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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: March 14, 2013)
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_____)

Case No.: PSH-13-0033

Issued : July 31, 2013

Hearing Officer Decision

Wade M. Boswell, Hearing Officer:

This Decision concerns the eligibility of XXXXXXXXXXXXXXXXXXXX (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 granted at this time.

I. Background

The individual is employed by a DOE contractor who has requested that the individual be granted access authorization. The individual completed a Questionnaire for National Security Positions (QNSP) in June 2008 (2008 QNSP) and the Local Security Office (LSO) conducted a personnel security interview (PSI) with the individual on January 22, 2009 (2009 PSI). *See* Exhibit 11, Exhibit 13. The individual completed an additional QNSP in March 2012 (2012 QNSP) and the LSO conducted an additional PSI with the individual on August 21, 2012 (2012 PSI). *See* Exhibit 10, Exhibit 12. As a result of information disclosed by the individual on his QNSPs and during the PSIs with respect to

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.

his consumption of alcohol and his involvement with the criminal justice system, the individual was referred to a DOE consulting psychologist for an evaluation which took place on October 18, 2012 (Evaluation). *See* Exhibit 8.

Since the Evaluation did not resolve the concerns about the individual's alcohol consumption or criminal behavior, 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 three potentially disqualifying criteria set forth in the security regulations at 10 C.F.R. §§ 710.8, subsections (h), (j) and (l) (hereinafter referred to as Criterion H, Criterion J and Criterion L, 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. 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 presented no witnesses; the individual testified but presented the testimony of no other witnesses. The LSO introduced 14 numbered exhibits into the record; the individual tendered two exhibits (Exhibits A-B). 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 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

² Criterion H 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 . . ."; Criterion J 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 . . ."; and Criterion L relates to information that a person has "[e]ngaged in any unusual conduct or is subject to any circumstances which tend to show that the individual is not honest, reliable, or trustworthy; or which furnishes reason to believe that the individual may be subject to pressure, coercion, exploitation, or duress which may cause the individual to act contrary to the best interests of the national security . . ." 10 C.F.R. §710.8(h), (j)and (l).

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

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 three criteria as the bases for suspending the individual’s security clearance: Criterion H, Criterion J and Criterion L. Criterion H concerns information that a person has “an illness or mental condition of a nature which, in the opinion of a psychiatrist or 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 involving 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 Evaluation in which the DOE consulting psychologist concluded that the individual met the *Diagnostic Statistical Manual of the American Psychiatric Association IVth Edition TR (DSM-IV-TR)* criteria for Alcohol Abuse and that that is a condition that can lead to significant defects in his judgment and/or reliability. Ex. 1 and Ex. 8 at 12 – 13.

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). In addition to the Evaluation in which the DOE consulting psychologist concluded that the individual met the *DSM-IV-TR* criteria for Alcohol Abuse without adequate evidence of rehabilitation or reformation, the LSO noted 14 factual bases to support its concerns under Criterion J, including that the individual had been cited by local law enforcement officers for driving under the influence of alcohol in 2006. Ex. 1 and Ex. 8 at 12.

Criterion L concerns information that an individual has engaged in conduct “which tends to show that the individual is not honest, reliable, or trustworthy....” 10 C.F.R. § 710.8(I). With respect to Criterion L, the LSO alleges a pattern of criminal conduct by the individual based upon six instances in which the individual had been cited, charged and/or arrested for violations for the law. Ex. 1. Conduct reflecting questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations raises questions about an “individual’s reliability, trustworthiness and ability to protect classified information.” Adjudicative Guidelines at Guideline E.

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

IV. Findings of Fact

At the hearing, the individual contested several details contained in the Notification Letter, frequently challenging information that the LSO had obtained from the individual during the PSIs. In each such case, I have carefully considered the arguments presented by the individual at the hearing in reaching the findings of facts set forth below.

The individual consumed alcohol on a regular basis for approximately 20 years, beginning when he was 18 years old. Although he did not become intoxicated every time he drank, he would become intoxicated between once a month and once a week during this period of time and he frequently experienced hangovers. Ex. 13 at 153 – 155, 161 – 171, 175 – 187, 198 – 207. The individual and his second wife were together for approximately two years towards the end of this 20-year period and, during their time together, the individual’s consumption of alcohol increased, with the individual becoming intoxicated once or twice per week. *Id.* at 189 – 192, 204 – 206; Tr. at 30 – 35, 42 – 49.

