

* The original of this document contains information which is subject to withholding from disclosure under 5 U.S.C. 552. Such material has been deleted from this copy and replaced with XXXXXXXX's.

October 22, 2002
DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Hearing Officer's Decision

Name of Case: Personnel Security Hearing

Date of Filing: June 4, 2002

Case Number: VSO-0548

This Decision concerns the eligibility of xxxxxxxxxxxxxx (hereinafter "the individual") for continued access authorization. The regulations governing the individual's eligibility are set forth at 10 C.F.R. Part 710, "Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material." This Decision will consider whether, based on the testimony and other evidence presented in this proceeding, the individual's suspended access authorization should be restored. For the reasons detailed below, it is my decision that the individual's access authorization should not be restored.

I. BACKGROUND

In May 2002, the Manager of a Department of Energy (DOE) Operations Office issued a Notification Letter to the individual, stating that the DOE was in possession of derogatory information that created a substantial doubt concerning his continued eligibility for access authorization. In the Notification Letter the Operations Office also informed the individual that he was entitled to a hearing before a Hearing Officer in order to respond to the information contained in the Notification Letter. The individual requested a hearing in this matter and the Operations Office forwarded this request to the Office of Hearings and Appeals. I was appointed to serve as the Hearing Officer. In accordance with 10 C.F.R. § 710.25(e) and (g), I convened a hearing in this matter (the hearing).

In the Notification Letter, the Operations Office indicates that the individual has been "a user of alcohol habitually to excess, or

has been diagnosed by a board-certified psychiatrist . . . as alcohol dependent . . . " 10 C.F.R. § 710.8(j) (hereinafter Criterion J). In addition the Notification Letter indicated a Criterion F and a Criterion L concern. Those concerns were based the individual's statements regarding his level of consumption of alcohol and his intentions regarding his future consumption of alcohol. At the hearing the DOE counsel indicated that the DOE was withdrawing the Criterion F and L concerns. I granted her request to withdraw those concerns based on my belief the concerns were primarily based on behavior that is properly a security concern under Criterion J. 1/

The Notification Letter cited a DOE consulting psychiatrist's report issued on September 27, 2001. In that report the DOE consulting psychiatrist found that the individual was alcohol dependent. The Notification Letter also referred to a May 25, 1993 psychiatric report issued by a prior DOE consulting psychiatrist (hereinafter the first DOE consulting psychiatrist). In that report the first DOE consulting psychiatrist found that the

1/ There were some overstatements in the Notification Letter regarding the basis for Criterion F (falsification) and L (unusual behavior) concerns. For instance item number 1 under the falsification section and item number 14 under the unusual behavior section indicated that during personnel security interviews held in 2000 and 2001 the individual failed to disclose an increase in alcohol consumption in 1997. The Notification Letter specified that during the psychiatric evaluation the individual "described a period of increased alcohol use after the 1997 divorce." There are no specific cites to support this statement. However after reviewing the record, I am convinced that the basis for this statement is the consulting psychiatrist's report that indicates the individual stated that he consumed two to three six packs of beer per week and 18-24 glasses of wine per week during 1997. Undated report of September 27, 2001 psychiatric evaluation at 2. The record is clear that during several PSIs the individual reported since 1997 he has consumed two to three six packs of per week or 18-24 glasses of wine per week. I believe the Notification Letter used the discrepancy between the psychiatric report's statement which used an "and" and the PSI use of an "or" as the basis for a finding that during the PSIs the individual under-reported his alcohol consumption in 1997. The Notification Letter should have been more specific in pointing out the basis for its conclusion.

individual was alcohol dependent in 1990 and that his dependence was in remission. The record in this case also indicates that the first DOE consulting psychiatrist performed a second evaluation of the individual during the year 2000. In the report of that evaluation the first DOE consulting psychiatrist again determined that the individual was alcohol dependent.

