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November 2, 2009

DECISION AND ORDER
OFFICE OF HEARINGS AND APPEALS

Hearing Officer Decision

Name of Case: Personnel Security Hearing

Date of Filing: July 21, 2009

Case Number: TSO-0787

This Decision concerns the eligibility of XXXXXXXXX (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 been employed by a DOE contractor since 2004, Exhibit 11 at 4, and has held a DOE access authorization since 2005. Exhibit 5 at 2. On January 9, 2009, the individual was arrested and charged with child solicitation by electronic communication device. Exhibit 8. The Local Security Office (LSO) conducted a Personnel Security Interview (PSI) of the individual on January 27, 2009, Exhibit 12, and referred the individual for an evaluation by a DOE consultant-psychologist (DOE psychologist). Exhibit 4. The DOE psychologist examined the individual on February 19, 2009, and issued a psychological assessment on February 27, 2009. Exhibit 6. The Local Security Office (LSO) ultimately determined that the derogatory information concerning the individual created a substantial doubt about his eligibility for an access authorization, and that the doubt could not be resolved in a manner favorable to him. Accordingly, the LSO proceeded to obtain authority to initiate an administrative review proceeding.

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.

The LSO issued a Notification Letter to the individual on July 9, 2009. *See* 10 C.F.R. § 710.21. That letter informed the individual that information in the possession of the DOE created a substantial doubt concerning his eligibility for access authorization. Specifically, the DOE characterized this information as indicating that the individual (1) has an illness or mental condition of a nature which, in the opinion of a licensed clinical psychologist, causes or may cause, a significant defect in judgment or reliability; and (2) 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 the national security. Exhibit 1 (citing 10 C.F.R. § 710.8(h), (l)).

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 August 5, 2009.

At the hearing I convened pursuant to 10 C.F.R. § 710.25(e) and (g), I took testimony from the DOE psychologist, the individual, his counselor, and another psychologist, who evaluated the individual in March 2009. Each of the witnesses was present throughout the hearing and observed the testimony of the other witnesses. The DOE Counsel and counsel for the individual submitted fifteen² and seven exhibits, respectively.

² The individual's attorney objected to the admission of four of the DOE's exhibits, one of which, Exhibit 8, included police reports of the individual's January 9, 2009, arrest, and the other three of which, Exhibits 3, 4, and 5, were case evaluation sheets prepared by DOE security personnel. Hearing Transcript [hereinafter Tr.] at 7-8. Noting, among other reasons, that such documents are routinely admitted into the record of Part 710 proceedings, I overruled this objection. Tr. at 11-12.

The individual's attorney also objected to the admission of Exhibit 15, containing the raw results of the psychological tests given to the individual in March 2009. *Id.* at 15. Prior to the hearing, the individual's attorney provided these tests results to the DOE Counsel, who then sought to introduce them into the record. The psychologist who administered the tests testified that he felt "very strongly" that the raw test results "might be misleading to someone who doesn't know the tests, or might be misleading to someone who reads them out of context," *id.* at 222-23, and therefore "might potentially be misinterpreted or misused in some way." *Id.* at 223. I noted that, while I understood the psychologist's concerns, as with regard to the other exhibits to which the individual's counsel objected, the results of psychological tests have been routinely admitted into the record in these proceedings. *Id.* at 224. Further, I stated that I would not apply a standard that would keep a document "out of the record because of the possibility that it might be misinterpreted." *Id.* at 225.

Later in the hearing, the DOE psychologist volunteered his opinion that, despite the fact that the results of the tests he administered to the individual had already been submitted into the record by the DOE counsel, his and the other psychologist's "ethic[al] standards . . . state that we should not be making our raw test results available to anyone other [than] another clinical psychologist or someone trained in that." *Id.* at 311. The individual's attorney, in her closing statement, asked me to reconsider my decision overruling her previous objection to the admission of the test results. *Id.* at 352. Having given this matter further consideration, I will not disturb my earlier decision overruling the objection, for the reason I set forth above and at the hearing in this matter. In the future, if the DOE

II. The Notification Letter and the Security Concerns at Issue

As the basis for the security concerns under Criterion H, the Notification Letter cites the opinion provided by the DOE psychologist in his assessment of the individual, in which he did not diagnose the individual with a mental illness, but found that the individual:

did engage in sexual behavior that reflected very poor judgment. Also he was unable to fully control his impulsive wish to engage sexually with an under-aged female even though he believed that it was wrong. This “mental condition,” as opposed to a “mental illness,” caused and could continue to cause a significant defect in judgment.

