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November 19, 2009

DECISION AND ORDER
OFFICE OF HEARINGS AND APPEALS

Hearing Officer Decision

Name of Case: Personnel Security Hearing

Date of Filing: June 19, 2009

Case Number: TSO-0767

This Decision concerns the eligibility of XXXXXXXXXXXX (hereinafter referred to as “the individual”) to hold an access authorization 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.”¹ In this Decision, I will consider whether, on the basis of the testimony and other evidence in the record of this proceeding, the individual’s access authorization should be restored. As discussed below, after carefully considering the record before me in light of the relevant regulations, I have determined that the DOE should not restore the individual’s access authorization at this time.

I. Background

The individual has worked for a DOE contractor and held a DOE access authorization since 1986. In July 2008, the Local Security Office (LSO) received the report of a background investigation of the individual that identified issues of potential concern, including her finances and gambling. Exhibit 5. The LSO conducted a Personnel Security Interview (PSI) of the individual on August 19, 2008. Exhibit 4. Issues related to the individual’s finances were resolved in the PSI, but because the gambling issue remained unresolved, the LSO referred the individual for an evaluation by a DOE consultant-psychiatrist (DOE psychiatrist). Exhibit 5. The DOE psychiatrist examined the individual on March 12, 2009, and issued a report on March 13, 2009. Exhibit 3. The LSO ultimately determined that the derogatory information concerning the individual created a substantial doubt about her eligibility for an access authorization, and that the doubt could not be resolved in a manner favorable to her. Accordingly, the LSO proceeded to obtain authority to initiate an administrative review proceeding.

The administrative review proceeding began with the issuance of a Notification Letter to the individual. *See* 10 C.F.R. § 710.21. That letter informed the individual that information in the

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.

possession of the DOE created a substantial doubt concerning her eligibility for access authorization. Specifically, the DOE characterized this information as indicating that the individual has an illness or mental condition of a nature which, in the opinion of a psychiatrist, causes or may cause, a significant defect in judgment or reliability. Exhibit 1 (citing 10 C.F.R. § 710.8(h)).

The Notification Letter informed the individual that she was entitled to a hearing before a Hearing Officer in order to resolve the substantial doubt regarding her 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 on June 23, 2009.

At the hearing in this matter, I took testimony from the individual, the DOE psychiatrist, an Employee Assistance Program counselor at her workplace (EAP counselor), and the individual's husband, stepdaughter, brother, coworker, and former supervisor. The DOE Counsel submitted five exhibits prior to the hearing, and the individual presented two exhibits at the hearing.

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. After due deliberation, I have determined that the individual's access authorization should not be restored. The specific findings that I make in support of this decision are discussed below.

II. Analysis

A. The Basis for the DOE's Security Concerns

As the basis for security concerns under Criterion H, the Notification Letter cites the opinion of the DOE psychiatrist that the individual meets the criteria for Pathological Gambling set forth in the Diagnostic and Statistical Manual of Mental Disorders, 4th edition, Text Revised (DSM-IV-TR), and further that this illness or mental condition causes or may cause a significant defect in judgment or reliability. Exhibit 1; *see also* Exhibit 3 at 9, 11-12 (report of DOE psychiatrist). The Notification Letter further states that (1) in about May 2008, during a annual physical conducted under the DOE's Human Reliability Program, the individual expressed concern about her gambling and was referred to the EAP counselor; (2) in her August 19, 2008, PSI, she admitted that she had a gambling problem; (3) after stating in her PSI that she was no longer gambling, the individual reported in her March 12, 2009, psychiatric evaluation that she resumed gambling and currently gambled twice a month; (4) the individual admitted to spending a significant amount of her retirement savings and a home equity loan for the purpose of gambling, and frequently used cash advances on her credit cards for the same purpose; (5) she admitted to using money for gambling that was allocated for bills, and thus being delinquent in paying her debts; (6) she admitted that her family expressed concern about her gambling and that she lies to her family and friends about her whereabouts in order to hide her gambling; (7) she admitted she has no control over how much money she spends gambling and often spends more than she intends, easily spending \$1,000 per night; and (8) she admitted that her gambling problem has caused her difficulty sleeping.

