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**United States Department of Energy
Office of Hearings and Appeals**

In the Matter of:	Personnel Security Hearing)	
)	
Filing Date:	March 21, 2013)	
)	Case No.: PSH-13-0037
)	

Issued: July 25, 2013

Hearing Officer Decision

Wade M. Boswell, Hearing Officer:

This Decision concerns the eligibility of XXXXXXXXXXXX (hereinafter referred to as “the individual”) to hold an access authorization¹ under the Department of Energy’s (DOE) regulations set forth at 10 C.F.R. Part 710, Subpart A, entitled, “General Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material.” As fully discussed below, after carefully considering the record before me in light of the relevant regulations and Adjudicative Guidelines, I have determined that the individual’s access authorization should not be restored at this time.

I. Background

The individual is employed by a DOE contractor in a position that requires him to hold DOE access authorization. In July 2012, the individual traveled to visit friends in a distant city and, while out one evening, became separated from his local companions. When he was unable to locate them at the end of the evening, he walked a short distance away from the bar where they had been drinking and eventually fell asleep alongside a building, having removed his shoes, socks and shirt. Several hours later, he was awakened by a policeman and paramedic. He was determined not to need medical assistance, but was arrested and charged with “public nuisance.”

¹ Access authorization is defined as “an administrative determination that an individual is eligible for access to classified matter or is eligible for access to, or control over, special nuclear material.” 10 C.F.R. § 710.5(a). Such authorization will be referred to variously in this Decision as access authorization or security clearance.

The individual reported his arrest to his employer and the DOE, as required by security regulations. His employer temporarily suspended one of his clearances while conducting an investigation. Subsequently, the Local Security Office (LSO) commenced an inquiry and conducted a personnel security interview (PSI) with the individual on November 28, 2012. *See* Exhibit 13. The PSI did not resolve concerns over the individual's behavior which resulted in the issuance of the citation and raised additional concerns over the individual's consumption of alcohol. As a result, the individual was referred for evaluation by a DOE consulting psychologist, who submitted a psychological assessment dated January 11, 2013. *See* Exhibit 7.

Since neither the PSI nor the DOE psychologist's evaluation resolved the security concerns arising from the individual's alcohol usage, the LSO informed the individual in a letter dated February 20, 2013 (Notification Letter), that it possessed reliable information that created substantial doubt regarding his eligibility to hold a security clearance. In an attachment to the Notification Letter, the LSO explained that the derogatory information fell within the purview of two potentially disqualifying criteria set forth in the security regulations at 10 C.F.R. § 710.8, subsections (h) and (j) (hereinafter referred to as Criterion H and Criterion J, respectively).² *See* Exhibit 1.

Upon his receipt of the Notification Letter, the individual exercised his right under the Part 710 regulations by requesting an administrative review hearing. *See* Exhibit 2. The Director of the Office of Hearings and Appeals (OHA) appointed me the Hearing Officer in the case and, subsequently, I conducted an administrative hearing in the matter. At the hearing, the LSO introduced 14 numbered exhibits into the record and presented the testimony of one witness, the DOE consulting psychologist. The individual introduced 14 lettered exhibits (Exhibits A-O – there is no Exhibit I) into the record and presented the testimony of five witnesses, including that of himself and that of a licensed drug and alcohol counselor who participated in his alcohol treatment program. The exhibits will be cited in this Decision as “Ex.” followed by the appropriate numeric or alphabetic designation. The hearing transcript in the case will be cited as “Tr.” followed by the relevant page number.³

II. Regulatory Standard

A. Individual's Burden

A DOE administrative review proceeding under Part 710 is not a criminal matter, where the government has the burden of proving the defendant guilty beyond a reasonable doubt. Rather, the standard in this proceeding places the burden on the individual because

² Criterion J relates to information that a person has “[a]n illness or mental condition of a nature which, in the opinion of a psychiatrist or a licensed clinical psychologist, causes, or may cause, a significant defect in judgment or reliability . . .” and Criterion H relates to information that a person has “[b]een, or is, a user of alcohol habitually to excess, or has been diagnosed by a psychiatrist or a licensed clinical psychologist as alcohol dependent or as suffering from alcohol abuse . . .” 10 C.F.R. §710.8(j) and (h).