Exhibit 6 at 6. Any mental condition that could cause a significant defect in judgment raises clear concerns regarding an individual’s ability to protect classified information and safeguard special nuclear material. *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 (Adjudicative Guidelines) at ¶ 27 (“*The Concern*. Certain emotional, mental, and personality conditions can impair judgment, reliability, or trustworthiness. A formal diagnosis of a disorder is not required for there to be a concern under this guideline.”)

Under Criterion L, the Notification Letter alleges the following:

- (1) On January 9, 2009, police arrested the individual and charged him with three felony counts of child solicitation by electronic communications device.
- (2) On June 17, 2009, the individual pled guilty to two misdemeanor charges of attempting to commit a felony.
- (3) The individual admitted that, “on December 30, 2008 and January 4, 2009, he exposed his genitals and masturbated via webcam and transmitted those images through the internet to a person whom he believed was a 14 year-old girl.”³

psychologist feels that ethical obligations preclude him from producing certain documents, this is a matter that should be addressed with the DOE prior to his submission of those documents to the agency.

³ According to police reports in the record, the individual was in fact communicating with officers who had assumed the online identity of a fictitious 14-year-old girl. Exhibit 8.

(4) The individual admitted that, “on January 4, 2009 and January 8, 2009, he agreed to meet a girl whom he believed was 14 years old with the intent of having sexual relations with her.”

(5) On January 9, 2009, the individual “obtained a hotel room . . . and had in his possession a bundle of white roses, a video camera with a tripod, wine, numerous condoms, and a piece of ladies’ lingerie.”

(6) The individual admitted to “knowing that the pursuit of a minor with the intent to have sexual relations was illegal.”

Exhibit 1. With the exception of the date of the individual’s plea,⁴ the individual has not disputed any of these allegations. The behavior to which the individual has admitted raises serious concerns regarding his judgment and reliability. *See* Adjudicative Guidelines at ¶ 12 (“*The Concern*. Sexual behavior that involves a criminal offense, indicates a personality or emotional disorder, reflects lack of judgment or discretion, or which may subject the individual to undue influence or coercion, exploitation, or duress can raise questions about an individual’s reliability, trustworthiness and ability to protect classified information.”); Adjudicative Guidelines at ¶ 15 (“*The Concern*. 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.”); Adjudicative Guidelines at ¶ 30 (“*The Concern*. 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 laws, rules and regulations.”).

III. Regulatory Standard

A finding of derogatory information does not end the evaluation of evidence concerning the individual’s eligibility for access authorization. *Personnel Security Hearing*, Case No. TSO-0052 (2003). 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). It is my role as the Hearing Officer 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.*

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

⁴ A stipulation signed by the parties to this case states that the individual entered his plea on May 26, 2009, not June 17, 2009, as stated in the Notification Letter. Exhibit F.

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).⁵ 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.

IV. Hearing Testimony

A. The Individual

1. Events Leading to the Individual's January 9, 2009 Arrest

The individual testified that he originally "began going on-line to do internet chats as a way of socializing and making friends. Over time it got progressively worse. I started taking progressively more risks in my personal life, which eventually led up to me contacting a person I believed to be a 14-year-old girl, . . ." Tr. at 85. He stated that he contacted this person in a "general chat room" and was not looking to meet a minor. He did not dispute, however, that the person stated that she⁶ was 14 years old, *Id.* at 85, a fact substantiated by transcripts of the chats in question, which were provided by the individual's counsel prior to the hearing and submitted by the DOE Counsel as an exhibit in this proceeding. Exhibit 14 at 1 (between six and seven minutes into their first chat on December 29, 2008, girl identifies herself as being 14 years old).

He testified that "the conversation did start off as innocent, you know, simple -- simple things of, 'What kind of hobbies do you like? . . .' Eventually we both started turning things into a sexual matter, and I definitely admit I was a very willing participant." Tr. at 86. The individual testified that, twice during their chat sessions, which spanned from December 30, 2008, to January 8, 2009, Exhibit 14, he exposed his genitals on webcam, Tr. at 86, and also masturbated on camera. Tr. at 133, 136. During one of their chat sessions, the individual asked the girl if she "knew how to delete a conversation? I don't want you to get caught, and I don't know if you have your yahoo [set up] to record your past conversations." Exhibit 14 at 16. In his hearing testimony, the individual explained that he "didn't want her to get caught. I knew that what I was doing was wrong, and I guess that's the only purpose for that." Tr. at 131.

