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August 18, 2005

DEPARTMENT OF ENERGY  
OFFICE OF HEARINGS AND APPEALS

Hearing Officer's Decision

Name of Case: Personnel Security Hearing

Date of Filing: April 4, 2005

Case Number: TSO-0219

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 not be restored.

I. BACKGROUND

On August 6, 2003, the individual entered into a court approved "diversion agreement" that settled two criminal charges against him.<sup>1</sup> The first charge related to the individual's December 13, 2002 arrest for possession of marijuana and carrying a concealed deadly weapon<sup>2</sup> (hereinafter the concealed weapon incident). The second charge related to the individual's March 2003 arrest for "Menacing and Assault Fourth Degree"<sup>3</sup> (hereinafter the domestic violence incident).

On July 19, 2004, a DOE consulting psychiatrist evaluated the individual. In his report, the consulting psychiatrist concludes that the individual suffers from alcohol abuse. Consulting psychiatrist's report at 3.<sup>4</sup> The report summarized the basis for the diagnosis of alcohol abuse as:

[The individual] presents with a history of apparent long-standing alcohol use which has resulted in significant impairment in judgment as evidenced by behavioral problems both surrounding his divorce as well as his most recent arrest [October 2003] for DUI.

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<sup>1</sup> The diversion agreement is DOE exhibit #11.

<sup>2</sup> The arrest citation relating to the possession of marijuana and carrying a concealed weapon is DOE exhibit #12.

<sup>3</sup> The arrest citation for the menacing and assault charge is not included in the record of this proceeding.

<sup>4</sup> The DOE consulting psychiatrist report is DOE exhibit #8

On January 26, 2005, the DOE issued a Notification Letter to the individual. The Notification letter was based on the two incidents described above and the DOE consulting psychiatrist's finding that the individual suffers from alcohol abuse. The Notification Letter finds security concerns under Criterion j (diagnosis of alcohol abuse), Criterion k (arrest for possession of marijuana) and Criterion l (the concealed weapon incident and the domestic violence incident) 10 C.F.R. §710.8(j),(k) & (l).

In the Notification Letter, the Manager 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. 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 individual presented an explanation of the concealed weapon incident and domestic violence incident which he believes minimizes their significance. He also presented testimony which indicates that his consumption of alcohol has been reduced. He believes that this information demonstrates that he is eligible for reinstatement of his access authorization.

At the hearing the individual testified on his own behalf. He also presented the testimony of his father, his brother, his son, a friend, her son, a second friend and three coworkers. The DOE called the DOE consulting psychiatrist. A summary of the testimony follows.

## II TESTIMONY

### A. The Individual

The individual testified that he has worked at the DOE facility since 1989. Tr. at 47. He has a responsible position and his attendance has been excellent. Tr. at 48. He provided details about the three areas of concern in this proceeding:

#### 1. Alcohol Use

The record indicates the individual was arrested in 2000 and 2003 for driving while intoxicated (DUI). The individual testified about his 2003 DUI arrest. He was at a friend's home and he drank a limited amount of wine just before leaving the house. Within a few minutes, he was arrested for DUI with a breathalyzer reading of .13. He lost his driver's license for 30 days. He believes the 2003 loss of his drivers license made him recognize the seriousness of driving after consuming alcohol. He testified that he no longer drives after consuming alcohol. Tr. at 76.

The individual also testified that he has consumed excessive amount of alcohol during periods of high stress in his life. Tr. at 90. For example, he testified he drank 8 to 10 beers a day for a month in 2000 after he was diagnosed with cancer. Tr. at 73. He also testified that he drank excessively during his 2002 divorce.

He testified that the stresses from his divorce and cancer diagnosis have passed, and he now consumes alcohol only moderately. Currently, when he consumes alcohol, he consumes a beer or two in the evening. Tr. at 51. He testified that the last time he was intoxicated was 9 months before the hearing when he was on a Caribbean cruise. Tr. at 50. He testified that since his evaluation by the DOE consulting psychiatrist, he has never consumed more than 2 or 3 beers in a single evening. Tr. at 79. He believes that he will not turn to alcohol to relieve stress in the future. Tr. at 79, 95

## 2. The Concealed Weapon Incident

The individual explained the circumstances surrounding his December 2002 arrest for carrying a concealed weapon and possessing marijuana. The individual testified that a friend's ex-husband (hereinafter ex-husband) asked him to come to a hotel parking lot to discuss some relationship issues. The individual drove his father's truck to the hotel parking lot but was unable to locate the ex-husband. He then drove to a nearby fast food restaurant where he was arrested. The police found a hand gun and a marijuana cigarette on the passenger side of the truck he was driving. Tr. at 52.

