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September 9, 2009

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Hearing Officer's Decision

Case Name: Personnel Security Hearing

Filing Date: May 28, 2009

Case Number: TSO-0758

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 restore the individual's access authorization.

I. Background

The local security office (LSO) suspended the individual's access authorization and issued him 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 1990, the individual was cited for Driving with an Open Container;
- 2) From 2000 to 2005, his wife had concerns about his drinking;
- 3) In early 2006, he drank straight whiskey and increased his drinking, which became a problem. His wife became increasingly concerned, but he took no action;
- 4) Since early 2006, on six occasions he drank a fifth of whiskey in one day;
- 5) In late 2007, he noticed a dent in his truck. He suspected that he had hit something while he was driving during an alcohol-induced blackout;

- 6) In January 2008, he was arrested for Aggravated Driving While Intoxicated (DWI) and Leaving the Scene of an Accident. He had no memory of the accident he caused;
- 7) In November 2008, a DOE-consultant psychiatrist diagnosed the individual with Alcohol Abuse.

DOE Exh. 1 (Notification Letter and Statement of Charges, Mar. 6, 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 individual’s above-described alcohol-related arrests. DOE Exh. 1 (Notification Letter and Statement of Charges, Mar. 6, 2009).

The individual requested a hearing to respond to the LSO’s security concerns, and I conducted the hearing on July 24, 2009. The individual represented himself. The individual testified and called the following witnesses: his Employee Assistance Program (EAP) counselor, his wife, his Alcoholics Anonymous (AA) sponsor, his church friend, his friend, and his supervisor. 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. Tr. at 5-6.

II. Summary of Hearing Testimony

A. The Individual

The individual testified that he began drinking at age 17 or 18. *Id.* at 13. He first drank to intoxication in college, where he drank to intoxication often. He said, “I personally think that something inside me was prepared to abuse alcohol perhaps my whole life. . . . [T]he onset of that difficulty waited until . . . I was in my mid-40’s.” *Id.* at 17. “[A]lcoholism took over.” By “alcoholism,” he means drinking that he cannot control that has consequences. *Id.*

By 2003, he began to drink “more heavily.” *Id.* at 13. His drinking caused him “more and more problems.” *Id.* at 18. He thought, “I can handle this quietly on my own.” He wanted to avoid the embarrassment of telling people of his problem. *Id.*

The individual’s wife became concerned about his drinking, and he tried to hide it. *Id.* at 14. On January 7, 2008, on his way home from work, he parked his vehicle to drink so that his wife would not see him drinking. *Id.* at 14-15. (He said, “It’s not a pretty story,

but . . . that's the truth of what was going on." *Id.* at 18.) He drank the "major portion" or all of a fifth of liquor and became intoxicated. *Id.* at 15, 16. On the way home, he caused an accident. *Id.* at 15.

While sitting in jail the next morning, the individual decided to stop drinking. *Id.* at 29-30. He was worried about consequences with his job and his wife, but he was "relieved" that he could set those concerns aside. *Id.* at 19. After he left jail the next morning, he talked to his minister. *Id.* at 19-20. His minister advised him to attend AA and offered to help him with AA's spiritual aspects. *Id.* at 21-22. (He had previously thought about attending the AA group that meets in his church, but he did not because he was concerned with anonymity. That is no longer a concern. *Id.* at 22.)

On January 10, 2008, the individual saw an EAP counselor. *Id.* at 35. The individual initially saw him every month, but has since seen him every two months. *Id.* at 36. Although the individual got in touch with the counselor when the counselor followed-up on his DWI, the individual has also seen the counselor at his own request. The relationship grew from monitoring to therapy. *Id.*

On January 11, 2008, the individual saw an alcohol counselor. *Id.* at 25. She "immediately" gave him "useful, tangible advice on avoiding things and situations . . . that might trigger a desire to drink." *Id.* at 26. He worked at building a therapeutic relationship with her, and she has been counseling him weekly or bimonthly ever since. *Id.* at 25-27. She helps him address underlying anxiety. *Id.* at 27-28. Now, instead of agonizing over problems, he "can go to serenity." *Id.* at 28. He will continue counseling. *Id.* at 37.

