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November 19, 2009

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Hearing Officer's Decision

Case Name: Personnel Security Hearing

Filing Date: June 23, 2009

Case Number: TSO-0773

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 as Alcohol Dependent or as suffering from Alcohol Abuse. 10 C.F.R. § 710.8(j). The LSO alleges that:

- 1) In 1977, the individual was arrested for Driving While Intoxicated (DWI);
- 2) In 1987, the individual was arrested for DWI;
- 3) In 1995, the individual was charged with Battery;
- 4) During a background investigation, three neighbors reported that the individual can be belligerent, sometimes appears to be drunk, and has made threats of violence. The neighbors also reported that the individual started a fire while welding in his yard. The individual was intoxicated, and the fire spread to nearby properties;

- 5) At a May 2008 Personnel Security Interview (PSI), the individual admitted that he had consumed alcohol prior to the 1995 charge for Battery;
- 6) At the May 2008 PSI, the individual admitted that he continues to drink and that in an hour he drinks between one and three beers;
- 7) In January 2009, a DOE-consultant psychologist diagnosed the individual with Alcohol Abuse. He stated that the individual has a long history of Alcohol Abuse, and that he is a functioning abuser who associates with other abusers. The DOE-consultant psychologist opined that in order to remediate his Alcohol Abuse, the individual must attend an intensive outpatient program and address his denial and minimization of his condition; and
- 8) During the individual's interview with the DOE-consultant psychologist, the individual admitted that he sometimes drives his tractor and bushhog at night after drinking.

DOE Exh. 2 (Notification Letter and Statement of Charges, May 20, 2009).

At the hearing, the individual stated that he does not dispute the truth of the allegations in the Statement of Charges, except that (i) he no longer suffers from Alcohol Abuse; (ii) he does not drive his equipment late at night after consuming alcohol; and (iii) while intoxicated he did not become belligerent, threaten his neighbors, or start a fire that spread to his neighbor's property. Tr. at 8-9.

II. Summary of Hearing Testimony

A. The Individual

The individual testified that he sometimes drinks beer. (He does not drink other alcohol.) *Id.* at 33. He does not drink to get intoxicated. *Id.* at 96. He usually drinks "one or two." *Id.* at 34. At a "lengthy" social gathering, he may drink six to eight. (The last time he did so was at a New Year's party to celebrate the arrival of 2007. *Id.* at 38.) If he drinks more than two, someone else drives. *See id.* at 34. He cannot recall the last time he was intoxicated. *Id.* at 96-97. He may drink "several days in a row" or not for "months." In 2009, he had not had anything to drink from January to August. *Id.* at 98.

The individual mows more than 15 acres. *Id.* at 39-40. Because he cannot mow it all during the day, he sometimes mows after dark. *Id.* at 40-41. He purchased headlights for his tractor so that he could do so. *Id.* at 41. He has never driven his tractor while intoxicated. *Id.* at 51, 109-110. (He had told the DOE-consultant psychologist that he drives the tractor after drinking a beer. But he did not mean to indicate that he drives the tractor while impaired. *Id.* at 64.)

In 1995, the individual had a fire in his yard. *Id.* at 51, 55. He had been welding. A spark lit up some leaves. The wind spread the fire to his neighbor's field while he tried to

put it out. *Id.* at 52. The fire singed his hair, and the smoke reddened his eyes. *Id.* at 54. Although his neighbors may have assumed that he had been drinking, he did not drink before he began welding or while he was welding. *Id.* at 53, 54.

The individual shares a property line with the neighbor on his north side. *Id.* at 48. The neighbor on his north moved there in 2007. *Id.* at 56. They have a history of enmity rooted in the neighbor on his north damaging the individual's property. *Id.* at 57-61, 83-84. (He does not have a dispute with any other neighbor. *Id.* at 107.) The neighbor on his north did not witness the 1995 fire, and the neighbor falsely told the OPM investigator that the individual had been drinking at the time of the fire. *Id.* at 56. The neighbor on his north has a reputation for untruthfulness. The individual has not threatened him. *Id.* at 60.

In 1995, the individual was on an airplane. He tripped and fell onto a nearby passenger. *Id.* at 76. When the plane landed, he was arrested for assault. *Id.* at 69. Although he drank between 7 and 9 beers in the 7.5 hours before he got on the airplane, he was not impaired. *Id.* at 70.

After 1987, the individual has not been stopped for driving after drinking. *Id.* at 34-35. After 1988, the individual has not had any physical altercations or arguments after drinking. *Id.* at 36-37. His drinking has never caused domestic violence. His wife and ex-wife have not told him that he drinks too much. *Id.* at 68.

B. The Individual's Wife

The individual's wife testified that she married the individual in 1995. *Id.* at 126. The individual drinks beer, but no other alcohol. *Id.* at 128.

The individual does not have a drinking problem. *Id.* at 127. Since they have been married, she is only aware that he has been intoxicated once. *Id.* at 128. His drinking has never caused problems in their relationship. Nor has the individual consumed alcohol and become violent with her or their child. *Id.* at 127. He does not drink and then drive an automobile or his tractor. *Id.* at 131, 133.

