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December 31, 2009

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Hearing Officer's Decision

Name of Case: Personnel Security Hearing

Date of Filing: August 20, 2009

Case Number: TSO-0808

This Decision considers the eligibility of XXXXXXX XXXXXXX (hereinafter referred to as "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 explained below, it is my decision that the individual should not be granted an access authorization at this time. 1/

I. *BACKGROUND*

The individual has worked for Department of Energy (DOE) contractors since 2003, and has worked for his current DOE contractor employer since May 2007. The individual's employer requested that he be granted an access authorization and in September 2007, the individual submitted a Questionnaire for

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1/ Decisions issued by the Office of Hearings and Appeals (OHA), with names and other personal identifying information deleted, 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 at http://www.oha.doe.gov/search.htm .

National Security Positions (the 2007 QNSP) to the DOE. Based on information reported on the 2007 QNSP, the DOE conducted a Personnel Security Interview with the individual in May 2008 (the 2008 PSI). In addition, the individual was evaluated in January 2009 by a DOE-consultant psychologist (the DOE-consultant Psychologist), who issued a Psychological Evaluation Report (the Report) containing his conclusions and observations.

In July 2009, the Manager of the DOE area office where the individual is employed (the Manager) issued a Notification Letter to the individual. Enclosure 1 to this letter, which is entitled "Information Creating a Substantial Doubt Regarding Eligibility for Access Authorization," states that the individual's behavior has raised security concerns under 10 C.F.R. § 710.8(f), (h), (j), (k) and (l) of the regulations governing eligibility for access to classified material (Criteria F, H, J, K and L).

With respect to Criterion F, Enclosure 1 identifies information indicating that the individual deliberately misrepresented, falsified, or omitted significant information from a 2003 QNSP when he failed to list several medications that he had been prescribed for depression, and when he expressed confusion at his 2008 PSI after he was asked when he last used illegal drugs.

The Notification Letter next finds that in January 2009, the DOE-consultant Psychologist opined that the individual suffers from a social anxiety disorder and major depression, recurrent severe, and is credibly diagnosed with substance abuse and alcohol dependence (Criterion J). He concluded that these conditions cause or may cause a significant defect in judgment or reliability (Criterion H). 2/

The Notification Letter also finds that in 2004, the individual tested positive for Benzodiazepines, specifically linked to a sedative, but denied illegal drug use. At a subsequent 2004 PSI, the individual admitted to using cocaine and a friend's prescription sedative immediately prior to this drug test. The Notification Letter concludes that the individual's positive drug

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2/ In his Report, the DOE-consultant Psychologist recommended that the individual abstain from drugs and alcohol, attend an intensive outpatient program transitioning to regular Alcoholics Anonymous (AA) meetings and working with an AA sponsor. He also recommended that the individual be in psychotherapy with goals to develop alternative ways to manage his anxiety and depression. Report at 13-14.

test and admissions raise a concern about illegal drug use. (Criterion K).

Finally, the Notification Letter finds that the individual's conduct in not providing accurate and complete information to the DOE about his admitted use of illegal drugs raises concerns about unusual conduct and honesty. (Criterion L).

Enclosure 2 to July 2009 Notification Letter, *citing* 2008 PSI and 2008 Psychological Evaluation Report.

II. *THE NOVEMBER 2009 HEARING*

On July 28, 2009, the individual requested a hearing (hereinafter "the hearing") to respond to the concerns raised in the Notification Letter. At that time, he asserted that he has not intentionally lied to the DOE about anything, but his social anxiety makes him uncomfortable and affects his ability to function in interview situations. He also stated that he has made numerous bad decisions earlier in his life by taking or discontinuing medications without medical advice, but that his social anxiety issues made him hesitant to seek help from others. He stated that he has now established his own, supportive family and has strong relations with his co-workers. Finally, he expressed a willingness to undertake counseling or a step program "if that is what is recommended." July 28, 2009, letter from the individual to the Manager of Personnel Security at his DOE regional office. At a September 10, 2009, conference call in this proceeding, the individual stated that he intended to immediately enter alcohol treatment in order to address some of the DOE's concerns.

At the hearing convened in this matter in November 2009, testimony was received from nine persons. The DOE presented the testimony of the DOE-consultant Psychologist. The individual, who was not represented by counsel, testified and presented the testimony of his substance abuse counselor (the individual's counselor), his wife, his father, his mother, his supervisor, and a co-worker.

