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August 25, 2009

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Hearing Officer's Decision

Name of Case: Personnel Security Hearing
Date of Filing: April 27, 2009
Case Number: TSO-0740

This decision concerns the eligibility of XXXX X. XXXXXXXXX (hereinafter referred to as "the Individual") to have his security clearance restored 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." For the reasons set forth below, I conclude that the Individual's security clearance should not be restored.

I. BACKGROUND

Employment records obtained by the Local Security Office (LSO) indicate that, in August 1995, the Individual was a passenger in a motor vehicle involved in an accident. Since the Individual was on duty at the time of the accident and the motor vehicle was owned by his employer, a breathalyzer test was administered to the Individual after the accident. This breathalyzer test indicated that his blood alcohol concentration (BAC) was .055g/mL. On February 25, 2003, the Individual was arrested and charged with "Battery, Disorderly Conduct, Resisting Arrest and Assault." The Individual had been consuming alcohol shortly before this arrest. The Individual also admitted that he waited two months before reporting the February 25, 2003, arrest to the LSO. Exhibit 5 at 26-29, 70. On June 25, 2005, the Individual was detained by police for detoxification due to alcohol. On May 24, 2007, the Individual submitted a Questionnaire for National Security Positions (QNSP), in which he had failed to report the February 25, 2003, arrest.¹

The LSO conducted a Personnel Security Interview (PSI) of the Individual on August 7, 2008.² During this PSI, the Individual was asked why he did not report the February 25, 2003, arrest on

¹ A partial copy of this QNSP appears in the record as Exhibit 7.

² The transcript of this PSI appears in the record as DOE Exhibit 6.

his QNSP. The Individual responded by stating that he had forgotten about the arrest. Exhibit 6 at 7-8. The Individual also disputed the employment records indicating that he had been involved in a motor vehicle accident while having a BAC of .055. Exhibit 6 at 21-24. However, the Individual did admit that he (1) was using alcohol while on-call at the time of the incident that resulted in his February 25, 2003, arrest, (2) was intoxicated when he was detained by police on June 25, 2005, and (3) is typically intoxicated once or twice a year. Exhibit 6 at 9, 29.

On December 9, 2008, the LSO conducted a second PSI of the Individual.³ During this PSI, the Individual was asked why he did not list the February 25, 2003, arrest on his QNSP. The Individual initially responded by stating that he did not understand that he was required to list arrests even when he was not convicted. Exhibit 5 at 69. However, the Individual subsequently admitted that he omitted the arrest from the QNSP because he was concerned that revealing his arrest could cost him his security clearance. Exhibit 5 at 70-78. The Individual also stated that he did not know why he failed to include the February 25, 2003, arrest on his QNSP. Exhibit 5 at 75.

During the December 9, 2008, PSI, the Individual was also asked if he recalled telling an investigator with the Office of Personnel Management (OPM) that he does not get intoxicated and has never had “adverse law enforcement contact.” The Individual responded by repeatedly stating that he did not recall making such comments to the OPM investigator. Exhibit 5 at 24-26. However, the Individual subsequently admitted that he had not been honest with the OPM investigator because he was concerned about his security clearance. Exhibit 5 at 92-93. The Individual also admitted that he waited two months before reporting his February 25, 2003, arrest to the LSO because he was concerned that the arrest would affect his security clearance. Exhibit 5 at 26-29, 70.

Because of the security concerns raised by this information, the LSO asked the Individual to submit to an examination by a DOE Psychiatrist. On January 20, 2009, the DOE Psychiatrist conducted a forensic psychiatric examination of the Individual. The DOE Psychiatrist also reviewed selected portions of the Individual's security file. On January 21, 2009, the DOE Psychiatrist issued a report in which he stated that the Individual met the criteria for alcohol abuse set forth in Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition-Text Revised (DSM-IV-TR).⁴ DOE Exhibit 3 at 7-9. Noting that the Individual continues to use alcohol, sometimes to the point of intoxication, the DOE Psychiatrist further opined that the Individual was not sufficiently rehabilitated or reformed from his alcohol abuse. *Id.* at 9.⁵

³ The transcript of the December 9, 2008 PSI appears in the record as Exhibit 5.

⁴ A copy of this report appears in the record as Exhibit 3.

⁵ The DOE Psychiatrist opined that in order to establish rehabilitation or reformation from his alcohol abuse, the Individual must abstain from using alcohol and undergo outpatient treatment of at least moderate intensity. The treatment program and abstinence from alcohol should be of at least one year's duration. DOE Psychiatrist's Report of Examination at 9.

