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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 2, 2014)
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_____)

Case No.: PSH-14-0020

Issued: May 29, 2014

Administrative Judge's Decision

Steven L. Fine, Administrative Judge:

This Decision concerns the eligibility of XXXXXXXXX (hereinafter referred to as “the Individual”) to hold a security clearance 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 discussed below, after carefully considering the record before me in light of the relevant regulations, I conclude that the Individual’s security clearance should not be restored.

I. BACKGROUND

This case involves an Individual with four Driving Under the Influence (DUI) arrests. After the Individual’s fourth DUI, the LSO conducted a Personnel Security Interview (PSI) of the Individual and requested that he be examined by a DOE consultant Psychologist (the Psychologist). Unable to resolve the derogatory information, the LSO issued a Notification Letter to the Individual. *See* 10 C.F.R. § 710.21. The letter informed the Individual that information in the possession of the DOE created a substantial doubt concerning his eligibility for a security clearance. Specifically, the LSO stated that the Individual had been found to habitually use alcohol to excess and that the Individual had engaged in criminal activity which brought into question his honesty, reliability, and trustworthiness. This conduct comes within the purview of two potentially disqualifying criteria, Criterion J and Criterion L.¹

¹ Specifically, the Notification Letter alleges that the Individual has: (1) “[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) (Criterion J); and (2) “[e]ngaged in any unusual conduct or is

The Notification Letter informed the Individual that he was entitled to a hearing before an Administrative Judge² in order to resolve the substantial doubt regarding his eligibility for a security clearance. The Individual requested a hearing, and the LSO forwarded the Individual's request to the Office of Hearings and Appeals (OHA). The Director of OHA appointed me as the Administrative Judge in this matter.

At the hearing I convened pursuant to 10 C.F.R. § 710.25(e) and (g), I took testimony from the Individual, his three friends and co-workers, and the Psychologist. *See* Transcript of Hearing, Case No. PSH-14-0020 (hereinafter cited as "Tr."). The LSO submitted 11 exhibits, marked as Exhibits one through 11, while the Individual submitted seven exhibits, marked as Exhibits A through G.

II. STANDARD OF REVIEW

The Administrative Judge'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). The regulations state that "[t]he decision as to access authorization is a comprehensive, common-sense judgment, made after consideration of all the relevant information, favorable or unfavorable, as to whether the granting of access authorization would not endanger the common defense and security and would be clearly consistent with the national interest." 10 C.F.R. § 710.7(a). In rendering this opinion, I have considered the following factors: 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.

III. FACTUAL BACKGROUND

The Individual has a history of five arrests, including four DUIs. Three of the DUIs (in 1978, 1979, and 1985) and a non-alcohol related arrest for Disturbing the Peace (in 1968), occurred in the distant past. The Individual's fourth DUI, however, occurred on August 24, 2013.

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(l) (Criterion L).

² Effective October 1, 2013, the titles of attorneys in the Office of Hearings and Appeals (OHA) changed from Hearing Officer to Administrative Judge. *See* 78 Fed. Reg. 52389 (August 23, 2013). The title change was undertaken to bring OHA staff in line with the title used at other federal agencies for officials performing identical or similar adjudicatory work.

