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October 29, 2009

DECISION AND ORDER
OFFICE OF HEARINGS AND APPEALS

Hearing Officer's Decision

Case Name: Personnel Security Hearing

Date of Filing: June 19, 2009

Case Number: TSO-0771

This Decision concerns the eligibility of XXXXXXXXXXXX (the individual) to hold an access authorization (also called a security clearance) under the provisions of 10 C.F.R. Part 710, entitled "Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material."¹ In this decision, I will consider whether, on the basis of the testimony and other evidence in the record or this proceeding, the individual's access authorization should be restored. For the reasons discussed below, I have determined that the individual's access authorization should not be restored.

I. Background

The provisions of 10 C.F.R. Part 710 govern the eligibility of individuals who are employed by or are applicants for employment with DOE, contractors, agents, DOE access permittees, and other persons designated by the Secretary of Energy for access to classified matter or special nuclear material. 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 or continuation 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).

On June 16, 2008, the individual reported to his employer that he had been arrested for driving while intoxicated (DWI) and on other charges associated with an accident in which he had been involved. This arrest, in conjunction with a similar arrest two years earlier and the individual's commitment after that first arrest never to drink and drive again, raised concerns for the local DOE security office (LSO) about his continued eligibility for a security clearance. After conducting a Personnel Security Interview (PSI) with the individual, the LSO determined that he had not resolved its concerns, and referred him to a DOE-sponsored psychiatrist (DOE psychiatrist) for an evaluation. The DOE psychiatrist evaluated the individual in February 2009,

¹ Access authorization is defined as "an administrative determination that an individual is eligible for access to classified matter or is eligible for access to, or control over, special nuclear material." 10 C.F.R. § 710.5(a).

and issued a report in which he expressed his opinion that the individual suffered from alcohol abuse.

The administrative review proceeding began with the issuance of a Notification Letter to the individual. See 10 C.F.R. § 710.21. That letter informed the individual that information in the DOE's possession created a substantial doubt concerning his eligibility for access authorization. Specifically, the LSO characterized this information as indicating that the individual suffered from alcohol abuse, a mental condition that may cause a defect in judgment or reliability, and that he engaged in unusual conduct that tends to show that he is not reliable or trustworthy. DOE Exhibit (Ex.) 1 (citing 10 C.F.R. § 710.8 (h), (j), and (l)).²

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). The Director of the Office of Hearings and Appeals appointed me as the Hearing Officer in this matter on June 23, 2009.

At the hearing I convened pursuant to 10 C.F.R. § 710.25(e) and (g), I took testimony from the individual, his girlfriend, a co-worker, and the DOE psychiatrist. The transcript of the hearing will be hereinafter cited as "Tr." The LSO submitted nine exhibits into the record prior to the hearing, and the individual submitted one exhibit at the hearing and three exhibits after the hearing.

II. Regulatory Standard

A hearing under Part 710 is held "for the purpose of affording the individual an opportunity of supporting his eligibility for access authorization," *i.e.*, "to have the substantial doubt regarding eligibility for access authorization resolved." 10 C.F.R. § 710.21(b)(3), (6). It is my role as the Hearing Officer to issue a decision that reflects my comprehensive, common-sense judgment, made after consideration of all relevant evidence, favorable and unfavorable, as to whether the granting or continuation of a person's 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 am instructed by the regulations to resolve any doubt as to the individual's access authorization eligibility in favor of national security. *Id.*

² Criterion H relates to information that a person has "[a]n illness or mental conditional of a nature which, in the opinion of a . . . licensed clinical psychologist, causes or may cause a significant defect in judgment or reliability." 10 C.F.R. § 710.8(h) (Criterion H). Criterion J relates to information that a person has "been, or is, a user of alcohol habitually to excess, or has been diagnosed by a psychiatrist or licensed clinical psychologist as alcohol dependent or as suffering from alcohol abuse." 10 C.F.R. § 710.8(j) (Criterion J). Criterion L relates, in relevant part, to information that a person "[e]ngaged in any unusual conduct or is subject to any unusual 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) (Criterion L).