Finally the Notification Letter indicates that during the individual's personnel security interviews (PSI) the individual described periods during which he used alcohol habitually to excess. Specifically the Notification Letter refers to the individual's consumption during his service in the military, after his six-month marriage in 1989 and during a three-month period of back pain in 2000.

II. REGULATORY STANDARD

In order to frame my analysis, I believe that it will be useful to discuss briefly the respective requirements imposed by 10 C.F.R. Part 710 upon the individual and the Hearing Officer. As discussed below, once a security concern has been raised, Part 710 clearly places upon the individual the responsibility to bring forth persuasive evidence concerning his eligibility for access authorization, and requires the Hearing Officer to base all findings relevant to this eligibility upon a convincing level of evidence. 10 C.F.R. §§ 710.21(b)(6), 710.27(b), (c), (d).

A. *The Individual's Burden of Proof*

It is important to bear in mind that a DOE administrative review proceeding under this Part is not a criminal matter, where the government would have the burden of proving the defendant guilty beyond a reasonable doubt. Once a security concern has been raised, the standard in this proceeding places the burden of proof on the individual. It is designed to protect national security interests. The 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 individual must come forward at the hearing with evidence to convince the DOE that restoring his access authorization "would not endanger the common defense and security and would be clearly consistent with the national interest."

This is not an easy evidentiary burden for the individual to sustain. The regulatory standard implies that there is a presumption against granting or restoring an access authorization.

See *Department of Navy v. Egan*, 484 U.S. 518, 531 (1988) ("clearly consistent with the national interest" standard for the granting of access authorizations 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 an access authorization). Consequently, it is necessary and appropriate to place the burden of persuasion on the individual in cases involving national security issues. In addition to his own testimony, the individual in these cases is generally expected to bring forward witness testimony and/or other evidence which, taken together, is sufficient to persuade the Hearing Officer that restoring access authorization is clearly consistent with the national interest. *Personnel Security Hearing (Case No. VSO-0002)*, 24 DOE ¶ 82,752 (1995).

B. Basis for the Hearing Officer's Decision

In personnel security cases under Part 710, it is my role as the Hearing Officer to issue a Decision as to whether granting an 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(a). 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 of access authorization would not endanger the common defense and security and would be clearly consistent with the national interest." 10 C.F.R. § 710.7(a). I must examine the evidence in light of these requirements, and assess the credibility and demeanor of the witnesses who gave testimony at the hearing.

III. THE HEARING

At the hearing, the individual testified on his own behalf. He also presented the testimony of a co-worker who knows him well, another co-worker, his stepson, a supervisor, and an evaluating psychologist. The DOE counsel presented the testimony of a DOE consulting psychiatrist.

The individual's attorney indicated in his opening statement that during the individual's military service, 2/ during three months in 1988 and during three months in 2000 the individual may have consumed significant amounts of alcohol. Tr. at 14. The individual's attorney indicated that the testimony will demonstrate that in 1989 the individual received information from the employee assistance program that permitted him to assume responsibility and control over his drinking. Tr. at 15.

The attorney pointed out that there is no information in the individual's military record that he drank to excess. Tr. at 15. He pointed out that there is no indication in the record that any person ever saw the individual drink to excess. Tr. at 20. Furthermore, there is no information in the record that the individual was ever arrested for driving under the influence or that the individual was ever arrested or punished for any behavior attributable in any way to alcohol. 3/ Tr. at 15. In concluding his opening statement the individual's attorney argued that he would show that the individual is a man of great self-discipline who has recognized his alcohol problem and has dealt with that problem. Tr. at 20.

The following is a summary of the testimony presented at the hearing.

1. The Individual

The individual testified that he graduated from the xxxxxxxxxxxx with honors in 19xx. Tr. at 27. While in the military, he drank the same amount as other officers. He testified that he typically drank five to eight drinks in an evening. Tr. at 31. He further stated that no one in the military ever suggested that he was drinking excessively or that he had a problem with alcohol. Tr. at 32. He retired from the military in 1985. Tr. at 27. Shortly after retiring he started to work at a DOE site. Tr. at 27. He has worked in the same work area continually for 17 years. Tr. at 34. He has held an access authorization since 1978. Tr. at 29.