An administrative review proceeding was initiated by the LSO. *See* 10 C.F.R. § 710.9. The LSO then issued a letter notifying the Individual that it possessed information that raised a substantial doubt concerning his eligibility for access authorization (the Notification Letter).⁶

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).⁷ The Director of OHA appointed me as the Hearing Officer in this matter on May 13, 2009.

On May 21, 2009, after the Notification Letter had been issued and before the hearing was held, the Individual was arrested for Aggravated Driving While Under the Influence of Liquor or Drugs. Prior to the hearing, on June 18, 2009, the LSO issued an amended statement of charges incorporating this additional derogatory information.

At the hearing I convened pursuant to 10 C.F.R. § 710.25(e) and (g), I took testimony from the Individual, the DOE Psychiatrist and the Individual's supervisor. *See* Transcript of Hearing, Case No. TSO-0740 (hereinafter cited as "Tr."). The LSO submitted 11 exhibits, marked as Exhibits 1 through 11, while the Individual submitted 3 exhibits, marked as Exhibits A through C.⁸

II. STANDARD OF REVIEW

The Hearing Officer's role in this proceeding is to evaluate the evidence presented by the agency and the Individual, and to render a decision based on that evidence. *See* 10 C.F.R. § 710.27(a). The regulations state that "[t]he decision as to access authorization is a comprehensive, common-sense judgment, made after consideration of all the relevant information, favorable or

⁶ Specifically, the Notification letter alleges that the Individual has:

(1) Deliberately misrepresented, falsified, or omitted significant information from a Personnel Security Questionnaire, a Questionnaire for Sensitive (or National Security) Positions, . . . on a matter that is relevant to a determination regarding eligibility for DOE access authorization, or proceedings conducted pursuant to Sec. 710.20 through Sec. 710.31, 10 C.F.R. § 710.8(f) (Criterion F), and has,

(2) Been, or is, a user of alcohol habitually to excess, or has been diagnosed by a board-certified psychiatrist or a licensed clinical psychologist as alcohol dependent or as suffering from alcohol abuse, 10 C.F.R. § 710.8(j) (Criterion J).

⁷ The Individual also submitted an affidavit in support of his request for a hearing.

⁸ On July 21, 2009, I issued a letter closing the record at the close of business on July 23, 2009. On July 28, 2009, the Individual submitted a copy of a Psychological Evaluation conducted as part of a fitness for duty evaluation which resulted from the Individual's May 21, 2009, arrest. Although this report was submitted after I closed the record, in the interest of fairness and administrative efficiency, I am including it in the record, as Exhibit C, and considering its contents in my present deliberations.

unfavorable, as to whether the granting 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(a). I have considered the following factors in rendering this decision: the nature, extent, and seriousness of the conduct; the circumstances surrounding the conduct, including knowledgeable participation; the frequency and recency of the conduct; the Individual's age and maturity at the time of the conduct; the voluntariness of the Individual's 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. *See* 10 C.F.R. §§ 710.7(c), 710.27(a). The discussion below reflects my application of these factors to the testimony and exhibits presented by both sides in this case.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Criterion F

The Individual omitted his February 25, 2003, arrest for Battery, Disorderly Conduct, Resisting Arrest and Assault from his QNSP. When questioned by LSO officials about this omission, he first contended that this omission was due to a failure in memory, and then asserted that he omitted the arrest because the charges had been dropped. Exhibit 6 at 7-8. However, upon further questioning by the LSO, he admitted that his omission was motivated by his concern about the effect that the arrest would have upon his security clearance. Exhibit 5 at 69-78. Moreover, the Individual also admitted that his concern that the arrest would negatively affect his security clearance motivated his failure to report the February 25, 2003, arrest to the LSO in a timely manner. Exhibit 5 at 26-29, 70. The Individual also admitted that he had provided an OPM investigator with false information because of his concerns about his security clearance. *Id.* at 20-22, 90-93. The Individual's failure to report his February 23, 2003, arrest to the LSO in a timely manner, his omission of the February 25, 2003, arrest from his QNSP, and his intentional provision of false information to the OPM investigator, each raise significant security concerns. The fact that these omissions and the intentional provision of false information were deliberately calculated to deceive the LSO heightens the significance of these concerns. The lack of candor exhibited by the Individual during the PSI serves to further heighten these concerns. Accordingly, Criterion F was properly invoked by the LSO.

Deliberately omitting or concealing relevant facts and the provision of false information during a process for determining eligibility for a security clearance demonstrates questionable judgment and lack of candor, and can also raise questions about an individual's reliability, trustworthiness and ability to protect classified information. *See* Guideline E of the *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 the hearing, the Individual claimed that he had not reported the February 25, 2003, arrest to the LSO because he had been told by an LSO official that he did not have to report an arrest

unless he was convicted. Tr. at 91. He provided the same explanation for his omission of the arrest from his QNSP. *Id.* at 92, 96. The Individual also disputed the allegation that he had contended that his omission of his February 25, 2003, arrest was due to a failure in memory. Tr. at 101.

