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September 4, 2009

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Hearing Officer's Decision

Case Name: Personnel Security Hearing

Filing Date: May 1, 2009

Case Number: TSO-0749

This Decision considers the eligibility of XXXXX (the individual) to hold an access authorization 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." As I explain below, the Department of Energy (DOE) should not grant the individual an access authorization.

I. Background

The local security office (LSO) issued the individual a Notification Letter with a Statement of Charges that cites a Criterion J security concern. Criterion J includes habitually using alcohol to excess or being diagnosed by a psychiatrist or a licensed clinical psychologist as alcohol dependent or as suffering from alcohol abuse. 10 C.F.R. § 710.8(j). The LSO alleges that:

- 1) In February 2004, the individual was cited for Minor in Possession (MIP). He had had about six beers over a two or three-hour period;
- 2) In March 2004, he was cited for MIP. He had had about six beers over a two or three-hour period;
- 3) In September 2004, he was arrested for Aggravated Driving While Intoxicated (DWI). He had had about six beers over a two or three-hour period;
- 4) In November 2004, while on probation for his first DWI arrest, he was cited for MIP. He had had about six beers over a two or three-hour period;
- 5) In November 2004, he stopped drinking. He resumed within six months;

- 6) In March 2007, he was arrested for Aggravated DWI and Open Container. He initially denied that he had been drinking, but later admitted to having had four or five beers;
- 7) In March 2007, he entered counseling, but he terminated his counseling after four sessions because his DWI charge was dismissed. The individual continued to drink;
- 8) In November and December 2008, the individual drank to intoxication.
- 9) In November 2008 and January 2009, the individual stated that he does not need alcohol treatment or counseling and that he intends to continue drinking;
- 10) In January 2009, the individual had abnormally elevated liver enzyme levels, which suggests that he had recently been drinking enough to cause mild liver damage;
- 11) In January 2009, a DOE-consultant psychiatrist diagnosed the individual with Alcohol Abuse.

DOE Exh. 1 (Statement of Charges, Mar. 18, 2009).

The Statement of Charges also cites a Criterion L security concern. Criterion L includes “unusual conduct” and “circumstances which tend to show that the individual is not honest, reliable, or trustworthy; or which furnishes reason to believe that the individual may be subject to pressure, coercion, exploitation, or duress which may cause the individual to act contrary to the best interests of the national security.” 10 C.F.R. § 710.8(l). The Criterion L security concern stems from the above-described citations for MIP and arrests for DWI. DOE Exh. 1 (Statement of Charges, Mar. 18, 2009).

The individual requested a hearing to respond to the LSO’s security concerns, and I conducted the hearing on June 29, 2009. The individual was represented by an attorney. The individual testified and called the following witnesses: his father and two friends. The DOE counsel called the DOE-consultant psychiatrist.

At the hearing, the individual stated that he does not dispute the truth of the allegations in the Statement of Charges, except that he no longer suffers from Alcohol Abuse and that he has not had a drink since January 1, 2009. Tr. at 6.

II. Summary of Hearing Testimony

A. The Individual

The individual testified that had his first drink when he was 16 years old. *Id.* at 44. By age 18, he rebelled, drank regularly, and developed a drinking problem. Every other weekend, he drank seven or eight beers. *Id.* at 22, 44, 45. He drank too much because he

had “problems in [his] maturity level.” *Id.* at 20. (At the time of the hearing, the individual was 23 years old. *Id.* at 44.)

In 2004, the individual was cited for MIP three times, and he was arrested for DWI once. *Id.* at 13. (He received his third MIP while he was on probation for the DWI.) That year he attended one five-hour class. He thinks that “it was about alcohol abuse,” but he does not recall. He also had one-on-one counseling for six weeks. He did it because he was required to. *Id.* at 34. He also took six weeks of driver education classes, which had an impact on him. *Id.* at 52, 53. He stopped drinking “for a few months.” *Id.* at 35. He started drinking again because he was around friends who were drinking. *Id.* at 35-36.

In 2007, the individual received a second DWI. *Id.* at 13-14. Then his lawyer instructed him to attend twelve counseling sessions. He stopped going after four. He said, “I can’t tell you why.” *Id.* at 36. At the time, he did not feel that he had a problem with alcohol, but now he thinks that he did. *Id.* at 37.

