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August 10, 2009

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Hearing Officer's Decision

Name of Case: Personnel Security Hearing

Date of Filing: April 27, 2009

Case Number: TSO-0736

This Decision concerns the eligibility of XXXXXXXXXX (hereinafter referred to as "the Individual") to maintain a security clearance 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." This Decision considers whether, on the basis of the evidence in this proceeding, the Individual's security clearance should be restored.¹ For the reasons stated below, I find that the Individual's security clearance should not be restored.

I. BACKGROUND

The Individual has a history of five arrests and at least two speeding tickets. Four of these arrests were alcohol-related. In 1989, and again in 1991, he was arrested for Driving While Intoxicated (DWI). On December, 14, 1999, he was arrested for Battery against a Household Member (the Individual had been consuming alcohol at the time of this incident). On July 12, 2001, he was arrested for Aggravated Driving under the Influence of Intoxicating Liquor or Drugs and Open Container. The fifth arrest, for driving without a license, occurred in 1992. On July 28, 2006, and again on March 19, 2008, the Individual received tickets for speeding.

In addition to his history of arrests and speeding tickets, the Individual also has a history of financial irresponsibility and tax delinquency. In June 2005, the Individual owed his local government \$670 for four unpaid traffic tickets. As recently as September 29, 2008, the Individual owed the Federal government in excess of \$8,000 and over \$2,000 to his State government for tax delinquencies.

The Individual also has a history of inappropriate sexual conduct in the workplace. On June 16, 2005, the Individual's employer issued a written reprimand to him for inappropriate conduct of a

¹ 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>.

sexual nature and misuse of a government computer. It is also alleged that the Individual failed to attend sexual harassment training mandated by the June 16, 2005, reprimand.

The Local Security Office (LSO), over a period of seven years, conducted at least four Personnel Security Interviews (PSI) of the Individual, one each on July 25, 2001, October 31, 2006, December 27, 2006, and September 29, 2008.² After the final PSI failed to resolve the security concerns raised by the derogatory information concerning the Individual, an administrative review proceeding was initiated. *See* 10 C.F.R. § 710.9. The LSO then issued a letter notifying the Individual that it possessed information that raised a substantial doubt concerning his eligibility for access authorization (the Notification Letter).³

The Notification Letter informed the Individual that he was entitled to a hearing before a Hearing Officer in order to resolve the substantial doubt regarding his eligibility for access authorization. The Individual requested a hearing, and the LSO forwarded the Individual's request to the Office of Hearings and Appeals (OHA). The Director of OHA appointed me as the Hearing Officer in this matter on May 13, 2009. At the hearing I convened pursuant to 10 C.F.R. § 710.25(e) and (g), I took testimony from the Individual and three other witnesses. *See* Transcript of Hearing, Case No. TSO-0736 (hereinafter cited as "Tr."). The LSO submitted 19 exhibits, marked as Exhibits 1 through 19, while the Individual submitted 6 exhibits, marked as Exhibits A through F.

II. STANDARD OF REVIEW

The Hearing Officer's role in this proceeding is to evaluate the evidence presented by the agency and the Individual, and to render a decision based on that evidence. *See* 10 C.F.R. § 710.27(a). The regulations state that "[t]he decision as to access authorization is a comprehensive, common-sense judgment, made after consideration of all the relevant information, favorable and unfavorable, as to whether the granting or continuation of 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 have considered the following factors in rendering this opinion: the nature, extent, and seriousness of the conduct; the circumstances surrounding the conduct, including knowledgeable participation; the frequency and recency of the conduct; the Individual's age and maturity at the time of the conduct; the voluntariness of the Individual's participation; the absence or presence of rehabilitation or reformation and other pertinent behavioral changes; the

² The September 29, 2008, PSI transcript appears in the record as DOE Exhibit 3. The December 27, 2006, PSI transcript appears in the record as DOE Exhibit 4. The LSO had also conducted PSIs of the Individual on October 31, 2006, and July 25, 2006. The transcripts of these PSIs appear in the record as DOE Exhibits 5 and 6, respectively.