The individual disputes certain of the allegations set forth in the Notification Letter. As required by the Part 710 regulations, 10 C.F.R. § 710.27(b), I make findings below regarding each of these allegations. However, the individual does not dispute the diagnosis of the DOE psychiatrist, nor that the diagnosed illness or mental condition causes or may cause a significant defect in judgment or reliability, and this alone is sufficient to raise legitimate security concerns under Criterion H. *See also 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) at ¶ 18 (“Compulsive gambling is a concern as it may lead to financial crimes including espionage.”). The remainder of this decision will focus on whether those legitimate concerns have been resolved, i.e., whether the risk of the individual engaging in compulsive gambling in the future is low enough that restoring her clearance would not endanger the common defense and security and would be clearly consistent with the national interest.

B. Whether the Security Concerns Have Been Resolved

A hearing under Part 710 is held “for the purpose of affording the individual an opportunity of supporting his eligibility for access authorization,” i.e., “to have the substantial doubt regarding eligibility for access authorization resolved.” 10 C.F.R. § 710.21(b)(3), (6). Under the Part 710 regulations, the Hearing Officer is directed to make a predictive assessment as to whether granting or restoring 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).

“In resolving a question concerning an individual's eligibility for access authorization,” I must consider:

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 of the individual at the time of the conduct; the voluntariness of 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.

10 C.F.R. § 710.7(c).

Having considered all of the above factors, I address below those which I find to be most relevant to the present case. I first discuss certain discrepancies in the record regarding the nature, extent, and frequency of the individual's gambling. I then address the issues of rehabilitation or reformation and the likelihood of recurrence of the individual's gambling and, finally, the potential for pressure, coercion, exploitation, or duress.

1. The Nature, Extent, and Frequency of the Individual's Gambling

There is no dispute in the present case that the individual developed a gambling problem which, by the individual's own report, became a concern to her in 2006, when she “was spending too much

time there. I was dipping into my retirement money” Transcript [hereinafter Tr.] at 96. The record indicates that the individual and her husband had decided to pull out a lump sum of retirement funds for reasons unrelated to gambling, Tr. at 130, 147, but that the availability of this money facilitated her worsening habit. Tr. at 101-02, 112.

However, the individual disputes certain of the specific allegations set forth in the Notification Letter as to the extent and frequency of her gambling. First, she takes issues with the statement that she admitted gambling “approximately twice a month.” Exhibit 1. The Notification Letter cited the report of the DOE psychiatrist, in which he quoted the individual as stating that “I still go twice a month, on payday weekends.” Exhibit 3 at 6. In her June 3, 2009, request for a hearing, she stated that she had “said I could go biweekly and spend about \$100.00 but I really don’t go that often.” Exhibit 2 at 2. At the hearing, the individual did not dispute the quote attributed to her by the DOE psychiatrist, explaining that, “I think I told him that, but mostly it was I didn’t want to minimize.” Tr. at 156. She testified that, in fact, since August 2008, she had only gone to a casino “twice, two or three times[,]” *id.* at 121, the last time being “just before” she saw the DOE psychiatrist in March 2009. *Id.* at 108.

Second, though the Notification Letter states that the individual admitted spending a “significant portion” of a \$150,000 home equity loan on gambling, Exhibit 1, the individual contends that she did not use any of the loan for that purpose. Exhibit 2 at 2. The individual also claims, contrary to the allegations in the Notification Letter, that her family “has never expressed concern about my gambling,” Exhibit 2 at 3, and that she was “never late” in paying bills because of gambling, Exhibit 2 at 3; *see* Tr. at 138 (“I don’t remember saying that I was ever delinquent in debt.”).

In fairness to the individual, I note that some of the allegations in the Notification Letter are based upon statements of the individual that are open to more than one interpretation, for example, as to whether the individual used a “significant portion” of her \$150,000 home equity loan on gambling, and whether her family had, in fact, expressed concern about her gambling. In addition, the Notification Letter’s use of the present tense can leave the mistaken impression that the individual’s admissions were related to her then current behavior, whereas the actual portions of the record cited clearly refer to past behavior. *See, e.g.*, Exhibit 1 at 5 (“She admitted she has no control over how much money she spends gambling and often spends more money than she intends; she easily spends \$1,000 a night gambling.”).