2/ The individual was in the military from 1973 through 1985. Tr. at 28.

3/ There is nothing in the record that indicates the individual was ever arrested or questioned for any activity.

The individual testified that he was married in 1988 and divorced after six months of marriage. Tr. at 39. During that marriage he had two or three drinks in the evening. Tr. at 39. He testified that his moderate alcohol consumption was a factor in his wife's decision to seek a divorce. Tr. at 50. After his divorce his alcohol consumption increased to six or seven drinks in the evening. Tr. at 39 and 54. After several months of the higher level of alcohol consumption he decided he did not like his life style. Therefore, he sought help through the employee's assistance program (EAPRO). Tr. at 39. He received some reading material and counseling. He then decided to take control and he reduced his alcohol consumption to his normal level of two or three drinks in the evening. Tr. at 40. In 1990 he was again married to the same woman. He and his wife decided there would be no alcohol in their home. During their seven-year marriage he rarely consumed alcohol. Tr. at 41.

He testified that since his 1997 divorce his consumption of alcohol has remained at two or three drinks several nights a week with the exception of three months in the early part of 2000 after he injured his back. During that period he testified that he increased his alcohol consumption to alleviate his back pain. Tr. at 42.

Finally, the individual testified that he believes he is in control of his alcohol consumption. Tr. at 43. He also testified that he is reliable and that he does not abuse alcohol. Tr. at 58. Finally, he stated his belief that he is not alcohol dependent. Tr. at 59. The individual believes that he can control his alcohol consumption.

2. A Co-worker

The Co-worker testified that she has worked as a scientist at the DOE site for five years and that she has worked closely with the individual during that period. Tr. at 70. For the last three years they have been best friends and they do a lot of things socially. Tr. at 72 and 75. She testified that her relationship with the individual is similar to her relationship with family members. 4/ She indicated that the individual often attends get togethers at her relatives' homes and that she often goes out to

4/ She testified that she does not have a romantic relationship with the individual. Tr. at 75.

dinner with the individual and normally there is no alcohol consumption at those meals. Tr. at 74.

She also testified that she speaks with the individual almost every night on the telephone. She indicated if the individual had been consuming alcohol before or during those telephone calls she would have been aware of a change in his behavior. Tr. at 75. She indicated she does not believe the individual was consuming alcohol in his apartment. Tr. at 75. She also testified that "I've never personally seen him drunk." Tr. at 75.

3. Second Co-worker

The second co-worker testified that he has known the individual as a co-worker since 1991. Tr. at 89. Since 1997 they have socialized outside of work. Tr. at 89. He has been in the individual's apartment about 12 times. Tr. at 89. He indicated that the apartment is relatively small and very neat. He has been in the individual's apartment early in the day and late in the evening. He indicated he has never seen any alcohol in the individual's apartment and has never seen the individual intoxicated. Tr. at 91.

He testified that when the individual has come to his home he has offered him a beer. On two occasions the individual accepted the beer and had either one or two beers during the course of watching a movie or sitting around. Tr. at 91.

4. The individual's stepson

The individual's stepson testified that he is 27 and lives in the area of the DOE site. Tr. at 98. He stated that during the individual's second marriage with his mother he never saw the individual drink alcohol and that there was never any alcohol in the house. He also testified that since the 1997 divorce the individual and he have gotten together at least a couple of times a month. Tr. at 102. He described three types of get togethers: going out to restaurants; visiting the stepson's home and socializing with the stepson's wife and two children; and working with the individual on the stepson's farm. He testified that the individual never has a drink at restaurants. He also testified that when the individual visits his family there is never any alcohol consumption. Tr. at 103. He testified when he and the individual work on his farm he sometimes buys a six pack of beer and the individual will drink one or two beers. Tr. at 103. He indicated that he has visited the individual's apartment and that

on one occasion the individual offered him a glass of beer. Tr. at 104. The stepson testified that the individual consumes very little alcohol and the stepson testified that he believes the individual is not alcohol dependent.