The individual testified that the ex-husband telephoned the police and reported that he had threatened the ex-husband with a hand gun. The individual testified he never saw the ex-husband at the motel and he never threatened the ex-husband. Tr. at 54. When asked how the ex-husband would have been aware that the individual had a hand gun in the truck, he speculated that the ex-husband knew his father had a concealed weapon permit and often leaves a hand gun in his truck. Tr. at 55.

## 3. The Domestic Violence Incident

The individual described the March 2003 domestic violence incident. His ex-wife invited him to her home to talk and to see his children. Tr. at 62. Their discussion turned into an argument which awoke his daughter. His wife went into his daughter's bedroom and locked the door. Tr. at 63. During this period, she asked the individual to leave her house. Nevertheless, he continued the argument through the locked door. His son heard the argument and came from upstairs and asked his father to leave the house. Tr. at 63. The individual and his son struggled. His son hit his head on the floor. The individual testified that he was very upset that his son received a minor injury from hitting his head on the floor. Tr. at 64. He talked with his son the next day at work and apologized for the incident. He and his son have remained on good terms.

The individual testified that the son found a hand gun on the stairs when he came downstairs to intervene in the argument between his parents. The individual explained that he had taken his hand gun from the gun cabinet so that he could take it home. Tr. at 86. He testified that there were no shells in the gun and that it was not part of the argument with his wife. Tr. at 87.

The individual testified that the next day his wife called the police and the police charged him with fourth degree menacing. In accordance with the court's directive the individual attended nine anger management classes. Tr. at 69.

#### B. The Individual's Father

The individual's father testified that he occasionally has a beer or two with the individual. He testified that he has seen the individual intoxicated on a few occasions. He has not seen the individual intoxicated in the last year. Tr. at 114.

The individual's father testified that the truck his son was driving on the night of the concealed weapon incident is his truck. He testified that his two sons often borrow the truck. He testified that he is the registered owner of the hand gun that was in the truck. Tr. at 114. There are coyotes on his farm and therefore he has a permit to carry a concealed hand gun. On some days he carries the hand gun in his truck and on some days he does not. Tr. at 121. He believes he may have left the hand gun in the truck on the day of his son's arrest. After the incident the police returned the hand gun to the individual's father. Tr. at 115.

The father testified that his other son lost a job because of his use of marijuana. He testified that it is very possible that his other son could have borrowed his truck earlier in the day of the concealed weapon incident. Tr. at 117. However, the father could not recall if the other son had actually borrowed the truck on that day. The father indicated that if the other son borrowed the truck, he could have left the marijuana in the truck. Tr. at 116.

The father testified about the domestic violence incident. Tr. at 117. During the argument the individual's wife telephoned the father and asked him to come to her house because the individual "was misbehaving." Tr. at 117. By the time he arrived the situation had calmed down and he determined that his grandson was not seriously hurt. Tr. at 117.

#### C. The Individual's Son

The individual's son testified that he is 20 years old and currently attends college. He does not currently live with his father but visits his home on a weekly basis. Tr. at 32. He has not seen his father consume any alcohol in the last 9 months. Tr. at 32. The last time he saw his father intoxicated was at their grandmother's home two years before the hearing. Tr. at 32.

The individual's son described the events that occurred on the night of the domestic violence incident. He testified that he was upstairs and he heard his parents arguing. He decided to go downstairs to try to calm the situation. As he was going downstairs, he found a hand gun that his father had left on the stairs. Tr. at 40. He testified that in view of the circumstances he did not believe it was a good idea at that time to have the gun in the room. Therefore, he threw the gun out of a window.<sup>5</sup> Tr. at 40.

