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February 25, 2008

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Hearing Officer's Decision

Name of Case: Personnel Security Hearing

Date of Filing: August 21, 2007

Case Number: TSO-0534

This decision concerns the eligibility of XXXXXXXXXXXX ("the Individual") for continued access authorization. This Decision will consider whether, based on the testimony and other evidence presented in this proceeding, the Individual's suspended access authorization should be restored. For the reasons detailed below, it is my decision that the Individual's access authorization should not be restored at this time.

I. BACKGROUND

The Individual has been employed at a DOE facility in a position that requires him to hold an access authorization. The Individual reported to the local security office (LSO) at his facility that he was arrested for Statutory Rape due to his sexual involvement with a 15-year-old female ("the adolescent"). As a result, the Individual was the subject of a personnel security interview (PSI) in March 2006. DOE Ex. 3.

During the PSI, the Individual discussed the events leading to his arrest, and ultimately his indictment, for Statutory Rape. The Individual stated that he met the adolescent in March 2005 when he was temporarily living with his father. He was 22 years old at the time. *Id.* at 47. She was a neighbor. The Individual stated during the PSI that, although the adolescent never specifically stated that she was 18 years old, she led him to believe that she was. *Id.* at 46. The Individual stated that he and the adolescent had consensual sex twice. *Id.* at 47. When the adolescent's father learned of the Individual's sexual involvement with his daughter, he had the Individual arrested for Statutory Rape. *Id.* at 49.

In October 2005, the Individual was indicted for Statutory Rape, a charge to which he pled not guilty. DOE Ex. 4. In April 2007, the Individual entered a guilty plea to the statutory rape charge. DOE Ex. 2. Upon completion of a number of court-ordered requirements, including undergoing a psychological evaluation and paying a fine, the Individual was sentenced to one year of probation in his state's judicial diversion program. *Id.*; *see also* Indiv. Ex.

In July 2007, the DOE notified the Individual that his arrest for Statutory Rape and the resulting criminal proceedings created security concerns under 10 C.F.R. § 710.8(l) (Criterion L). Notification Letter, July 13, 2007. Upon receipt of the Notification Letter, the Individual requested a hearing in this matter. *See* Individual's Letter, July 26, 2007. In his response, the Individual stated that he ended the relationship in June 2006. *Id.* The Individual stated that he did not knowingly have sexual relations with a minor; he believed that the adolescent was 18 years of age due to her appearance, actions, and overall demeanor. *Id.*

The DOE forwarded the request to the Office of Hearings and Appeals (OHA). The OHA Acting Director appointed me to serve as the Hearing Officer. A hearing was held in this matter. Both the Individual and the DOE counsel submitted documents. At the hearing, the Individual presented his own testimony as well as the testimony of his wife, his father, his mother, his stepmother, his father-in-law, and a former employer. The DOE counsel did not bring forth any witnesses.

II. HEARING TESTIMONY

A. The Individual

The Individual described his sexual involvement with the adolescent as “a lack in judgment.” Transcript (“Tr.”) at 99. He stated, “maybe not in years, but in maturity and priorities, I was very young. I was very immature. My priorities have changed a great deal since then.” *Id.* He added that the incident and the resulting consequences have made him evaluate his priorities. Tr. at 100.

Regarding how he came to be involved with the adolescent, the Individual stated that, while the adolescent never explicitly told him her age, her actions led him to believe she was 18 years old. For example, he stated, “when I met her, she was walking around, smoking, and, you know, out in the neighborhood, so I’m thinking, you know, if she’s not 18, she’s not going to be out in ... broad view of her parents and neighbors smoking. And then she said, ‘Well, I went to the store and bought cigarettes,’ so I’m sitting here thinking she’s at least 18, if she’s going to the store and buying cigarettes.” Tr. at 100. The Individual stated that he knew the adolescent was in high school, but he thought she was an 18-year old senior, which was common in his hometown. Tr. at 101, 122. The Individual also stated that the adolescent’s appearance led him to believe she was at least 18 years old. Tr. at 106, 122.

