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DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Hearing Officer's Decision

Name of Case: Personnel Security Hearing

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Case Number: TSO-0064

This Decision concerns the eligibility of xxxxxxxxxxxx (hereinafter "the individual") for continued access authorization. The regulations governing the individual's eligibility are set forth at 10 C.F.R. Part 710, "Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material." This Decision will consider whether, based on the testimony and other evidence presented in this proceeding, the individual's suspended access authorization should be restored. For the reasons detailed below, it is my decision that the individual's access authorization should be restored.

I. BACKGROUND

In April 2003, the Manager of a Department of Energy (DOE) Operations Office issued a Notification Letter to the individual, stating that the DOE was in possession of derogatory information that created a substantial doubt concerning his continued eligibility for access authorization. In the Notification Letter the Operations Office also informed the individual that he was entitled to a hearing before a hearing officer in order to respond to the information contained in the Notification Letter. The individual requested a hearing in this matter and the Operations Office forwarded this request to the Office of Hearings and Appeals. I was appointed to serve as the hearing officer. In accordance with 10 C.F.R. § 710.25(e) and (g), I convened a hearing in this matter (hearing).

The Notification Letter finds security concerns related to the individual's behavior under Criteria J & H. 10 C.F.R. § 710.8(j) & (h). Criterion J security concerns relate to the use of alcohol habitually to excess or a diagnosis of alcohol abuse or dependence. Criterion H security concerns relate to a finding of a mental condition, which, in the opinion of a psychiatrist causes or may cause a significant defect in judgment. The Notification Letter bases both concerns on a January 7, 2003, report by a DOE consulting psychiatrist. In that report the consulting psychiatrist diagnosed the individual as suffering from alcohol abuse and he found that the individual is a user of alcohol

habitually to excess. The report also finds that the individual's alcohol abuse may cause a significant defect in his judgement.

The Notification Letter also indicated that the individual engaged in unusual behavior under 10 C.F.R. § 710.8(l). (Criterion L) In specifying the facts supporting the Criterion L concern, the Notification Letter indicates "See Criteria H and J." Because the behaviors that formed the basis for the Criterion L security concern were all related to alcohol misuse, I made a tentative determination that the finding of a Criterion L security concern should be dismissed. The DOE counsel agreed with my preliminary determination. Accordingly, no further consideration was given to that concern.

II. REGULATORY STANDARD

In order to frame my analysis, I believe that it will be useful to discuss briefly the respective requirements imposed by 10 C.F.R. Part 710 upon the individual and the hearing officer. As discussed below, once a security concern has been raised, Part 710 clearly places upon the individual the responsibility to bring forth persuasive evidence concerning his eligibility for access authorization, and requires the hearing officer to base all findings relevant to this eligibility upon a convincing level of evidence. 10 C.F.R. §§ 710.21(b)(6), 710.27(b), (c), (d).

A. The Individual's Burden of Proof

It is important to bear in mind that a DOE administrative review proceeding under this Part is not a criminal matter, where the government would have the burden of proving the defendant guilty beyond a reasonable doubt. Once a security concern has been raised, the standard in this proceeding places the burden of proof on the individual. It is designed to protect national security interests. The hearing is "for the purpose of affording the individual an opportunity of supporting his eligibility for access authorization." 10 C.F.R. § 710.21(b)(6). The individual must come forward at the hearing with evidence to convince the DOE that restoring his 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).

This is not an easy evidentiary burden for the individual to sustain. The regulatory standard implies that there is a presumption against granting or restoring an access authorization. See *Department of Navy v. Egan*, 484 U.S. 518, 531 (1988) ("clearly consistent with the national interest" standard for the granting of access authorizations indicates "that security determinations should err, if they must, on the side of denials"); *Dorfmont v. Brown*, 913 F.2d 1399, 1403 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991) (strong presumption against the issuance of an access authorization). Consequently, it is necessary and appropriate to place the burden of persuasion on the individual in cases involving national security issues. In addition to his own testimony, the individual in these cases is generally expected to bring forward witness testimony and/or other evidence which, taken

together, is sufficient to persuade the hearing officer that restoring access authorization is clearly consistent with the national interest. *Personnel Security Hearing (Case No. VSO-0002)*, 24 DOE ¶ 82,752 (1995).