On October 7, 2013, the LSO conducted a PSI of the Individual. During this PSI, the Individual reported that he was involved in an automobile accident on the way to a social function at an Alcoholics Anonymous (AA) club. Exhibit 9 at 9-10. The police administered two Breathalyzer tests to the Individual, which measured his Blood Alcohol Concentration (BAC) at .128 and .13, respectively. Exhibit 9 at 15. The Individual claimed that his last consumption of alcohol had occurred 12 hours earlier at 3:00 a.m. Exhibit 9 at 15, 27. The Individual reported that he had begun drinking at 5:00 p.m. the evening before the arrest. Exhibit 9 at 16. He claimed he did not recall how much alcohol he consumed that night, but "it was a lot." Exhibit 9 at 16. In 1979, after his second DUI, the Individual began attending AA meetings and stopped drinking completely for nine months. Exhibit 9 at 39-40. He quit drinking and began attending AA clubs again in 2008, allegedly in support of his wife who was in an AA 12-Step program, although he attended different AA clubs than his wife. Exhibit 9 at 49-50. He claimed that he did not feel he had a problem with alcohol, but felt his wife would be better off if he did not drink. Exhibit 9 at 52. He admitted that he identified himself as an alcoholic at AA meetings, claiming that it would have been awkward if he had not done so.³ Exhibit 9 at 52-53. At one time, he was attending four to seven AA meetings a week. Exhibit 9 at 95. In 2011, about a year after his wife had passed away, he quit AA and started drinking again. Exhibit 9 at 51, 95, 97. He described his current alcohol consumption pattern as one to three drinks, two times a week. Exhibit 9 at 58-61, 100. He estimated that he usually has between two to three ounces of whiskey in a drink. Exhibit 9 at 62. The Individual claimed that, on the day of the arrest, he did not realize he was intoxicated. Exhibit 9 at 64-65. He further admitted that: he had at times taken a drink when he had promised himself that he would not drink, some of his medications are labeled with warnings against combining them with alcohol, and that his late wife had sometimes complained about his drinking. Exhibit 9 at 74-75, 82, 84-86. The Individual continues to use alcohol, but does not drink around his family. Exhibit 9 at Exhibit 9 at 32, 88.

At the request of the LSO, the Psychologist evaluated the Individual on November 15, 2013. Exhibit 6 at 1. The Psychologist reviewed selected portions of the Individual's personnel security file, administered a battery of standardized psychological tests to the Individual, and interviewed the Individual. Exhibit 6 at 1. After completing her evaluation of the Individual, the Psychologist issued a report on November 15, 2013, in which she specifically found that the Individual did not meet the criteria for a mental illness or mental condition set forth in the Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition (DSM-V). Exhibit 6 at 8. However, the Psychologist found that the Individual was habitually using alcohol to excess. Exhibit 6 at 9. She based this finding on the information provided by the Individual, specifically, his statements that he was currently consuming "one to three mixed drinks, containing two to three ounces of whiskey twice a week" and his stated intention to continue this pattern of alcohol consumption in the future. Exhibit 6 at 3. The Psychologist concluded that the Individual:

Possibly has used alcohol habitually to excess since 2011, and continues to engage in heavy or risky drinking as per NIH 2005 guidelines for males: more than four drinks per day one day per month, with 1.5 ounces of alcohol

³ During this PSI, the Individual was asked: "When you participated in AA meetings, did you announce yourself as an alcoholic?" The Individual responded by stating: "That's really confidential and it's an anonymous program, so do I really have to answer that?" Exhibit 9 at 52.

constituting one drink. [The Individual] drinks 2-3 ounces of whiskey in his drinks, with the amount uncertain as he "does not measure" his alcohol. This means he possibly is drinking twice the recommended amount of alcohol per drink, doubling his total of drinks from 1-3 per day to 2-6 per day, two to three times per week. More than four alcoholic drinks per day more than one day per month is considered heavy drinking.

Exhibit 6 at 8.

The Psychologist opined that there was no evidence that the Individual had been rehabilitated or reformed. Exhibit 6 at 9. The Psychologist opined that in order to be reformed or rehabilitated from his excessive alcohol use, the Individual would need to "reduce his consumption of alcohol to within NIH guidelines (less than 14 drinks per week, less than four drinks per day) and drink at that level indefinitely to be considered reformed." Exhibit 6 at 9.

IV. DEROGATORY INFORMATION AND SECURITY CONCERNS

The Individual's four alcohol-related arrests and his excessive alcohol consumption raise security concerns because his alcohol use might lead to the exercise of questionable judgment or the failure to control impulses, or negatively impact his reliability and trustworthiness. *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) Guideline G at ¶ 21. The Adjudicative Guidelines state that: "alcohol-related incidents away from work, such as driving while under the influence, . . . regardless of whether the individual is diagnosed as an alcohol abuser or alcohol dependent," are "conditions that could raise a security concern and may be disqualifying." Adjudicative Guideline G at ¶ 22.