The Individual has failed to resolve the security concerns raised by his omissions and repeated provision of false information to DOE security officials. The Individual provided the LSO with three different explanations for his omission of his February 25, 2005, arrest: (1) his memory failed him, (2) he believed that he only had to report convictions and not arrests, and (3) he was concerned that he would lose his security clearance. The Individual also admitted that he had provided the OPM investigator with false information. The Individual's lack of candor continued at the hearing, where he denied that he had ever asserted that he had forgotten about the arrest, even though the transcript of the August 7, 2008, PSI clearly indicates the contrary. Exhibit 6 at 7-8. Accordingly, the record shows that the Individual has not been completely honest during any stage of the investigation and administrative review process. His lack of candor even continued during the hearing itself. Accordingly, the significant security concerns about the Individual raised under Criterion F remain unresolved.

2. Criterion J

The Notification Letter cites two related concerns under Criterion J: (1) the Individual's significant history of alcohol-related incidents, and (2) his diagnosis of alcohol abuse by a board-certified psychiatrist.

The Individual's History of Alcohol-Related Incidents

The Individual's history of alcohol-related incidents includes two alcohol-related arrests, one in 2003, for Battery, Disorderly Conduct, Resisting Arrest and Assault, and the other in 2009, for DWI, as well as a detention for detoxification by his local police department on June 25, 2005.⁹ In addition, the Individual's employment records show that he was found to have a BAC of .055g/mL, while on duty. The Individual also admits that he has come to work with a "hangover" on approximately six occasions during the 1990s and early 2000s. Exhibit 5 at 36-38.

The Adjudicative Guidelines provide that a number of conditions involving alcohol raise security concerns "regardless of whether the individual is diagnosed as an alcohol abuser or alcohol dependent." Guideline G at ¶ 22. Specifically Guideline G states that driving under the influence, fighting, disturbing the peace, reporting to work or duty in an intoxicated or impaired condition, and habitual or binge consumption of alcohol to the point of impaired judgment, raise security concerns regardless of whether the individual is diagnosed as an alcohol abuser or

⁹ The DOE Psychiatrist's report states that the Individual was arrested on August 23, 1999, for public intoxication. However, there is no evidence in the record supporting this assertion and it does not appear in the statement of charges. The Individual admits being involved in a dispute that resulted in a visit from the local police on that date, but denied being arrested or using alcohol on that date.

alcohol dependent. Guideline G at ¶ 22(a), (b) and (c). Accordingly, the Individual's history of alcohol-related incidents raises significant security concerns under Criterion J.

Because the Individual has demonstrated little, if any, insight into the problems that alcohol has caused him, I cannot find at this time that these security concerns have been resolved. The Individual's lack of insight into the effects of alcohol on his behavior was demonstrated by his hearing testimony when he attempted to mitigate the concerns raised by his May 21, 2009, arrest. The Individual testified that he was riding his motorcycle when he was stopped by a police officer who thought (mistakenly in the Individual's opinion) that the Individual had dropped his motorcycle. Tr. at 94. The police officer administered some tests and asked the Individual if he had been drinking. Tr. at 90. The police officer asked the Individual to submit to a breathalyzer test, which the Individual refused. Tr. at 88-89. The Individual testified that he decided to refuse the breathalyzer test because he was angry that the police officer had stopped him without good cause. Tr. at 90, 94-95. The Individual testified that he still does not believe he should have been cited for DWI. Tr. at 90, 93. The Individual testified that he had consumed three beers before his DWI arrest. Tr. at 87. The Individual testified that he was not intoxicated on the night of his DWI arrest. Tr. at 96. However, the record includes a Notice of [driver's license] Revocation (NOR) which incorporates the arresting officer's sworn statements that the Individual had bloodshot watery eyes, slurred speech and the odor of alcohol at the time of the May 21, 2009, DWI arrest. Exhibit 11 at 1. The arresting officer also swore that that Individual failed a field sobriety test and admitted drinking four beers. *Id.*

This testimony indicates that the Individual views the May 21, 2009, arrest as a failure of the arresting officer's judgment rather than a consequence of his own poor judgment concerning alcohol. The Individual exhibited a similar lack of insight when testifying about the other alcohol-related incidents in which he had been involved. The Individual has therefore failed to mitigate the security concerns raised by his history of alcohol-related incidents.