³ The Notification Letter alleges that the Individual has "Engaged 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. Such conduct or circumstances include, but are not limited to, criminal behavior, a pattern of financial irresponsibility, conflicting allegiances, or violation of any commitment or promise upon which DOE previously relied to favorably resolve an issue of access authorization eligibility." 10 C.F.R. § 710.8(l) (Criterion L).

motivation for the conduct; the potential for pressure, coercion, exploitation, or duress; the likelihood of continuation or recurrence; and other relevant and material factors. *See* 10 C.F.R. §§ 710.7(c), 710.27(a). The discussion below reflects my application of these factors to the evidence presented by both sides in this case.

III. FINDINGS OF FACT AND ANALYSIS

The record shows that the Individual has exhibited a pattern of financial irresponsibility, tax delinquencies, inappropriate sexual behavior, and criminal behavior between 1989 and 2008. A common thread throughout the Individual's history is a failure to obey laws, regulations, and other rules. Moreover, each of the incidents documented above involves a failure to exercise sound judgment and self-control. Accordingly, the LSO properly invoked Criterion L.

A finding of derogatory information does not, however, end the evaluation of evidence concerning an individual's eligibility for access authorization. *See Personnel Security Hearing*, Case No. VSO-0244 (affirmed by OSA, 1999). In the end, like all Hearing Officers, I must exercise my common sense judgment in deciding whether the Individual's security clearance should be restored after considering the applicable factors prescribed in 10 C.F.R. § 710.7(c). Therefore, I must consider whether the Individual has submitted sufficient evidence of mitigation to resolve the security concerns raised by his criminal behavior, financial irresponsibility and sexual conduct. After considering all of the evidence in the record, I find that, the Individual has not sufficiently mitigated the concerns raised by his inappropriate sexual conduct, financial irresponsibility and pattern of criminal behavior.

Financial Irresponsibility and Delinquent Tax Obligations

The record shows that the Individual has a history of failing to pay debts. As of June 2006, the Individual had four unpaid, and past due, traffic tickets, totaling \$670. The Individual failed to pay his state income tax in 2004 and, at the time that the Notification Letter was issued, owed his State government approximately \$2,000. The Individual also failed to pay his Federal Income tax in 2003 and 2005.⁴ At the time that the Notification Letter was issued, the Individual owed the Federal government approximately \$8,000. The Individual attributed his financial delinquencies to the cost of trying to maintain two households when he was separated from his now former spouse. Tr. at 46-49. The Individual asserts that he now has his financial affairs in order. *Id.* at 49.

Failure or inability to live within one's means, satisfy debts, and meet financial obligations may indicate poor self-control, lack of judgment, or unwillingness to abide by rules and regulations, all of which can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. An individual who is financially overextended is at risk of having to engage in illegal acts to generate funds. *Revised Adjudicative Guidelines for Determining Eligibility for Access to Classified Information issued by the Assistant to the President for*

⁴ The Individual's tax delinquencies constitute both criminal activity and financial irresponsibility. The issues raised by the criminal activity aspects of the Individual's tax delinquencies are discussed at length below.

National Security Affairs, The White House (December 29, 2005) (Adjudicative Guidelines) at Guideline F. The Adjudicative Guidelines specifically identify a number of conditions present in the instant case that could raise security concerns. These conditions include “(a) inability or unwillingness to satisfy debts; (b) indebtedness caused by frivolous or irresponsible spending and the absence of any evidence or willingness or intent to pay the debt or establish a realistic plan to pay the debt; (c) a history of not meeting financial obligations; (d) deceptive or illegal financial practices such as . . . income tax evasion . . . , [and] . . . (g) failure to file annual Federal, state or local income tax returns as required . . .” Adjudicative Guideline F.

Guideline F sets forth six factors that can mitigate security concerns arising from financial irresponsibility. Specifically, Guideline F provides, in pertinent part, that “clear indicators that the problem is resolved or is control” and that “a good faith effort to repay overdue creditors or otherwise resolve debts” are mitigating factors. Guideline F at ¶ 20(b) and (c). Moreover, our case law has long held that “Once a pattern of financial irresponsibility has been established, an individual must demonstrate a new pattern of financial responsibility in order to mitigate or resolve the security concerns raised by the established pattern of financial irresponsibility.” *Personnel Security Hearing*, Case No. TSO-0531 (2008); *Personnel Security Hearing*, Case No. TSO-0170 (2006); *Personnel Security Hearing*, Case No. VSO-0108 (1996).