In February 2005, while the individual may have been intoxicated,⁴ he had a physical altercation with a neighbor. *Id.* at 26. After the altercation ended, the individual went to the neighbor’s apartment door and pounded on it (and punctured it) with a screwdriver in an attempt to entice the neighbor to come out and continue the fight. Ex. 12 at 40, 44. The individual acted belligerently towards the police when they arrived and was cited for battery (which was subsequently amended to disturbing the peace); the neighbor was not cited. The individual was fined and required to pay to replace the neighbor’s door. *Id.* at 38, 46 – 47; Tr. at 19.

⁴ At times the individual has stated that he does not believe he was intoxicated at the time of this incident and at other times the individual has stated that he was intoxicated. Ex. 12 at 45, Tr. at 23.

In March 2005, while both the individual and his second wife were intoxicated, they had a physical altercation which resulted in the individual being arrested and charged with battery/domestic violence. *Id.* at 26; Ex. 12 at 58 – 59. His wife was not cited. They had a subsequent physical altercation in September 2005, at which time the individual kicked in a bathroom door and flushed his wife’s cell phone down a toilet to prevent her from making a telephone call. Tr. at 17 – 18. During the second incident, the individual acknowledges that he had been drinking but does not believe he was intoxicated.⁵ Ex. 12 at 67. The September 2005 incident resulted in local authorities charging the individual with domestic violence and malicious destruction of property when the earlier domestic violence charge was prosecuted. Tr. at 16 – 17. The individual’s wife did not appear in court when the charges were scheduled for trial in March 2007. Ex. 12 at 80. For the earlier charges, the individual was ordered to attend 28 sessions of domestic violence counseling (26 group sessions of 60 to 90 minutes each and two individual sessions of three hours each); the latter charges were dismissed. Tr. at 24; Ex. 14 at 98. The individual reports gaining significant insight into his behavior as a result of the counseling. Tr. at 55 – 56. The individual has been involved in no incidents of domestic violence subsequent to the counseling.

The individual drove after consuming alcohol, although he has stated he has no accurate memory of the frequency that he would do so. To the extent that he has attempted to estimate the number of times he has driven while intoxicated, his estimates have been inconsistent: at times reporting between 20 and 40 times and other times reporting less than 20 times. Notwithstanding the foregoing, the individual has acknowledged that between Thanksgiving and Christmas in 2006 he drove while intoxicated at least once per week. *Id.* at 25 – 30, 36 – 39, 40, 41, 42.

In November 2006, the individual was arrested⁶ for speeding and driving under the influence (DUI) of alcohol. At the police station, his blood alcohol (BAC) content registered .163 g/210L and .161 g/210 L. Ex. 14 at 218 – 219. The individual entered a five-year deferred prosecution agreement, which required that the individual participate in an intensive outpatient program for alcohol treatment for six months (three sessions per week for two hours each) and, thereafter, attend follow-up group and individual counseling sessions for 18 months. Tr. at 93 – 94. Participation in Alcoholic Anonymous meetings was also mandated. *Id.* at 61, 77, 103. As a result of his successful performance under the deferred prosecution agreement, the court dismissed the charges without prejudice in January 2012. Ex. 12 at 148.

⁵ At times, the individual has also denied that he was drinking during this second incident. Ex. 12 at 93, 116.

⁶ The individual has asserted that he was not arrested, but only received a citation, for this incident. The police report for the incident state that the police officer informed the individual that he was under arrest and he was asked to exit his vehicle and he was read his Miranda rights. Ex. 14 at 218 – 219.

In 2007, the individual was cited for driving with expired license plates, and paid fines and fees totaling \$443. Ex. 14 at 98. In 2011,⁷ he was cited for speeding on the grounds of a DOE facility and suspended from work without pay for two days. Tr. at 100 – 102.

Since completing his court-mandated alcohol treatment program, the individual has consumed alcohol on an occasional basis and testified that he had a drink at a business function about a month prior to the hearing. *Id.* at 65 – 69, 108 – 111; Ex. 12 at 199 – 201. The individual is aware of the risk of relapse and monitors his drinking accordingly. Tr. at 69 – 71. The individual’s occasional consumption of alcohol appears contradictory to his statements to the DOE that his intention is to no longer consume alcohol and his statement on his 2012 QNSP that “In 2007, I entered counseling and rehabilitation. I have remained abstinent from alcohol.” Ex. 10 at 20. The individual testified that his statements that he would “not drink” in the future meant that he did not intend to drink in high volumes, get drunk or “party;” he did not intend to communicate that he planned to stop drinking completely. Tr. at 69 – 70. When questioned about his statement in the 2012 QNSP he stated that he was in error to have used the word “abstinent.” *Id.* at 97 – 98.

