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United States Department of Energy
Office of Hearings and Appeals

In the matter of Personnel Security Hearing	)	
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Filing Date: July 11, 2012	)	Case No.: PSH-12-0094
	)	
	)	

Issued: November 6, 2012

Decision and Order

Robert B. Palmer, Hearing Officer:

This Decision concerns the eligibility of XXXXXXXXXXXXX (hereinafter referred to as "the individual") for 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." [1] For the reasons set forth below, I conclude that the individual's security clearance should not be restored at this time. [2]

I. BACKGROUND

The individual is employed by a Department of Energy (DOE) contractor, and was granted a security clearance in connection with that employment. On June 9, 2011, the individual was arrested for a number of traffic-related offenses, including Driving Under The Influence Of Alcohol (DUI),

[1] An access authorization is an administrative determination that an individual is eligible for access to classified matter or special nuclear material. 10 C.F.R. § 710.5. Such authorization will also be referred to in this Decision as a security clearance.

[2] Decisions issued by the Office of Hearings and Appeals (OHA) are available on the OHA website located at http://www.oha.doe.gov . The text of a cited decision may be accessed by entering the case number of the decision in the search engine located at http://www.oha.doe.gov/search.htm.

as the result of an accident during which the vehicle he was driving struck a concrete barrier. Because this information raised legitimate security concerns, the local security office (LSO) summoned the individual for an interview with a personnel security specialist in April 2012. After this PSI failed to adequately address the LSO's concerns, the individual was referred to a local psychiatrist (hereinafter referred to as "the DOE psychiatrist") for an agency-sponsored evaluation. The DOE psychiatrist performed an evaluation of the individual in May 2012, and prepared a report for the LSO. After reviewing this report and the rest of the individual's personnel file, the LSO determined that derogatory information existed that cast into doubt the individual's eligibility for access authorization. It informed the individual of this determination in a letter that set forth the DOE's security concerns and the reasons for those concerns. I will hereinafter refer to this letter as the Notification Letter. The Notification Letter also informed the individual that he was entitled to a hearing before a Hearing Officer in order to resolve the substantial doubt concerning his eligibility for access authorization.

The individual requested a hearing on this matter. The LSO forwarded this request to the Office of Hearings and Appeals, and I was appointed the Hearing Officer. The DOE introduced eight exhibits into the record of this proceeding and presented the testimony of the DOE psychiatrist. The individual introduced one exhibit and presented the testimony of two witnesses, in addition to testifying himself.

II. THE NOTIFICATION LETTER AND THE DOE'S SECURITY CONCERNS

As indicated above, the Notification Letter included a statement of derogatory information that created a substantial doubt as to the individual's eligibility to hold a clearance. This information pertains to paragraph (j) of the criteria for eligibility for access to classified matter or special nuclear material set forth at 10 C.F.R. § 710.8.

Under criterion (j), information is derogatory if it indicates that the individual "has been, or is, a user of alcohol habitually to excess, or has been diagnosed by a psychiatrist as alcohol dependent or as suffering from alcohol abuse." 10 C.F.R. § 710.8(j). As support for this criterion, the Letter cites the diagnosis of the DOE psychiatrist that the individual suffers from Alcohol Abuse, the DUI arrest, and the individual's history of excessive alcohol consumption. This history is described in section IV. below.

This derogatory information adequately justifies the DOE's invocation of criterion (j), and raises significant security concerns. Excessive alcohol consumption such as that exhibited by the individual often leads to the exercise of questionable judgement or the failure to control impulses, and can therefore raise questions about an individual's reliability and trustworthiness. *See Revised*

Adjudicative Guidelines for Determining Eligibility for Access to Classified Information, The White House (December 19, 2005) (Adjudicative Guidelines), Guideline G.

III. REGULATORY STANDARDS

The criteria for determining eligibility for security clearances set forth at 10 C.F.R. Part 710 dictate that in these proceedings, a Hearing Officer must undertake a careful review of all of the relevant facts and circumstances, and make a "common-sense judgment . . . after consideration of all relevant information." 10 C.F.R. § 710.7(a). I must therefore consider all information, favorable or unfavorable, that has a bearing on the question of whether granting or restoring a security clearance would compromise national security concerns. Specifically, the regulations compel me to consider the nature, extent, and seriousness of the individual's conduct; the circumstances surrounding the conduct; the frequency and recency of the conduct; the age and maturity of the individual at the time of the conduct; the absence or presence of rehabilitation or reformation and other pertinent behavioral changes; the likelihood of continuation or recurrence of the conduct; and any other relevant and material factors. 10 C.F.R. § 710.7(c).

A DOE administrative proceeding under 10 C.F.R. Part 710 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). Once the DOE has made a showing of derogatory information raising security concerns, the burden is on the individual to produce evidence sufficient to convince the DOE that granting or restoring 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). *See Personnel Security Hearing*, Case No. VSO-0013, 24 DOE ¶ 82,752 at 85,511 (1995) (*affirmed* by OSA, 1996), and cases cited therein. The regulations further instruct me to resolve any doubts concerning the individual's eligibility for access authorization in favor of the national security. 10 C.F.R. § 710.7(a).