5. The Individual's supervisor

The individual's supervisor testified that he has known the individual since the individual started working at the DOE site. He testified that the individual's performance is excellent. Tr. at 128. He accompanied the individual to a meeting at which the individual presented a professional paper. Tr. at 117. That paper is included in the record as individual exhibit #1. He testified that the individual had one or two glasses of beer at dinner on their first night. Tr. at 118. During the conference there were a number of social functions where the alcohol was available at no charge. The individual limited himself to one or two drinks. Tr. at 119.

The individual's supervisor has been to a number of other social occasions with the individual. Tr. at 119. He has seen the individual have one or two drinks but he has never seen the individual drink to excess. Tr. at 120. The individual's supervisor also reviewed the individual's attendance records that were submitted at the Hearing. ^{5/} He testified that those records indicate that the individual has "very excellent attendance." Tr. at 122.

6. The DOE Consulting Psychiatrist

The DOE consulting psychiatrist testified that on the basis of his September 27, 2001 evaluation and several written tests administered to the individual, he determined that the individual met the criteria for alcohol dependence and the individual did have a history of consuming alcohol to excess. Tr. at 135-138.

The consulting psychiatrist testified that "during times of stress in his life . . . [the individual] turned to alcohol heavily for relief." Tr. at 139. He indicated there is a pattern. "If the stress were there, then he was drinking very, very heavily. If the stress had resolved, then he was not drinking so heavily, but still beyond what, in my opinion is in normal range of drinking . . ." Tr. at 139.

^{5/} The attendance records are individual exhibit #2.

The consulting psychiatrist indicated that the individual had symptoms of high tolerance. Specifically, he indicated the individual can drink very high amounts of alcohol and function very well at work. Tr. at 139. In addition, the DOE consulting psychiatrist pointed out that at least during one period the individual had a drink in the morning and the pattern of drinking in the morning is a red flag to a mental health professional. Tr. at 139. He further testified that there was evidence that alcohol did interfere with the individual's first marriage. Tr. at 139. The consulting psychiatrist concluded that there was a pattern of excessive alcohol consumption and use of alcohol for relief which, in his opinion, constitutes alcohol dependence. Tr. at 140, 154 and 197.

The consulting psychiatrist indicated two years of total sobriety would indicate total remission. He testified that the individual's character and motivation are high. However, he believes the individual's statement that he still wants to drink indicates a classic pattern of denial. Tr. at 143.

During the cross examination of the consulting psychiatrist the individual's attorney asked:

Q. Well, let me ask you this: . . . as a matter of an individual's management of their own behavior, are you saying that in your experience . . . anyone who, at any time, in their previous life has drunk to excess is unable to manage their drinking thereafter in a way that would make them responsible with respect to the use of alcohol?

The DOE consulting psychiatrist replied that every case needs to be considered individually. However, he indicated in his opinion the individual's pattern of alcohol consumption puts him at high risk for future excessive consumption if there is a high level of stress in his life. Tr. at 148.

7. The Individual's Consulting Psychologist

The individual's consulting psychologist testified that the individual's history indicates that he has used alcohol to resolve problems that are not resolvable by alcohol (i.e., to alleviate back pain) and this constitutes misuse of alcohol. Tr. at 171. He testified that the individual has demonstrated the capacity to reduce consumption after several months of excessive alcohol consumption. Tr. at 171. His report indicates that the individual "readily acknowledges that he consumes alcohol on a regular basis."

However, the psychologist's report pointed out that the consumption of alcohol by itself is not sufficient to determine substance dependence. The report points out that the DSM-IV definition of alcohol dependence indicates the consumption of alcohol must lead to a "maladaptive pattern that ultimately leads to clinically significant impairment or distress manifested by several possible functional difficulties." July 16, 2002 report by the consulting psychologist at 3.