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<sup>5</sup> He retrieved the gun the next morning

When he got downstairs, he found that his mother had locked herself in his sister's bedroom. His father was trying to enter the bedroom to continue their argument. Tr. at 36. He testified that he tried to restrain his father. Tr. at 36. During the struggle with his father, he hit his head on the floor and received a minor injury. Tr. at 33. The grandfather came to the house and the situation calmed down and his father left the house. There never have been any other incidents between him and his father, and he and his father have had a good relationship since the incident. Tr. at 34, 35.

#### D. The Individual's Brother

The individual's brother testified that he has occasionally had a few beers with the individual, but has never seen him intoxicated. Tr. at 148. He testified that he often borrows his father's truck and that the marijuana in his father's truck on the night of the concealed weapon incident belonged to him. Tr. at 148. He testified that his father "sometimes" keeps a hand gun in the "glove box" of his truck. Tr. at 152, 153.

#### E. The Prior Supervisor

The prior supervisor testified that he has known the individual professionally for 10 years. Tr. at 52. Until recently, he supervised the individual's work group. Tr. at 53. The prior supervisor testified that he believes the individual's ability to meet deadlines and achieve goals indicates he is reliable. Tr. at 55. He believes the individual is honest, well respected by his co-workers and a good employee. Tr. at 56 and 60. He has never seen an indication of drug use or any other illegal activity. Tr. at 57. He does not believe the individual is a security risk. Tr. at 58. The prior supervisor does not know the individual socially and he has never met his family. Tr. at 59.

#### F. Supervisor

The supervisor has known the individual for 10 years. Tr. at 108. He believes the individual is reliable and an excellent employee. He has never seen the individual consume alcohol. Tr. at 108.

#### G. A Co-worker

The co-worker testified that he has worked with the individual for one year. In that year he has seen the individual on a daily basis. He believes the individual is a good worker and has never had any disciplinary problems. Tr. at 144.

#### H. The Individual's Long Time Friend

The individual's long time friend testified that he has known the individual since elementary school. Tr. at 24. He currently sees the individual once a month. Tr. at 24. He has only seen the individual drink on one occasion. At that time, the individual drank a single beer. Tr. at 24. He believes the individual is reliable and an honest person. Tr. at 29.

### I. The Individual's Friend

This witness is the former wife of the ex-husband involved in the concealed weapon incident. She has known the individual for 10 years. Tr. at 126. She indicated that she and the individual are friends and they are not romantically involved. Tr. at 129. She sees the individual several times a week. Tr. at 129. She testified that occasionally the individual drinks beer. When they are relaxing and talking, the individual may have between two and five beers over an extended period of time. Tr. at 127. She has never seen the individual intoxicated. Tr. at 127. She testified that in 2003, when the individual was in the process of getting a divorce from his wife, she and the individual did not see each other very often. However, the individual told her that he had been drinking heavily during that period. Tr. at 131.

She testified about the circumstances that led to the concealed weapon incident. She indicated that she believes her ex-husband was trying to get the individual into trouble. Tr. at 134.

### J. The Friend's Son

The friend's 14 year old son testified that he respects the individual and he sees him on a regular basis. He has seen the individual consume alcohol but he has never seen him intoxicated. Tr. at 138. He testified that the individual treats his mother and him very well. He testified that his father strongly dislikes the individual. Tr. at 142.

### K. The DOE Consulting Psychiatrist

The DOE consulting psychiatrist testified that the diagnosis of alcohol or drug abuse is a retrospective diagnosis and that clinicians look at how the individual used alcohol prior to the evaluation. Tr. at 13. He indicated that the individual's historic pattern is to use alcohol inappropriately to cope with stress. Tr. at 11. He testified that this "recurrent pattern" of misuse of alcohol during periods of stress led him to diagnose the individual with alcohol abuse. Tr. at 11.

The DOE consulting psychiatrist then discussed rehabilitation. He indicated the recognized standard for rehabilitation is abstinence. Tr. at 14. However, he pointed out that rehabilitation is really demonstrating a change in behavior patterns. Tr. at 14. If the person is "self-medicating" an emotional problem, experts look for a change in that behavior and the "development of alternate coping mechanisms." He concluded that the clearest showing of rehabilitation in this case would be abstinence, combined with counseling and education that provide the individual skills to deal with stress without turning to alcohol. Tr. at 18.