IV. FINDINGS OF FACT

The following facts are derived from the individual's April 2012 PSI and his testimony at the hearing, and are undisputed. The individual began drinking during his sophmore year in college in 2008. He would drink approximately once per month, consuming anywhere from one to two beers up to a maximum of 12 beers per evening. On most occasions, he would drink at least four or five, and it would take this amount of consumption for him to become intoxicated. Beginning in the summer of 2010, his drinking increased. He would drink two or three times per week, consuming between four and 15 beers on each occasion, and becoming intoxicated on a weekly basis. After the individual began working for the DOE contractor in January 2011, his level of consumption

decreased. From then until his accident in June, he drank once or twice per month, consuming up to 10 beers over five or six hours on each occasion, and becoming intoxicated approximately once per month. He estimated that in the year preceding his PSI, he had driven while intoxicated two to three times, including on the night of his arrest, and that since 2008, he had suffered five alcoholic blackouts.

At approximately 3:00 p.m. on the afternoon of June 9, 2011, the individual joined a group of his co-workers who were "tailgating" at a local stadium before a baseball game. When the baseball game started at seven or seven-thirty, the individual and most of his fellow celebrants decided to remain in the parking lot eating and drinking, rather than enter into the stadium to watch the game. The individual ate and continued to drink beer until approximately 10 o'clock that night. During this time, he estimated, the individual drank 11 beers. In a futile attempt to regain his sobriety before driving to his friend's house, where he had planned to spend the night, the individual waited until 11:30 p.m. or midnight before departing from the stadium parking lot. The individual's memories of the events that followed are hazy at best. According to the police report, the individual was travelling at a high rate of speed on a local highway when he failed to negotiate a curve, and his vehicle struck a concrete barrier. The individual, who was unhurt, then left the vehicle, which had been extensively damaged, in the middle of the roadway and began walking toward the nearest exit. The police arrived at the scene, had the vehicle cleared from the road, and then located the individual. After he failed a field sobriety test, the police arrested the individual and took him to a local hospital, where blood was drawn at 1:45 a.m. on June 10th for the purpose of measuring the individual's blood alcohol content (BAC). The individual's BAC was measured at .209, more than two and one-half times the legal limit.

As a result of this arrest, the individual was placed in a diversionary program for first-time DUI offenders. In an order dated December 2, 2011, and "following a colloquy before the Court wherein the defendant expressed an understanding of the program," DOE Ex. 6 at 11, a judge placed the individual in the program, conditioned upon the individual completely abstaining from alcohol and illegal drug use for a period of one year, attending at least three Alcoholics Anonymous (AA) meetings, paying court costs and other applicable fees, and successfully completing highway safety and DUI classes.

For two months after the accident, the individual did not consume alcohol. However, after that period, the individual began drinking approximately once per month, consuming three to five beers each time. He reported drinking to intoxication two or three times during this period. In December 2011, after the individual was placed in the DUI diversion program, the individual drank to intoxication, consuming approximately ten 16-ounce beers over six or seven hours at his office's Christmas party. From January 2012 until the date of the hearing, the individual drank on two

occasions. The first was in late February, and the last time that the individual consumed alcohol was in late March. On both occasions, the individual had three to five beers. The individual stated that he did not drive after any of these instances of alcohol consumption.

V. ANALYSIS

A. Mitigating Evidence

At the hearing, the individual generally did not dispute the allegations set forth in the Notification Letter. Instead, through his testimony and that of his father and his cousin, he attempted to show that he has established a pattern of responsible drinking that is sufficient to adequately address the DOE's security concerns.

The individual testified that his greatest consumption of alcohol was during his college years, and that after he started working, his drinking decreased because of his added responsibilities. Hearing transcript (Tr.) at 26. After his arrest, the individual testified, he was "upset with [himself] for what had happened," and he did not drink alcohol for approximately two months. When he resumed drinking, he made sure that, when he went out, he had a way to return home that did not involve driving under the influence of alcohol. Tr. at 25. He believes that he is in control of his drinking. Tr. at 27. None of his family or friends have told him that he has a drinking problem, and alcohol has not adversely affected his relationships with them or his performance at work. Tr. at 30

The individual then testified about the highway safety and DUI classes that he took as a condition of his participation in the DUI diversion program. He said that the highway safety class involved the effects that alcohol consumption has on the body, the responsible consumption of alcohol and the traffic laws involving drinking. Tr. at 31. The DUI class was an extension of the highway safety class, and involved group discussions where the participants would talk about their arrests, any problems they had had with alcohol in the past, and what they intended to do to avoid future problems. Tr. at 31-32.