III. *APPLICABLE STANDARDS*

A DOE administrative review proceeding under this Part is not a criminal case, in which the burden is on the government to prove the defendant guilty beyond a reasonable doubt. In this type of case, we apply a different standard, which is designed to protect national security interests. A hearing is "for the purpose of affording the individual an opportunity of supporting his eligibility for access authorization." 10 C.F.R. § 710.21(b)(6).

The burden is on the individual to come forward at the hearing with evidence to convince the DOE that granting or restoring his access authorization "would not endanger the common defense and security and would be clearly consistent with the national interest." 10 C.F.R. § 710.27(d).

This standard implies that there is a presumption against granting or restoring of a security clearance. *See Department of Navy v. Egan*, 484 U.S. 518, 531 (1988) (the "clearly consistent with the interests of national security test" for the granting of security clearances indicates "that security determinations should err, if they must, on the side of denials"); *Dorfmont v. Brown*, 913 F.2d 1399, 1403 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991) (strong presumption against the issuance of a security clearance). Consequently, it is necessary and appropriate to place the burden of persuasion on the individual in cases involving national security issues. *Personnel Security Hearing*, Case No. VSO-0002 (1995).

Once a security concern has been found to exist, the individual has the burden of going forward with evidence to rebut, refute, explain, extenuate or mitigate the allegations. *Personnel Security Hearing*, Case No. VSO-0005 (1995), *aff'd*, Case No. VSA-0005 (1995). *See also* 10 C.F.R. § 710.7(c).

IV. *ANALYSIS*

The testimony at the hearing focused on the individual's recent efforts to abstain from alcohol and to participate in recovery activities. In this regard, testimony focused on the length of time in recovery necessary for this individual to establish that he is at low risk for relapsing into the misuse of alcohol. As the medical experts viewed the individual's recovery activities as impacting and potentially mitigating the DOE's criteria F, K and L concerns, I will begin my analysis with a discussion of the individual's alcohol rehabilitation activities and the treatment of his mental conditions.

A. *The DOE's Criteria H and J Concerns*

In his testimony at the hearing, the individual stated he now recognizes that he has a problem with alcohol and needs assistance to stop drinking over the long term. TR at 115. He testified that he tended to consume alcohol at home by himself, and that he would drink more than he intended. He stated that he believes that the DOE-consultant Psychologist's Report is accurate, and that he

intends to do his best to abstain from alcohol. TR at 115. 3/ He stated that his first session with his counselor was on September 22, 2009, that they have now had five or six sessions, and that he intends to consult with him on a weekly basis for as long as his counselor believes that it is necessary. TR at 113-114, 127. He testified that the counselor has directed him to join Alcoholics Anonymous (AA), and advised him to attend 90 meetings in 90 days. The individual stated that the first week or two, he "eased into" the AA program, but that he now is trying to attend AA meetings five times a week, and is studying the "Big Book" of AA. He stated that his wife has been very supportive about his frequent attendance at evening AA meetings. He stated that he now is "warming up" to the meetings and now talks to a few of the participants after the meetings. He stated that he has not yet picked an AA sponsor. TR at 130-136.

The individual testified that going to AA meetings and trying to quit drinking have made him realize how much of an problem he has had. TR at 130. He testified that the effort needed for him to abstain from alcohol caught him by surprise, and that weekends are the most difficult because he used to consume beer while he watched football on television. TR at 131. He stated that he began to abstain in late September, but had a slip-up, and that his sobriety date is now October 23, 2009. TR at 137.

At the hearing, the individual testified that he would begin to maintain a written record to verify his attendance at AA meetings. TR at 170-171. In a post-hearing FAX submitted by the individual on November 18, 2009, an attendance sheet indicates that the individual attended seven AA meetings during the ten-day period from November 8 through November 17, 2009.