The individual was possibly intoxicated in December 2011 as a result of emotional distress over the dissolution of his third marriage. At that time, alcohol may have contributed to a verbal altercation he had at an organization where he volunteers. In May 2012, the individual became intoxicated on a business trip after consuming six to seven drinks. Ex. 8 at 4, 11; Tr. at 67.

On October 18, 2012, the DOE consulting psychologist evaluated the individual and concluded that he met the criteria set forth in the *DSM-IV-TR* criteria for Alcohol Abuse. Notwithstanding his prior alcohol treatment and counseling, she noted that he occasionally drinks to intoxication and stated that to evidence adequate rehabilitation or reformation he would need to completely abstain from alcohol consumption for a period of two years, during which time he should avail himself of counseling in order to deal with the psychological stress he has experienced and continues to experience regarding interpersonal relationships. She concluded that the individual’s alcohol abuse is an illness or mental condition that can lead to significant defects in his judgment or reliability. Ex. 8 at 11, 12, 13.

The DOE psychologist was present for the testimony of the individual at the hearing. Based on the information presented at the hearing, she refined her diagnosis to Alcohol Abuse in Sustained Full Remission (as defined in the *DSM-IV-TR*) since alcohol had not caused the individual any problems and he has not shown any signs of abuse for the previous 12 months. Tr. at 122. She reduced her requirements for demonstrating adequate rehabilitation or reformation to one year of abstinence and continuing to see a counselor with whom the individual had testified he is currently working⁸ during that abstinence.

⁷ The Notification Letter states that this incident occurred in October 2012; however, the 2012 PSI was conducted prior to such date and covered this incident, referring to it as occurring in October 2011. Ex. 12 at 151.

⁸ Although the individual testified that he attended counseling with respect to relationship issues once every four to six weeks, I make no findings with respect to such counseling. The individual had stated in

She testified that within the prior 12 months, the individual “does not appear to have been suffering from an illness or mental condition which could cause a significant defect in his judgment or reliability.” *Id.* at 129. On further questioning, she stated that the individual’s current diagnosis is an illness or mental condition that could cause a significant defect in judgment or reliability and that an additional year of complete abstinence and counseling would be required to resolve those concerns. *Id.* at 131.

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)⁹ and the Adjudicative Guidelines. After due deliberation, I have determined that the individual’s access authorization should not be granted. 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.

A. Review of Criterion H and Criterion J Security Concerns

As noted above, when the DOE consulting psychologist evaluated the individual in October 2012, she diagnosed the individual as meeting the criteria set forth in the *DSM-IV-TR* for Alcohol Abuse, without adequate evidence of rehabilitation or reformation, and opined that this is a condition that could cause significant defects in his judgment and reliability. Ex. 8 at 12 – 13. The Evaluation outlined steps to evidence adequate rehabilitation and reformation, which focused primarily on complete abstinence for a period of time. Although the individual had abstained from alcohol for approximately three years in conjunction with his court-order alcohol treatment program (beginning in 2007), he has subsequently consumed alcohol occasionally and did so as recently as the month prior to the hearing. The individual has demonstrated no abstinence since the date of the Evaluation.

Although the individual is aware of the Evaluation, he contests its validity, asserting that the DOE psychologist is in error when she states that he has continued to abuse alcohol and that he has not demonstrated adequate rehabilitation or reformation. Ex. 2; Tr. at 63. The administrative review hearing provides an individual the opportunity to mitigate, or even refute, the LSO’s security concerns. In this case, the individual presented no expert

the 2012 PSI that that counseling had ended and I was not persuaded by the Letter of Counseling submitted as to the depth and length of the restoration of such counseling relationship. Tr. at 125; Ex. 12 at 239 – 240; Ex. B.

⁹ 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.

lay testimony or documentation with respect to the alcohol-related and psychological concerns set forth in the Notification Letter. To address these issues, he offered his own testimony in which he stated that the DOE psychologist inaccurately reported information from his interview with her and that the court-ordered alcohol treatment that he had completed following his DUI arrest constituted adequate rehabilitation or reformation. As noted in the Findings of Facts, *supra.*, the individual has reported information inconsistently. I found the DOE psychologist's testimony credible with respect to her interview of the individual and the Evaluation a reliable record of the information conveyed to her. The DOE psychologist notes that subsequent to the individual's completion of his alcohol treatment program, he has over-indulged in alcohol consumption and such over-indulgence contributes to her conclusion that the individual has not demonstrated adequate rehabilitation or reformation. *Cf.* Adjudicative Guidelines at Guideline G ¶ 23(c) (alcohol concerns may be mitigated when an individual has acknowledged the issues and established a pattern of *responsible use*).