B. Basis for the Hearing Officer's Decision

In a personnel security case under Part 710, it is my role as the hearing officer to issue a decision as to whether granting an access authorization would not endanger the common defense and security and would be clearly consistent with the national interest. 10 C.F.R. §710.27(a). Part 710 generally provides that "[t]he decision as to access authorization is a comprehensive, common-sense judgment, made after consideration of all relevant information, favorable and unfavorable, as to whether the granting of 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). I must examine the evidence in light of these requirements, and assess the credibility and demeanor of the witnesses who gave testimony at the hearing.

III. HEARING

At the hearing the DOE counsel presented the testimony of a DOE consulting psychiatrist and a DOE security specialist. The individual testified on his own behalf and presented the testimony of 10 other witnesses. Some background information will be helpful to understand the testimony. During a long and successful career in the military, the individual consumed significant amounts of alcohol on numerous occasions. As a result of a 1992 arrest for driving under the influence of alcohol (DUI) on a military base, the individual's military career was ended. After the end of his military career the individual reduced his consumption of alcohol. In March 2002 the individual was under considerable stress and drank a significant amount of alcohol. On that night he had a minor traffic accident and was again arrested for DUI. DOE Exhibit #7. The state court suspended the individual's license for six months, fined him, required him to perform 50 hours of community service and to attend a DUI school. DOE Exhibit #6. In April 2002, the individual started receiving ongoing counseling from a psychologist (hereinafter the individual's treating psychologist). At the beginning of June 2003, the individual consulted a second psychologist (hereinafter the individual's consulting psychologist).

The testimony at the hearing described the individual's alcohol use during two periods. First, the individual was a limited social drinker between 1994 and March 2002. Second, since his second DUI in March 2002 the individual has become progressively more aware of the seriousness of his alcohol abuse problem and more committed and involved in his rehabilitation program. The following is a summary of the testimony presented at the hearing.

1. The DOE consulting psychiatrist

The first witness was the DOE consulting psychiatrist who evaluated the individual during December 2002 and wrote a report dated January 7, 2003. Transcript of Hearing (hereinafter Tr.) at 19. He testified that during that 2002 evaluation he diagnosed the individual as suffering from alcohol abuse on the basis that the individual “used alcohol in such a way that it impaired his functioning in significant ways” and the individual had “a vulnerability to the drug alcohol.” Tr. at 26 and 29. He further testified that at the time of the 2002 evaluation the individual had abstained from alcohol consumption for some months but indicated that he believed that he could drink socially. Tr. at 30.

On September 30 the DOE consulting psychiatrist evaluated the individual a second time. ^{1/} The consulting psychiatrist testified that his discussion with the individual led him to believe that after the individual consumed alcohol in May 2003 the individual had “a moment of clarity” in which he realized that a relationship with alcohol is not important compared to the risks alcohol consumption would cause him. Tr. at 31 and 35. The DOE consulting psychiatrist testified that it was a positive that the individual arranged to see the consulting psychologist, continues to see the treating psychologist, and has committed himself to sobriety. He also testified that during his evaluation he was impressed by the individual’s involvement in his recovery program, his views on recovery, his lack of denial and his ability to foresee a happy and productive life without the use of alcohol. Tr. at 31. He explained that if you are sober and miserable that does not work so people need more than abstinence; they need to rebuild their lives around a sober life style. Tr. at 32. He testified that he believed the individual has adopted a productive sober life style and is rehabilitated. Tr. at 33.