The Individual stated that he and the adolescent had sexual intercourse on two occasions in March 2005. Tr. at 105, 124. They ended their sexual relationship when they had a pregnancy scare. Tr. at 105. The Individual stated, “I realized that there was a potential that she could get pregnant, and I realized real quick that I didn’t want a baby with that girl ... if you’re not willing to accept the consequences, you don’t need to be playing the game, I guess. And that’s how I saw it. I wasn’t willing to accept the consequences of her having a baby.” Tr. at 105-106. He stated that shortly after he ended his sexual involvement with the adolescent, her father became aware of the relationship. Tr. at 104-105, 124. The Individual stated that the adolescent had been involved with other men, but he “was the only one that was of age.” Tr. at 108. In the

Individual's opinion, the adolescent's father took his anger out on him "because [the Individual] was the only one that could take any heat for it." Tr. at 108-109.

The Individual admitted that his father had warned him to avoid the adolescent but he ignored his father's advice. Tr. at 109. The Individual stated that it was "the best piece of advice I never followed in my life." *Id.* He added,

I was young, and, like I said, at that age, you have a hard time thinking that – well, at that age, you think you know what's going on, whether you really do or not, and you think it's just – or I thought it was just one of those [parents] trying to reel you back things, and, of course, I was trying to pull away farther, so I just didn't listen.

Id. He stated that he did not think his father meant that the adolescent was too young; he believed his father meant that the adolescent "was maybe the clingy kind of psycho girlfriend that you see on TV." Tr. at 123. He believed his father "was being paranoid" and "overprotective." Tr. at 124.

Regarding the criminal proceeding, the Individual stated that he pled guilty to the Statutory Rape charge and was entered into the state's Judicial Diversion Program. Tr. at 126-130. The Individual stated that he originally pled "not guilty" to the charge, but he changed his plea because entering a "guilty" plea was a condition of being granted a judicial diversion. Tr. at 130. As a result, his one-year prison sentence was suspended and he was placed on probation for one year. If he complied with the requirements of his probation, his attorney could petition the court to expunge his record of both the guilty plea and the sentence. Tr. at 132. The Individual stated that it was his understanding that, if he violated the terms of the probation, he would then have to serve the one-year prison term. *Id.*; see also *Indiv. Ex. B.*

The Individual stated the incident was a lapse in judgment that would never recur in the future. Tr. at 140. He added that he is very open about the incident with people and, therefore, he cannot be blackmailed. Tr. at 140.

B. The Individual's Wife

The Individual's wife stated that while she and the Individual have known each other for about five years, they have been together for about 13 months, and married for five months. Tr. at 8, 10. She stated that the Individual is a "good person to be around" and a "very nice, generous person." Tr. at 11. She further described the Individual as "honest," "very caring," and "very trustworthy." Tr. at 12. The Individual's wife stated that the Individual told her about the statutory rape charge when they began dating, adding "he was very open." Tr. at 12. She stated, "I was kind of shocked at first, really, but I didn't think anything bad about him. I mean, people make mistakes all the time." *Id.* She stated that the Individual told her that he had become involved with the adolescent and later learned that she was 15, nearly 16, years old. Tr. at 17. She added that the Individual recognized his mistake in believing the adolescent was over 18 and accepted responsibility for the situation. Tr. at 20-21.

The Individual's wife stated that the Individual has never given her a reason not to trust him. She stated, "he's been very open and very honest about everything, since the beginning." Tr. at 13. She added that there had been times when it may have been more convenient for the Individual to lie to her, but he was always honest with her. Tr. at 15. The Individual's wife stated that the Individual spends his free time with her and that they spend a lot of time with their families. Tr. at 18.

According to the Individual's wife, the Individual has good judgment. She stated that he has used his good judgment in maintaining the family finances and in the way he handled the criminal charges against him. Tr. at 16-17. She added that she does not believe the Individual is gullible or more trusting of others than most people. Tr. at 18.