⁵ Those factors include the following: the nature, extent, and seriousness of the conduct, the circumstances surrounding his conduct, to include knowledgeable participation, the frequency and recency of his 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 his conduct, the potential for pressure, coercion, exploitation, or duress, the likelihood of continuation or recurrence, and other relevant and material factors.

⁶ Though the "girl" with whom the individual chatted was, in fact, two police officers, I will refer to this person as a girl and use the feminine pronoun, both for ease of reference and because it more accurately conveys the contemporaneous point of view of the individual, who at the time clearly believed he was communicating with a 14-year-old girl. *Id.*

He and the girl made arrangements to meet on January 9, 2009, Exhibit 14 at 25-30, on which date the individual drove two and a half to three hours to the girl's town of residence, booked a hotel room, and drove to an agreed-upon meeting location. *Id.* at 86, 128; Exhibit 12 at 18. "It was specified that it was her aunt's house, and that I was supposed to meet her there at a specific time, and we also discussed -- and she did ask me to bring other articles, which I did acquiesce and bring." Tr. at 86. One of the items he brought was a video camera, and though the individual testified that he had not recorded sexual encounters before, "there was probably some intent that if she was open to the idea we would record -- record something." *Id.* at 40.

The individual testified that, upon arriving at the house, he never got out of his car, but that he parked the car, after a time driving it a couple of blocks away, where he again parked and was approached by police and arrested. *Id.* at 87-88; Exhibit 8 at 11 (police report corroborating individual's account). Regarding his actions on and leading up to January 9, 2009, the individual testified that he "knew at the time it was wrong, and I'm never going to deny that, and I'm always going to have to live with the consequences of that for the rest of my life." Tr. at 89; *see also* Tr. at 128-30 (testimony of individual that he knew engaging in sexual acts with a 14-year-old girl would be illegal).

The individual stated in his testimony that he had "developed a problem over the years that I was not paying attention to, that I wasn't even aware that I had, until I developed a lot of denial of who I was, a lot of denial of not dealing with problems in my personal life, . . ." *Id.* at 90. He testified that he has had "sexualized contact over the internet" in the past, but only with adults. *Id.* He provided his "best guess" that he had exposed his genitals and masturbated over the internet via webcam 20 to 30 times in the past. *Id.* at 126-27. The individual also stated that, during his past internet chats, he "probably mentioned" his occupation and "may have mentioned one or two times -- a couple of times or more" the name of his DOE-contractor employer, and though he did not recognize at the time that doing so showed bad judgment, he does now. *Id.* at 125-26.

2. Events After the Individual's January 9, 2009 Arrest

The individual testified that he reported his arrest to his employer three days after the arrest, which occurred on a Friday. *Id.* at 104; *see* Exhibit 8 at 1 (incident report corroborating individual's account). Accepting an offer by his employer, the individual saw a counselor employed by the company, who suggested that he be tested for "sexual addiction and possibly internet addiction, as well." *Id.* at 94.

The individual's "sister . . . suggested I should get into counseling, and the first lawyer that I went to also suggested that I get into counseling, and I agreed, . . ." *Id.* at 93. His attorney in the present case, who also represented the individual in his criminal proceeding, referred the individual to his current counselor, whom the individual began to see in January 2009. *Id.* at 94. He described his counseling as "extremely helpful," noting that his self-esteem is "a lot higher" and that the counselor has given him "a lot of tools for being able to deal with problems that I

have been ignoring for years.” *Id.* at 95. He testified that he has seen his counselor once every two weeks. *Id.* at 148.

His counselor also recommended books to the individual which he has been “working through diligently,” and which he brought to the hearing, including Sexaholics Anonymous and Sex Addicts Anonymous, each of which contains information about similar but distinct 12-step programs similar to Alcoholics Anonymous. *Id.* at 97. The individual testified that he has attended meetings of both groups, and has a sponsor that he talks to “every single day.” *Id.* at 89, 156-57.

The individual testified, *id.* at 105-06, and official documents in the record reflect, that he pled guilty to two misdemeanors on May 26, 2009, Exhibit 9 (plea agreement), and on June 17, 2009, was sentenced to one year supervised probation, Exhibit G (letter from probation officer), including as a condition of probation that the individual “shall install the appropriate software on [his] home computer so that defendant’s computer usage may be monitored by probation.” Exhibit 9 at 2. The plea agreement also provides that, if the individual successfully completes probation, he will receive a “conditional discharge,” *id.*, meaning that “he will not receive a conviction for this offense and it will be cleared from his record.” Exhibit G at 1.