The individual has never mistreated their neighbors. *Id.* at 129. He has conflicts with one neighbor. Drinking does not contribute to the conflicts. *Id.* at 129. The neighbor lied to the police – he told them that the individual had threatened him in order to have the individual arrested. *Id.* at 132. He does not have a conflict with any other neighbor. *Id.* at 130-31.

C. The Individual's Daughter

The individual's daughter testified that she left home in 1990. *Id.* at 193. She visits him every few weeks. *Id.* at 191.

The individual drinks beer. *Id.* at 185. He does not drink any other alcohol. *Id.* She has never seen him intoxicated. *Id.* at 187. (If he had been intoxicated when she was living

at home, she did not notice; she is not aware that he got a DWI at that time. *Id.* at 186, 191.) She has never seen him drive his tractor while impaired. *Id.* at 188. She has never seen him drive after drinking. Drinking never contributed to domestic arguments. *Id.* She last saw him drink in April 2008. *Id.* at 197.

The individual is a reasonable person who avoids disagreements. *Id.* at 190. He only has conflicts with one neighbor. *Id.* at 195.

D. The Individual's Brother In-Law

The individual's brother in-law testified that he met the individual at work. *Id.* at 177. He later married the sister of the individual's wife. *Id.* He sees the individual once a month. *Id.* at 180.

The individual does not drink more than four or five beers over several hours. *Id.* at 179. The individual's brother in-law has never seen the individual intoxicated. *Id.* Nor did the individual's work performance suffer due to drinking. *Id.* at 177.

E. The Individual's First Neighbor

The individual's first neighbor testified that she has not visited the individual's home or socialized with him. *Id.* at 120. Nor do they speak regularly. *Id.* at 121. She sees him when he mows his property. *Id.* at 122.

The individual's neighbor has not seen the individual and suspected that he had been drinking. *Id.* at 122. Nor is she aware that the individual has an alcohol problem. *Id.* at 119.

The individual's neighbor is not aware that the individual has ever been involved with domestic violence. *Id.* at 113. Nor has she observed or heard of the individual making threats of violence. *Id.* at 117.

The neighbor on the individual's north has a reputation for being "strange." *Id.* at 114, 115. He has been a "nuisance" to the individual and others in the area. *Id.* at 115, 116. The individual does not have a conflict with any other neighbor. *Id.* at 124.

The neighbor does not know whether the individual was drinking at the time of his 1995 fire. He could have been. *Id.* at 121. She does not know if she told an OPM investigator that the individual was drinking and that his drinking may have affected his judgment. *Id.* at 122-23. The neighbors who helped him fight the fire told her that he had been drinking. *Id.* at 124.

F. The Individual's Second Neighbor

The individual's second neighbor testified that for three and a half years, he has lived about a quarter of a mile from the individual. *Id.* at 164, 171. He has never visited the

individual's house, although he sees him at least once a week. *Id.* at 172, 174. They are not friends, but they have a "good relationship." *Id.* at 169. When the individual's second neighbor has needed help with his property, the individual has been courteous and helpful. *Id.* at 169-70. He has not been belligerent. *Id.* at 170.

The individual's second neighbor knows the neighbor on the individual's north. *Id.* at 165. The neighbor on the individual's north behaves erratically. He is unreasonable, "rude," and "not a very nice man." *See id.* at 165-66, 168.

The individual's second neighbor has never seen the individual drink. *Id.* at 174. If the individual ever operated his tractor while intoxicated, he probably would have hurt himself. *Id.* at 170-71.

G. The Individual's Aunt

The individual's aunt testified that she has known the individual his entire life. *Id.* at 144. They visit eight or ten times a year. *See id.* at 162.

The individual's aunt has not seen him drink in about a year. *Id.* at 162. Nor has she seen him drink excessively. *Id.* at 148, 149. He does not drive after drinking. *See id.* at 147.

The individual is not belligerent or mean, although he is "annoyed" with his one neighbor. *Id.* at 149. His neighbor has let his house fall into disrepair, which is an "awful mess" beside the neighbor's "beautiful" yard. *Id.* at 151. When the individual's family has a gathering in their yard, the neighbor tries to stir up dust. *Id.* at 152. He also damaged the individual's fence and tree. *Id.* at 153.

H. The Individual's Psychologist

The individual's psychologist testified that the individual does not meet the DSM-IV-TR¹ criteria for Alcohol Abuse. *Id.* at 202, 206, 215, 217. In order to meet the criteria for Alcohol Abuse, the individual must have a pattern of alcohol-related problems within a 12-month period. *Id.* at 204. First, he has not failed to fulfill a major role obligation at work or at home. *Id.* at 211, 212. Second, he has not used alcohol in situations that are physically hazardous, such as driving or operating heavy machinery. *Id.* at 212. Third, he has not had recurrent alcohol-related legal problems. His last problematic episode with alcohol occurred more than 22 years ago. *Id.* at 202. (Even if the 1995 incident had been alcohol-related, it does not establish a pattern of problems that meet the criteria for an alcohol use disorder. *Id.* at 203.) And his episodes are "discrete incidents across a life span;" not a "pattern." *Id.* at 233. Fourth, he has not continued drinking despite persistent social or interpersonal problems exacerbated by drinking. *Id.* at 213.

