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April 28, 2004

**DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS**

Hearing Officer's Decision

Name of Case: Personnel Security Hearing

Date of Filing: November 3, 2003

Case Number: TSO-0070

This Decision concerns the eligibility of XXXXX (the individual) to hold an access authorization¹ under the regulations set forth at 10 C.F.R. Part 710, entitled "Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material." The individual's access authorization was suspended by the Manager of a Department of Energy (DOE) Office (the DOE Office) pursuant to the provisions of Part 710. Based on the record before me, I am of the opinion that the individual's access authorization should not be restored at this time.

I. Background

The individual has been an employee of a DOE contractor since 1998, and was granted a security clearance in October 2000. DOE Exhibit 10. In January 2002, the individual was arrested and charged with Aggravated Driving While Intoxicated (DWI), and promptly reported this to his employer. DOE Exhibit 9. The DOE office conducted a Personnel Security Interview (PSI) with the individual on July 22, 2002. DOE Exhibit 14. The DOE office then requested that the individual be interviewed by a DOE consultant psychiatrist (DOE psychiatrist). The psychiatrist interviewed the individual on October 10, 2002, and thereafter issued an evaluation to the DOE, in which he opined that the individual suffered from Alcohol Dependence, with Physiological Dependence, in Early Partial Remission. DOE Exhibit 17. The DOE office 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 the individual. Accordingly, the DOE office suspended the individual's access authorization, and obtained authority from the Director of the Office of Safeguards and Security to initiate an administrative review proceeding.

¹Access 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 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 possession of the DOE created a substantial doubt concerning his eligibility for access authorization. The Notification Letter included a statement of that derogatory information and 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 DOE office 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.

At the hearing convened pursuant to 10 C.F.R. § 710.25(e) and (g), I took testimony from the individual, one of his best friends, the individual's counselor, a DOE personnel security specialist, and the DOE psychiatrist. Both the individual and the DOE Counsel submitted exhibits. I closed the record upon receiving the transcript of the hearing.

I have reviewed and carefully considered the evidence in the record. I have considered the evidence that raises a concern about the individual's eligibility to hold a DOE access authorization. I have also considered the evidence that mitigates that concern. I conclude, based on the evidence before me and for the reasons explained below, that the security concerns have not been fully resolved, and that the individual's access authorization should not be restored at this time.

II. Analysis

A. The Basis for the DOE's Security Concern

As indicated above, the Notification Letter issued to the individual included a statement of the derogatory information in the possession of the DOE that created a substantial doubt regarding the individual's eligibility for access authorization. In the Notification Letter, the DOE characterized this information as indicating that the individual (1) "is a user of alcohol habitually to excess, or has been diagnosed by a psychiatrist as alcohol dependent or as suffering from alcohol abuse;" 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." *See* 10 C.F.R. § 710.8(j), (l). The statements were based on the individual's history of alcohol use, and behavior surrounding that use, as well as on the diagnosis by the DOE psychiatrist that the individual suffered from Alcohol Dependence, with Physiological Dependence, in Early Partial Remission.

In December 1987, the individual was arrested for underage possession of alcohol and for theft. In 1990 and 1991, the individual "took part in his first alcohol abuse treatment, . . . He intended to be treated as an out-patient, but the evaluator concluded that he was a 'two-fisted alcoholic' and he was admitted as an in-patient for twenty-one days." Attachment to Notification Letter at 2. The individual was arrested again in March 1991 for "Contributing Alcohol Beverages to a Minor and Consuming an Alcoholic Beverage Next to a Motor Vehicle." *Id.* During the period April 1993

through July 1994, while he was serving in the Navy, the individual was involved in two alcohol-related incidents. *Id.* at 2.

On January 31, 2002, the individual was arrested for aggravated driving while intoxicated (DWI). He refused to take a breathalyzer test and told the officer on the scene that he could not pass a field sobriety test. *Id.* at 1. The individual ultimately pled guilty to DWI (the charge having been reduced from aggravated DWI), and his license was suspended for one year, effective May 10, 2002.

Despite this fact, the individual continued to drive a car, as he admitted to a DOE Personnel Security Specialist [PSS] in his July 2002 PSI.

[PSS]: So what have you done [to get to and from work] up to now?

[Individual]: Uh, I've been taking a chance, actually.

[PSS]: So you've been driving on a revoked license?

[Individual]: It's the only way I can get to work right now and to school.

[PSS]: Uh, you know that's not good.

[Individual]: Well, I'm trying to work out a schedule with my parents to see if they can drive me to and from work.

