the individual’s Army enlistment application (completed in 1979) where he acknowledged that he experimented with marijuana while in high school. Ex. 3 at 19-20.

The individual does not deny the authenticity of the statement on his Army enlistment application and, in fact, it is the individual who provided the LSO with a copy of his enlistment application. *See* Ex. 3 at 1-2. His testimony, as well as his statements during the PSIs, suggests that, absent having been confronted with the statement on his enlistment application, he has no or little recollection of such usage. Tr. at 44. The individual also testified that he initially understood the question during the PSI as inquiring about past involvement with drug activity, as opposed to an inquiry about even a single instance of illegal drug use. *Id.* Under these circumstances, I find that the individual’s responses during the PSIs in which he denied having illegally used a controlled substance were not a deliberate attempt to mislead the LSO with respect to his eligibility for access authorization and, therefore, do not constitute a Criterion F security concern. 10 C.F.R. § 710.8(f).

Based upon the foregoing, I find that the individual has resolved the Criterion F security concerns.

V. Conclusion

In the above analysis, I have found that there was sufficient derogatory information in the possession of the DOE that raised serious security concerns under Criterion F. After considering all the relevant information, favorable and unfavorable, in a comprehensive common-sense manner, including weighing all the testimony and other evidence presented at the hearing, I have found that the individual has brought forth sufficient evidence to resolve the security concerns associated with Criterion F. Accordingly, I have determined that the individual’s access authorization should 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.

Wade M. Boswell
Administrative Judge
Office of Hearings and Appeals

Date: May 3, 2017