¹ AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 198-99, 214 (4th ed., text. rev., 2000).

Because the individual has not had alcohol-related legal trouble in more than 20 years, his risk of relapse is “low.” *Id.* at 231.

When the individual’s psychologist formed her opinion, she did not consider unverifiable third-party statements about the individual’s drinking and conflicts with a neighbor. *Id.* at 207. They are not credible enough to form the basis of a diagnosis. *Id.* at 208. The statements from the neighbor on the individual’s north may be motivated by malice. They also conflict with the results of her evaluation. *Id.* at 214.

I. The DOE-Consultant Psychologist

The DOE-consultant psychologist testified that he diagnosed the individual with Alcohol Abuse because he had a “habitual pattern” of alcohol consumption that resulted in legal trouble and conflict with others. *See id.* at 242, 253.

The individual could not resolve concerns about his drinking with his self-report. *Id.* at 256. The “clinical feel” of the DOE-consultant psychologist’s interview with the individual felt “guarded” and “minimizing.” *Id.* at 244. The results of a personality test showed that the individual is “hypervigilant[t]” and shows a “concern” for “criticism” and “finding fault” with him. *Id.* at 247. The individual tried to externalize responsibility for the consequences of his drinking. *Id.* at 251. He “had the sophistication and motivation to minimize and deny” his alcohol problem. *Id.* at 260.

If the individual and his witnesses “are to be trusted and believed,” the DOE-consultant psychologist would not have diagnosed the individual with Alcohol Abuse. *Id.* at 257, 259, 260. The individual and his witnesses testified that he has moderated his drinking and has good judgment. *Id.* at 257. (Occasional drinking is not evidence of abuse. *Id.* at 256.) Although the individual can be abrasive, they testified that he has developed a “mutual respect” with most of his neighbors. *See id.* at 262. For over 15 years he has been responsible to his family. Based on their testimony, the individual’s risk of relapse would be low. *See id.* at 261.

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).²

² 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. Findings of Fact and Analysis

The LSO's Criterion J security concern stems from the individual's Alcohol Abuse diagnosis. The DOE-consultant psychologist diagnosed the individual with Alcohol Abuse because he had alcohol-related legal trouble, he had operated machinery after drinking, and he had alcohol-related conflicts. Due to the individual's history of drinking, the DOE-consultant psychologist would not accept the individual's self-report that he no longer abused alcohol.

At the hearing, the individual presented witnesses to corroborate that he has established a pattern of responsible drinking. His witnesses also corroborated that he has avoided driving and operating machinery while impaired and that alcohol has not contributed to conflicts with his neighbors. The DOE-consultant psychologist testified that if the individual and his witnesses are credible, then he would agree with the individual's psychologist that he could not have diagnosed the individual with Alcohol Abuse.

I find that the individual and his witnesses are credible. They presented a consistent picture of an individual who has moderated his alcohol use. Two neighbors supported their testimony. The neighbors were persuasive – they have regular contact with the individual, yet they were objective because the individual is not their friend. Because the

individual and his witnesses are credible, I find that the individual does not suffer from Alcohol Abuse.

I also find that the individual's risk of relapse is low. The individual's psychologist testified that to meet the criteria for Alcohol Abuse, the individual must have recurrent alcohol-related problems within a twelve-month period. She testified that because he has not had recurrent alcohol-related legal problems in many years, his risk of relapse is low. The DOE-consultant psychologist agreed that his risk of relapse is low for this reason and because he has been dedicated to his family for 15 years.

Finally, under the Adjudicatory Guidelines, the individual has resolved the Criterion J security concern associated with his problematic use of alcohol in 1995. The guidelines list "conditions" that could mitigate an allegation of excessive alcohol use. *See* STEPHEN J. HADLEY, THE WHITE HOUSE, ADJUDICATIVE GUIDELINES FOR DETERMINING ELIGIBILITY FOR ACCESS TO CLASSIFIED INFORMATION 11 (1995). They include, "(a) so much time has passed . . . that [the behavior] is unlikely to recur or does not cast doubt on the individual's current reliability, trustworthiness, or good judgment; [and] (b) the individual . . . has established a pattern of . . . responsible use. . . ." *Id.*

Assuming that the individual's 1995 arrest for assault and his 1995 brush fire were alcohol-related, they were the individual's last alcohol-related trouble. The individual testified that he has since established a 14-year pattern of responsible alcohol use, and his witnesses corroborated that he has done so. Because the individual has avoided alcohol-related trouble for 14 years, a sufficient period of time has passed for me to conclude that his risk of relapse is low and that his unreliable behavior is unlikely to recur.

V. Conclusion

Because the individual has resolved the LSO's Criterion J security concern, 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: November 19, 2009