After listening to most of the testimony at the hearing, the DOE consulting psychiatrist believed that the individual's family situation is more stable and his cancer is in remission. These are positive factors. Tr. at 100. However, he testified that rehabilitation and reformation would "require some significant and recurrent stress that did not result in return to alcohol use as a result of [the stress]." Tr. at 101. The DOE consulting psychiatrist believed the individual has reduced his consumption of alcohol. However, since the individual has not been abstinent and the individual has not received

treatment that would help him deal with stress, the DOE consulting psychiatrist was not certain that the individual is serious in his effort to stop his misuse of alcohol. Tr. at 104.

### III. 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 his 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 her 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 her 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.

#### IV. ANALYSIS

The individual's response to the DOE security concerns is very limited. His approach was to provide an explanation that minimizes the seriousness of the concealed weapon citation, the possession of marijuana citation and the domestic violence incident. He has also presented information indicating he has reduced his consumption of alcohol. As discussed below his explanations fell short of convincing me that his access authorization should be restored.

##### A. The Concealed Weapon Citation

The individual's explanation regarding the concealed weapon citation is that he went to the motel parking lot to meet the ex-husband, but never met or saw him. The police report indicates the ex-husband called the police and reported that "the individual was driving around the [motel] and threatened [the ex-husband] with a gun." DOE exhibit #12. The police responded to the ex-husband on the basis of his statement about a weapon. After stopping the individual's truck the police found the hand gun and marijuana.

The individual's statement that he never saw the ex-husband at the motel and his speculation that the ex-husband made a false report to the police are not credible. In my view, it is highly unlikely that the ex-husband would have called the police without actually seeing the hand gun. I believe for him to have seen the hand gun the individual must have shown it to him. Therefore, I believe it is highly probable that the individual threatened the ex-husband or showed the gun to him. Therefore, I am not convinced that the individual is accurately describing the events of that evening. Accordingly, I do not believe the individual has resolved the security concern regarding the concealed weapon citation.

##### B. The Individual's Marijuana Possession Citation

The testimony by both the individual and his brother indicated the marijuana belonged to his brother. The individual testified that he did not know that the marijuana cigarette was in the truck. I am not persuaded that the marijuana belonged to his brother and the individual was not aware of his presence in the truck. First, it seems unlikely that the brother would have left marijuana in his father's truck. Furthermore, the assessment questionnaire that the individual completed on November 7, 2003 indicates the individual used marijuana in 1984. This leads me to believe that possession of marijuana was not alien to the individual. Finally, as discussed above, I do not believe the individual's testimony about not seeing the ex-husband in the parking lot. Since I find that individual not particularly credible about the incident, I am not convinced by the individual testimony that the marijuana the police found in the truck did not belong to him.

### C. The Domestic Violence Incident

As discussed above, the testimony is clear that the wife locked herself in her bedroom to try to get away from the individual, and the individual's son thought it necessary to use force to restrain his father. While the scuffle with his son was a minor one, the domestic violence incident indicated the individual either was using alcohol inappropriately or has anger management problems. I find that the individual was out of control, and I do not believe the individual's attempt at minimizing the significance of the event.

### D. Alcohol Abuse

The DOE consulting psychiatrist diagnosed the individual with alcohol abuse based on the individual's two DUIs and his misuse of alcohol to reduce stress. I believe the diagnosis is correct. I will consider whether the individual has established that he is reformed or rehabilitated.

I am convinced that the individual has not consumed alcohol to excess in the past year. However, this is not sufficient to constitute reformation or rehabilitation in this case. I note in this regard that the individual turned to alcohol to cope with stress. I believe the DOE consulting psychiatrist's recommendation of one year of abstinence and a treatment program that will teach the individual how to deal with stress without turning to alcohol constitutes a minimum program for demonstrating rehabilitation. The individual has not abstained from alcohol use. The only anger management education he has received is the nine court ordered classes he attended. There was no testimony regarding these sessions. Therefore, the individual has not demonstrated that these sessions have provided him with the tools to manage future stressful events without improperly using alcohol. Accordingly, I find that the individual has failed to demonstrate that he is rehabilitated from alcohol abuse.

## V. CONCLUSION

I have concluded that the individual has not mitigated the DOE security concerns under Criteria j, k and l of 10 C.F.R. § 710.8. In view of the record before me, I am not 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 not 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. Wieker  
Hearing Officer  
Office of Hearings and Appeals

Date: August 18, 2005