The individual stated in his testimony that his probation officer has conducted two random, unannounced, scans of his computer. *Id.* at 155-56; *see also* Exhibit G at 2 (letter from probation officer reporting no violations of probations and stating that she has “frequently monitored and searched his automobile, residence, and computers and ha[s] found nothing of concern on his property”). According to the individual’s testimony, he has engaged in no internet chats since his arrest and that “no messenger systems or anything” are installed on his computer. Tr. at 104. “I have also installed software that . . . prevents [one] from going to specific areas on the internet.” *Id.* He testified that only his counselor has the password to change the settings for this software. *Id.* at 154.

Asked about his future intentions, the individual stated that he is “avoiding not just chat rooms; I’m avoiding blogs, I’m avoiding forums, I’m avoiding any personal dealings sites whatsoever.” *Id.* at 158. He testified that he intends, even after his probation is ended, to “continue to constantly do the steps and continue to constantly rely on the support structure I have built up these past couple of months . . .” *Id.* at 158-59.

Finally, the individual testified that he now considers himself to be honest, reliable, and trustworthy, and that he is not subject to pressure, coercion, exploitation, or duress “because everyone that I care about knows about the conduct. I have already had experience being confronted with it, and it’s public knowledge.” *Id.* at 167.

B. Psychologist Who Evaluated Individual in March 2009

The psychologist who evaluated the individual in March 2009 testified that, among his other experience, he has performed “1,500 sex offender evaluations, man on man, court testimony, at least 300 times.” *Id.* at 177; *see also* Exhibit B (curriculum vitae). Accordingly, the individual’s attorney offered the psychologist as an expert in psychology and sex offender evaluations, and the DOE counsel stated that she had no objection. *Id.* at 177.

The psychologist stated that his evaluation of the individual included a four-hour interview of the individual, eight to ten hours of psychological testing, interviews of four of the individual’s family members, and review of the internet chat transcripts and relevant police reports. *Id.* at 188. When asked if the individual was open and honest in his interview and tests, the psychologist stated that “[a]s far as I know, he was. He didn’t tell me anything that later I have heard was contradicted.” *Id.* at 189.

In an April 20, 2009, “Comprehensive Sex Offender Evaluation Report,” Exhibit A, the psychologist diagnosed the individual with “avoidant personality as his main problem. That disorder clearly contributed to him being more comfortable in interactions over the Internet and that he was relatively uncomfortable in his direct interactions with others.” *Id.* at 16. However, the psychologist testified that, while he has

almost always seen a personality disorder in a person who has committed a sex offense, . . . they’re borderline features or narcissistic features or obsessive-compulsive features or antisocial features, or all four of those mixed together, not really avoidant so much, and all those other personality traits that we do often see aren’t present in [the individual], so I thought that that was an interesting difference than one I would see in most cases.

Id. at 199. The psychologist further testified that he saw the individual as a “good candidate for outpatient treatment, and given that he was forthcoming about the offense, took responsibility for the offense, he’s able to carry on conversations, I thought he had a good prognosis to be able to progress fairly quickly through treatment.” *Id.* at 199-200. Thus, though the psychologist originally diagnosed the individual with a “relatively mild” personality disorder, *id.* at 197, “I’m thinking that that’s now resolved, and largely due to the treatment that he’s been involved in since January.” *Id.* at 199.

In his April 2009 report, the psychologist opined that the individual “presents a low risk of recidivism in the next seven to ten years.” Exhibit A at 21. In his testimony, the psychologist explained his opinion that the individual “doesn’t present with the hallmark features associated with the high risk.” Tr. at 201. According to the psychologist, the individual is “not psychopathic,” he “doesn’t have a clear sexual preference for any kind of criminal sexual activity, including with children,” does not have a problem with substance abuse, does not have a “[t]otal inability to sustain relationship with a relation partner,” has no history of nonsexual violence, and has no history of nonviolent crimes. “[S]o you look at a lot of potential risk markers, and most of them aren’t there.” *Id.* at 201-02.

