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DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Hearing Officer's Decision

Name of Case: Personnel Security Hearing

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Case Number: VSO-0574

This Decision concerns the eligibility of XXXXXXXXXXXX (hereinafter referred to as "the individual") to retain 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." A Department of Energy (DOE) Operations Office determined that reliable information it had received raised substantial doubt concerning the individual's eligibility for access authorization under the provisions of Part 710. The issue before me is whether, on the basis of the evidence and testimony in the record of this proceeding, the individual's access authorization should be restored. For the reasons stated below, the individual's access authorization should not be restored.

I. BACKGROUND

The present proceeding arose after the individual reported to the DOE that he had been involved in a traffic accident late in 2000 and had been arrested for Driving While Intoxicated (DWI). Six months later, the individual reported to the DOE that he had appeared in court and entered a guilty plea to the charges of Driving While Ability Impaired (DWAI) and failure to keep right. He also reported that he paid the required fine and his driver's license was suspended. To investigate this issue in more detail, the security office of the local DOE Operations Office conducted a Personnel Security Interview (PSI) of the individual. During the PSI, the individual provided additional information about the accident, admitting that he had consumed three or four beers before the accident. The individual also disclosed that after a series of three seizures he had been diagnosed with epilepsy in 1997, for which he takes Dilantin or its generic equivalent, a medication prescribed by his physician. He further disclosed that his doctors had advised him that he should not consume alcohol while he is taking Dilantin. At the time of the PSI, the individual stated he was taking Dilantin and consuming one to two alcoholic drinks once or twice a week. Information obtained within the next six months indicated that the individual had suffered another seizure episode and that

he drinks two to three alcoholic drinks two to three times per month. The PSI and the additional information failed to resolve DOE's security concerns about the individual. The individual was referred to a DOE consultant psychiatrist (DOE Psychiatrist), who evaluated him in person and reviewed his personnel files. The DOE Psychiatrist's report states that the individual suffers from alcohol dependence.

On the basis of that information, the DOE issued the individual a letter (Notification Letter) in which it informed him of its specific security concerns regarding his eligibility for access authorization and his procedural rights, including his right to a hearing. The individual then filed a request for a hearing. This request was forwarded to the Office of Hearings and Appeals (OHA) and I was appointed as hearing officer. A hearing was held under 10 C.F.R. Part 710. At the hearing, the DOE called three witnesses: the DOE Psychiatrist, a DOE personnel security specialist and the individual. The individual called two witnesses-- the director of an alcohol and substance abuse service and his girlfriend-- and testified on his own behalf. The record of this proceeding was closed when I received a copy of the transcript of the hearing (Tr.).

II. STANDARD OF REVIEW

The hearing officer's role in this proceeding is to evaluate the evidence presented by the agency and the individual, and to render a decision based on that evidence. *See* 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 or continuation of access authorization will not endanger the common defense and security and is clearly consistent with the national interest. Any doubt as to the individual's access authorization eligibility shall be resolved in favor of the national security." 10 C.F.R. § 710.7(a). I have considered the following factors in rendering this decision: 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 continuation or recurrence; and other relevant and material factors. *See* 10 C.F.R. §§ 710.7(c), 710.27(a). The discussion below reflects my application of these factors to the testimony and exhibits presented by both sides in this case.

When reliable information reasonably tends to establish the validity and significance of substantially derogatory information or facts about an individual, a question is created as to the individual's eligibility for an access authorization. 10 C.F.R. § 710.9(a). The individual must then resolve that question by convincing the DOE that granting his access authorization "will not endanger the common defense and security and will be clearly consistent with the national interest." 10 C.F.R. § 710.27(d). In the present case, the DOE has raised an appropriate question as to the individual's eligibility, and the individual has not convinced me that granting his security clearance will not endanger the common defense and will clearly be in the national interest.

III. FINDINGS OF FACT

The individual began drinking beer occasionally as a teenager, with more consistent use as a college student and in the years following. In 1994, he suffered the first of four seizures, and following his doctor's advice, restricted his alcohol intake. Transcript of Hearing (Tr.) at 111 (correcting earlier information that first seizure occurred in 1993). From 1993 through 1999, he generally drank two to three beers once or twice a week, with an occasional episode of drinking five to six beers over a five- to six-hour period. After 1999, his alcohol consumption decreased further and, with the exception of the date of his alcohol-related accident in 2000, has remained at a minimum level to the present time. DOE Exhibit (Ex.) 1 at 2-3 (Report of DOE Psychiatrist). The individual suffered a second seizure in 1995, and a third in 1997, at which time he was diagnosed with epilepsy and placed on anticonvulsant medication. Ex. 6 at 32 (Transcript of August 15, 2001 Personnel Security Interview). Despite the medication, the individual suffered a fourth seizure episode in 2001, after his interview with the DOE Psychiatrist. Tr. at 111.