Hearing Officers customarily accord deference to the opinions of mental health professionals with respect to security concerns under Criterion H and Criterion J. At the hearing, the DOE psychologist who had been present throughout the hearing testified that, having heard the testimony of the individual, the psychologist would continue her diagnosis of Alcohol Abuse.¹⁰ Noting that since alcohol had not caused the individual any problems and he has not shown any signs of abuse since his intoxication in May 2012, she equivocated on whether he suffered from a condition that could cause the individual to have a significant defect in judgment or reliability. Tr. at 129, 131. Ultimately, she concluded that, until the individual has completed an additional year of complete abstinence and counseling, he will continue to have a condition that could cause a significant defect in his judgment or reliability. *Id.* As of the date of the hearing, the individual has not established any period of abstinence subsequent to the Evaluation. I found no evidence presented by the individual sufficient to mitigate the Criterion H and Criterion J security concerns. *See* Adjudicative Guidelines at Guideline G ¶23 and Guideline I ¶29.

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

B. Review of Criterion L Security Concerns

The LSO cites six incidents to demonstrate a pattern of criminal behavior by the individual. The individual argues that the LSO has mischaracterized as "arrests" events where he was only "cited." However, an examination under Criterion L focuses on the underlying behavior of a person; security concerns are neither triggered nor mitigated by the characterization of an event or by the disposition of a matter. Behavior that demonstrates an unwillingness or inability to comply with laws, rules or regulations

¹⁰ In light of the passage of time since the Evaluation, the DOE psychologist would modify the diagnosis from "Alcohol Abuse" to "Alcohol Abuse, Sustained Full Remission." Tr. at 122.

raises questions about a person's reliability, trustworthiness and the ability to protect classified information. Adjudicative Guidelines at Guideline E ¶ 15.

Four of the incidents cited by the LSO involved alcohol either directly (as in the individual's arrest for DUI) or indirectly (as with the incidents of domestic violence when the individual was either intoxicated or had consumed alcohol). These four events occurred in 2005 and 2006. Beginning in 2007, the individual participated in separate counseling for both domestic violence and alcohol use. The individual has credibly testified as to the skills he acquired as a result of the domestic violence counseling and the insight that he developed. Tr. at 55 – 56. There is no evidence that there has been any occurrence of domestic violence subsequent to his completion of such counseling. While this weighs in favor of mitigating these incidents, all of these incidents also involved the individual's use of alcohol. As discussed above, while the individual has completed certain alcohol treatment programs, he has not provided adequate evidence of rehabilitation or reformation with respect to his alcohol use. Ex. 8. Until such time as the individual has evidenced such rehabilitation or reformation, I cannot find that he has mitigated the Criterion L security concerns arising from these four incidents.

The remaining incidents noted by the LSO are (1) a 2007 citation for operating a motor vehicle with expired license plates, and (2) a 2011 citation for operating a motor vehicle at speed in excess of the speed limit. With respect to the expired registration, the individual credibly testified that he was unaware that his registration had expired a few days prior to his receiving the citation. Tr. at 89. With respect to the speeding violation, the individual testified that it occurred at a DOE site when he accelerated while approaching a speed limit sign, not realizing that the legal speed limit did not increase until he reached the sign. The individual has acknowledged responsibility for this error and accepted a two-day, unpaid suspension from work. *Id.* at 101 – 102. The individual has stated that these are his only two traffic infractions (other than the DUI) and the LSO has presented no information on vehicular violations. Ex. 12 at 154. These two incidents appear to be isolated occurrences which are minor in nature. I find that the individual has mitigated the security concerns arising from these two incidents. *See* Adjudicative Guidelines at Guideline E at ¶ 17(c).

Until the individual has resolved the security concerns with respect to his alcohol use, I cannot find that he has mitigated all of the security concerns raised under Criterion L with respect to his honesty, reliability and trustworthiness.

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 Criteria H, J and L. 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 all of the security concerns associated with Criteria H, J and L. Accordingly, I have determined that the individual's access authorization should

not be granted. 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 31, 2013