The Individual's Diagnosis of Alcohol Abuse by a Board-Certified Psychiatrist

An additional security concern under Criterion J was raised when a board-certified Psychiatrist diagnosed the Individual with alcohol abuse on January 21, 2009. The DOE Psychiatrist, noting that the Individual continued to use alcohol, sometimes to the point of intoxication, concluded that the Individual was not sufficiently reformed or rehabilitated. It is well settled that a reliable diagnosis of alcohol abuse raises significant security concerns under Criterion J. Excessive alcohol consumption often leads to the exercise of questionable judgment or the failure to control impulses, and can raise questions about an individual's reliability and trustworthiness. Guideline G at ¶ 21.

In the present case, it is not clear whether the Individual disputes the DOE Psychiatrist's diagnosis of alcohol abuse. The Individual initially testified that he does not believe he has an alcohol problem.¹⁰ Tr. at 93. However, he subsequently testified that: "I've got to say I need to

¹⁰ After the hearing, the Individual has submitted a report of a psychological evaluation conducted by a psychologist (the Psychologist) employed by a DOE facility to perform fitness for duty evaluations. A copy of this report appears

face the facts that maybe I've got an alcohol problem." Tr. at 94. The Individual testified that he has begun to see a counselor with his employer's Employee Assistance Program (EAP). Tr. at 93. The Individual also testified that he is willing to stop using alcohol. Tr. at 99-100.

The DOE Psychiatrist testified at the hearing that his diagnosis of alcohol abuse was based upon the Individual's recurrent history of alcohol-related employment and legal issues. Tr. at 40. He also testified that, at the time of his report, he believed that the Individual's alcohol abuse was in "full sustained remission." Tr. at 41-42. The DOE Psychiatrist also noted that the incident in which the Individual was found to have a BAC of .055g/mL while on duty was an example of alcohol affecting the Individual's workplace performance. *Id.* at 42-34. The DOE Psychiatrist also testified that the Individual's involvement in alcohol-related incidents while possessing a DOE security clearance was significant. *Id.* at 44-45. The Individual's May 21, 2009, DWI arrest constitutes an alcohol-related legal problem, *Id.* at 49, and that his May 21, 2009, use of alcohol while operating a motorcycle is especially significant because it conclusively shows that the Individual is no longer in full sustained remission, and because it was the most serious of the Individual's alcohol related incidents. *Id.* at 49-50, 75. The DOE Psychiatrist further testified that the Individual's use of alcohol while operating a motor vehicle when the present security clearance hearing had been scheduled in the near future constitutes both an employment issue and a legal issue caused by his alcohol use. *Id.* at 76-77. He opined that the Individual is in a high degree of denial about his problems with alcohol. *Id.* at 77-78.

I found the DOE Psychiatrist's testimony to be persuasive and convincing. His report documented the Individual's history of three alcohol-related legal problems, as well as an alcohol-related failure to fulfill a major role obligation at work. Exhibit 3 at 7-8. His testimony convinced me that the May 21, 2009, DWI arrest constitutes both a fourth alcohol-related legal problem and an additional alcohol-related failure to fulfill a major role obligation at work. Moreover, the Individual has neither shown that he does not suffer from alcohol abuse nor established a pattern of abstinence or responsible use. Accordingly, I find that the Individual has not sufficiently resolved those concerns arising from the DOE Psychiatrist's diagnosis of alcohol abuse.

IV. CONCLUSION

For the reasons set forth above, I conclude that the Individual has not resolved the security concerns raised under Criteria F and J. Therefore, the Individual has not demonstrated that

in the record as Exhibit C. That report indicates that the Psychologist reviewed a copy of the DOE Psychiatrist's report and the Individual's employment records. The report also indicates that the Individual was subjected to a comprehensive battery of psychological tests, none of which indicated "significant psychological pathology." Exhibit C at 4. The Psychologist opined that "[the Individual's] history of alcohol related difficulty, coupled with the current aggravated DWI charge, certainly suggest a pattern of alcohol misuse. I could not conclude, however, that [the Individual] meets diagnostic criteria for either alcohol [abuse or dependence]." Exhibit C at 5. While the Psychologist obviously conducted an extensive evaluation of the Individual, his report does not explain why he disregarded the Individual's two alcohol-related arrests and detention for intoxication, as well as the incident in which the Individual was found to have a significant BAC at work. Moreover, the Psychologist was unavailable for examination at the hearing. I am therefore only according this report neutral weight.

restoring his security clearance would not endanger the common defense and would be clearly consistent with the national interest. Accordingly, the Individual's access authorization should not be restored. The Individual may seek review of this Decision by an Appeal Panel under the procedures set forth at 10 C.F.R. § 710.28.

Steven L. Fine
Hearing Officer
Office of Hearings and Appeals

Date: August 25, 2009