C. The Individual's Father

The Individual's father stated that the Individual never denied the incident involving the adolescent. He stated, "[the Individual] told the truth about it, you know. He's never tried to hide it." Tr. at 26. He added that once the Individual learned that law enforcement wanted to question him in connection with the statutory rape charges, "he turned [himself] in." *Id.* The Individual's father believed the Individual's sexual involvement with the adolescent was a lack of maturity and stated that he believed that the Individual "has matured a lot since this happened ... he's grown up a lot. This has scared him to death. And he's really had to think about things." *Id.*

The adolescent lived in the Individual's father's neighborhood. Tr. at 27. The Individual's father stated,

I lived [in the same neighborhood as the adolescent], I was single at the time, and the girl came, her and a friend, selling candy for school. And after I bought the candy from her, she would come back and knock on my door. And I would answer the door, and she'd go, 'what are you doing?' I said, 'watching TV.' She'd stand there. And I said, 'well I got to go back in.' So I knew the girl was bad news.

Tr. at 27-28. The Individual's father stated that he told the Individual that the adolescent "was trouble" and that the Individual should stay away from her. He added, however, that he knew the adolescent was under 18 but he did not discuss her age with the Individual. Tr. at 28. He added, "[the adolescent] looked older ... but I knew she was still in high school ... she acted like she was underage [and was] immature." Tr. at 28-29. The Individual's father stated that the adolescent would often stop by his house. He stated, "I'd answer the door, I felt that she would want me to invite her in. And she would be on my doorstep when I'd come home from work and just things like that that she had no business [doing]." Tr. at 29. The Individual's father believed that if he had not ignored the adolescent, she would have "propositioned" him. *Id.* He added that the adolescent had a bad reputation in his neighborhood and that she was known for being promiscuous. Tr. at 30-31.

The Individual's father stated that the Individual moved out of his home shortly after the incident with the adolescent. Tr. at 32. He stated that he believed the Individual showed good judgment in the way he handled the situation. He stated, "[the Individual] went to the police and, you know, he told them the truth." Tr. at 34. The Individual's father stated that the Individual "realizes in hindsight that he needs to be more careful in his judgment." Tr. at 35. The Individual's father believed the Individual is "a trusting person" and may have a tendency to be too trusting of others. Tr. at 39.

D. The Individual's Mother

The Individual's mother and father have been divorced for about 20 years. Tr. at 43. She stated that she interacts with the Individual almost daily. Tr. at 44. The Individual's mother lived with the Individual shortly after the incident with the adolescent. She stated, "he was very worried, very concerned. He didn't know ... how he was going to handle the situation." *Id.* The Individual's mother described the Individual as "very thoughtful" and stated, "he's always been very dependable and reliable and trustworthy." Tr. at 47. For example, she stated that when the Individual was in high school and the family was under some financial strain, the Individual worked in order to contribute to the family income. Tr. at 47. She stated that the Individual "is a good person, he's a hard worker, and his judgment is very good." Tr. at 48. The Individual's mother added that she did not believe it was easy to fool the Individual, in general. However, she stated that he may be too trusting of others, adding "he tries to look for the good in people [rather] than the bad." Tr. at 52-53.

E. The Individual's Stepmother

The Individual's stepmother has known the Individual for 15 years. Tr. at 71. She stated that although she is now divorced from the Individual's father, she and the Individual still have a close relationship. Tr. at 71. The stepmother stated that she had seen the adolescent when she dropped the Individual's younger brother off at the Individual's father's home for the weekend. Tr. at 74. The stepmother described the adolescent as "tall" and "very curvaceous" and stated that she believed the adolescent was "anywhere from 17 to 19" years old. Tr. at 75.