The individual’s two DWI arrests were the only times that he drove after drinking. *Id.* at 24, 53-54. The individual also testified that he “may have” told the DOE-consultant psychiatrist that he drove intoxicated before 2004, but that that’s “not true.” *Id.* at 57.

“[A]bout two years ago or so” he began “taking steps” to “move on with [his] life and make things better for [him]self.” *Id.* at 20-21, 23. He reduced his drinking to the “occasional” family reunions and camping trips, when he would have four or five beers and not get intoxicated. *Id.* at 23-24. The individual’s last drink was on January 1, 2009, and he does not plan to drink again. *Id.* at 16, 38.

The individual chose the first of the year to stop drinking “to bring in a new year . . . with higher hopes.” *Id.* at 61. He stopped to “help” himself because it “would just be better for [his] life in the long run.” *Id.* at 25, 26. He wanted to get his “life on the right path.” *Id.* at 27. He wants to work for the DOE “really bad” and he’ll do “whatever” he has to do. *Id.* at 26. (He stopped drinking for his own benefit, despite having stopped after questions were raised about his access authorization. *Id.* at 61-62.) The individual acknowledged that he had told the DOE-consultant psychiatrist that he stopped drinking to lose weight. He did not tell him of his other reasons for abstaining because he did not think of them. *Id.* at 26.

The individual received the DOE-consultant psychiatrist’s report at the end of January 2009. *Id.* at 49. He recalls reading that the DOE-consultant psychiatrist recommended that the individual attend Alcoholics Anonymous (AA) weekly. *Id.* at 49. (AA had been suggested to the individual for legal purposes. *See id.* at 29.) He delayed attending because he did not feel that he needed to attend. *Id.* at 21, 50. He said, “I was getting help through different – a different way than AA.” *Id.* at 17. He overcame his alcohol problem through willpower and by “growing up . . . just getting older.” *Id.* at 21, 50. Also, he would “talk with family members and friends,” such as his mother and father. *Id.* at 17, 29.

The individual first attended AA in May 2009. *Id.* at 46. He did not feel that he had an alcohol problem, but he went anyway because “just seeing other people with the same problem that I had in the past maybe helps me a little bit more.” *Id.* at 31. He also figured that “[t]hey have sessions all the time,” and “it couldn’t really hurt.” *Id.* at 30. He said that attending “seemed like the better thing to do, and it really does help.” *Id.* at 29. (The individual’s AA attendance is the first time he had entered treatment upon his own choice. He would have still attended, even if his access authorization had been denied. *Id.* at 60.) He attended three more times, all in May 2009. *Id.* at 33, 45. He wants to find a sponsor and begin the steps, although he has done neither. *Id.* at 31, 33, 38.

The individual sees himself attending AA a year from the hearing. *Id.* at 38. He feels that he “need[s] to be there.” *Id.* at 41, 51. But he has not attended after May 2009 because towards the end of that month he started a new job, and he has not had “a set schedule.” *Id.* at 17, 46. (Before he started, he had not had a job “for a while.” *Id.* at 58.) He had attended the “young people’s group,” but that starts to soon for him to attend. *Id.* at 59. He acknowledged that his city has AA meetings “probably every day.” *Id.* at 47.

The individual lives with his cousin, who keeps alcohol in their home. *Id.* at 40, 42. His cousin and his best friend are his former drinking partners, and he sees both of them “about every day.” *Id.* at 40, 42. They sometimes drink around him, but that does not bother him. *Id.* at 41. He is not tempted to drink because he does not “need” or “want” alcohol. *Id.* at 66. He used to drink at friends’ houses. *Id.* at 43. He has not been to their houses lately. *Id.* at 43.

The individual’s support system consists of his parents and friends. *Id.* at 40.

The individual’s current sobriety differs from his past attempts because he desires stability and a career. *Id.* at 37-38. He said, “I look back . . . and I see that alcohol was definitely . . . holding me back.” *Id.* at 38. His sobriety has “made . . . things a lot easier for [him].” *Id.* at 39. He has also lost about 20 pounds. *Id.* at 39.