I have thoroughly considered the record of this proceeding, including the submissions tendered in this case and the testimony of the witnesses presented at the hearing. In resolving the question of the individual's eligibility for access authorization, I have been guided by the applicable factors prescribed in 10 C.F.R. § 710.7(c).³ After due deliberation, I have determined that the individual's access authorization should not be restored. The specific findings that I make in support of this decision are discussed below.

III. The Notification Letter and the Security Concerns

In the Notification Letter, the LSO set forth its concerns regarding the individual's eligibility for access authorization and the facts that support each of those concerns. The LSO cited the following derogatory information as a basis for its security concerns under Criteria H and J. Ex. 1. The Notification Letter stated that the individual was arrested for driving under the influence of alcohol in 2006 and 2008.⁴ After each arrest, he had intended, but failed, to limit his alcohol consumption. He admitted that, since 2006, he had drunk to intoxication and driven while intoxicated numerous times, had blacked out on three occasions, and had gone to work with a hangover on three occasions. The LSO also relied on the DOE psychiatrist's opinion that the individual suffers from "alcohol abuse." See Ex. 3 (Evaluation Report). As derogatory information underlying its Criterion L concerns, the LSO listed other traffic-related violations with which the individual had been charged at the time of his two DWI arrests and his continued pattern of drinking alcohol to intoxication after each DWI arrest, and even after purchasing his own breathalyzer, despite his intention to limit his alcohol consumption.

I find that the information set forth above constitutes derogatory information that raises legitimate questions regarding an individual's eligibility for access authorization under Criteria H and J. A mental condition such as alcohol abuse can impair a person's judgment, reliability and trustworthiness. See *Revised Adjudicative Guidelines for Determining Eligibility for Access to Classified Information* issued by the Assistant to the President for National Security Affairs, The White House (December 29, 2005) (Adjudicative Guidelines) at Guideline I; *Personnel Security Hearing*, Case No. TSO-0357 (October 26, 2006).⁵ In addition, the excessive consumption of alcohol itself is a security concern because that behavior can lead to the exercise of questionable judgment and the failure to control impulses, which in turn can raise questions about a person's reliability and trustworthiness. See Adjudicative Guidelines at Guideline G; *Personnel Security Hearing*, Case No. TSO-0442 (July 25, 2007).

³ Those factors include the following: 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 continuance or recurrence, and other relevant and material factors.

⁴ The evidence suggests that the arrests were in fact for Driving While Intoxicated (DWI), and I will refer to them as such throughout this decision.

⁵ Decisions issued by the Office of Hearings and Appeals after November 19, 1996, are available on the OHA website located at <http://www.oha.doe.gov>. The text of a cited decision may be accessed by entering the case number of the decision in the search engine located at <http://www.oha.doe.gov/search.htm>.

I also find that the facts set forth above constitute derogatory information that raises national security concerns under Criterion L. Conduct that involves questionable judgment and unwillingness to comply with rules and regulations—in this case, continuing to drink to intoxication after two DWI arrests, driving while intoxicated after one DWI arrest, and violating motor vehicle laws—can raise questions about an individual’s reliability, trustworthiness and ability to protect classified information. *See* Guideline E of the Adjudicative Guidelines.