Regarding the individual's progress since the April 2009 report, the psychologist opined that the individual is receiving appropriate treatment, and meeting with his counselor "within the scope of frequency that many other treatment programs use." *Id.* at 209. He testified that he had spoken with the individual's counselor, who indicated that the individual "is doing everything he's being asked to do. He's totally compliant." *Id.* at 210. After hearing the testimony of the individual's counselor, which I discuss below, the psychologist stated:

My opinion in April was that he was low risk, and I would say based on the pace of his treatment and the successful meeting of a lot of his treatment goals and his ability to articulate a safety plan and to articulate the risk factors and what it is that he needs to address emotionally and mentally, then I would say it's very low.

Id. at 296.

Later in his testimony, the psychologist quantified this risk as "five percent or below, because I think there's a lot of research that supports that." *Id.* at 336. However, he clarified that this opinion was of the risk that the individual would engage "in behavior that would either commit a new crime or would constitute a violation of his conditions" of probation, noting that any inappropriate use of the internet would violate the terms of his probation. *Id.*

The psychologist acknowledged that, once the individual is "off probation, he's free to do what he wants to do. Will he revert to that? And I think his therapist would be the better person to address has he really gotten the message, and is he going to . . . stay away from it." *Id.* at 339. In the opinion of the psychologist, if the individual "continues benefiting from treatment, and he continues in treatment for as long as he's asked to do, then I think he's got a good prognosis to not go back and indulge in" behavior that is inappropriate for a person who holds a security clearance "and accept that he's not your average guy who can make average imprudent decisions, and nobody cares. I think that should be one of the goals of his ongoing counseling." *Id.* at 339-40.

The psychologist testified that he would not currently recommend that the individual have unmonitored use of the internet, *id.* at 217-18, and that as "far as later having full access to an unfettered computer, I think his therapist could better address the time frame of when that's going to be." *Id.* at 218. He stated that this recommendation was not based on an opinion that the individual, in particular,

can't be trusted. It's just from experience, we know it's more productive in rehabilitation to reduce the risk that somebody might do that, and if out of ten clients with similar issues, five of them are going to be drawn into doing that again, and the other five are going to do well, but we don't know which five are which until we get further down the road in treatment, it's just a good idea to recommend it, so the recommendation was kind of a blanket recommendation

because of the nature of the case, and not because of any, you know, concern that I have that he's just waiting for an opportunity to do this, . . .

Id. 218-19.

Regarding the individual's future judgment and reliability in general, the psychologist testified that "the rest of his life shows exceptionally good judgment, better than, I think, the typical person, better than a lot of people I have known in school and in my professional community." *Id.* at 297.

C. The Individual's Counselor

The individual's counselor is a licensed professional counselor and licensed social worker. *Id.* at 230; *see also* Exhibit D (curriculum vitae). He testified that 50 to 75 percent of his practice deals with sex offenders or people with sexual difficulties, *id.* at 230-21, and that he "make[s] it a point that half of [his required units of continuing education] are having something to do with sex offender treatment." *Id.* at 231-32. The individual's attorney offered the counselor as an expert "in treatment, specifically of people with sexual problems," and the DOE counsel stated that she had no objection. *Id.* at 246.

The counselor testified that when he first saw the individual in January 2009, he was very depressed, remorseful, and inconsolable. *Id.* at 246-47. He testified that, while shame can be a useful tool in therapy, for the individual "it was way too much, so the first part of the treatment plan that I had in mind . . . [was] to alleviate some depression, . . . to get him to move through some of these feelings, and that's going to take a few sessions." *Id.* at 247-48. The counselor described the various phases of counseling through which he has been working with the individual, *id.* at 252-59, and described him as "enthusiastic to the point where I have to slow him down, you know. I'm just saying, 'Wait a minute. Let's let this -- let this get in you before we go on to the -- to the next phase,' but he's excited about the possibilities" *Id.* at 255. According to the counselor, the individual is now dealing with his problems "in a really different way. He's meeting his problems head on." *Id.* at 255-56. "[H]e's really operating on a . . . much more mature and appropriate level in the way he relates to the world and people in it and that kind of thing. It's been quite an amazing transformation." *Id.* at 260.

The counselor acknowledged that "you have to crawl before you walk, and you have to walk before you run, so we're not going to -- we're not going to turn [the individual] into an extrovert who goes out and starts dating women right away. It's just not going to happen." *Id.* at 257. He testified that he has "worked a couple of sessions" on role play, focusing on "'how do we meet a girl? How do you start a conversation?'" *Id.* at 258. "[W]e're doing that, but we want to . . . wait a little while, until he gets his confidence built up in himself, that he can support himself, that he can feel good about himself, and that he doesn't have to go trolling on the internet." *Id.*

As for the future, the counselor described what he called a "safety plan" which identifies "the physical, cognitive, and emotional states that could be triggers for the [individual] to act

out, . . . and it's his responsibility to be able to identify those and stop them and have alternative behaviors.” *Id.* at 263. The counselor testified that the individual is “[a]bsolutely” able to do this. *Id.* “[H]e's identified all those kind of emotional states that he needs to look out for, and he has a safety plan in place, . . .” *Id.* at 259. The counselor opined that the chances of the individual “acting out on the computer are very, very low . . .” *Id.* at 275-76.