DOE Exhibit 14 at 82.

After the July 2002 PSI, the individual also drove on a suspended license at least once, when he drove to his October 10, 2002 interview with the DOE psychiatrist. Transcript of Personnel Security Hearing (Tr.) at 22. At the hearing in this matter, the individual testified that this was the *only* time he drove on a suspended license, an apparent contradiction of the individual's admissions in the July 2002 PSI. *Id.*

Some of the concerns in the present case arise from the individual's use of alcohol. Excessive use of alcohol raises a security concern due to the heightened risk that an individual's judgment and reliability will be impaired to the point that he will fail to safeguard classified matter or special nuclear material. *E.g., Personnel Security Hearing, Case No. VSO-0479, 28 DOE ¶ 82,857 (2002).*

A separate concern is raised by the individual's knowingly driving on a suspended license. Such disregard for the law raises concerns that the individual may similarly disregard other laws, including those which protect classified information and special nuclear materials. Moreover, this behavior (and the disregard for law and authority that it suggests) indicates a serious lapse in judgment. Finally, the contradiction between the individual's testimony at the hearing and his statements in the

July 2002 PSI, concerning the extent to which he drove on a suspended license, raises a question as to whether the individual testified truthfully under oath at the hearing.

B. Whether the Security Concerns Have Been Resolved

A hearing under Part 708 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). “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).

As discussed below, I find that the concerns related to the individual’s alcohol problems has been resolved. However, the individual has not resolved the separate concerns regarding his violation of the law and his apparent false testimony at the hearing.

1. Alcohol use (Criterion J)

Since his interview with the DOE psychiatrist 18 months ago, and the subsequent diagnosis of alcohol dependence, the individual has made impressive strides toward rehabilitation, efforts in line with those recommended by the DOE psychiatrist.

I considered he had kind of like an average severity of his problem and recommended kind of an average treatment recommendation, which is one year. A year is a common number to demonstrate adequate rehabilitation and reformation. . . . I picked a year and gave just general specifications. I think outpatient treatment. I didn’t think he required inpatient treatment. I was pretty sure he wasn’t drinking real heavily to where he would need inpatient. And typically I’ll say what I did there, leaving it open to him and the treatment provider, as to what sort of specifics they do in treatment.

Tr. at 41-42.

The individual has provided evidence of his regular attendance at Alcoholics Anonymous (AA) meetings. Individual’s Exhibit D. In addition, the individual presented the testimony of his substance abuse counselor. The counselor testified that the individual first visited him on December

26, 2002, and last visited him less than two weeks prior to the January 2004 hearing. The individual began with weekly visits to the counselor until about March 2003, at which time the visits became biweekly. At the time of the hearing, the counselor testified that he was seeing the individual every three or four weeks. Tr. at 55-56. Asked at the hearing whether he thought the individual would return to drinking, the counselor responded, “[H]e worked so hard on, you know – through what we call recovery issues, like putting your lifestyle together and addressing some major personal issues, and he doesn’t see the need for drinking. So I don’t see him returning to drinking.” Tr. at 64-65.

The DOE psychiatrist was similarly optimistic in his hearing testimony.

Looking at some of the numbers here, it looks like there has been a year and eight months since his last acknowledged drink, a year and three months since his meeting with me, and a year and one month since he has been in formal treatment with [his counselor]. . . . The good signs are he’s done both, he’s got AA and individual counseling. He’s shown a commitment in paying out of his own pocket to see [his counselor]. Weekly sessions sound fine, and then he and [his counselor] thought that after about four or five months, it looks like they went to biweekly, that’s typical, and continuing now.

. . . .

Probably the most pertinent numbers, what would I think his risk of relapsing into alcohol problems while holding a clearance. Then I think his prognosis would be good, like 90 percent chance that he’d be able to continue his sobriety and his freedom from alcohol-related problems.

Tr. at 86-87, 89.

Based on the evidence and testimony presented by the individual, and the opinion of the DOE psychiatrist, I find that the chance of the individual returning to drinking in the future is low enough that what risk it does present is acceptable. Thus, the security concerns raised by the individual’s problems with alcohol have been resolved.

2. Conduct tending to show that the individual is not honest, reliable, or trustworthy (Criterion L)

As discussed above, there are separate concerns related to other aspects of individual’s behavior, specifically his driving without a license and the factual contradictions between his PSI and his hearing testimony. I do not find that these concerns have been sufficiently resolved to warrant restoration of the individual’s clearance.