The Individual's stepmother stated that the Individual "has grown up an incredible amount" as a result of the incident with the adolescent. Tr. at 84. She stated that prior to the incident the Individual was "a bit immature" but generally had good judgment. Tr. at 85-86. She added, "I think his maturity level since all this has happened has increased tremendously, because it's forced him to look at some of the consequences that can come from a mistake, and all of the ramifications that come with it, and how completely life-changing one decision can be." Tr. at 86. Regarding whether she believed the Individual was naïve or too trusting of others, the Individual's stepmother stated that the Individual "looks [for] the best in people." *Id.*

F. The Individual's Father-in-Law

The Individual's father-in-law is a full-time pastor. Tr. at 117. He stated that he was aware of the Individual's guilty plea to the statutory rape charge and that he spoke with the Individual regarding the incident and its consequences. Tr. at 115, 117. He stated that he believed the

Individual has “truly learned from and seen the effect of what the bad judgment in the past has done to the point that it’s like you don’t know what you have until you don’t have it [any] longer, and it just really makes you grow up real quick.” Tr. at 116. The father-in-law added that he has seen “a commitment in [the Individual’s] life to do things better. He’s become more conscientious. I think he has a lot of things going for him.” Tr. at 116-117. He added that he believed the Individual demonstrated great maturity in “stepping forward and taking responsibility [for] his relationship [with the adolescent] ... stepping forward and even taking responsibility for his actions and not trying to skirt the issues, [not] try to cover the issues.” Tr. at 119. He added,

It shows maturity to me when someone is able to face their situation head on and admit that situation and deal with it, and even seek the counsel, whatever is needed to improve their situation from where they were ... [the Individual is] looking to better his life, he’s looking to provide for his family, he’s looking to do, I think, the positive things....

Tr. at 119-120.

G. The Individual’s Former Employer

The Individual’s former employer owns a construction company. Tr. at 59. He described the Individual as “an excellent worker” who was “very dependable.” Tr. at 61. He stated that he always saw the Individual use good judgment in the workplace. For example, he did not violate any safety procedures and he reported safety violations to his management. Tr. at 62. The former employer stated that, as part of the job, his employees go into other people’s homes. He stated that he often sent the Individual on those jobs because he knew the Individual was trustworthy. Tr. at 63-64. The former employer stated that the Individual informed him of the incident involving the adolescent and the resulting criminal charge. Tr. at 67. He stated that it did not affect his opinion of the Individual at all. *Id.*

III. STANDARD OF REVIEW

The regulations governing the Individual’s eligibility for an access authorization, also referred to as a security clearance, are set forth in 10 C.F.R. Part 710, “Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material.” An individual is eligible for access authorization if such authorization “would not endanger the common defense and security and would be clearly consistent with the national interest.” 10 C.F.R. § 710.7(a). “Any doubt as to an individual’s access authorization eligibility shall be resolved in favor of the national security.” *Id.* See generally *Dep’t of the Navy v. Egan*, 484 U.S. 518, 531 (1988) (the “clearly consistent with the interests of national security” test indicates that “security clearance determinations should err, if they must, on the side of denials”).

Under Part 710, the DOE may suspend an individual’s access authorization where “information is received that raises a question concerning an individual’s continued access authorization eligibility.” 10 C.F.R. § 710.10(a). Derogatory information includes, but is not limited to, the

information specified in the regulations. 10 C.F.R. § 710.8. Once a security concern is raised, the individual has the burden to bring forward sufficient evidence to resolve the concern.

In considering whether an individual has resolved a security concern, the Hearing Officer considers various factors, including the nature of the conduct at issue, the frequency or recency of the conduct, the absence or presence of reformation or rehabilitation, and the impact of the foregoing on the relevant security concerns. 10 C.F.R. § 710.7(c). The decision concerning eligibility is a comprehensive, common-sense judgment based on a consideration of all relevant information, favorable and unfavorable. 10 C.F.R. § 710.7(a). In order to reach a favorable decision, the Hearing Officer must find that “the grant or restoration of access authorization to the individual would not endanger the common defense and security and would be clearly consistent with the national interest.” 10 C.F.R. § 710.27(a).