The Individual's five arrests constitute criminal conduct which raises security concerns under Criterion L. "Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness and ability to protect classified information." Adjudicative Guideline J at ¶ 15. "Criminal activity creates doubt about a person's judgment, reliability and trustworthiness. By its very nature, it calls into question a person's ability or willingness to comply with laws, rules and regulations." *Id.* at ¶ 30.

In addition, the inconsistencies in the information provided by the Individual in his PSI, and at the hearing, raise questions about the Individual's judgment, honesty, and reliability. The Adjudicative Guidelines state in pertinent part: "Conduct involving questionable judgment . . . can raise questions about an individual's reliability, trustworthiness and ability to protect classified information." Adjudicative Guideline E at ¶ 15.

V. ANALYSIS

Criterion J

At the hearing, the Individual contended that he is not “an abusive or excessive user of alcohol.” Tr. at 8. Specifically, he contended that he currently consumes “only” 12 drinks per week, which is two drinks less than the National Institute of Alcohol Abuse and Alcoholism’s (NIAAA) standard of 14 drinks per week for heavy or at-risk drinking.⁴ Tr. at 8. He further noted that his most recent blood tests, submitted as Exhibit C, show that his liver enzymes are normal, indicating that he does not abuse alcohol. Tr. at 10. The Individual further claimed that his alcohol consumption on the night before his latest DUI arrest was an isolated case, and not his normal behavior. Tr. at 10.

At the hearing, the Individual testified that he does not have a problem with alcohol, although he conceded that that he had used alcohol to excess in the 1970s. Tr. at 49-50, 78. He testified that he could not recall the last time that he was intoxicated, but admitted that he drank to excess on the night of August 23, 2013, the night before his last DUI arrest. Tr. at 50, 55. He testified that this was “probably” the only time he had been intoxicated during the past 20 years. Tr. at 50. He testified that on the evening before his arrest, he had been consuming alcohol until approximately midnight, when he went to bed. Tr. at 56-57. The Individual testified that he does not recall how much alcohol he consumed during this time. Tr. at 57. He testified that he could not fall asleep, so he got out of bed and had another drink at approximately 2:00 a.m. of the day of his arrest, and went back to bed and until 8:00 or 9:00 a.m. Tr. at 57. The Individual testified that he did not feel the effects of his drinking when he woke up that morning. Tr. at 58-59. He testified that his DUI arrest occurred later that day at 3:45 p.m. Tr. at 57. The Individual testified that that he was unaware that he had any alcohol in his system when he chose to operate his motor vehicle. Tr. at 57-58. He did not believe poor judgment led to his latest DUI, because he didn’t realize that he still had alcohol in his system. Tr. at 65. He testified that he had one to three drinks “a couple of times a week.” Tr. at 51-52. He further testified that he had recently began to measure the alcohol content of his drinks. Tr. at 52. He testified that, during the PSI and the Psychological Examination, he may have overestimated the amount of alcohol he was mixing his drinks with. Tr. at 53. He then testified that he was now putting exactly two ounces of alcohol in his drinks. Tr. at 53. He initially testified that he is currently consuming one to three drinks of alcohol, two nights a week. Tr. at 54.

Later on during the hearing, the Individual claimed the most he would drink on a particular day would be two drinks. Tr. at 66. He testified that he has reduced his drinking “not because I thought I was an abusive drinker, but my concern was what the DOE thought.” Tr. at 52. The Individual testified that he had stopped drinking from 2008 until 2011. Tr. at 60. He testified that he had been attending AA meetings “in support of [his] wife, and liked the places where they were being held, liked a lot of the people, started getting involved in activities with them . . . and . . . just didn’t drink at all.” Tr. at 60, 76-77. The Individual testified that he was, at one time, attending several AA meetings per week and had become the treasurer for one of the meeting groups. Tr. at 76. He admitted that he sometimes chaired meetings, had been working the AA’s Twelve-Step Program, and had a sponsor. Tr. at 76. When I asked the Individual if anyone at AA had ever challenged him on his belief that he did not have a problem with alcohol, he responded by stating: “Well, no, I didn’t speak openly at the meetings and say that I did not think I had a problem. I said I was there because I wanted to stop drinking and to continue to

⁴ The Individual ignored the important fact that the NIAAA’s standard also considers consumption of four drinks in one day on a monthly basis to be at-risk drinking.

stop drinking.” Tr. at 78-79. About a year after his wife’s death, he started to drink again. Tr. at 60. He attributed his previous DUIs to poor judgment rather than a problem with alcohol. Tr. at 63. He testified that he had consumed alcohol on the evening before the hearing. Tr. at 65. He testified that he does not use alcohol in the presence of his family. Tr. at 65. When questioned about his future intentions regarding his consumption of alcohol, he testified: “Probably to stop all together.” Tr. at 68.