At the end of the discussions, the individual continued, the instructor gave a blanket recommendation that all of the program participants refrain from alcohol use. However, he claimed, the instructor realized that most of the participants would continue to drink despite the requirement of the program that they remain abstinent. Consequently, she recommended that if they chose to drink, they should do so responsibly. Tr. at 34. From January 1, 2012, the date that the individual believed that his probation began, until his DUI class ended on February 8, 2012, the individual testified that he did not consume any alcoholic beverages. Tr. at 35. However, after considering the instructor's recommendation, the individual drank on two occasions, both times in a manner that he

considered to be responsible. Tr. at 36. After his PSI, the individual realized the importance that the DOE attached to his remaining abstinent, and he stopped drinking completely. His last consumption of alcohol occurred in late March 2012. Tr. at 37-38. He intends to remain abstinent throughout the remainder of his probation, and after that to "just drink one or two beers, on occasion." Tr. at 40.

The individual's father testified that, other than the instance in December 2011 when the individual drank to intoxication at his office Christmas party, the individual has consumed alcohol responsibly since his arrest. Tr. at 92. He further stated that the individual has not consumed alcohol since he received the DOE psychiatrist's report in early April 2012. Tr. at 90. The individual's cousin testified that each time that he has witnessed the individual drinking, the individual has done so responsibly, and that he has not seen the individual consume alcohol since April 2012. Tr. at 77-80.

B. Hearing Officer's Evaluation Of The Evidence

After careful consideration of this testimony and of the record as a whole, I find that substantial security concerns remain regarding the individual's usage of alcohol. As an initial matter, I do not believe that the individual has established a period of responsible alcohol use that is of sufficient duration to constitute a significant mitigating factor. Although the evidence does indicate that the individual reduced his consumption significantly after he started working in January 2011, after his June 2011 accident, and most recently, after his March 2012 PSI, his last three usages of alcohol were anything but responsible. The individual admittedly drank to intoxication at his office Christmas party in mid-December 2011, shortly after the date of a court order imposing a 12-month period of probation during which the individual was not to consume alcohol or use illegal drugs. While the individual testified that he believed at that time that his probation started in January 2012 and that he was not informed otherwise, the most reasonable conclusion is that his probation began on the date of the court order admitting him into the DUI diversion program, which was December 2, 2011. However, regardless of whether the individual was on probation at the time of his Christmas party, consuming ten 16-ounce beers over a period of six or seven hours can hardly be considered responsible alcohol use.

The individual admittedly drank beer while on probation in February and March 2012. While he attempted to excuse these violations by citing the alleged recommendation of his DUI instructor that if he and his classmates were going to drink, they do so "responsibly," he recognized that the instructor was not condoning such behavior, Tr. at 34, and he cited no basis for reasonably believing that his instructor had the authority to alter the terms of his court-ordered probation. Consumption of alcohol in any amount in violation of a court order cannot be considered responsible behavior.

Furthermore, *Adjudicative Guideline G* provides for the establishment of a pattern of responsible use as a mitigating factor when the individual also "acknowledges his or her . . . issues of alcohol abuse [and] provides evidence of actions taken to overcome the problem." *Adjudicative Guidelines, Guideline G*, ¶ 23(b). The individual has done neither of these things. Upon receiving a diagnosis of Alcohol Abuse from a trained mental health professional, a prudent course of action would have been to seek treatment, or at least to seek a second opinion from a qualified professional, such as a licenced substance abuse counselor. Yet when the individual received the diagnosis of the DOE psychiatrist in June 2012, he took neither of these actions, believing "that [he] didn't actually have a problem, and that, [he] wouldn't need the alcohol treatment, in order to . . . control what was perceived to be a problem." Tr. at 65. Indeed, when asked at the hearing to access the individual's progress toward recovery from Alcohol Abuse, the DOE psychiatrist expressed doubt as to whether the individual was, in fact, in recovery, because he had not yet identified himself as having a drinking problem, a factor that he referred to as "a key missing piece." Tr. at 130. Moreover, the DOE psychiatrist expressed "concerns" about the individual's ability to remain abstinent, and indicated that there is currently insufficient evidence to ascertain, with any degree of certainty, whether or not the individual will be able to adhere to a pattern of responsible alcohol use. Tr. at 132-133. I agree with this assessment. Accordingly, I conclude that the individual's six months of responsible behavior regarding alcohol (from his last admitted usage in late March 2012 to the date of the hearing), are insufficient to demonstrate that his chances of returning to a pattern of alcohol abuse are sufficiently small. The individual's failure to clearly acknowledge that he has a drinking problem and the absence of a support system, such as ongoing participation in AA or individual counseling, support this conclusion. No other significant mitigating factors are evident from the record.

VI. CONCLUSION

As set forth above, I find that the individual has not successfully addressed the DOE's security concerns under criterion (j). I therefore conclude that he has not demonstrated that restoring his access authorization would not endanger the common defense and would be clearly consistent with the national interest. Accordingly, I find that the individual's security clearance should not be restored at this time. The individual may seek review of this Decision by an Appeal Panel under the procedures set forth at 10 C.F.R. § 710.28.

Robert B. Palmer
Hearing Officer
Office of Hearings and Appeals

Date: November 6, 2012