³ OHA decisions are available on the OHA website at www.oha.doe.gov. A decision may be accessed by entering the case number in the search engine at www.oha.gov/search.htm.

it is designed to protect national security interests. This is not an easy burden for the individual to sustain. The regulatory standard implies that there is a presumption against granting or restoring a security clearance. *See Department of Navy v. Egan*, 484 U.S. 518, 531 (1988) (“clearly consistent with the national interest” standard for granting 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).

The individual must come forward with evidence to convince 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). The individual is afforded a full opportunity to present evidence supporting his eligibility for an access authorization. The Part 710 regulations are drafted so as to permit the introduction of a very broad range of evidence at personnel security hearings. Even appropriate hearsay evidence may be admitted. 10 C.F.R. § 710.26(h). Thus, an individual is afforded the utmost latitude in the presentation of evidence to mitigate the security concerns at issue.

B. Basis for the Hearing Officer’s Decision

In personnel security cases arising under Part 710, it is my role as the Hearing Officer to issue a Decision that reflects my comprehensive, common-sense judgment, made after consideration of all the relevant evidence, favorable and unfavorable, as to whether the granting or continuation of a person’s access authorization will not endanger the common defense and security and is clearly consistent with the national interest. 10 C.F.R. § 710.7(a). I am instructed by the regulations to resolve any doubt as to a person’s access authorization eligibility in favor of the national security. *Id.*

III. The Notification Letter and the Security Concerns at Issue

As previously noted, the LSO cited two criteria as the bases for suspending the individual’s security clearance: Criterion H and Criterion J. Criterion H concerns information that a person has “an illness or mental condition of a nature which, in the opinion of a board-certified psychiatrist, other licensed physician or a licensed clinical psychologist causes, or may cause, a significant defect in judgment or reliability.” 10 C.F.R. § 710.8(h). It is well established that “certain emotional, mental, and personality conditions can impair judgment, reliability, or trustworthiness.” *See* Guideline I of the *Revised Adjudicative Guidelines for Determining Eligibility for Access to Classified Information*, issued on December 29, 2005, by the Assistant to the President for National Security Affairs, The White House (Adjudicative Guidelines). Conduct influenced by such psychological conditions can raise questions about an individual’s ability to protect classified information. With respect to Criterion H, the LSO relied on the January 11, 2013, report of the DOE psychologist which noted that the individual’s use of alcohol habitually to excess is a condition that can cause significant defects in judgment and reliability. Ex. 1 and Ex. 7 at 7.

Criterion J refers to information indicating that an individual has “[b]een, or is, a user of alcohol habitually to excess, or has been diagnosed by a psychiatrist or a licensed clinical

psychologist as alcohol dependent or as suffering from alcohol abuse.” 10 C.F.R. § 710.8(h). Excessive alcohol consumption raises a security concern because it can lead to questionable judgment and the failure to control impulses, which in turn can raise questions about a person’s reliability and trustworthiness. *See* Adjudicative Guidelines at Guideline G; *Personnel Security Hearing*, Case No. PSH-11-0035 (April 19, 2012). With respect to Criterion J, the LSO noted that (1) the individual had been arrested and charged in July 2012 after drinking to intoxication, taking off his shoes, socks and shirt, and falling asleep behind a building, and (2) individual had been stabbed in the heart in February 2007⁴ by a stranger to whom he had offered a ride home at a time when the individual was intoxicated. Additionally, the LSO relied on the report of the DOE psychologist, dated January 11, 2013, which concluded that the individual’s drinking has been frequently excessive, warranting DOE’s concern about his use of alcohol habitually to excess. Ex. 1 and Ex. 7 at 7.

In light of the information available to the LSO, the LSO properly invoked Criterion H and Criterion J.

IV. Findings of Fact

The individual has consumed alcohol regularly since becoming 21 years old; he reports that he typically drinks once or twice per week and drinks to intoxication perhaps twice per month. Based on his reported alcohol consumption, the DOE consulting psychologist calculated that prior to September 13, 2012, the individual was drinking to legal intoxication multiple times per month. *Id.* at 3.