B. The Individual’s Father

The individual’s father testified that the individual was a “rambunctious” teen. *Id.* at 67. The individual’s father “didn’t have too much problem with him,” although he “ran astray a little bit.” *Id.* at 68. The individual told him that he received his MIP’s because the police raided parties and cited everyone “regardless if they were drinking or not.” *Id.* at 68-69, 73. But the individual “may have mentioned that he was drinking on one of those occasions.” *Id.* at 72.

The individual “got into trouble sometimes” because “he wasn’t an adult.” *Id.* at 68. When he got in trouble, the individual’s father spoke with him about his drinking. The individual responded that he needed to stop or cut down. *Id.* at 76.

The individual's father does not believe that the individual now has a problem with alcohol. *Id.* at 71. The individual said that he is not tempted by alcohol, nor does he keep alcohol in his home. *Id.* at 74, 76. He will not drink again because "he realized what this can do . . . to your career and your life." *Id.* at 79.

Now the individual is "grown up and matured." His father sees "a big change . . . in the last couple of years." *Id.* at 68. "He's settled down quite a bit." *Id.* at 78. He did well in school, earned a degree, and "held down several jobs." *Id.* at 70. The individual is now a designated driver. *Id.* at 75.

C. The Individual's First Friend

The individual's first friend has known the individual for a little over a year. *Id.* at 85. They took several classes together as part of a degree program. *Id.* at 83.

The two have not socialized regularly, but they did socialize three or four times. *Id.* at 85-86, 88. He is not familiar with the individual's drinking friends. *Id.* at 88. In the fall of 2008 he saw him drink six beers, which is the most he has seen him drink. *Id.* at 86, 88. They last socialized in November 2008, when they attended a "get-together" at a local restaurant. The individual had one beer. *Id.* at 82. They have not socialized together this year. *Id.* at 84.

The individual and his first friend do not discuss the individual's issues with alcohol. *Id.* at 87.

D. The Individual's Second Friend

The individual's second friend testified that he met the individual at school. *Id.* at 91. They have known each other since the fall semester, 2005. *Id.* at 90. They saw each other at class four days a week. *Id.* at 91. Once or twice a month, they saw each other on the weekend. *Id.* at 95.

On occasion, the two of them had lunch at the individual's house. *Id.* at 91, 92. The individual would drink about two beers over three hours. *Id.* at 92. On the weekends, the individual would invite him over. Other friends would also be there, and they would drink. *Id.* at 95. The individual would not get drunk. *Id.* at 96. When asked if he and the individual got drunk playing a drinking game, he responded, "Oh yeah." *Id.* at 99.

The second friend has seen the individual drive after drinking no more than two beers. *Id.* at 96. Since his last DWI, "[h]e's gotten better" – "he doesn't want to take any chances like that anymore." *Id.* at 98.

The second friend has not seen the individual drink since last fall. *Id.* at 97. Since January, he has seen the individual four times. *Id.* at 102. In that time, the individual quit drinking. *Id.* at 97. The individual is "a lot clearer." He has "a better outlook . . . more focused." *Id.* at 103.

E. The DOE-Consultant Psychiatrist

The DOE-consultant psychiatrist testified that he evaluated the individual in January 2009. *Id.* at 106. The individual told him that he got intoxicated a week before his November 2008 PSI, and two or three weeks before their January 2009 meeting. *Id.* at 112-13. He thought that his drinking problem was in his past and assumed that it was going to go away. *Id.* at 113-14.

Based on height, weight, and blood-alcohol concentration, the DOE-consultant psychiatrist can make a “fairly precise estimate[] of how many drinks . . . a person would have had to have consumed.” *Id.* at 109. Using this measurement, the DOE-consultant psychiatrist believes that when the individual was arrested for DWI, he likely drank more than what he told him. *Id.* Since the individual has two DWI’s, the DOE-consultant psychiatrist assumes that “many times” he has driven “over the legal limit” but was not caught. *Id.* at 110. [In the DOE-consultant psychiatrist’s report, he cites a study that concluded that for each DWI arrest, the motorist drove intoxicated 100 other times, without being caught. DOE Exh. 6.]