The Psychologist testified after observing the testimony of the Individual. She testified that the Individual estimated that he consumed about 14 mixed drinks on the evening before the arrest and that each of these drinks contained three ounces of whiskey. Tr. at 88-89. She testified that she was not qualified to provide an opinion as to whether the Individual’s reported alcohol consumption on the evening before his arrest was consistent with a BAC of .13 or .128, 12 or 13 hours later. Tr. at 89. However, she testified that if the Individual did not feel the effects of his previous night’s alcohol consumption when he woke up the next morning, then he has likely developed a tolerance to alcohol, and that if the Individual has developed a tolerance to alcohol, he is likely consuming more alcohol than he admits. Tr. at 90. She expressed a concern that the Individual might not realize how much alcohol he is actually consuming and might be drinking more than he intends. Tr. at 90-91. She testified that, for men, the National Institute of Health (NIH) considers more than four or five drinks a day on any one day in a month to be risky drinking. Tr. at 91-92. The Psychologist testified that consuming more than six ounces of alcohol in one day, once per month, would constitute “heavy drinking.” Tr. at 101. She testified that the Individual’s current reported alcohol consumption level could still be considered “problematic drinking.” Tr. at 92-93. Because of the time period between the Individual’s third and fourth DUIs, she does not believe that the Individual has “a pattern” of DUIs. Tr. at 93. The Psychologist testified that she believed that the Individual “had been and was a user of alcohol habitually to excess,” since he was consuming up to nine ounces of alcohol in one day. Tr. at 94. In order to be reformed, the Psychologist testified, the Individual would have to reduce his consumption to less than six ounces a day, and drink at that level indefinitely. Tr. at 94. The Psychologist testified that it is too soon to say if the Individual has been reformed. Tr. at 95. The Psychologist testified that the Individual needs to show that he can refrain from risky drinking for a period of at least one year, to be considered reformed. Tr. at 96. The Psychologist testified that the psychological tests that she administered to the Individual did not show any evidence of a substance dependence disorder or of somebody that has an alcohol problem. Tr. at 99.

The LSO’s security concern under Criterion J is based on the Psychologist’s conclusion that the Individual has been a user of alcohol habitually to excess. The phrase “user of alcohol habitually to excess” is not set forth in the Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition, as a formal psychiatric diagnosis, nor is it defined in the Part 710 regulations. However, OHA Administrative Judges have addressed the application of this phrase in numerous Decisions, and have defined it as properly applying to individuals who drink to intoxication as a customary practice or pattern. *See, e.g., Personnel Security Hearing, Case No. PSH-12-0113 (2012); Personnel Security Hearing, Case No. TSO-0738 (2009); Personnel Security Hearing, Case No. TSO-0793 (2009); Personnel Security Hearing, Case No. TSO-0738 (2009); Personnel Security Hearing, Case No. TSO-0453 (2007).*⁵ In both her report and her testimony, the

⁵ Decisions issued by the Office of Hearings and Appeals (OHA) are available on the OHA website located at <http://www.doe.gov/OHA>.