The consulting psychologist testified that on the basis of definition of alcohol dependence "I don't find him to be alcohol dependent. I find him to exercise bad judgment . . . in terms of consumption of alcohol to resolve problems." Tr. at 173. He concluded that the individual has demonstrated an ability to manage his alcohol consumption so it does not cause difficulties or dysfunctions in his life. Tr. at 175.

The consulting psychologist was asked to predict the individual's future consumption of alcohol. He testified that he believed the individual would behave in the future as he has in the past. He believes the individual has demonstrated a general reduction in alcohol consumption over the years. He indicated he would predict that the individual would continue to function without any alcohol related problems. Tr. at 192. He also predicted that the individual is unlikely to heavily consume alcohol in the future. Tr. at 193. He testified that he could recommend therapy to teach the individual strategies to deal with stress. He suggested such therapy would teach the individual skills to deal with stressful situations. Tr. at 194 and 199.

IV. ANALYSIS AND FINDINGS

I have thoroughly considered the record of this proceeding, including the military records submitted by the individual 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)(5). After due deliberation, I have determined that the individual's access authorization should not be restored at this time. I cannot find that such restoration would not endanger the common defense and security and would be clearly consistent with the national interest. 10 C.F.R. § 710.27(a). The specific findings I make in support of this decision are discussed below.

A. Security Concerns

The individual's consulting psychologist believes the individual has misused alcohol and has a problem dealing with stress, but is not alcohol dependent. The individual's consulting psychologist focuses the diagnosis on the portion of the definition of alcohol dependence in the DSM-IV that refers to the adverse effects on the dependent's life. He points to the portion of the definition that seems to require a "pattern of substance use, leading to clinically significant impairment." In his view, except for access authorization problems, alcohol has had no known adverse effects on the individual's life. Since the individual has been able to function effectively while consuming alcohol and he is not physically dependent, he believes the individual is not alcohol dependent. He characterizes the individual's alcohol problem as "misuse." 6/

The consulting psychiatrist testified that he participated in the deliberation and approval of the DSM-IV by the Assembly of the American Psychiatric Association. Tr. at 152. He indicated that the definition and criteria specified in the DSM-IV are not absolute tests but are rather there to guide clinicians. Tr. at 152. He acknowledges that in many cases of dependence, a patient is physically dependent or has significant legal or job-related problems. While this individual is not physically dependent and has not had life style problems related to alcohol, the record indicates that on three occasions the individual has been diagnosed by a psychiatrist as alcohol dependent. The testimony of the consulting psychiatrist that the individual meets the criteria for being alcohol dependent was clear and convincing. The individual has a high level of tolerance, he has consumed alcohol over long periods of time and the individual has indicated a persistent desire to reduce his alcohol consumption. The consulting psychiatrist testimony, that the individual has a high risk for future excess consumption of alcohol, convinced me that the individual is properly diagnosed as alcohol dependent.

6/ The fact that the psychologist characterizes the individual's problem in a way that does not precisely fall within the Criterion J definition does not persuade me that a security concern does not exist. This is not an issue of semantics. Even if I were to find that the individual is not alcohol dependent, the manner in which the individual has used alcohol represents a security concern that he must resolve if he is to have access authorization.

I therefore find that the DOE correctly invoked Criterion J. Nevertheless, a finding of derogatory information does not end the evaluation of evidence concerning the individual's eligibility for access authorization. Individuals may bring forward evidence to mitigate or resolve a security concern. See *Personnel Security Hearing (Case No. VSO-0244)*, 27 DOE ¶ 82,797 (1999) (affirmed by OSA, 1999); *Personnel Security Hearing (Case No. VSO-0154)*, 26 DOE ¶ 82,794 (1997), *aff'd*, *Personnel Security Review (Case No. VSA-0154)*, 27 DOE ¶ 83,008 (1998) (affirmed by OSA, 1998).