IV. Findings of Fact

The individual is a 24-year-old employee of a DOE contractor. He began drinking alcohol in high school, and consumed one to three drinks on the average of once every other month until he turned 21 years old. Ex. 6 (Transcript of October 10, 2006, PSI) at 28-31. He estimated he had gone to work with a hangover three times during this same period. Tr. at 82. Once he was of legal age, he began drinking four to five beers or mixed drinks in an evening, roughly once every two weeks. *Id.* at 32-34. In 2006, within six weeks of his 21st birthday, he was arrested for DWI. His license was suspended, and he was required to pay a fine, participate in a two-day substance abuse awareness program, and attend a victim impact program. Ex. 6 at 21-24. After his conviction, he cut back on his alcohol consumption, *id.* at 35, and bought a breathalyzer to test his alcohol level, in order to learn how many drinks he could consume and still stay below the legal blood alcohol limit to comply with motor vehicle laws. Tr. at 79. He stopped using the breathalyzer when it needed to be recalibrated. *Id.* He stated that his alcohol consumption then increased, and he estimated he drank to intoxication six times a month, and drove while intoxicated 20 to 30 times while aged 21 and 22. Ex. 5 (Transcript of January 15, 2009, PSI) at 28-29. At the hearing, he testified that he blacked out three times between 2006 and 2008. Tr. at 81-82. He was arrested a second time for DWI in 2008, at age 23. Ex. 5 at 5. His license was suspended again, he was placed on two years of probation, he paid more significant fines, and he was required to attend a weekend-long intervention program for repeat offenders as well as the same victim impact program. *Id.* at 15-17. After his second DWI, he abstained from alcohol for a month and attended Alcoholics Anonymous (AA) meetings sporadically. *Id.* at 40; Tr. at 49-50.

Because the January 2009 PSI did not resolve the LSO’s security concerns, the individual was referred to the DOE psychiatrist for an evaluation, which was conducted in February 2009. In a report of his evaluation issued on February 22, 2009, the DOE psychiatrist diagnosed the individual as suffering from alcohol abuse, without adequate evidence of rehabilitation or reformation, as defined in the Diagnostic and Statistical Manual of the American Psychiatric Association, Fourth Edition, Text Revised (DSM-IV-TR). Ex. 3 at 9. The DOE psychiatrist stated in his report that as adequate evidence of rehabilitation, the individual could attend AA meetings twice a week for a year with a sponsor, followed by an additional year of complete abstinence from alcohol, or complete 50 hours of alcohol abuse treatment and counseling over six months, followed by an additional year and one-half of complete abstinence from alcohol. In the alternative, the individual could achieve reformation from alcohol abuse, without participating in either of the suggested rehabilitation programs, by abstaining from alcohol for three years. *Id.* He also wrote that the individual had reported to him that he had stopped drinking alcohol the day before his January 2009 PSI, had been successfully abstinent since then, and intended to attend AA and remain abstinent. *Id.* at 10.

At the hearing, the individual produced evidence that he has attended AA consistently, three times a week, since January 2009. *Id.* at 75; Individual's Ex. A (AA Attendance Sheet). He has not sought a sponsor or begun the Twelve-Step Program that is generally recognized as AA's path to recovery from alcoholism. He explained that the senior members of his AA group not only did not encourage him to get a sponsor or begin the Twelve Steps, but rather advised against doing so. Tr. at 72-73. Both he and his girlfriend testified that he has been abstinent since January 15, 2009. *Id.* at 51 (testimony of individual), 10 (testimony of girlfriend). They keep no alcohol in their home. *Id.* at 14 (testimony of girlfriend), 39, 45-46 (testimony of co-worker).

After hearing the testimony of the individual, his girlfriend, and a co-worker, the DOE psychiatrist testified that his diagnosis of alcohol abuse was still correct, but that the individual had made remarkable progress since his psychiatric evaluation six months ago. In light of that progress, the DOE psychiatrist's opinion was that the individual's risk of relapse, as of the hearing, was low: "He's certainly at more risk than someone who has never abused alcohol to the level he has, but I think that given his recognition and acceptance of [the] problem, . . . it would be my opinion that he's a very reasonable, safe risk for the DOE." *Id.* at 85. He stated that he was now optimistic that the individual would maintain abstinence. *Id.* at 90. In his opinion, AA is not the only path to rehabilitation, and he was not concerned that the individual had not sought a sponsor and was not following the Twelve Steps. *Id.* at 84, 86. He testified that he was impressed by the individual's recognition of his illness: "The biggest [step] is taking responsibility and admitting that alcohol has been a problem for him. This is really huge and, frankly, not all that common. . . . [Few] DOE subjects . . . have that level of acknowledgment even at the hearing." *Id.* at 90-91. The DOE psychiatrist stated, however, that he would be more confident of his opinion if he were to be reassured that the individual took three additional steps: arranging with his probation officer to be subject to random alcohol screenings, starting a course of counseling with a substance abuse counselor, and providing his parents with the DOE psychiatrist's report. *Id.* at 83-84, 87. We agreed to leave the record in this proceeding open for 30 days to permit the individual to submit evidence that he had complied with the DOE psychiatrist's requests. *Id.* at 92. The DOE psychiatrist further testified that even if the individual did not comply with his requests, he would not change his opinion of the individual's prognosis. *Id.* at 93.