On the other hand, in some instances, the current protestations of the individual directly contradict her alleged earlier statements, such as where the report of the DOE psychiatrist states that the individual “acknowledged” that she had delinquent debt because she gambled with money that was allocated for bills, and further quotes the individual as stating that she gambles “twice a month, . . .” Exhibit 3 at 4, 6. Where there are such contradictions, I find it likely that the truth is closer to the individual’s statements that are both more proximate in time to the events in question and not as favorable to her interests in the present case.

This finding is most relevant when considering the extent of the individual’s more recent gambling. Thus, I find that the individual probably gambled *at least* twice a month between August 2008, when she stopped seeing the EAP counselor after three months, and March 2009, when she was evaluated

by the DOE psychiatrist. In this regard, I am particularly concerned that there were times when the individual gambled that she still, even as recently as at the hearing in this matter, would not acknowledge as gambling. When asked by the DOE counsel how much she gambled after she stopped seeing the EAP counselor in August 2008, the individual responded that “what I took I would not consider gambling because I wouldn't -- I was -- I could afford to lose \$20.” Tr. at 121. I later asked her to clarify her statement, explaining that, “just to be very clear, when we're talking about gambling, I'm talking about spending as little as a penny . . . in a casino.” *Id.* at 157. The individual responded:

Okay. And when I'm talking about gambling, I'm talking about spending money that will hurt you. . . . [T]here's a difference between going to a casino for entertainment, where you can take some money and say “I'm going to enjoy myself,” just like you go to a movie theater and spend eight bucks on a popcorn. . . . That is different from when you spend money where you feel it could hurt you. Then that's gambling. That's . . . what I'm afraid of. That's what I was doing and what I don't want to ever do again.

Id. at 157-58.

In this sense, the individual's hearing testimony, rather than resolving the security concerns in this case, heightened those concerns by casting doubt on the reliability of individual's self-report of the extent and frequency of her gambling. I do not conclude here that the individual intentionally lied at the hearing, but rather that she seemed to have a distorted view of her own behavior. This observation not only informs my conclusions as to her past behavior, but also has implications for my opinion as to the presence of rehabilitation or reformation, and the likelihood of recurrence of the individual's gambling, both of which I discuss below.

2. Rehabilitation or Reformation, and the Likelihood of Recurrence

In his March 13, 2009, report on the individual, the DOE psychiatrist concluded that, “given her past history, her risk of relapse into excessive gambling is high.” Exhibit 3 at 12. For purposes of rehabilitation and reformation, the DOE psychiatrist recommended “a one-year outpatient treatment program. This treatment should include at least weekly meetings with a counselor or a gambling treatment group such as Gamblers Anonymous. Her one-year of treatment should include abstinence from all forms of wagering (casinos, lottery, sports betting, Internet gambling, etc.)” *Id.* This recommendation was echoed in the testimony of the EAP counselor, who also advised one year of abstinence from gambling, Tr. at 81-82, and in 2008 “encouraged her to get hooked up” with Gamblers Anonymous. *Id.* at 74.

As noted above, the individual testified that she has not gambled since seeing the DOE psychiatrist in March 2009, six months before the hearing in this matter. The DOE psychiatrist testified that he “had no reason to doubt” this assertion. *Id.* at 182. For the reasons explained above, I am less confident in the individual's self-report of abstinence from gambling. It is, in any case, clear that the individual has not abstained from gambling for the one year recommended by the DOE psychiatrist. Neither had the individual received any treatment in the six months prior to the hearing. This lack of

treatment undermines her efforts at rehabilitation regardless of whether, as the individual credibly testified at the hearing, she had legitimate medical reasons that prevented her from seeking treatment. *Id.* at 190-91.

The DOE psychiatrist was present for the entire hearing, and testified last. Reflecting on the testimony he heard, he remarked that he “came out more confused about the facts than ever, and almost the more the questions came, the more confused I became.” *Id.* at 167. He also noted the individual’s testimony that, after seeing the DOE psychiatrist, “I did go to the casino, but it was more -- I was doing more self-testing, . . .” *Id.* at 99; *see also, e.g., id.* at 120, 158, 160. The psychiatrist saw this as rationalization, and “in a sense almost worse, because you’re not admitting to yourself what you’re doing.” *Id.* at 171. Citing her testimony, he opined that “there’s still part of her that doesn’t quite think she’s got a gambling problem.” *Id.* at 183.