Elevated liver enzymes suggest “extended periods of heavy drinking” within weeks or months of the test, but do not prove heavy drinking. Tr. at 117, 119, 120. (Consuming less than 21 drinks a week causes “almost no chance” of elevated liver enzymes. *Id.* at 119.) Being overweight can also cause elevated liver enzymes. *Id.* at 117.

In January 2009, the individual’s liver enzymes were “abnormally high.” *Id.* at 117. The individual told the DOE-consultant psychiatrist that he weighed 190 after having lost 20 pounds. *Id.* at 115. [The individual testified that at the hearing, he weighed 190. *Id.* at 56.] His Body Mass Index (BMI) was 29.8, which is just shy of obesity (30). *Id.* at 115, 117. Excessive drinking and obesity were the individual’s only possible causes for elevated liver enzymes. *Id.* at 118.

When the individual had his liver enzymes tested in April 2009, his levels were no longer abnormally elevated. *Id.* at 118. His decrease constitutes “a medical reason[] . . . to verify that [the individual] hasn’t been drinking . . . over the[] past few months.” *Id.* at 118, 121. Since the individual is now the same weight as when he saw the DOE-consultant psychiatrist, his weight likely did not cause his elevated enzymes. *See id.* at 120. (Since the tests were performed by two different labs using different measurement scales, the DOE-consultant psychiatrist could only make “rough comparisons” between them. But the individual’s enzymes “went from being higher than normal for either lab to within normal for either lab.” *Id.*; *see also id.* at 150.)

When asked about the individual’s alcohol treatment, the DOE-consultant psychiatrist said that he had “the general impression that [the individual] . . . did the court-ordered minimum and didn’t get a huge amount of benefit from the basic programs that he was forced to take.” *Id.* at 121. As soon as the charges for his second DWI were dropped, the individual discontinued the treatment that his lawyer recommended. *Id.* at 124.

The individual no longer meets the criteria for Alcohol Abuse because he has not “had [legal] problems” for “a long time.” *Id.* at 125, 140. To show evidence of rehabilitation and reformation, the individual must abstain for a year. *Id.* at 126. He must also participate in a treatment program for a year, although the sobriety date is more important than the treatment time. *Id.* at 128, 138, 156. (For the DOE-consultant psychiatrist, whether the individual meets the criteria for Alcohol Abuse and whether he has shown adequate evidence of rehabilitation and reformation are separate issues. *Id.* at 158-59.)

The individual has not shown adequate evidence of rehabilitation and reformation because he has not abstained for a year, and his participation in AA has a “couple of problems.” *Id.* at 128, 129, 140. His participation appeared “to be almost wholly externally motivated.” *Id.* at 129. That is “not bad,” but “being honest . . . is important.” *Id.* at 130. The individual said that his AA participation “had nothing to do with [his] security clearance,” but that’s “not what [the DOE-consultant psychiatrist] saw in his behaviors.” *Id.* at 131. There is “an obvious connection” between his “last minute” AA participation and the hearing date. *Id.* at 130. The “disjunction [is] not a good sign.” *Id.* at 131. “The other negative on the treatment program . . . is the fact that he hasn’t gone . . . for a month.” *Id.* at 132. His failure to attend shows that the “external motivation was not strong enough to push him to go.” *Id.* [“A common robust start-up within AA is 90 meetings in 90 days.” *Id.* at 134.] Nor has the individual replaced his drinking with non-drinking activities. *Id.* at 133-34.

The individual does not have an adequate support system; he has the same support system that he had through his three citations for MIP and two arrests for DWI. *Id.* at 140. He still associates with his drinking friends, which is a “trigger” and “a danger for him.” *Id.* at 136.

When asked about the individual’s level of commitment to his recovery, the DOE-consultant psychiatrist replied, “Just getting started. Just barely.” *Id.* His current period of sobriety is his longest, which indicates that he is early in his recovery and vulnerable to relapse. *Id.* at 162. His risk of relapse is “high.” *Id.* at 139.

III. Legal Standard

In order to grant or restore an individual’s access authorization, the Hearing Officer must find that the grant or restoration “will not endanger the common defense and security and is clearly consistent with the national interest.” 10 C.F.R. §§ 710.7(a), 710.27(a); *see also Dep’t of the Navy v. Egan*, 484 U.S. 518, 528 (1988). In order for the Hearing Officer to make this finding, the individual must resolve the security concerns that the DOE identifies in its Notification Letter. *See, e.g., Personnel Security Hearing*, Case No. TSO-0586 (2008).¹

¹ OHA decisions may be accessed by entering the case number in the search engine on the OHA website, www.oha.doe.gov.