In the present case, the Individual has submitted evidence showing that he has paid the four outstanding traffic tickets. Tr. at 52, Exhibit F. More importantly, the Individual has shown that he has entered into payment arrangements with the Federal and State tax authorities for repayment of his outstanding taxes and has been complying with these payment plans. Exhibits A-E. At the hearing, the Individual testified that his financial issues resulted from his having to maintain two households while he was separating from his now former spouse. Tr. at 46-47. The Individual noted that he has cut his household expenses by moving in with his long-term girlfriend and leading a simpler, more family centered lifestyle. *Id.* at 49-50. The documentary and testimonial evidence submitted by the Individual has convinced me that he has just begun to establish a pattern of financial responsibility. In the end, a five month-old pattern of financial responsibility is of insufficient duration to fully mitigate the Individual’s six-year pattern of financial irresponsibility. I therefore find that the Individual has not resolved the DOE’s concerns about his financial irresponsibility.

Sexual Conduct

On June 16, 2005, the Individual’s employer issued a written reprimand to him and suspended him for 20 days without pay.⁵ The Individual was also required to take sexual harassment training. These actions were taken because the Individual’s employer had concluded that he:

Engaged in inappropriate conduct of a sexual nature consisting of offensive verbal statements, a pattern of insult and innuendo, including lewd remarks, obscene gestures, and derogatory comments in the presence of male co-workers and have

⁵ Two documents communicating the employer’s disciplinary actions to the Individual appear in the record as Exhibit 12.

directed such conduct towards female co-workers on a regular basis over a long period of time. Further, despite [the Individual's] claim that [he] had never accessed pornographic sites, sexually explicit images were found on [his work] computer.

Exhibit 12 at 4.⁶ The Individual did not deny these actions, but rather contended that he was singled out for disciplinary action. Tr. at 53-52, 57-59, 61-62. He contended that he did not visit any pornographic internet sites, but acknowledged that he maintained explicit photographs on his employer's computer. *Id.* at 62. According to the Individual, a co-worker had uploaded these photographs from a diskette. *Id.* at 54, 56. The Individual would, from time to time, view these pictures on his government computer. *Id.* at 62.

The disciplinary actions taken by the Individual's employer included a requirement that the Individual attend a course on sexual harassment. The Individual admitted that he failed to attend this course. The Individual's failure to attend mandated sexual harassment training indicates (1) he did not understand the gravity of his actions in the workplace; (2) he was unwilling to be educated on the subject; and (3) he disregarded an order connected with a disciplinary action.

The actions described above clearly indicate that the Individual had exhibited a lack of judgment and discretion. The Adjudicative Guidelines state that sexual behavior that reflects a lack of judgment or discretion raises a potentially disqualifying security concern. Adjudicative Guideline D at ¶ 12-13. Moreover, the Individual misused a government computer.

Guideline D sets forth four conditions that can mitigate security concerns arising from inappropriate sexual behavior. Specifically, Guideline D provides that security concerns arising from sexual behavior can be mitigated when the Individual is able to show that it: "Happened so long ago, so infrequently, or under such unusual circumstances, that it is unlikely to recur and does not cast doubt on the individual's current reliability, trustworthiness or good judgment." Guideline D at ¶ 14 (b). In the present case, approximately four years have passed since the Individual was disciplined for his sexual conduct, and there is no indication that his inappropriate sexual conduct has recurred. However, the Individual's sexual conduct is part of a larger pattern which indicates that the Individual has repeatedly exercised poor judgment, a lack of self-control, and has been unwilling or unable to abide by laws, rules, and/or regulations. Moreover, the Individual's refusal to attend sexual harassment training increases the likelihood that he might engage in that prohibited conduct again. Accordingly, I am unable to conclude that the Individual has resolved the security concerns raised by his sexual conduct.

⁶ The Notification Letter indicates that the Individual failed to attend the required sexual harassment classes. The only indication in the record that the Individual had not attended those classes is the Individual's admission that he could not remember attending them. Such a failure would constitute yet another example of the Individual's failure to comply with law, rules or regulations.