On the positive side, the DOE psychiatrist found “promising” the fact that the individual had taken the step of having herself banned from the casino she regularly frequented, *id.* at 184, and noted as positive that “she’s starting to face difficult things of like dealing with the -- the guilt or shame element of it, and -- and starting to take responsibility for the problems that she had, and starting to take the first steps.” *Id.* at 184-85. In the end, however, asked where how he would characterize the risk of relapse, he responded, “[m]edium high. I think she’s made improvement . . . but not to the point that I’d say that she’s established rehabilitation or reformation.”

3. The Potential for Pressure, Coercion, Exploitation, or Duress

This final consideration, the potential for pressure, coercion, exploitation, or duress, illustrates the connection between the individual’s behavior and the security concerns in this case. Though concerns regarding the individual’s current financial situation were found by the LSO to be resolved after the PSI, Exhibit 5, the risk that the individual will engage in compulsive gambling in the future endangers her future financial security, and in turn the national security, as I explain below.

I note here that it is difficult to reach any definitive conclusions regarding the amount of losses the individual sustained from gambling, particularly in 2006, which appears to have been when she gambled the most. Exhibit 3 at 3 (individual reports to DOE psychiatrist that she won about \$190,000 in 2006, with losses of about the same amount); Tr. at 142 (testimony of individual that she reported to the IRS winnings exceeding her losses by \$30,000); *id.* at 113-14 (stating that she came out \$30,000 ahead in 2006, but “that’s on paper. Personally, I don’t believe that you win at the casino.”).²

² The individual produced IRS Account Transcripts for tax years 2006 and 2007. Exhibit B. These transcripts indicate deductions from Adjusted Gross Income of nearly \$200,000 in 2006 and over \$60,000 in 2007. These deductions (the difference between AGI and Taxable Income) would have included any gambling losses claimed by the individual, against any winnings that the individual would have reported as income, though the transcripts do not identify the deductions taken. In any event, I would be hesitant to rely on the amount of losses reported by a compulsive gambler, particularly when it would not have been in her interest to contemporaneously disclose the extent of her losses to her spouse.

While it would be difficult, if not impossible, to definitively establish the individual's past net winnings or losses, I agree with the testimony of the DOE psychiatrist as to what would be a reasonable assumption. He noted that the individual exclusively played the slot machines, which is "almost a pure game of chance," and that the casino "typically has a prearranged percentage that the house keeps on that game of chance" *Id.* at 165. Thus, "to somebody who is gambling in the six figures, it's almost impossible that that person is going to win money statistically So just from a reasonable guess, I would assume she's losing money." *Id.* at 166.

Whether this is in fact true of the individual's prior gambling experience, it is a very reasonable assumption as to any future gambling the individual may engage in, and it is the individual's future gambling, not her past behavior, that is most important in the final analysis. There is persuasive testimony in this case that there is a significant risk that the individual will relapse into compulsive gambling in the future, and the financial insecurity that can arise from such behavior clearly heightens the potential for pressure, coercion, exploitation, or duress. As the Adjudicative Guidelines plainly state, "[c]ompulsive gambling is a concern as it may lead to financial crimes including espionage." Adjudicative Guidelines at ¶ 18. Considering all of the factors set forth above, I cannot find the risk of the individual engaging in compulsive gambling in the future is low enough that restoring her clearance would not endanger the common defense and security and would be clearly consistent with the national interest.

III. Conclusion

In the above analysis, I have found that there was sufficient derogatory information in the possession of the DOE that raises security concerns under Criterion H. 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 not brought forth evidence to mitigate sufficiently the security concerns advanced by the LSO. I therefore cannot find that restoring the individual's access authorization would not endanger the common defense and would be clearly consistent with the national interest. Accordingly, I have determined that the individual's access authorization should not be restored. The parties may seek review of this Decision by an Appeal Panel under the regulations set forth at 10 C.F.R. § 710.28.

Steven J. Goering
Hearing Officer
Office of Hearings and Appeals

Date: November 19, 2009