In February 2009, the individual provided technical assistance to a friend who owned a bar and restaurant. His friend reciprocated by providing him dinner and drinks and, while seated at the bar, the individual conversed with another patron who needed a ride home. Tr. at 111 – 112. The two stopped at a casino en route and the individual consumed additional alcohol while there. *Id.* at 114 – 115; Ex. 7 at 3. The individual acknowledges being intoxicated.⁵ When the individual attempted to discharge his passenger in the passenger’s neighborhood, an altercation ensued which resulted in the individual being stabbed in the chest and his heart punctured. The individual required emergency surgery. Tr. at 113 – 114.

In July 2012, the individual traveled to visit friends in a distant city and, while out one evening, became separated from his local companions. When he was unable to locate them at the end of the evening, he walked a short distance away from the bar where they had been drinking and eventually fell asleep alongside a building, having removed his shoes, socks and shirt. Several hours later, he was awakened by a policeman and paramedic. He was determined not to need medical assistance, but was arrested and

⁴ The date noted by the LSO is incorrect and, as noted under “Findings of Fact,” *infra.*, the correct date is 2009. Tr. at 110 – 111.

⁵ The individual’s reports with respect to his intoxication on this particular evening have varied. He stated to the DOE psychologist that he had “felt intoxicated;” however, he stated during the PSI that “I wasn’t legally intoxicated.” Ex. 7 at 3; Ex. 13 at 51.

charged with public nuisance. *Id.* 116 – 121. No breath or blood tests were administered; however, the individual acknowledges that he was intoxicated when he left the bar. Ex. 7 at 4, 5; Ex. 13 at 32. Following his arrest, the individual was processed at a local police station and released on his own recognizance shortly after his arrival at the police station. Tr. at 120 – 121.

As a result of the individual's arrest, his employer suspended one of his clearances on July 10, 2012. Ex. G at 1. Notwithstanding his alcohol-related arrest and the resulting suspension of one of his clearances, the individual reported that he had become intoxicated on alcohol at least once in the following months. Tr. at 110; Ex. 7 at 5.

On September 7, 2012, the individual entered into a plea agreement with local prosecutors which provided that the charge against him would be dismissed if the individual, *inter alia*, paid a fine and completed an "alcohol program." Ex. 10 at 2 – 4.

His employer's employee assistance counselor referred the individual for an evaluation at a drug and alcohol treatment clinic. Ex. D at 1 – 2. The individual entered an intensive outpatient program (IOP) for alcohol treatment and discontinued drinking on September 13, 2012; he completed the IOP in November 2012. Tr. at 18, 41, 124; Ex. 7 at 6; Ex. 13 at 24. The individual and his employer also entered into a Mandatory Recovery Agreement pursuant to which the individual agreed to abstain from alcohol for 12 months, be subject to random testing for drugs and alcohol, complete an IOP and attend three meetings of Alcohol Anonymous (AA) per week for six months. Ex. L at 1. His employer restored his suspended clearance on September 28, 2012. Ex. H at 1.

On January 10, 2013, the DOE consulting psychologist evaluated the individual, which was approximately five weeks after the individual's completion of the IOP. *See* Ex. 7. As a result of the evaluation, the DOE psychologist concluded that the individual did not meet the criteria for any of the alcohol disorders classified in the *Diagnostic Statistical Manual of the American Psychiatric Association IVth Edition TR (DSM-IV-TR)*; however, based on the individual's historic pattern of alcohol consumption and alcohol related incidents, the DOE psychologist concluded that the individual is a user of alcohol habitually to excess, which is a condition that causes or could cause significant defects in his judgment and reliability.⁶ Tr. at 158 – 159; Ex. 7 at 7. In his report, the DOE psychologist opined that in order to evidence adequate reformation, the individual needed to demonstrate that he could control his alcohol consumption so that he does not frequently drink to intoxication. The individual needed to continue his abstinence for a total of 12 months and obtain an AA sponsor for at least nine months, something that the individual had not commenced at the time of the evaluation. *Id.*