Nonetheless, consistent with the opinion of the psychologist’s testimony discussed above, the counselor recommended that the individual’s internet access continue to be restricted “while he’s in treatment, . . . just [as] a safeguard right now in terms of his treatment to – to keep it all clean and keep it all honest [But] I don't see any reason in the future when he completes treatment that we can't start weaning him off of that.” *Id.* at 271. The counselor explained that “it’s kind of like an alcoholic. . . . [H]e may be sober for, you know, three or four years, but you don't want to have a bottle in the cabinet, you know.” *Id.* at 272. When I asked the counselor what “level of risk” he was willing to tolerate before he could agree that these restrictions could be removed, he responded that when the individual has

got another year of treatment under his belt, and he's -- he's progressed through treatment, I would say five to ten percent is the time where you need to let go of some of those controls, because this is the real world, and eventually he's going to have to be out there, regardless, and being on the computer and taking control of himself and being able to be successful with that.

Id. at 351.

Also in line with the opinion of the psychologist described above, the counselor testified that, aside from the behavior at issue in this case, the individual “shows very good judgment. . . . I think he has above average judgment.” *Id.* at 287. Further, he did not believe that the fact that the individual’s behavior broke certain rules means he would break rules in the context of DOE security. *Id.* at 287-88. “I think he was very good at separating, ‘This is work, and I can't do this, but I'm going to do this, because I'm meeting these needs over here.’” *Id.* at 288.

D. The DOE Psychologist

The DOE psychologist testified that he has conducted approximately 740 evaluations over the course of his career, *id.* at 31-32, and has testified in court “probably five to eight times, maybe more.” *Id.* at 32. “Most of my work has been in the area of suicide, wrongful death claims.” *Id.* at 33; *see also* Exhibit 6 (containing curriculum vitae). Asked regarding expertise in the treatment of “sex offender issues,” the DOE psychologist responded that he has “treated a number. At what point does one became an expert in that, I'm not sure, but I don't claim to be expert in that.” Accordingly, the DOE counsel offered the psychologist as an expert in psychology. *Id.* at 33. The individual’s attorney stated that she did not object to the DOE psychologist “being qualified as a psychologist. My objection is he's indicated he's not an expert on sex offender issues, so depending on how he's offered as an expert, that's my concern.” *Id.* at

34. The DOE counsel then confirmed that she was not offering the DOE psychologist as an expert on sex offender issues. *Id.* at 35.

The DOE psychologist testified that he reviewed the individual's personnel security file prior to interviewing him for "about an hour," on February 19, 2009, as part of an evaluation that included psychological testing and lasted a "little over four hours." *Id.* at 37. He testified that the testing indicated that the individual was depressed and insecure, *id.* at 40, but revealed no "diagnostic category pathology" *Id.* at 39. The DOE psychologist's February 27, 2009, assessment of the individual reviewed the criteria for several potential diagnoses, as set forth in the Diagnostic and Statistical Manual of Mental Disorders, 4th edition, Text Revised, specifically Impulse-Disorder Not Otherwise Specified, and two Sexual Paraphilias, Exhibitionism and Pedophilia, Exhibit 6 at 4-5, but concluded that the individual could not be "diagnosed with a mental illness." *Id.* at 6.

However, in response to the question of the DOE as to whether the individual had an illness or mental condition of a nature which causes or may cause a significant defect in judgment or reliability, the DOE psychologist stated in his assessment that the individual did have a "'mental condition,' as opposed to a 'mental illness,' [that] caused and could continue to cause a significant defect in judgment." *Id.* In his testimony, the DOE psychologist explained that a

mental condition is when a set of behaviors are troublesome, meaning that they are of a nature that either are going to cause a person personal distress or that cause society personal distress, that are in some nature dangerous to other people or to themselves, or that psychologically are self-defeating, personally injurious.