A Pattern of Criminal Behavior

It is well settled that failure to pay taxes on time raises a serious security concern. *Personnel Security Hearing (Case No. VSO-0081)*(1996). The Individual's failure to comply with State and Federal tax laws raises grave doubts about his judgment, reliability, common sense, willingness to abide by the law, and honesty. Moreover, the Individual has a history of at least five arrests beginning in 1989 and continuing until 2001.⁷ The Individual's record of five arrests, along with his repeated violation of Federal and State tax laws constitute a significant pattern of criminal behavior.

The Adjudicative Guidelines state: "Criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. By its very nature, it calls into question a person's ability or willingness to comply with law rules and regulations." Adjudicative Guideline J, ¶ 30. In the present case, these concerns are magnified by the sheer number of criminal behaviors.

Guideline J sets forth four factors that can mitigate security concerns arising from criminal conduct. Specifically, Guideline J provides, in pertinent part, that the security concerns arising from criminal behavior can be mitigated when "there is evidence of successful rehabilitation; including but not limited to the passage of time without recurrence of criminal activity, remorse or restitution, job training or higher education, good employment record, or constructive community involvement." Guideline J at ¶ 32(d).

Four of the Individual's arrests were alcohol-related. The evidence in the record shows that the Individual has recognized that he has had an alcohol problem and stopped consuming alcohol in 2003. In addition, he has obtained counseling for his alcohol problem and the issues underlying it from his employer's EAP program. It is also clear that the Individual's financial circumstances and judgment had been negatively affected by an unsuccessful marriage. The Individual is now sober, is in a healthy, happy and stable relationship and is successfully parenting two young adult sons. The Individual continues to be monitored by his EAP counselor. The removal of the aggravating factors of alcohol and a difficult marriage make a return to criminal behavior by the Individual much less likely.

The Individual's EAP counselor testified on his behalf. The EAP counselor's testimony convinced me that the Individual had made a great deal of progress. The EAP Counselor testified that the Individual had accepted responsibility for his drinking and had worked hard to address it. Tr. at 30. The EAP Counselor testified that he had no concerns about the Individual's ability to maintain a DOE security clearance. *Id.* at 31. The Individual's relationship with his former spouse was an issue he had needed to address as well. The Individual "learned he could develop a better sense of control and direction over what was taking place by staying in control

⁷ Four of these arrests are alcohol-related. These alcohol-related arrests suggest that the Individual may well have an alcohol-related disorder. However, the evidence in the record indicates that the Individual has received substance abuse counseling and has abstained from alcohol use since 2003. Accordingly, the LSO did not cite Criterion J or Criterion H in the Notification Letter. The LSO did, however, cite these four alcohol-related arrests under Criterion L, because they contribute to a pattern of criminal behavior.

and developing better communication skills.” *Id.* at 34. The EAP Counselor believes that the Individual had been direct and honest with him. *Id.* at 35. By working with his EAP counselor to address his financial and alcohol issues, the Individual has exhibited improved judgment. *Id.* at 37-38. Through therapy, the Individual has resolved a problem with authority. *Id.* at 41-42.

However, the record shows that the Individual has experienced an unusually large number of lapses in judgment and self-control that have occurred in several domains. The record shows a sixteen year long pattern of criminal behavior. In addition, the Individual exhibited a pattern of inappropriate sexual conduct on a regular basis over a long period of time. These facts suggest that the Individual’s lapses may well be part of a larger problem with judgment and/or self-control. While four years have passed since the Individual has engaged in criminal conduct, the Individual has recently, in 2006 and 2008, received two traffic tickets for driving in excess of 90 miles per hour. Simply put, the Individual has not provided sufficient evidence to convince me that the DOE can count on him to obey its laws, rules and regulations in the future. Therefore, the questions about the Individual’s judgment, reliability, self-control, and willingness to obey rules and follow regulations remain unresolved.

IV. CONCLUSION

For the reasons set forth above, I conclude that the Individual has not resolved the security concerns raised under Criterion L. Therefore, the Individual has not demonstrated that restoring his security clearance would not endanger the common defense and would be clearly consistent with the national interest. Accordingly, it is my opinion that the Individual's access authorization should not be restored at this time. The Individual may seek review of this Decision by an Appeal Panel under the procedures set forth at 10 C.F.R. § 710.28.

Steven L. Fine
Hearing Officer
Office of Hearings and Appeals

Date: August 10, 2009