When the individual attended his first AA meeting, he felt comfortable. The attendees shared his experiences and "understood [his] thought processes." *Id.* at 23. He said, "AA felt immediately right to me." *Id.* He values the "camaraderie" and "fellowship" to "tell a story about something that you did that violated your principles, and to have someone else say, yes, I did that same thing, but we don't have to do that anymore." *Id.* at 30.

The individual began attending AA about four times a week, although the court had not ordered him to go. *Id.* at 23. He said, "I was going to AA because I wanted to recover." *Id.* at 24. Now he goes two or three times a week. *Id.* at 31. He said, "AA keeps you . . . reminded that I have chosen to not take a drink again, and I've chosen that for very good reasons, and that somebody else hasn't made me do that. . . . I have decided for myself that life is better without alcohol." *Id.* at 30-31. He will "absolutely" do AA for the rest of his life. *Id.* at 32.

In April 2008, the individual got an AA sponsor. *Id.* at 32. They share a professional background, and the individual liked what he had to say. They meet once a week. *Id.* They started working on the 12 steps of AA "almost immediately," but their pace has been "very slow and deliberate." He is on step 11. *Id.* at 33. The steps helped him with his "spiritual awakening," which has "been very important." *Id.* at 34-35.

The individual's wife has attended several AA meetings to support him, although she is not a long-term participant. *Id.* at 35.

From January 2008 through May 2009, the individual had a breath-activated ignition lock on his car. (If the device detects alcohol on the user's breath, it does not allow the car to start. *Id.* at 38.) He used the device more than 200 times per month. *Id.* at 41. Chewing food creates "mouth alcohol." He once blew a false positive because he had just bitten into a hamburger. *Id.* at 38. The ignition lock service people advised him that if that happens again, he should have the police test his breath to confirm that he has not been drinking. *Id.* at 48. He had another false positive after he had bitten into an orange. *Id.* at 39. He rinsed his mouth out, waited five minutes, and blew a negative reading. (If he had been drinking, rinsing would not have removed his breath alcohol. *Id.* at 51.) After the AA meeting that he was headed to, he went to the local police station for a breath test to confirm that he had not been drinking. *Id.* at 39. During both false positives, the individual was by himself. *Id.* at 51-52.

During the first few weeks and months of the individual's sobriety, he avoided places where alcohol was served. *Id.* at 43. But he has "been [to such places] many times since then" and has not been tempted. *Id.* Although at first he felt odd not drinking, he does not crave alcohol. *Id.* at 42.

When the individual stopped drinking, his wife stopped drinking, too. (Although she never had a drinking problem.) She removed all the alcohol from the house. *Id.*

The individual's "AA friends" constitute his primary support network. *Id.* at 55. The individual's church congregation also knows of his recovery. *Id.* at 54. He makes himself available to discuss his recovery with congregation members with drinking problems. (The "more public" he is with his problem, "the more opportunities" he "may have to help other people." *Id.* at 55.) Some of his co-workers know, but he does not discuss his problems with them. *Id.* at 54.

B. The Individual's EAP Counselor

The individual's EAP counselor testified that he believes that the individual has not had a drink since January 2008. *Id.* at 61. He based his opinion on the individual's reports and his private therapist's assessment of his behavior. (Although the EAP counselor is not the individual's therapist, "it's pretty hard to separate that out.") The individual's employer also conducts random alcohol tests, which have all come back negative. *Id.* [From February 21, 2008, through July 9, 2009, the individual had 107 breath alcohol tests. *See* Hearing Exh. D (Letter from EAP Office Manager, July 9, 2009).]

The individual's EAP counselor believes that the ignition lock positives were false positives. *Tr.* at 62. The individual would not have metabolized the alcohol quickly enough for the system to show a negative reading five minutes later. *Id.*

The individual's EAP counselor has not detected any "evasiveness or deceit." *Id.* at 63. The individual has "been, from the very beginning, forthright in his disclosure about his drinking behavior." He is "openly engaged in the evaluation process" by telling his EAP counselor "what he's doing to prevent relapse, and what he's characterized as very positive changes in his life because of his sobriety." *Id.*

The individual's prognosis is "very good." *Id.* at 64. His recovery progress caused the EAP counselor to recommend removing the individual's work restrictions as of July 2008. *Id.* at 60-61.