The individual began working with an AA sponsor shortly after the psychological evaluation and formalized that arrangement in April 2013. Tr. at 72. The individual has been abstinent from alcohol since September 13, 2012, and this has been verified by random testing by his employer. *See* Ex. B, Ex C. Since February 2013, the individual

⁶ The IOP licensed drug and alcohol counselor testified that the individual had been diagnosed by the IOP treatment facility as meeting the criteria set forth in the *DSM-IV-TR* for alcohol dependence. Tr. at 33.

has also been in weekly counseling with a therapist associated with the IOP treatment facility. Tr. at 135.

V. Analysis

I have thoroughly considered the record of this proceeding, including the submissions tendered in this case 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)⁷ and the Adjudicative Guidelines. After due deliberation, I have determined that the individual's access authorization should not be restored at this time. I cannot find that restoring the individual's DOE security clearance will not endanger the common defense and security and is clearly consistent with the national interest. 10 C.F.R. § 710.27(a). The specific findings that I make in support of this decision are discussed below.

As calculated by the DOE psychologist based upon information reported to him by the individual, the individual drank to legal intoxication multiple times per month from the time he turned 21 years old until his arrest in July 2012. Ex 7 at 3. The individual has acknowledged that his intoxication played a role in both incidents cited by the LSO – offering a ride to a stranger who stabbed him in the heart⁸ and falling asleep while only partially clothed in a public area. *Id.* at 3, 4; Ex. 13 at 32. He has also acknowledged drinking to intoxication following his July 2012 arrest during the period that his employer was evaluating whether or not to restore a clearance that had been suspended as a result of his alcohol-related arrest. Tr. at 110; Ex. 7 at 5. These incidents create legitimate doubt about the individual's judgment and reliability. *See* Adjudicative Guideline, Guideline G at ¶ 21.

The individual has entered into separate agreements with his employer and his IOP treatment facility with respect to his abstinence from alcohol for one year and other aspects of his rehabilitation from excessive consumption of alcohol. All information available supports that he has been fully compliant with both agreements. As of the date of the hearing, the individual had completed an IOP, had been abstinent from alcohol for approximately nine months, and had been working with an individual counselor for four months and an AA sponsor for approximately three months. The critical question is whether this is sufficient time to evidence that, going forward, the individual has the ability to control his consumption of alcohol. The DOE psychologist's written evaluation stated that 12 months of abstinence and nine months of individual work with an AA sponsor would be required to evidence sufficient reformation. Ex. 7 at 7.

⁷ Those factors include the following: the nature, extent, and seriousness of the conduct, the circumstances surrounding the conduct, to include knowledgeable participation, the frequency and recency of the conduct, the age and maturity at the time of the conduct, the voluntariness of his 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.

⁸ See note 5, *supra*.

The DOE psychologist attended the hearing and testified after hearing the testimony of all the other witnesses. He noted that several of the witnesses testified that the individual had experienced a transformation beginning in January 2013, seeming to have accepted in a more fundamental way that alcohol is a personal problem for him. The DOE psychologist testified that such testimony reinforced his thoughts that the individual had “gamed the system” during his initial period of treatment. The DOE psychologist had considered revising his recommendation to require that the individual’s abstinence be counted from January 2013, when he more fully engaged in his recovery. Tr. at 160 –161. He ultimately concluded that those additional months of abstinence subsequent to September 2013 would not provide him with any additional confidence in the individual’s capacity to control his consumption of alcohol. *Id.* at 161 – 162.

As the Hearing Officer, I have doubts about the authenticity of the transformation in the individual that was reported to have occurred beginning in January. It was not clear to me whether genuine engagement in his recovery program began to occur in January or whether the individual concluded following his interview with the DOE psychologist in January that he needed to project a different approach. The individual’s willingness to create misleading impressions is documented in the record. During the DOE psychological evaluation, he reported to the psychologist that when attending AA meetings he would tell the group that he is an “alcoholic” only in order to “reduce the tension in the room.” Ex. 7 at 7. Also, the individual stated to his IOP counselor and treatment group that he saw “no benefit” to alcohol in his life, creating the impression that alcohol was an unlikely aspect of his life in the future. Tr. at 30, 43, 148. However, on the final day of his IOP, the individual stated to the LSO that after his year of required abstinence he would *not* abstain from alcohol, but use it “sparingly.” Ex. 13 at 71. He elaborated that he could not rule out getting intoxicated in the future, but would “definitely think twice” before he did so. *Id.* at 76.