The Personnel Security Specialist was of the opinion that the resolution of the individual’s alcohol problem resolved the issues raised under Criterion L as well. “[T]here has been adequate evidence of rehabilitation and reformation, and the issues as they were stated in Criterion L related to the

alcohol. So . . . mitigating the [Criterion] J concerns mitigates the [Criterion] L concerns.” Tr. at 90-91.

I disagree in part. Two of the specific issues raised in the Notification Letter under Criterion L seem to be tied to the individual’s use of alcohol. Attachment to Notification Letter at 2. To this extent, I agree with the Personnel Security Specialist that the Criterion L concerns have been resolved because the individual’s alcohol problem has been resolved. However, I do not see how the individual’s choice to drive without a license was in any way tied to his use of alcohol.² Thus the individual’s rehabilitation from his alcohol problem, as positive and admirable as that is, does not allay the concerns raised by his knowing violation of the law.

The Personnel Security Specialist also identified what she saw as other factors mitigating the concerns stemming from the individual’s behavior.

Actually, I think it’s – well, the obvious security concern is that, you know, he was driving under a revoked license and he shouldn’t be. However, it’s highly to his credit, because we couldn’t have known it otherwise, that he self-admitted to it. You know, he’s in a situation where you have to get to work, and I think I’d feel differently if the situation was more where he was driving to go out and party, or he decided just to go look at the museums Those are not things out of necessity, but I do find it a necessity to be able to get to work. And we wouldn’t know the information if he hasn’t admitted to it on his own, so I see it as favorable.

Tr. at 27.

I agree with the Personnel Security Specialist that the circumstances under which the individual broke the law make *some* difference. If my job were to penalize the individual for his violation of the law, these circumstances might affect the extent of the penalty. But those circumstances are not sufficient to alleviate the security concern in this case. One can imagine circumstances that would mitigate the concern, such as if the individual had driven with his suspended license on only an isolated occasion arising out of an emergency. But the individual admitted that he had been driving to work and school without a valid license. Except under exigent circumstances, an individual holding a security clearance does not have the discretion to violate rules when he believes it is appropriate under the circumstances. Thus, the contention that the individual violated of the law “out of necessity” cannot be sufficient to resolve the underlying concern stemming from the violation itself.

Similarly, rarely does forthrightness by an individual in and of itself resolve concerns, even those raised solely by virtue of that individual’s self-reporting. So while it is positive that the individual did not hide the fact that he drove without a license, this does not resolve the concern raised by the

² The DOE Psychiatrist agreed. Tr. at 93 (“I don’t see it as connected either.”).

individual's apparent willingness to break the law.³ As discussed above, the real concern is that the individual may in the future violate laws that protect classified information and special nuclear materials. That the individual might only violate those laws under certain circumstances, or that he might admit such violations, does not negate the risk that the individual will violate such laws in the first place.

Finally, I was disturbed by the apparent contradiction between the individual's statements in his PSI and his testimony at the hearing. At the hearing, the individual replied "Yes" to the following unambiguous question: "[Y]ou're saying that the only time that you drove when you knew your license was suspended was when you drove to [the DOE psychiatrist]'s office?" Tr. at 22. Yet, at the July 2002 PSI, the individual admitted that he had received notice of the suspension of his license, and that he had nonetheless been driving to work and school. DOE Exhibit 14 at 82.

With regard to one of the specific factors that I am to take into account, the "recency of the conduct," I note that all of the conduct under Criterion L discussed above took place quite recently, the driving without a license within the last two years, and the hearing testimony within the last few months. Thus, relatively little time has passed since the conduct, and as a result the mitigating effect of applying this factor is slight.

This is not to say we can be certain that, if his clearance is restored, the individual would engage in behavior that is dishonest or in violation of security rules. But there remains a substantial doubt in this regard, and the Part 710 regulations require that "[a]ny doubt as to an individual's access authorization shall be resolved in favor of the national security." 10 C.F.R. § 710.7(a).

III. Conclusion

As discussed above, the individual has resolved the security concerns raised by his problems with alcohol. He has not, however, resolved the concerns stemming from his violation of the law and the contradictions between his PSI and his sworn testimony at the hearing. Therefore, because I cannot conclude that restoring the individual's access authorization would not endanger the common defense and security and would be clearly consistent with the national interest, it is my opinion that the individual's access authorization should not be restored. 10 C.F.R. § 710.27(a). The individual

³Moreover, it does not appear that the individual volunteered that he had been driving without a license, but that he reported this only after being asked. DOE Exhibit 14 at 82.

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

Steven J. Goering
Hearing Officer
Office of Hearings and Appeals

Date: April 28, 2004