The DOE consulting psychiatrist discussed in some depth the basis for his belief that the individual was rehabilitated. He first dealt with the individual’s five months of abstinence. He indicated

There are people who may abstain from alcohol and say, you know, I can’t drink, I’m alcoholic, but are not really in recovery psychologically, in that they’re not really confronting their own issues and they go on, internally, in pain, and may go on for months or year but they never -- they never really get better and [they are] always just one drink away from disaster.

Part of what we look for is the presence or absence of denial, and there’s a variety of ways to look at that. I was reassured after the individual made his statement this morning, that he had completed a course of rehabilitation, that he added that and clarified that it’s you know, it’s never over. It’s an ongoing process.

^{1/} The letter reporting the September 30, 2003 evaluation is DOE Exhibit #14.

That kind of recognition is a good example of someone -- as the difference with somebody who's in denial who thinks, okay, I went through this treatment program for two years, or whatever, now I'm done, I'm okay now.

Tr. at 34.

In addition he testified:

His regular involvement in the fellowship of AA and the way he talked about it and characterized the meetings and what it meant to him, was persuasive to me. The fact that he has a sponsor and talked to me a bit about that relationship is usually a very positive sign.

Tr. at 34.

The DOE psychiatrist was asked whether the five months of abstinence and the individual's other behavioral changes is sufficient to indicate rehabilitation. The DOE consulting psychiatrist indicated "I would say that the qualitative evidence in this case outweighs the quantitative evidence." Tr. at 35. He testified that the individual has made a gradual lifestyle change in the 18 months since March 2002 and that he has shown adequate evidence of rehabilitation. Tr. at 37.

2. Individual's treating psychologist

The individual's treating psychologist testified that he began seeing the individual in April 2002, Tr. at 44, when he diagnosed the individual as suffering from alcohol abuse. Tr. at 51. The treating psychologist believes the individual began his rehabilitation process when he first came to see him. He has seen the individual for counseling on a number of occasions over the last 18 months and continues to counsel the individual on a monthly basis. Tr. at 44. He indicated that during the first year of treatment the individual did not attend AA and although he drank very little alcohol he was not committed to abstinence. Tr. at 56. However, in May 2003, the individual had four drinks of alcohol. After those drinks the individual "had an epiphany" in which he realized that he should not consume alcohol in the future and should be more active in his rehabilitation efforts. Tr. at 44. He testified that he believes that as a result of the strength of the individual's character and his "epiphany," it is a 99 percent probability that the individual will not drink again. Tr. at 44. He testified that he believes the individual's five months of abstinence are sufficient to convince him that the individual will remain abstinent. Tr. at 72.

3. The individual

The individual testified he has not had any alcohol in the last five months and his total consumption of alcohol over the last 18 months was three beers and a glass of wine during May 2003. Tr. at 14.

He further testified that he has come to realize that casual use of alcohol puts him at risk and therefore he participates actively in Alcoholics Anonymous (AA), has a sponsor and has even attended meetings in other areas when he was on vacation. Tr. at 66. He testified that he now recognizes and can deal with the factors that might cause him to consume alcohol. Tr. at 65. He testified that he has solid family support and is committed to abstinence. Tr. at 14 and 65.

4. Two neighbors

The first neighbor testified that she has been a neighbor of the individual and a close friend of the individual's wife for seven and a half years. Tr. at 133. She testified that during the last 18 months she has encountered the individual 30 times in social situations in which alcohol has been served and she has never seen the individual consume any alcohol. Tr. at 134. She also testified that the only time she ever saw the individual consume alcohol was several years ago on New Year's eve when he had a glass of champagne. Tr. at 133. She also testified that she often drops by the individual's house without an invitation and that she has spent considerable time in the kitchen and family areas. She testified that she has not seen the individual use alcohol in the past 18 months. Tr. at 136.