IV. ANALYSIS

The derogatory information concerning Criterion L centers on the Individual’s sexual relations with the adolescent, the resulting criminal charge of Statutory Rape, and the Individual’s guilty plea to the charge. Criterion L concerns conduct tending to show that the Individual was “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). There is no question that the Individual’s sexual involvement with the adolescent, in addition to being illegal, constituted a lapse in judgment. The Criterion L concern is that, in having sexual relations with the adolescent, the Individual did not exercise the type of judgment and caution the DOE expects of individuals holding security clearances and that he may not do so in the future. Given the circumstances of this case, I find that the LSO had ample grounds for invoking Criterion L. Thus, the only issue to be resolved is whether the security concern has been adequately mitigated.

After careful reflection on the record in this case, I am unable to conclude that the Individual’s clearance should be restored at this time. In personnel security proceedings where an Individual’s behavior has called into question his judgment and reliability, our previous cases have stated that a subsequent pattern of responsible behavior is of vital importance to mitigating those concerns. *See Personnel Security Hearing*, Case No. VSO-0499, 28 DOE ¶ 82,850 (2002). Guideline J of the Adjudicative Guidelines also sets forth various circumstances which may serve to mitigate security concerns raised by criminal behavior. The circumstances include the passage of time, the unlikelihood that the behavior will recur, and remorse. *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 (“the Adjudicative Guidelines”), Guideline J, ¶ 32.

In this case, more than two years have passed since the Individual’s sexual involvement with the adolescent. The Individual admitted he had engaged in a sexual relationship with the adolescent, acknowledged that he used poor judgment in becoming sexually involved with her, and accepted the legal consequences for his actions. According to his testimony and that of each of his

witnesses, the criminal proceeding that resulted from his sexual involvement with the adolescent caused the Individual to “grow up” and become more mature. These are mitigating factors.

On the other hand, the Individual ignored the advice of his father and had a sexual relationship with someone he knew was still in high school. The Individual’s assertion that, based on the adolescent’s appearance and actions, he thought she was an 18-year-old senior in high school when he became involved with her is not entirely persuasive. However, even if the Individual’s assertion is true, it simply demonstrates that the Individual gave little consideration at the time to whether the adolescent was too young to be involved with him. Had he thought the matter through and exercised the judgment expected of security clearance holders, he should have realized that, knowing that she was still in high school, it was more likely than not that the adolescent was underage and he should have acted accordingly.

Regardless of whether the Individual reasonably believed the adolescent was at least 18 years old prior to his sexual involvement with her, the fact remains that the Individual, 22 years old at the time, was old enough to exercise a greater degree of caution than he did in choosing a sexual partner. In addition to his lack of caution in that regard, several of the witnesses stated that the Individual may be too trusting of others in general and that he “looks for the best” in people. While this may be a favorable quality, it creates a concern that the Individual may, in the future, place himself in a situation where he is too trusting of individuals who may have less than honorable intentions.

Although there are no further incidents of bad judgment on the part of the Individual in the record, a relatively short time has passed since the Individual’s sexual involvement with the adolescent. Given the gravity of the Individual’s lapse in judgment and the resulting consequences of that lapse, there has simply been insufficient time since the incident for the Individual to have established a pattern of responsible behavior and good judgment adequate to mitigate the security concerns in this case. *See Personnel Security Hearing*, Case No. TSO-0505, 29 DOE ¶ 83,074 (September 25, 2007).

V. CONCLUSION

Upon consideration of the record in this case, I find that there was evidence that raised a doubt regarding the Individual’s eligibility for a security clearance under Criterion L. I also find insufficient evidence in the record to fully resolve that concern. Therefore, I cannot conclude that restoring the Individual’s access authorization “would not endanger the common defense and security and would be clearly consistent with the national interest.” 10 C.F.R. § 710.7(a). Accordingly, I conclude that the Individual’s access authorization should not be restored at this time.

The parties may seek review of this Decision by an Appeal Panel under the regulation set forth at 10 C.F.R. § 710.28.

Diane DeMoura
Hearing Officer
Office of Hearings and Appeals

Date: February 25, 2008