C. The Individual's Wife

The individual's wife testified that they have been married for 17 years. *Id.* at 66.

The individual had a drinking problem. *Id.* at 67. She would "occasionally notice" that he had too much to drink. *Id.* She suspects that "some of the time he was . . . successful in hiding it." *Id.* at 69. (Before his sobriety, she "frequently" found bottles around the house. *Id.* at 75.) The accident and DWI arrest were a "wake-up call" for the individual and his wife. *Id.* at 67-68. After she bailed him out of jail, she felt that a "big burden was lifted off both of [their] shoulders and it was out in the open and [they] could talk about it." *Id.* at 69. "[H]e doesn't feel the need to hide it anymore." *Id.* at 71. Now he has a support system through AA, his AA sponsor, and his therapist. "There is a whole network of people that can help him." *Id.* Their friends know of his recovery. *Id.* at 75.

The individual is "aware . . . that he just can't have another drink." *Id.* at 72. He will not drink again because "he's aware of the consequences if he does." *Id.* at 71-72. She does not believe that he craves alcohol. *Id.* at 72. He can attend events where alcohol is served. *Id.* They have other friends who do not drink, so their "circle of friends is not about drinking and partying." *Id.* at 72-73.

The individual attends at least two AA meetings a week. *Id.* at 76. His AA attendance does not burden their family. *Id.* at 74. They "accommodate that" because the individual's "recovery is paramount." *Id.*

The individual and his wife do not keep alcohol in their home. *Id.* at 76.

The individual's wife and their children never blew into the interlock device in order to start the individual's vehicle. *Id.* at 77.

D. The Individual's AA Sponsor

The individual's AA sponsor testified that he meets the individual for about an hour and a half every week. *Id.* at 80. He is committed to his sobriety. *Id.* at 84. They work on the 12 steps and apply them to the problems that the individual faces. The individual is now on step 11. *Id.* at 82. They also talk about the meetings the individual has attended. *Id.* at 80.

The individual attends AA 2-3 times a week. *Id.* at 81. The individual is an active participant. *Id.* “He feels like he gets a lot out of it.” Many people attend because they are court-ordered. The individual participates in a way that those people do not. *Id.* at 83. The individual has been “honest” and “forthcoming.” *Id.* at 85.

The individual has been sober for more than a year and a half. If he had been drinking, he would have told his sponsor, or his sponsor would have noticed. *Id.*

“You can’t ever tell” if an AA participant will relapse, but if the individual “keeps thinking the way he’s thinking, and doing the things he’s doing, he’s got a good chance to stay sober.” *Id.* at 83.

E. The Individual’s Church Friend

The individual’s church friend testified that the individual and his wife have actively participated in their church since 2001. *Id.* at 90-91.

The individual’s arrest “was a life-changing event for him.” *Id.* at 93. “He had come to a realization that he had to change or he was going to ruin his life.” *Id.*

Within a week of the individual’s arrest, he called his church friend and their minister and told them. *Id.* at 91. The individual was the high school youth advisor. His responsibilities included driving kids in the church van. The individual wanted to “work out” the issues with his responsibilities to the kids. He “was very open to wanting to do the right thing.” *Id.* at 92-93.

The individual “has been such a great role model on how to change . . . and [how to] make something positive out of a bad decision.” *Id.* at 93. The individual is a role-model for at least one other congregation member with a drinking problem. *Id.* at 94.

She has no reason to believe that he has had a drink after January 2008. *Id.* at 91. They have attended church social events together. Others were drinking, but the individual did not. *Id.* at 91-92.

F. The Individual’s Friend

The individual’s friend has known him for five years. *Id.* at 96. He knows him through church and a home schooling group that their kids share. *Id.*

Since the individual’s arrest, he has socialized with the individual at least four or six times. *Id.* at 97-98. Others have consumed alcohol, but the individual did not. *Id.*

The individual’s friend once ran an errand with the individual, in the individual’s vehicle. *Id.* at 99. He recalls the individual explaining the ignition lock device and stating that he is serious about his sobriety. *Id.*

G. The Individual's Supervisor

The individual's supervisor testified that as soon as the individual was arrested, he told her. *Id.* at 101. She had not been aware that he had a drinking problem. *Id.* at 103. She has not seen him impaired. *Id.* at 101.