The second neighbor testified that he has known the individual since he moved into the neighborhood in 1998. Tr. at 144. He rented a townhouse in the neighborhood and then purchased the townhouse next to the individual. He indicated that he visits the individual's house regularly on both social occasions and on unannounced visits. Tr. at 144. Before March of 2002 he very seldom saw the individual consume alcohol. Tr. at 145. Since March 2002 he has not seen the individual consume any alcohol. Tr. at 147. On cross examination he indicated that in the last year he has seen the individual once a month at social gatherings and that at all of these gatherings alcohol was available and the individual did not consume any alcohol. Tr. at 151. In addition to the social functions in the last three months, the second neighbor testified that he has been in the individual's house on a weekly basis and that he has never seen the individual consume alcohol.

5. The individual's wife

The individual's wife testified that she and the individual have been married for seven years. Tr. at 154. She testified that during those seven years when they went out to a social gathering, the individual would occasionally have a glass of wine or beer but on other occasions he would have nothing alcoholic to drink. Tr. at 155. She testified that the individual told her that in May 2003 he consumed two beers and that a few days later had a glass or two of wine in her presence. However, she testified that she had no recollection of his consumption of the wine. Tr. at 163. She testified that, except for the two incidents, she does not believe the individual has consumed any alcohol since March 2002. Tr. at 162.

She also testified that the individual is attending AA meetings on a regular basis. She indicated the individual tells her when he is going and when he returns he often made comments about his participation in the meetings. Tr. at 172. She also testified that the individual's sponsor often calls

the house and the individual and his sponsor have spoken on the phone on numerous occasions. Tr. at 172.

6. Brother-in-law

The individual's brother-in-law testified that they have a close family and the family usually gets together for a week in the summer in the mountains, a long weekend at the beach and for one of the winter holidays. Tr. at 183. He indicated that when he first knew the individual he would have a drink or a glass of wine on social occasions. Tr. at 184. However, in the last two years the individual has not consumed any alcohol in his presence. Tr. at 184.

7. Long time friend

The friend testified he has known the individual for thirty years. Tr. at 192. He testified that he has known the individual to consume alcohol in moderation. Tr. at 192. He testified that the last time he saw the individual consume alcohol was two years ago. Tr. at 195. When asked about their last social contact he indicated that last Saturday he invited the individual and his wife as well as another couple for dinner at his home. He indicated all present had a glass or two of wine, except for the individual, who did not consume any alcohol. Tr. at 196.

8. Athletic friend

The friend testified that he and the individual have regularly participated in many sporting activities including handball, shooting, hunting and fishing over the last 10 years. Tr. at 198. He has also been to the individual's home and the individual has been to his home. Tr. at 198. He testified that prior to the last year or so the individual drank a few beers but he believes the individual has completely stopped consuming alcohol in the last year. Tr. at 200. He testified that the last time he saw the individual socially was three months ago, when the individual, his mother and wife were at his home for a dinner. Tr. at 201. He testified that everyone except the individual consumed alcohol during the evening. Tr. at 201.

9. Individual's consulting psychologist

The individual's consulting psychologist examined the individual on June 4, 2003 and September 23, 2003. Tr. at 208. The evaluation report dated June 10, 2003 and an evaluation letter dated September 23, 2003 were both submitted by the individual. In his evaluation report the consulting psychologist diagnosed the individual with alcohol abuse. The consulting psychologist told the individual that he needed to abstain completely from alcohol and get into a recovery program.

The consulting psychologist testified that the individual "is sincerely seeking rehabilitation at this time and his prognosis is favorable with continued participation in AA . . ." Tr. at 210. He indicated that he believes that the individual is active in weekly AA meetings, has a sponsor, accepts

responsibility for his past alcohol use and has indicated his goal is to abstain from alcohol consumption for the rest of his life. Finally, the consulting psychologist indicated that he believes the individual is serious about not drinking alcohol and that he believes the individual will continue to be abstinent. Tr. at 211 through 215.

10. Employee friend

This friend testified that he has known the individual since 1996. Tr. at 225. He has been on many business trips with the individual and while on those trips had many meals with the individual. He indicates he has never seen the individual drink to excess and that the individual normally drinks no or very little alcohol. Tr. at 226. He also indicated that he has not seen the individual consume any alcohol during the last two years and he indicated that he believes the individual will not consume alcohol in the future. Tr. at 228.