The individual's counselor testified that he agreed with the DOE-consultant Psychologist that the individual suffers from social anxiety disorder, recurrent depression, and alcohol dependence. He also agreed with recommendations in the DOE-consultant Psychologist's report that the individual needs to maintain abstinence from alcohol, be actively involved in AA, and receive on-going counseling to address his anxiety and depression. TR at 36-37. He stated that he has told the individual that he should view his AA involvement and sobriety as a one or two year process,

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3/ The individual testified that he did not receive the DOE-consultant Psychologist's Report until after he decided during the September 10, 2009, telephone conference call in this proceeding to seek treatment for his alcohol problem. TR at 140.

and that he and the individual should meet weekly to deal with his depression, anxiety and social discomfort. TR at 39-40. He testified that the individual seems to be willing to do the best he can under the circumstances to engage in AA and counseling. He stated that the individual is not taking medication for his depression and anxiety, and that it may not be necessary for him to receive medication if his abstinence and his counseling improves his mood. He stated that he would reassess the need for medication after sixty days. TR at 42-43.

In the administrative review process, it is the Hearing Officer who has the responsibility for deciding whether an individual with alcohol problems has established rehabilitation or reformation. *See* 10 C.F.R. § 710.27. The DOE does not have a set policy on what constitutes rehabilitation and reformation from alcohol diagnoses, but instead makes a case-by-case determination based on the available evidence. Hearing Officers properly give a great deal of deference to the expert opinions of psychologists and other mental health professionals regarding the likelihood of relapse. *See, e.g., Personnel Security Hearing,* Case No. VSO-0027 (1995) (finding of rehabilitation); *Personnel Security Hearing,* Case No. VSO-0015 (1995) (finding of no established rehabilitation).

As an initial matter, I find that the testimony and evidence presented at the hearing provides sufficient corroborative support for the individual's assertion that he has been abstinent from alcohol since October 23, 2009, less than two weeks prior to the hearing, and currently is participating in rehabilitation activities. The individual's wife testified that the individual is seeing his counselor weekly, is attending AA meetings, and has abstained from alcohol for about three weeks. TR at 17, 29-31. His counselor also testified that the individual reported to him that he is maintaining abstinence and attending AA meetings. TR at 40-42, 58-59. The individual's parents and his supervisor also testified that the individual has told them that he is attending AA meetings and abstaining from alcohol. TR at 92, 105, 73.

However, I find that the individual has not completed all of the steps necessary achieve rehabilitation. At the hearing, the individual's counselor testified that he would need to counsel the individual for at least six months before he could assess when the individual would be at a low risk for relapse into alcohol dependence. He stated that six months of dedicated involvement in AA and counseling would confirm that the individual will move forward in a positive direction. TR at 55-57.

After hearing the testimony of the individual and his witnesses, DOE-consultant Psychologist testified that he is quite hopeful for the individual because he appears to be sincerely and credibly starting off the right way with his recovery, and is reporting the experiences with recovery that you would expect from someone being honest and truthful. TR at 145. He stated that the treatment program described by the individual's counselor fully meets the recommendations made in his Report. TR at 150. He testified that if this individual maintains his abstinence recovery activities for six months, that will be "a good benchmark" for assessing whether the individual has the commitment to achieve long-term sobriety. TR at 154-155. He stated that the individual currently is in "early, partial" remission from alcohol dependence due to his recent relapse, but that if he maintains his sobriety for six more months, he will achieve "sustained remission" from alcohol dependence. TR at 157-158.

I agree with the conclusion of these two medical professionals that the individual has made a good start on his recovery program. My positive assessment of the individual's demeanor and of the evidence presented at the hearing convince me that the individual is committed to his ongoing sobriety, and that he has begun the process of developing the personal skills and support network necessary to maintain his sobriety and to avoid relapses. However, as of the date of the hearing, the individual had completed only five weekly counseling sessions, less than a month of attendance at AA meetings, and less than two weeks of sustained abstinence. Clearly, this brief period of abstinence and rehabilitation activity is not sufficient to place the individual at a low risk of relapse into alcohol misuse. Both medical professionals agreed that the individual must maintain abstinence and participate in recovery activities for at least six months before they could assess him to be at low risk for relapse. I therefore conclude that the individual has not yet established rehabilitation and reformation from his alcohol dependence.

With regard to the DOE-consultant Psychologist's diagnoses of social anxiety disorder, and major depression, recurrent severe (Criterion H), I find that the DOE-consultant Psychologist testified that he approved of the individual's counselor's approach in treating those conditions. That approach involved assessing the need for medication after the individual has been abstinent from alcohol for sixty days. Accordingly, the individual has not yet established that these conditions are in remission and will not be likely to affect his judgment and reliability. I therefore conclude that the individual has not mitigated the DOE's Criterion H and J concerns.