The individual has taken his work restrictions seriously. *Id.* at 103. She sees "someone who is . . . deeply committed to being . . . a positive person." *Id.* at 104. Since his arrest, she sees that "more so." *Id.*

H. The DOE-Consultant Psychiatrist

The DOE-consultant psychiatrist testified that the individual has demonstrated adequate evidence of reformation and rehabilitation from his Alcohol Abuse diagnosis. *Id.* at 105-06. In the DOE-consultant psychiatrist's November 2008 evaluation, he stated that to show rehabilitation and reformation, for one year the individual must abstain and receive treatment. He has now done so for 18 months. *Id.* (The DOE-consultant psychiatrist was looking for whether the individual could complete a year of abstinence, because 90% of recovering alcoholics cannot. *Id.* at 110.) The individual also has a "very good fit with AA." *Id.* Continuing treatment past a year "improves" the individual's "prognosis," which is "excellent." *Id.* at 106, 110. His risk of relapse is low. *Id.* at 111.

The DOE-consultant psychiatrist's one concern was that the individual's ignition lock system returned a positive reading. *Id.* at 106. [At the time of the individual's evaluation, he was aware of one positive reading. The individual raised the second positive reading at the hearing.] He is now satisfied that both positive readings are false positives. *Id.* at 106-07. "Mouth alcohol" is "typically blown off in two, three minutes, as opposed to alcohol that you have in your system from drinking alcohol, would take a long time to come off." *Id.* at 107. The system showed zero readings too quickly for alcohol in his system to have caused the positive readings. *Id.* at 108.

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. I find that the individual has resolved the Criterion J security concern.

Guideline G of the Adjudicative Guidelines for Determining Eligibility For Access to Classified Information² explains the "[c]onditions that could mitigate" a security concern stemming from Alcohol Abuse. They include acknowledging the Alcohol Abuse; providing evidence of actions taken to overcome the problem; establishing a pattern of abstinence in accordance with treatment recommendations; and participating in counseling or treatment, such as AA.

The individual has shown each of the above conditions. After his DWI arrest, he took responsibility for his actions, committed to sobriety, and thoroughly examined his drinking problem. He exceeded the DOE-consultant psychiatrist's recommendation of one year of abstinence and participation in AA. His abstinence was verified by the objective ignition lock readings and random workplace alcohol tests, and his AA sponsor

² The White House issued the Guidelines on December 29, 2005.

testified that he has been an exemplary participant. He also took the initiative to see a therapist. The individual presented witnesses from various areas of his life, and each corroborated his abstinence and dedication to sobriety and treatment.

Additionally, the DOE-consultant psychiatrist testified that the individual has shown adequate evidence of rehabilitation and reformation from his Alcohol Abuse diagnosis. The DOE-consultant psychiatrist and the EAP counselor agreed that he has an excellent chance of maintaining his sobriety. The individual has the support of his wife, his church congregation, his friends, and a network of AA participants.

Criterion L

The LSO's Criterion L security concern stems from the individual's alcohol-related legal trouble: his citation for Driving with an Open Container, and his arrest for DWI and Leaving the Scene of an Accident. I find that he has resolved the LSO's security concern.

Guideline E of the Adjudicative Guidelines for Determining Eligibility For Access to Classified Information explains the "[c]onditions that could mitigate" a security concern stemming from personal conduct. They include showing that "the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that caused . . . [the] inappropriate behavior, and that such behavior is unlikely to recur."

The individual has shown the above conditions. The individual's alcohol-related legal trouble stemmed from his Alcohol Abuse. He acknowledged his behavior and obtained treatment to recover from his Alcohol Abuse. Because the individual has shown adequate evidence of rehabilitation and reformation from his Alcohol Abuse, he has persuaded me that his alcohol-related legal trouble is unlikely to recur.

V. Conclusion

Because the individual has resolved the LSO's Criterion J and Criterion L security concerns, I find that the DOE should restore his 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 9, 2009