On August 24, 2009, the individual submitted evidence that he had complied with the DOE psychiatrist's requests: a letter signed by his parole officer confirming that the individual had requested and would be subject to random drug screening, an e-mail from an alcohol counselor confirming the individual's next appointment, and a signed statement that the individual had shared the DOE psychiatrist's report with his parents. *Indiv. Exs. B, C, D.* After reviewing the individual's submission, the DOE psychiatrist provided the following opinion:

I believe [the individual] is following through with his rehabilitation and reformation. However, he has not been sober for an entire year and I stated in my report that two years of total abstinence were required. I do think that if he can show total abstinence for at least one year . . . my level of optimism of his maintaining sobriety for the second year and thereafter will rise considerably.

E-mail from DOE Psychiatrist to DOE Counsel, September 29, 2009.

V. Hearing Officer Evaluation of the Evidence

A. Criteria H and J

The DOE psychiatrist's diagnosis that the individual suffers from alcohol abuse is not disputed. He reached this diagnosis in his evaluation report in February 2009, and reasserted that opinion at the hearing six months later. At the hearing, the individual acknowledged that he suffers from alcohol abuse, and the record demonstrates that his behavior since early 2009 comports with a recognition and acceptance of this diagnosis. The issue, then, is whether the individual has mitigated the security concerns that the LSO has identified as arising from this mental condition.

An individual who is diagnosed with alcohol abuse may mitigate the security concerns raised by the condition through a demonstration of rehabilitation or reformation. Rehabilitation from alcohol abuse includes participation in a counseling or treatment program and a modification or elimination of alcohol consumption. Reformation from alcohol abuse includes acknowledgment of alcohol issues and the establishment of a pattern of responsible alcohol use. *See* Adjudicative Guidelines at Guideline G, ¶ 23(b), (c), (d). Mitigation may also be shown by demonstrating that "so much time has passed, or the behavior was so infrequent, or it happened under such unusual circumstances that it is unlikely to recur or does not cast doubt on the individual's current reliability, trustworthiness, or good judgment." *Id.* at ¶ 23(a).

At the hearing, the individual addressed his motivation for addressing his alcohol problem. He testified that a state law makes a third DWI conviction a felony, with a mandatory jail term of 30 days. *Tr.* at 49, 56. Such a disincentive is powerful: "[I]t's just not worth it. . . . I'm wanting to move on with my life . . . and I want to keep my job – and some day I want to get married, and I want to have kids, and . . . alcohol can't be a part of that." *Id.* at 56. In addition, his current employment is important to him, and he is not willing to place it in jeopardy. *Id.* at 21 (testimony of girlfriend). Although two DWIs did not convince him that he had a drinking problem, it appears that questions asked during his January 2009 PSI brought the serious nature of this problem to his attention. *Id.* at 49. Moreover, his evaluation with the DOE psychiatrist "really opened my eyes . . . and made me see that this is not the path I want to take with my health." *Id.* at 50. The DOE psychiatrist testified that, regardless whether the individual's motivation was based on fear of job security or future health, the individual was at low risk of relapse. *Id.* at 85. By the time of the hearing, he had abstained from alcohol for seven months, had been attending AA regularly, had good support from his girlfriend and, most important, had demonstrated, to the satisfaction of the DOE psychiatrist, that he had taken responsibility for and accepted that he suffers from alcohol abuse.