B. *The DOE's Criterion K Concerns*

As discussed above, the Notification Letter finds that in 2004, the individual tested positive for benzodiazepines, specifically linked to a sedative, but denied illegal drug use. At his 2004 PSI, the interviewer told the individual that he had tested positive for oxazepam, which is a form of benzodiazepine. 2004 PSI transcript at 12. At the hearing, the individual testified that he had not ever heard of oxazepam and cannot provide any explanation about it. TR at 116. 4/

At his 2004 PSI, the individual was told that he had tested positive for controlled substances, and he admitted to taking two Lortabs three or four days before his drug test, and to using cocaine the weekend prior to his drug test. 2004 PSI at 11-13. 5/ At the hearing, the individual testified that in 2004, he was helping his ex-girlfriend move out of his house, and hurt his back moving furniture. He stated that he took some Lortab prescription pain reliever that his ex-girlfriend offered to him. He stated that he has had his own prescription for Lortabs "a couple of times", so he "just didn't think anything of it" to take the Lortabs. While he admitted that he had no prescription for the Lortabs that he consumed prior to the 2004 drug test, he asserted that he has not taken prescription medication prescribed for others either before or since this one incident. TR at 116.

The individual testified that his use of cocaine at a bar in 2004 was an isolated event. He stated that he was making an effort to overcome his social anxiety disorder by going out to a bar and being sociable. He testified that he had just ended a five-year relationship with his ex-girlfriend and helped her move out, and he did not want to sit at home alone. He stated that he only went to the bar a few times, and he only tried cocaine once. He stated that this incident occurred before he met his wife. TR at 110-112, 115-117. His wife testified that she has never known the

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4/ Oxazepam is a benzodiazepine that is the active ingredient in Serax, a medication used to treat anxiety and alcohol withdrawal. The record in this proceeding does not indicate that the individual ever was questioned by the DOE concerning whether he had a prescription for Serax prior to the 2004 drug test.

5/ Lortab is a prescription pain medication that is comprised of the narcotic pain reliever hydrocodone and the over-the-counter painkiller acetaminophen.

individual to use illegal drugs or to misuse prescription drugs. TR at 20.

The individual's counselor testified that he does not believe that the individual's personality type would lead to an affinity for cocaine, and believes that his use was probably a one-time event. TR at 53. The DOE-consultant Psychologist stated that the individual had described to him the experience of someone who had used cocaine and had a dreadful experience with it. He stated that he has heard this narrative from several people who experimented with cocaine on one occasion, and he has no information that would lead him to doubt that the individual is being factual about a one-time use. TR at 167.

At the hearing, the individual provided copies of the results of two random drug screenings conducted by his employer on May 23, 2007 and March 9, 2009. The individual tested negative for marijuana, cocaine, amphetamines, opiates and PCP on both of these tests. Individual's Hearing Exhibits 1 and 2. In a post-hearing submission, the individual forwarded an email from the drug testing company used by his employer, indicating that they would create for the individual a series of six to ten random tests for drugs and alcohol over the six-month period from November 18, 2009 through May 18, 2010. *See* November 18, 2009 email from the individual to the Hearing Officer and the DOE Counsel.

I find that the individual's negative drug screens in May 2007 and March 2009 provide some support for his assertion that he has not used illegal drugs or misused prescription drugs since his use of a friend's Lortabs and a single use of cocaine in 2004. The testimony of his counselor and the DOE-consultant Psychologist also support his contention that his experimental use of cocaine in 2004 was a one-time event.

However, in light of the individual's serious problem with alcohol, and his other diagnoses that could affect his judgment and reliability, I believe that it would be premature to find that the individual can be relied upon to exercise good judgment in abstaining from illegal drugs or the misuse of prescription medications. The individual recently entered into a counseling relationship aimed at addressing his social anxiety and depression. A favorable prognosis by his counselor that his alcohol and mood affect disorders are being treated effectively and at low risk for recurrence is needed before I could conclude that the individual is at low risk for experimenting with illegal drugs or misusing

prescription drugs. Accordingly, I find that the individual has not yet mitigated the DOE's Criterion K concerns. 6/

C. *The DOE's Criterion F Concerns*

In the Notification Letter, the DOE finds that the individual received medication for depression from his doctor beginning in 2001, but that he failed to report this information on his 2003 QNSP. The individual testified that he did not purposely try to omit information from the QNSP. TR at 123. He stated that he answered "no" to Question 21 on the 2003 QNSP that asked if he had consulted with a "mental health professional (psychiatrist, psychologist, counselor, etc.)" because he was prescribed anti-depressants by his general practitioner. TR at 125. He stated that he first consulted with mental health counselors in about 2004. TR at 126.