B. Mitigating Evidence

The mitigation arguments presented in this case are threefold. First, the individual believes that he has shown that he is an excellent worker. Second, he claims to have maintained his alcohol consumption at a moderate level for two years. Third, he has indicated he would be willing to take whatever additional steps the DOE directs to resolve the concern related to his use of alcohol.

The individual has presented the testimony of people who have known him for many years. Their statements convince me that the individual is an excellent and dedicated employee. However, an excellent work record does not provide a sufficient basis to resolve a security concern.

I am not convinced, however, that the witnesses' testimony fully corroborates the individual's claim that he currently drinks very moderately. Their testimony does persuade me that the individual drinks rarely and only moderately in public.

However, I am not convinced that the individual's overall consumption of alcohol is moderate. The testimony about his life style indicates he generally drinks at home after work. He spends many hours on weekends and evenings in his apartment. The individual testified that he is currently limiting his consumption of alcohol to four or five days a week and on those days he is only consuming two or three drinks.

He presented the testimony of the first co-worker to substantiate his claim that he does not drink substantial amounts when he is alone in his apartment. However, I found her knowledge, which is based on her telephone calls with the individual, to be very weak corroboration for his claim that he does not drink excessively when alone in his apartment. During such times, it is possible that he is consuming more than the two to three drinks that he claims is his normal maximum alcohol consumption. None of the other

witnesses he presented gave signification relevant testimony on this point. Therefore, I do not believe the individual has convincingly demonstrated that he has avoided excess alcohol consumption in the last year. However, even if I was convinced that his current alcohol consumption was at a moderate level, this would not mitigate the DOE security concern that he is at a high risk for excessive alcohol consumption in the future.

His third mitigation argument is that he would be willing to take whatever steps the DOE directs to maintain his security clearance. Yet he has not taken the rehabilitation steps suggested by either professional. The DOE consulting psychiatrist suggests two years of total abstinence. Clearly, the individual has not had two years of abstinence nor did he indicate during his testimony that he intended to stop consuming alcohol.

Furthermore, the individual has not undertaken the stress counseling suggested by the consulting psychologist. The individual's consulting psychologist also suggests the individual should continue to limit his consumption of alcohol to a moderate level. As discussed above, I am not convinced that the individual has maintained a pattern of moderate alcohol consumption. I am therefore not persuaded that the psychologist is correct in asserting that the individual has moderated his alcohol consumption.

In a September 24, 2002, letter submitted after the Hearing the individual's attorney indicated that the individual stated that he wishes to obtain stress management counseling and he is willing to take whatever actions may be necessary for its successful completion, including abstaining from the further consumption of alcohol. 7/ While this indicates the individual may have come to recognize the seriousness of his problem, it does not resolve the cited security concern. Nevertheless, evidence of such counseling and abstention could be considered if the individual applies for a security clearance in the future.

Given the lack of corroboration of his description of his current alcohol consumption and the failure to demonstrate that he has taken steps necessary to achieve rehabilitation, I am unable to

7/ A security hearing provides an individual the opportunity to corroborate mitigating information. Promises to obtain counseling and to change behavior in the future are not sufficient for a finding of rehabilitation.

find that he has mitigated the DOE security concerns related to his alcohol dependence.

V. CONCLUSION

As indicated above, I have concluded that the individual has not resolved the DOE security concerns under 10 C.F.R. § 710.8(j). In view of the record before me, I am not persuaded that restoring the individual's access authorization would not endanger the common defense and security and would be clearly consistent with the national interest. Accordingly, I find that the individual's access authorization should not be restored.

Under our procedures, a review is available by an Appeal Panel. 10 C.F.R. § 710.28(b)-(e).

Thomas L. Wieker
Hearing Officer
Office of Hearings and Appeals

Date: October 22, 2002