Psychologist bases her conclusion that the Individual consumed alcohol “to excess” on the fact that his consumption of alcohol was in excess of the NIH Guidelines, which were developed to assist clinicians to identify alcohol consumption that “causes or elevates the risk for alcohol-related problems or complicates the management of other health problems.” NIH Guidelines at 1, *as cited in, Personnel Security Hearing, Case No. PSH-13-0101 (2014) (PSH-13-0101)*. While, the focus of the NIH Guidelines is to identify alcohol consumption that could compromise a patient’s health, the focus of the present proceeding is upon alcohol consumption that might lead to the exercise of questionable judgment, failure to control impulses, or that might negatively affect an individual’s reliability and trustworthiness. Adjudicative Guidelines at Guideline G, ¶21. “[C]aution should be exercised before the *a priori* application of standards crafted for preserving physical health to regulations promulgated to preserve national security.” *PSH-13-0101*. OHA Administrative Judges accord deference to mental health professionals with respect to issues concerning psychiatric or psychological illnesses or conditions. However, determining whether or not a particular individual drinks to excess, and how often that individual does so, is essentially a factual and legal determination, rather than a mental health determination, and is therefore well within the ambit of an Administrative Judge’s discretion and expertise. Accordingly, an Administrative Judge is able to decide whether or not a particular individual drinks to intoxication (or near-intoxication) with excessive frequency without relying upon a mental health expert’s opinion. In the present case, I find that since the Psychologist’s report and testimony show that her opinion is based solely upon a standard largely developed to assess the physical health effects of alcohol consumption, rather than the mental health, behavioral or national security effects of an individual’s alcohol consumption, it is insufficient to establish that the Individual habitually uses alcohol to excess.

However, the Adjudicative Guidelines indicate that any derogatory information showing that an individual was driving under the influence is sufficient to raise significant security concerns about an individual. Once these concerns are raised, it is incumbent upon the individual to resolve them. In the present case, the security concern arising from the Individual’s recent DUI is exacerbated by the evidence in the record, discussed above, showing that the Individual has a history of four DUI arrests, has stopped drinking on at least two occasions, has regularly participated in AA, and may well have developed a tolerance to alcohol. The Individual’s lack of credibility has prevented me from concluding that the security concerns arising from his recent DUI have been resolved. Because I cannot trust the information concerning his alcohol use provided by the Individual, I cannot conclude that the Individual’s operation of a motor vehicle while intoxicated was an isolated incident rather than a symptom of a more serious alcohol issue. For example, I find it difficult to believe that the Individual has quit drinking and regularly attended AA meetings during two periods of his life, without him having harbored some concern about his alcohol consumption. The Individual has repeatedly claimed during this proceeding that his recent DUI arrest occurred 12 to 14 hours after he last consumed alcohol. If the Individual was being truthful, his BAC 12 hours before his arrest would have been much higher, which suggests that he would have developed a tolerance to alcohol. If the Individual has developed a tolerance to alcohol, he has not been candid about his alcohol consumption. Moreover, the Individual has repeatedly claimed that he did not feel intoxicated before, during and after the accident which resulted in the most recent DUI. The import of this claim is that the Individual was either being untruthful in claiming that he was not intoxicated, or that he had developed a tolerance to alcohol. Simply put, if I am unable to trust the allegedly mitigating

information an Individual has provided to me, I am unable to resolve the derogatory information concerning him.

Accordingly, while I find that the LSO's allegations under Criterion J are not supported in the record, I find that the Individual has not mitigated the security concerns raised by the Individual's DUIs under Adjudicative G.

Criterion L

While most of the criminal conduct cited in the Notification Letter occurred almost 30 years ago, I find that the security concerns raised by the Individual's four alcohol-related arrests cannot be resolved by the passage of time alone. Given the role that alcohol has played in the Individual's past conduct, combined with the fact that the Individual's testimony concerning his alcohol history and consumption is not credible, I am not convinced that the underlying conduct will not recur. In the end, the Individual, by failing to provide truthful information concerning his alcohol consumption and history, has not resolved the doubts about his judgment, reliability and trustworthiness, that were raised by his four alcohol-related arrests. Accordingly, I find that the security concerns raised under Criterion L by the Individual's five arrests have not been resolved.

VI. CONCLUSION

For the reasons set forth above, I conclude that the LSO properly invoked only Criterion L. I find, however, that the Individual has not mitigated the security concerns under Criterion L or Adjudicative Guideline G. Accordingly, the Individual has not demonstrated that restoring his security clearance would not endanger the common defense and would be clearly consistent with the national interest. Therefore, 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.

Steven L. Fine
Administrative Judge
Office of Hearings and Appeals

Date: May 29, 2014