The individual testified that he now has a different understanding of the negative influence of alcohol in his life and that his future intentions are not to drink. Tr. at 138. However, the individual presented two character witnesses that cast doubt on the authenticity of this statement. One witness testified that the individual had told him that “he would absolutely never drink again *if that’s what it takes for him to be able to get his clearance back.*” Tr. at 53 (emphasis added). A second character witness testified that the individual had told him, with respect the administrative review process, that he does not believe that he has a current problem with alcohol or had had one in the past. *Id.* at 98. Although the individual attempted to distance himself from this testimony when specifically asked, attempts to distance oneself from the testimony of one’s own character witnesses are inherently suspect. *Id.* at 140 – 141, 154.

Although the individual acknowledges that alcohol played a role in the events preceding his arrest in July 2012, his presentation at the hearing suggested that he minimizes the significance of the event. For example, the individual’s exhibits at the hearing included a chart of the hourly temperature in the city he was visiting (apparently to demonstrate that the heat when he left the bar justified his removing his shirt, shoes and socks), a printout of the directions from the bar to the house he was visiting (apparently to demonstrate it would have been too expensive to take a taxi home once he was separated from his

companions) and the inmate property logs from the local police showing that he had been held at the stationhouse for less than an hour (apparently to show that the police at the stationhouse did not believe he was as intoxicated as the arresting officer, notwithstanding that the arresting officer reported him as disoriented and unable to answer certain questions and, when instructed to sit by the arresting officer, assuming a “three point stance (football lineman position)” and rubbing the ground with his hand). *See* Ex. J, Ex., M, Ex. N, Ex. 11 at 4. The individual’s presentation at the hearing advocated that his arrest was unwarranted, mistaken or being given exaggerated importance. Such posturing undermined the individual’s assertions of genuinely understanding and accepting the negative role that the consumption of alcohol has had on his past behavior, judgment and reliability. *Cf.* Adjudicative Guidelines, Guideline G ¶ 23(b) (acknowledgment of alcohol issues).

Notwithstanding the foregoing, the individual offered credible testimony by himself and others that he has abstained from consuming alcohol since September 13, 2012. His abstinence is supported by his employer’s random drug and alcohol. Abstinence is the key aspect of the individual’s reformation under Criterion H and Criterion J. The DOE psychologist did not premise adequate reformation upon permanent abstinence, but by the individual demonstrating that he can control his consumption of alcohol by abstaining for 12 months and gaining a better understanding of the role of alcohol in his life by working with an AA sponsor for 9 months. He commenced such actions in September 2012 and April 2013, respectively, and, as of the date of the hearing, has evidenced insufficient reformation as recommended by the DOE consulting psychologist. Hearing Officers customarily accord deference to the opinions of mental health professionals with respect to security concerns under Criterion H and Criterion J.

Based on the foregoing, I cannot find that the individual has mitigated the security concerns associated with Criterion H and Criterion J at this time.

VI. Conclusion

In the above analysis, I have found that there was sufficient derogatory information in the possession of the DOE that raises serious security concerns under Criterion H and Criterion J. After considering all the relevant information, favorable and unfavorable, in a comprehensive common-sense manner, including weighing all the testimony and other evidence presented at the hearing, I have found that the individual has not brought forth sufficient evidence to mitigate the security concerns associated with Criterion H and Criterion J. Accordingly, I have determined that the individual’s access authorization should not be restored at this time. The parties may seek review of this Decision by an Appeal Panel under the regulations set forth at 10 C.F.R. § 710.28.

Wade M. Boswell
Hearing Officer
Office of Hearings and Appeals

Date: July 25, 2013