Tr. at 56-57. He contrasted this with a mental illness, which "is defined as something that . . . has a formal diagnostic label, according to a standard reference." *Id.* at 56. When I asked the DOE psychologist if "mental condition" was a term or art in his profession, he responded that "[w]e seldom use the phrase mental condition. That's a DOE term. What we talk about are various features that a person has, . . . We give the descriptions of those things, . . . and we sometimes will use mental condition, but that's not the most common way we talk about it." *Id.* at 78.

After listening to the hearing testimony of the individual, his counselor, and the other psychologist who testified, the DOE psychologist agreed that the individual presented "a very low risk" of relapse, "defining relapse as [the individual] either having or attempting to have sexual contact with a person under 18 years of age, . . ." *Id.* at 323. This testimony was consistent with the statement in the DOE psychologist's February 2009 report that, "[g]iven his intense shame and embarrassment, it is my judgment that he will not engage in illegal sexual acts again." Exhibit 6 at 7.

The DOE psychologist testified that he was "impressed with the treatment processes that are going on" and "with the strengths in [the individual]'s character." Tr. at 308-09. However, he

also noted that he had to take into account information to which he previously did not have access, specifically the transcripts of the internet chat sessions at issue in the case, *id.* at 309-10, and the report of the psychologist who evaluated the individual in March 2009. *Id.* at 311.

“[W]hen you saw the whole transcripts, you saw really raw language, raw ideas. You saw an accustomed facility of talking, and I think [the individual] said it was kind of like a practiced routine that he would get into, he'd done it so many times.” *Id.* at 309. He further testified that the information provided in the April 2009 report of the other psychologist “made the depth of [the individual]'s involvement in sexual experience on the internet seem much more serious to me than what I had been aware of.” *Id.* at 311.⁷ He characterized the previous hearing testimony as focusing on “one event. From my perspective, there were 20 to 30 of these events. There were events over a long period of time. Each one of those involved very poor judgment. It doesn't matter whether they were legal or not.” *Id.* at 313.

The DOE psychologist acknowledged that “on an actuarial basis . . . he doesn't have the psychological components of people who tend to be high violators of their commitments to not re-offend. That, I believe.” *Id.* at 315. However, he opined that the risk of the individual “going on the internet and exhibiting himself or masturbating, those two things in particular, . . . I would say right now, for him – my sense of it is that he has about 60 percent chance of doing that over the next seven to ten years.” *Id.* at 350.

More generally, the DOE psychologist did not find evidence that the individual was unable to control his impulses in areas outside the behavior at issue in this case. *Id.* at 80. “I think his character is such that he's not going to be a loose cannon, generally impulsive, shooting his mouth off without thinking, . . . [T]hat is simply not [the individual].” In addition, consistent with the other expert testimony, the DOE psychologist testified that the individual exhibited “average to above average judgment in the rest of his life.” *Id.* at 326.

The DOE psychologist also volunteered the following regarding his expertise, vis-à-vis the other two experts who testified at the hearing:

My job as a contract evaluator, psychologist for DOE, is not to have been an evaluator of a sexual act. It was not to be confined to a legal one-time issue, whether he was guilty or not.

It was to take a look at the sexual acts, plural, that were done, and to think about them in light of [the individual]'s personality, his character, his ego -- his strengths of personality, his ego strength, and to make a determination whether those behaviors made him have a defect in judgment or reliability. It has nothing to do with being an expert or not in sexual behaviors.

⁷ There was some testimony at the hearing regarding whether the individual fully disclosed his past sexual practices to the DOE psychologist and to the LSO in his January 2009 PSI. However, this was not among the allegations raised in the Notification Letter. Exhibit 1.

Id. at 312.

V. Hearing Officer Evaluation of Evidence

Given the disturbing behavior that is at the heart of the present case, it is important to note here that the purpose of this proceeding is not to heap moral condemnation on the individual for his past actions, nor to punish him. Instead, as the Hearing Officer, I am to make a forward-looking, “predictive assessment” as to the risk to our common defense, security, and national interest, were the DOE to restore the individual’s access authorization. *E.g., Personnel Security Hearing, Case No. TSO-0746 (2009)*. This, however, in no way means that the seriousness of the individual’s conduct is not relevant to my determination. As noted above, the fact that the individual’s actions, by his own admission, broke the law, and that he contemplated and planned other illegal acts, raises serious questions regarding his future judgment, reliability, and trustworthiness. Moreover, the fact that the individual regards his past behavior with great shame, which is certainly understandable and by all appearances genuine, raises legitimate questions regarding his future susceptibility to undue influence or coercion, exploitation, or duress. Below, I address whether these questions have been sufficiently resolved in the present case.