In December of 2000, the individual was involved in a motor vehicle accident and was charged with Driving While Intoxicated (DWI). Ex. 6 at 6. During the Personnel Security Interview, the individual reported that he had consumed three or four beers during the four-hour period before the accident and that he was taking Dilantin for his epilepsy and Ambien to help him sleep when he was working evening and night shifts. *Id.* at 6-8. He was transported to a nearby hospital emergency room. About an hour after the accident, while still in the emergency room, he submitted to a blood alcohol test. *Id.* at 16-17. The results of the test, made known about ten days later, indicated that the individual's blood alcohol level was .09. *Id.* at 17-18. Because the blood alcohol level was below .10, the charge was later changed from DWI to Driving While Ability Impaired (DWAI), to which the individual pled guilty. The individual's driver's license was suspended, and he was sentenced to pay a fine and to attend a driver improvement program and a Crime Victims Impact Panel. The record reflects that he complied with all aspects of the sentence.

The individual has been forthcoming at all times in keeping DOE security apprised of all aspects of the above event. DOE security determined that the information he provided raised security concerns that could not be resolved and arranged for him to be evaluated by a DOE Psychiatrist. The DOE Psychiatrist interviewed the individual, performed a physical examination, and administered a number of alcohol screening tests. In the course of the interview, the individual explained his current drinking habits to the DOE Psychiatrist, revealing on one hand that his physician had told him he could consume one or two beers occasionally, and on the other hand that he had been told not to drink at all while taking anticonvulsant medication or at most extremely rarely, such as on New Year's Eve. Ex. 1 at 3. The DOE Psychiatrist's understanding was that the individual had set a limit for himself of two beers at any time, and that he had surpassed that limit on the day of the accident. *Id.* In the report, and again at the hearing, the DOE Psychiatrist stated that according to his calculations, in order for the individual to have had a blood alcohol content of .09 at the time he was tested, he must have consumed eight or nine beers that day, not three or four as the individual had reported. *Id.* at 4. Tr. at 11. The DOE Psychiatrist also stated that the individual had developed

a tolerance for alcohol. Ex. 1 at 4. The DOE Psychiatrist's physical examination of the individual revealed three abnormalities that are associated with sustained alcohol consumption: high diastolic blood pressure with no history of hypertension, diminished ankle deep tendon reflex without diminution of other deep reflexes, and possible liver enlargement. Ex. 1 at 12; Tr. at 8-9. The tests that the DOE Psychiatrist had the individual take— the Michigan Alcohol Screening Test and Dr. George Vaillant's Alcohol Screening Test— each produced a score that was compatible with a diagnosis of alcohol dependence. Ex. 1 at 9; Tr. at 8.

On the basis of the personal history he obtained both from his interview with the individual and from information contained in the individual's personnel security file, the DOE Psychiatrist determined that the individual met at least three of the criteria for alcohol dependence listed in the Fourth Edition of the Diagnostic and Statistical Manual (DSM-IV): tolerance of alcohol, continuing to use alcohol despite knowing that such use could decrease the effectiveness of his anticonvulsant medication, and unsuccessful control of alcohol use. Ex. 1 at 11; Tr. at 77. He therefore concluded in his report that the individual "qualifies for a DSM IV diagnosis of Alcohol Dependence with physiological dependence, DSM IV 303.90." Ex. 1 at 13. The results of the physical examination and the alcohol screening tests support this diagnosis. The DOE Psychiatrist further testified that adequate rehabilitation from alcohol dependence requires complete abstinence from alcohol consumption. Tr. at 12. */

Just before the hearing, the individual obtained an evaluation of his involvement with alcohol from the local alcohol and substance abuse services center. The director of the center was questioned at the hearing, providing the following testimony. The individual appeared at the center and provided responses to a comprehensive questionnaire that concerned his alcohol and drug use, any treatment for such use, family history of health, alcohol, and drug problems, and more general topics such as social, legal, recreational, and vocational issues. On the basis of the individual's responses, the center determined that nothing indicated that he had any issues that needed to be addressed. Tr. at 44-45; Letter from County Alcoholism Services to Hearing Officer, November 12, 2002.