As discussed above, the DOE psychiatrist expressed his optimism at the hearing that the individual will not relapse and his personal opinion that the individual was a "reasonable" risk for the DOE. After reviewing a post-hearing submission that responded favorably to the DOE psychiatrist's lingering concerns, the DOE psychiatrist then changed his opinion, despite having stated at the hearing that his opinion would not change, even if the individual failed to provide the requested submission. His latest statement indicates that his optimism has waned, and he will not state that the individual has achieved rehabilitation or reformation, because he has not been sober for a full year. Whereas the testimony of an expert witness is generally accorded deference when considering the totality of the evidence, I am unable to assign much weight to

the DOE psychiatrist's opinion in this case because of the inconsistent positions he has taken. Although the DOE psychiatrist was valuable in eliciting insightful testimony from the individual, his conflicting conclusions offer me little reliable expert opinion concerning whether the individual has successfully mitigated the LSO's security concerns arising from his mental health condition. The DOE psychiatrist's wavering opinion does indicate to me, however, that he retains some doubt regarding the individual's risk of relapse, despite the individual's laudable efforts over the past seven months. From a common-sense perspective, I have reservations as well about the individual's risk of relapse, based on the difficulty the individual faced in recognizing his alcohol problem coupled with the relatively short duration of his new pattern of healthy behavior.

The DOE regulations governing this proceeding instruct me to resolve any doubt as to the individual's access authorization eligibility in favor of national security. 10 C.F.R. § 710.7(a). The DOE psychiatrist's doubt, in conjunction with my own, leads me to conclude that the individual has not demonstrated adequate evidence of reformation or rehabilitation from his alcohol abuse. Consequently, I must conclude that the individual has not mitigated the security concerns associated with his alcohol abuse under Criteria H and J.

B. Criterion L: Honesty, Reliability and Trustworthiness

The security concerns that fall within Criterion L and Guideline E are distinct from those discussed above. They relate to behaviors that reflect, in this case, questionable judgment and lack of reliability. Nevertheless, the derogatory information that forms the bases for the LSO's concerns under Criterion L arise from the same set of facts as that underlying the Criteria H and J concerns: driving while intoxicated, which led to other motor vehicle infractions, and failing to recognize an alcohol problem, even after two DWI arrests. No evidence was presented that the individual's judgment is impaired in any other aspect of his life, including his employment. After considering the full record in this case, it is my opinion that the individual's poor judgment is one product of his alcohol abuse. Thus, if I had determined above that the individual had successfully mitigated the LSO's security concerns arising from his alcohol abuse through rehabilitation or reformation, then I would also find that the poor judgment he employed in the past was also mitigated. In this case, however, the doubt that remains concerning the individual's alcohol abuse, despite his admirable progress toward recovery, also attaches to his judgment and reliability until such time as he may be considered rehabilitated or reformed from his alcohol abuse, or has otherwise mitigated the LSO's concerns under Criteria H and J. Consequently, I cannot conclude that the individual has mitigated the LSO's concerns regarding his poor judgment and reliability.

VI. Conclusion

As explained in this Decision, I find that the LSO properly invoked 10 C.F.R. § 710.8(h), (j), and (l) in suspending the individual's access authorization on the basis of derogatory information it received regarding the individual. For the reasons I have described above, I find that the individual has not sufficiently mitigated the security concerns raised in this case. I therefore cannot find that restoring the individual's access authorization would not endanger the common defense and security and would be consistent with the national interest. Accordingly, I have

determined that the individual's access authorization should not be restored. The individual may seek review of this Decision by an Appeal Panel under the regulations set forth at 10 C.F.R. § 710.28.

William M. Schwartz
Hearing Officer
Office of Hearings and Appeals

Date: October 29, 2009