A. Criterion H

First, under Criterion H, I find that the legitimate security concerns raised by the individual’s mental condition remain unresolved, as I am not sufficiently convinced that the individual will, in the future, act in accordance with the sound judgment and reliability required of holders of DOE access authorization.

Among the factors that the Part 710 regulations require me to consider, one particularly relevant to the present case is “the likelihood of continuation or recurrence, . . .” 10 C.F.R. § 710.7(c). In her closing argument, the attorney for the individual asked me to “think of this issue of recurrence as recurrence of something . . . involving a child.” *Id.* at 365-66. Earlier in the hearing, referencing the specific allegations in the Notification Letter, the attorney stated that she “thought that we were focused on the notice that we were given to prepare for this hearing, which had to do with this particular behavior with the purported 14-year-old.” *Id.* at 319.

However, the regulations are quite clear that the notice provided to the individual in the Notification Letter is of the “information in the possession of DOE [that] has created a substantial doubt concerning the individual’s eligibility for access authorization.” 10 C.F.R. § 710.21(a). Nowhere do the regulations state, or imply, that such doubt can be resolved by merely showing that the individual will not repeat the same specific behavior cited as giving rise to the security concern in the first place. To the contrary, in addition to setting forth the specific factors that my determination must consider, 10 C.F.R. § 710.7(c), the regulations describe my

decision as “a comprehensive, common-sense judgment, made after consideration of all 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(c); *Personnel Security Hearing*, Case No. VSO-0034 (1995), *affirmed* (OSA, 1995).

With this in mind, I note that the opinion of the three experts in this case was unanimous in concluding that there is a very low risk that the individual will repeat the behavior that led to his January 2009 arrest. I found this expert testimony to be very persuasive, and this clearly resolves *part* of the concern as to the individual’s future behavior. There is also good reason to believe, based on the expert testimony, that the individual is at a low risk to violate the terms of his current probation, which would include inappropriate use of the internet, in particular because of the externally-imposed restrictions and monitoring of his internet usage that will remain in place until June 2010.

What is much less clear from the expert testimony in this case, however, is how the individual will behave once these external controls are removed. On one hand, there is the opinion of the DOE psychologist that there is an approximately 60 percent chance that the individual will again exhibit his genitals or masturbate online. Tr. at 350. The testimony of the other psychologist and the individual’s counselor was more reassuring as to future risk. However, even the “good prognosis” offered by the psychologist was dependent on whether the individual would, in the future, remain in treatment and continue to benefit from it. *Id.* at 339-40. Significantly, the individual’s counselor stated that he thought the restrictions on the individual’s internet usage could be removed when the risk of his inappropriate use has fallen to five or ten percent, after he has “another year of treatment under his belt, . . .” *Id.* at 351.

Even if I were to disregard the DOE psychologist’s pessimistic prognosis, I cannot issue a decision in this case that is conditioned on the individual continuing to receive appropriate treatment in the future or on his internet usage being monitored and restricted until such time that his risk of inappropriate use is sufficiently low. While it appears that the risk is likely to be low so long as there are legal restrictions on his internet use, the individual did not convince me that there will be an acceptably low risk of this behavior once the restrictions are removed. Such future behavior would obviously represent a severe lapse of judgment and reliability for one holding DOE access authorization. Thus, I cannot find that the legitimate concern raised under Criterion H has been resolved.

B. Criterion L

The expert opinion discussed above under Criterion H is also very helpful to my determination under Criterion L, even though under this criterion I need not rely on the opinion of a duly-qualified expert. I found the testimony of all of the experts to be thoughtful, well-considered, and probative on the issues relevant to this case. This testimony convinced me that there is a very low risk that the individual will repeat the same illegal behavior that led to his arrest. It also

convinced me that the individual shows average to above-average judgment in other areas of his life, which provides some assurance as to the individual's future behavior generally.

However, despite the positive factors highlighted by all of the expert testimony, I am left with significant lingering doubts regarding whether the individual, particularly once there are no longer the restrictions on his behavior imposed by the conditions of his probation, will refrain from behavior in the future that could easily subject him to pressure, coercion, exploitation or duress which may cause him to act contrary to the best interests of the national security. As such, in the end, I must err on the side of national security and find that the individual has not sufficiently mitigated the Criterion L concerns before me.

VI. 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 Criteria H and L. 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 either of 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 2, 2009