*/ The DOE Psychiatrist also expressed the opinion that the individual's seizures were caused by alcohol withdrawal. Ex. 1 at 12; Tr. at 33-34. A letter written by the individual's treating neurologist and submitted into the record by the individual indicates that professional's opinion that sleep deprivation is the cause of the individual's seizures. Letter from Neurologist to DOE Site Medical Director, August 3, 2001. Yet a third possibility suggested in the literature on epilepsy, also supplied by the individual, is that his seizures, like 70 percent of all epilepsy events, are idiopathic in nature, that is, no cause can be found to explain them. "Epilepsy Questions and Answers," Epilepsy Foundation, 2000. Based on the record in this case, I am unable to make a finding as to the cause of the individual's seizures. I do find, however, that even if alcohol were not the cause of the individual's seizures, the DOE Psychiatrist's diagnosis would still stand. Therefore, I believe that such a finding is not critical to my opinion in this case regarding the individual's eligibility for access authorization.

IV. ANALYSIS

The Notification Letter states that a board-certified psychiatrist evaluated the individual and diagnosed him as alcohol dependent. *See* 10 C.F.R. § 710.8(j) (Criterion J). The individual does not dispute the facts listed in the Notification Letter that concern his alcohol consumption and the alcohol-related accident. This derogatory information creates serious security concerns about the individual.

Excessive consumption of alcohol, even off the job, raises security concerns because of the possibility that a clearance holder may say or do something under the influence of alcohol that violates security regulations. *See Personnel Security Hearing* (Case No. VSO-0479), 28 DOE ¶ 82,857 (May 14, 2002); *Personnel Security Review* (Case No. VSA-0174), 27 DOE ¶ 83,005, *affirmed* (OSA 1998). In this case, the risk is that the individual's excessive use of alcohol might impair his judgment and reliability to the point that he will fail to safeguard classified matter or special nuclear material. It is appropriate for the DOE to question a person's reliability when that person excessively consumes alcohol, operates a motor vehicle while mentally impaired, and gets arrested. *See, e.g., Personnel Security Hearing* (Case No. VSO-0476), 28 DOE ¶ 82,827 at 85,864 (2001).

Since there is reliable, derogatory information that creates a substantial doubt concerning the individual's continued eligibility for access authorization, I need only consider below whether the individual has made a showing of mitigating facts and circumstances sufficient to overcome the DOE's security concerns under Criterion J arising from his alcohol consumption. Because the hearing officer may grant an individual's access authorization only if it "will not endanger the common defense and security and will be clearly consistent with the national interest," 10 C.F.R. § 710.27(d), the individual must provide convincing evidence mitigating those security concerns. In the present case, there are a number of factors I have considered in determining whether the questions raised under 10 C.F.R. § 710.8(j) are resolved, and my opinions on these matters are set forth below.

At the hearing, several facts came to light that mitigate the DOE's security concerns in varying degrees. First, the individual pointed out for the record several factual inaccuracies in the DOE Psychiatrist's report, which concerned former jobs he had held and members of his family that he had reported to have had alcohol problems. I find these errors to be immaterial; they do not mitigate the Criterion J concerns in any way. On the other hand, when questioned by the hearing officer, the DOE Psychiatrist stated that he had not ruled out other potential causes of the individual's diminished ankle deep tendon reflex. Tr. at 10. That admission undermines the factual basis for, and therefore to a small degree the certainty of, the DOE Psychiatrist's diagnosis.

More central to the individual's efforts at mitigation is the contrary diagnosis offered by the local alcohol and substance abuse services center. At the hearing, the DOE Psychiatrist asked the director of the center several questions to ascertain the level of familiarity the center had with the individual's history at the time it reached its conclusion that the individual had "no existing alcohol problem."

The center was unaware of the individual's increased alcohol tolerance, Tr. at 51, his consumption of eight or more drinks before his accident in 2000, *id.*, the fact that he had been instructed not to drink alcohol or at most no more than one to two drinks, Tr. at 52, or the abnormal physical traits—hypertension, reflexes, and liver enlargement—discussed above, Tr. at 60. Under these circumstances, I will give less evidentiary weight to the center's conclusion regarding the individual's alcohol issues than I will to the DOE Psychiatrist's conclusion.