The individual must resolve the DOE's security concerns by presenting evidence to rebut, refute, explain, extenuate, or mitigate the allegations supporting the DOE's security concerns. *See, e.g., Personnel Security Hearing*, Case No. TSO-0598 (2008). The individual must present corroborating evidence to support his or her efforts to resolve the DOE's security concerns. *See Personnel Security Hearing*, Case No. TSO-0693 (2009).

The individual has the burden to resolve the DOE's security concerns because once the DOE finds a security concern, "[T]here is a strong presumption against granting a[n] access authorization." *Dorfmont v. Brown*, 913 F.2d 1399, 1401 (9th Cir. 1990). "[D]eterminations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531; *see also* 10 C.F.R. § 710.7(a) ("Any doubt as to an individual's access authorization eligibility shall be resolved in favor of the national security.").

The Hearing Officer considers "all relevant information, favorable and unfavorable," to issue a decision that is "a comprehensive, common-sense judgment." 10 C.F.R. § 710.7(a). The Hearing Officer shall consider the following factors: witness demeanor and credibility; the authenticity and accuracy of documentary evidence; the nature, extent, and seriousness of the conduct; the circumstances surrounding the conduct, to include knowledge and 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 behavior changes; the motivation of the conduct; the potential for pressure, coercion, exploitation, or duress; the likelihood of continuation or recurrence; and other relevant and material factors. *Id.* at §§ 710.7(c), 710.27(a)-(b).

IV. Analysis

Criterion J

The LSO's Criterion J security concern stems from the individual's Alcohol Abuse diagnosis and his alcohol-related legal trouble. To mitigate the allegations, the individual and his witnesses testified that he has not had a drink since January 1, 2009, and that he has matured. Because the objective liver enzyme evidence supports their testimony and he has not had alcohol-related legal trouble since 2007, I agree with the DOE-consultant psychiatrist that the individual no longer suffers from Alcohol Abuse. However, I find that the individual has not resolved the Criterion J security concern.

The DOE-consultant psychiatrist has persuaded me that while the individual no longer suffers from Alcohol Abuse, he has not shown adequate evidence of rehabilitation and reformation. I agree that the individual must abstain for at least a year because he has relapsed after fewer months of sobriety than he had at the time of the hearing.

I also agree with the DOE-consultant psychiatrist that the individual's risk of relapse is high. While the individual has matured, maturity alone cannot reduce the individual's risk of relapse. He lacks an effective support network. He associates with his former drinking partners – he lives with one of them – which previously triggered a relapse.

Most of all, the individual's behavior suggests a tepid commitment to recovery. He delayed acknowledging his drinking problem (until January 2009), delayed attending AA (until May 2009; the month before the hearing), failed to continue AA, and likely minimized the extent of his drinking (he insisted that he had only driven twice after drinking, while his second friend's testimony suggested otherwise).

Criterion L

The LSO's Criterion L security concern stems from the individual's alcohol-related legal trouble: three citations for MIP and two arrests for DWI. To mitigate the allegations, the individual testified that he has not had alcohol-related legal trouble since 2007 and has abstained since January 2009. He and his father testified that he has matured. Since the individual is no longer a minor, he cannot receive another MIP. I find that the individual has not resolved the LSO's Criterion L security concern.

After the individual's first DWI, he had driver education but he continued to drive after drinking and was again arrested for DWI. His second friend testified that after the individual's second DWI, he continued to drive after drinking. Given the individual's history of driving after drinking, I believe that his high risk of relapse is accompanied by a high risk of being arrested for DWI.

The individual has not convinced me that his "increased maturity" will reduce his risk of an additional DWI because he has apparently not been completely forthcoming about his history of driving after drinking.

V. Conclusion

Because the individual has not resolved the LSO's Criterion J and Criterion L security concerns, I find that the DOE should not grant him an access authorization.

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

David M. Petrush
Hearing Officer
Office of Hearings and Appeals

Date: September