I find that the individual made an understandable error when he interpreted this question to be asking about consultations with psychiatrists, psychologists or counselors rather than being prescribed anti-depressants by his general practitioner. I conclude that the individual did not deliberately intend to deceive the DOE when he answered "no" to this question.

The Notification Letter finds that at his 2008 PSI, the individual was evasive in explaining his decision to stop taking prescribed anti-depressant medication while working at a remote location in 2006, and that he appeared "scattered in his thought processes" when questioned about his past use of illegal drugs or misuse of prescription drugs. *See* Enclosure 1 to Notification Letter. The individual testified that his answers at his 2008 PSI were vague and sometimes unresponsive, but that he was not deliberately seeking to mislead the DOE. He stated that he was in a highly nervous state due to his social anxiety disorder, and it was difficult for him to concentrate and to respond appropriately during the interview. At the hearing, the DOE-consultant Psychologist stated that he believed that the individual's vagueness during his 2008 PSI was a result of his extreme social anxiety. He stated that in reading the interview, he believes that the individual was too frightened to provide effective answers, and that he was not dissembling or prevaricating. He stated that the

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6/ *See* Adjudicative Guidelines for Determining Eligibility for Access to Classified Information, Guideline H, Paragraph 26(d) at http://www.archives.gov/isoo/pdf/hadley-adjudicative-guidelines.pdf (December 29, 2005)

individual was uncharacteristically honest on his psychological testing, and the individual was "pretty straightforward" during their January 2009 interview. TR at 164-165. The individual's counselor testified that it is common for people falling into chemical dependency or substance dependency to rationalize or minimize drug or alcohol use at first as an ego defense mechanism, and to become more responsive as they recognize their problem. He stated that in their counseling sessions, the individual has been pretty straightforward in acknowledging his substance abuse problem and his need to address it. TR at 51-52.

Based on the medical experts' testimony, I find that the individual's vague and conflicting responses at the 2008 PSI were not deliberate, but were the result of his mental conditions and his alcohol dependency. Accordingly, I conclude that the individual has mitigated the DOE's Criterion F concerns that he deliberately falsified or provided them with misleading information in his 2003 QNSP and at his 2008 PSI.

D. *The DOE's Criterion L Concerns*

As noted above, the Notification Letter finds that the individual's conduct in not providing accurate and complete information to the DOE about his admitted use of illegal drugs raises concerns about unusual conduct and dishonesty. As discussed above, I have concluded that the individual did not deliberately lie to the DOE when he failed to provide it with accurate and complete information concerning his misuse of drugs. However, the individual has not yet mitigated the DOE's concern that his judgment and reliability will not be impaired in the future by a recurrence of alcoholism, or depression, or that his social anxiety will permit him to provide accurate and complete information during an interview. Accordingly, until these concerns have been mitigated, I find that the individual has not mitigated the concern that he may be unreliable or engage in unusual conduct in the future.

V. *CONCLUSION*

For the reasons set forth above, I find that the individual suffers from social anxiety disorder and major depression subject to Criterion H, and alcohol dependence subject to Criteria H and J; has misused prescription and illegal drugs subject to Criterion K; and has engaged in unusual conduct under Criterion L. Further, I find that the derogatory information under Criteria H, J, K and L has not yet been mitigated by sufficient evidence of rehabilitation and reformation. I do find that the individual has mitigated the DOE's Criterion F concerns. Accordingly, after considering all of

the relevant information, favorable or unfavorable, in a comprehensive and common-sense manner, I conclude that the individual has not demonstrated that granting him an access authorization would not endanger the common defense and would be clearly consistent with the national interest. It therefore is my conclusion that the individual should not be granted an access authorization. The individual or the DOE may seek review of this Decision by an Appeal Panel under the regulation set forth at 10 C.F.R. § 710.28.

Kent S. Woods
Hearing Officer
Office of Hearings and Appeals

Date: December 31, 2009