The individual also argues that he did not drink alcohol in contravention of doctor's orders. If this argument were well founded, it would directly challenge one of the three criteria on which the DOE Psychiatrist based his diagnosis of alcohol dependence. However, I do not find the argument persuasive. The individual maintains that he relied on the package insert for his anticonvulsant medication Phenytoin, the generic form of Dilantin. The individual submitted a copy of the insert, which reads in part, "DO NOT DRINK ALCOHOL while you are taking the medicine unless you have discussed it with your doctor." The record reflects that the individual did indeed discuss this issue with his neurologist, Tr. at 103, who advised the individual's treating physician that "[t]he literature suggests that 1 or 2 alcoholic drinks at a time is not deleterious in terms of seizure control." Letter from Neurologist to Physician, October 21, 2002. In the same letter, the neurologist stated, "He really does not use much [alcohol] but 2 or 3 times a month, he will have 2 or 3 glasses of wine." As discussed below, I have been unable to ascertain the individual's current alcohol consumption level. The amount of wine he reported to the neurologist is just one of several estimates he has reported to various people at various times. Because of the variation in reporting, I am inclined to conclude that the individual most likely drinks more than he reports he is drinking. In any event, I agree with the DOE Psychiatrist that his consumption probably exceeds the level considered safe in the literature, as the neurologist cited. Tr. at 19-21.

Finally, there is the issue of the individual's credibility. While I believe that the individual has been sincere and forthright in virtually all attestations, I find I cannot rely on his statements regarding his alcohol consumption levels in the past or the present. The discrepancies in those statements may be due to his inability to recall precisely how much he drank at any particular point in his life, or as he stated, because he overestimated his consumption at times to present a "worst case scenario." Tr. at 75. Nevertheless, there are two instances in which the individual's inconsistent testimony leaves me wondering what the facts truly are, and under those circumstances it is difficult for me to give him the benefit of the doubt. The first is the individual's consumption on the day of his accident in December 2000. When questioned during the personnel security interview about how much alcohol he had consumed that day, he responded that he had consumed three or four beers, because he and his two friends had split a twelve-pack. Ex. 6 at 8-9. He had not only an answer, but a rationale for the answer. However, once the DOE Psychiatrist calculated that he must have consumed eight or nine beers to have had a blood alcohol level of .09 at the time of the test, he appears to have accepted that number as well. Tr. at 29, 51. The second, and from my perspective, more important discrepancy concerns his current consumption level. In his summation at the end of the hearing, the individual stated:

[I] know what my alcohol consumption is, one or two glasses of wine two or three times a month and I've gone again the maximum six to eight drinks or six a month, and this is . . . with my girlfriend. . . . but the bottom line is I don't drink. If I thought it was a problem or if it becomes a problem, I definitely would seek out and [the DOE Psychiatrist] did talk to me about, and ask the only thing you need to do is go to AA if you wanted to, but I have already stopped drinking. I think I have exhibited that.

Tr. at 135. Although he stated on the record that he had not had an alcoholic drink for more than one month before the hearing, Tr. at 103, unclear statements such as the one quoted above do not convince me that his accounting is accurate.

Moreover, even if it were accurate, one month of abstinence does not convince me that the likelihood that the individual will no longer consume alcohol to excess is low enough to warrant the restoration of his access authorization. In addition, the DOE Psychiatrist's diagnosis and finding of no rehabilitation or reformation must be given substantial weight. *Personnel Security Hearing* (Case No. VSO-0476), 28 DOE ¶ 82,827 at 85,864 (2001) (and cases cited therein) (great deference given to expert opinions of psychiatrists and other mental health professionals regarding rehabilitation and reformation). I cannot find that the individual is rehabilitated or reformed from his alcohol dependence at this time, nor am I confident that he will not resume consuming alcohol to excess. Consequently, the individual has not mitigated the DOE's security concern under Criterion J regarding his history of alcohol dependence.

V. CONCLUSION

For the reasons set forth above, I conclude that the individual has not presented evidence that warrants restoring his access authorization. Since the individual has not resolved the DOE's allegations under Criterion J, he has not demonstrated that restoring his security clearance will not endanger the common defense and will be clearly consistent with the national interest. Therefore, the individual's access authorization should not be restored.

The individual may seek review of this Decision by an appeal panel under the procedures set forth at 10 C.F.R. § 710.28.

William M. Schwartz
Hearing Officer
Office of Hearings and Appeals

Date: March 13, 2003