IV. ANALYSIS

I have been convinced by the testimony of the individual's wife, neighbors, and friends that during the period 1994 through March 2002 the individual was a moderate drinker. During March of 2002 the individual was under stress and he used alcohol inappropriately to relieve the stress which caused him to receive a DUI. The DOE consulting psychiatrist, the treating psychologist and the consulting psychologist all diagnosed the individual with alcohol abuse. The professionals agree that the individual's diagnosis of alcohol abuse means that if he were to continue to consume alcohol it is likely that alcohol would again cause him to do inappropriate things. The possibility that the individual will again use alcohol improperly is the basis for the DOE security concern.

The individual has brought forward witnesses and documentary evidence to convince me that he is rehabilitated. All three professionals testified that they believe the individual is rehabilitated. The testimony and documents submitted in this proceeding support the basis for the professionals' opinion that the individual is rehabilitated.

First, the testimony convinces me that the individual has been abstinent for the last five months. The neighbors, friends and his wife all indicated that they are familiar with the details of his life. These witnesses convinced me that since March of 2002 (the last 18 months) the individual has established a sober life style in which he has enjoyed normal activities without consuming alcohol. However as the individual admits, until May 2003, he was not committed to abstinence. The three professionals agree that during May 2003 the individual changed his approach and committed himself to total abstinence. The friends, neighbors and his wife provide corroboration that the individual has not consumed alcohol in the last five months.

Further, the testimony and AA attendance sheets submitted by the individual indicate the individual is participating actively in AA including having a sponsor. The treating psychologist has clearly indicated the individual continues to receive appropriate follow up counseling. Finally, the

individual's testimony and the evaluation of the professionals all indicate that the individual recognizes that if he again consumes alcohol he will have serious problems and that the professionals believe he is committed to avoiding those problems. I found the DOE consulting psychiatrist's opinion that the individual is rehabilitated to be especially convincing. He indicated the bases for the change in his opinion were specific and gradual changes in the individual's attitudes and behavior.

During OHA hearings, mental health experts, such as psychiatrists and psychologists, have often testified that normally one year of abstinence is necessary to demonstrate rehabilitation. *Personnel Security Hearing (Case No. VSO-0346)*, 28 DOE ¶ 82,757 (2000); *Personnel Security Hearing (Case No. VSO-0398)*, 28 DOE ¶ 82,788 (2001); *Personnel Security Hearing (Case No. VSO-0018)*, 24 DOE ¶ 82,758 (1995). The one year period of abstinence is a general standard and is often suggested because during a full year of abstinence a person will face a variety of life situations and the person's ability to maintain abstinence in all of those situations increases the probability of future abstinence. However, in this case the three professionals have strongly testified that the individual's behavior combined with five months of abstinence is sufficient to indicate a high probability that this individual will be abstinent in the future. The DOE psychiatrist and the two psychologists point to such behavioral factors as individual's recognition and understanding that he has an alcohol problem, his involvement with AA, his commitment to sobriety, and his ability over an 18-month period to lead an active social life without the consumption of alcohol. The professionals testimony indicates that for this individual five months of abstinence is sufficient to indicate a low probability of a relapse.

I have therefore determined that the individual has mitigated the DOE security concerns.

V. CONCLUSION

As indicated above, I have concluded that the individual has mitigated the DOE security concerns under 10 C.F.R. § 710.8. In view of the record before me, I am persuaded that restoring the individual's access authorization would not endanger the common defense and security and would be clearly consistent with the national interest. Accordingly, I find that the individual's access authorization should be restored.

The review procedures applicable to proceedings under Part 710 were revised effective September 11, 2001. 66 Fed. Reg. 47061 (September 11, 2001). Under the revised procedures, the review is performed by an Appeal Panel. 10 C.F.R. § 710.28(b)-(e).

Thomas L. Wicker
Hearing Officer
Office of Hearings and Appeals

Date: October 28, 2003