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United States Department of Energy
Office of Hearings and Appeals

In the Matter of:	Personnel Security Hearing	)
		)
Filing Date:	March 27, 2015	)
		) Case No.: PSH-15-0016
		)

Issued: June 25, 2015

Administrative Judge Decision

William M. Schwartz, Administrative Judge:

This Decision concerns the eligibility of XXXXXXXXXXXXXX (hereinafter referred to as "the individual") to hold an access authorization[1] 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 and the Adjudicative Guidelines, I have determined that the individual's access authorization should not be restored at this time.

I. Background

The individual works for a DOE contractor in a position that requires that he hold a DOE security clearance. In 1997, the individual was arrested for Public Intoxication while walking home. In 1998 and 1999, he was arrested twice for Theft of Property by Check, after he bounced a check at two different retail stores. He was arrested for Driving While Intoxicated (DWI) in November 2009 and, during a subsequent Personnel Security Interview (PSI), stated his intention never to drink and drive in the future. Nevertheless, he was arrested a second time for DWI in 2014. Because the local security office (LSO)

[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.

could not resolve the DOE's security concerns arising from his alcohol-related arrests during a second PSI in September 2014, the LSO referred the individual to a DOE consultant psychologist (DOE psychologist) for a mental health evaluation. In a November 21, 2014, evaluation report, the DOE psychologist concluded that the individual used alcohol habitually to excess and that his relationship to alcohol presents a significant defect in judgment or reliability. Independent of the DOE psychologist's evaluative report, the LSO determined that the individual's five arrests between 1997 and 2014 constituted a pattern of criminal conduct that raised additional concerns regarding his honesty, reliability, and trustworthiness.

On January 21, 2015, the LSO sent a letter (Notification Letter) to the individual advising him that it had reliable information that created a 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 Criteria H, J, and L, respectively).[2]

Upon his receipt of the Notification Letter, the individual exercised his right under the Part 710 regulations to request an administrative review hearing, and I was appointed the Administrative Judge in the case. At the hearing, the individual presented his own testimony and that of four other witnesses, and the LSO presented the testimony of one witness, the DOE psychologist. In addition to the testimonial evidence, the LSO submitted 32 numbered exhibits into the record. The exhibits will be cited in this Decision as "Ex." followed by the appropriate numeric designation. The hearing transcript in the case will be cited as "Tr." followed by the relevant page number.

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 concerns information that a person suffers from "[a]n 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). 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." 10 C.F.R. § 710.8(j). Finally, Criterion L concerns information that a person has engaged in unusual conduct that tends "to show that the individual is not honest, reliable, or trustworthy. . . . Such conduct or circumstances include, but are not limited to, criminal behavior . . ." 10 C.F.R. § 710.8(l).

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 at the hearing with evidence to convince the DOE that restoring 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). Hence, an individual is afforded the utmost latitude in the presentation of evidence to mitigate the security concerns at issue.

B. Basis for the Administrative Judge's Decision

In personnel security cases arising under Part 710, it is my role as the Administrative Judge 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 support for its security concerns under Criteria H and J, the LSO relies on the opinion of the DOE psychologist, who determined that the individual is a user of alcohol habitually to excess which, in his opinion, causes or may cause significant defects in the individual's judgment and reliability. In addition, the LSO cites the three alcohol-related arrests described above, which occurred in 1997, 2009, and 2014. Ex. 1. The facts that raise security concerns under Criterion L, in the opinion of the LSO, are the same three alcohol-related arrests in conjunction with the 1998 and 1999 arrests for writing bad checks.

I find that there is ample information in the Notification Letter to support the LSO's reliance on Criteria H, J, and L. The excessive consumption of alcohol is a security concern because that behavior can lead to the exercise of questionable judgment and the failure to control impulses, which in turn can raise questions about a person's reliability and trustworthiness. *See 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) at Guideline G. Criminal activity, such as the multiple lesser offenses at issue here, by its very nature, calls into question a person's ability or willingness to comply with laws, rules, and regulations. *Id.* at Guideline J.

IV. Findings of Fact

Except as noted below, the individual does not contest the facts underlying the LSO's concerns regarding his continued possession of a security clearance. At the hearing, however, the individual did provide a context for some of his actions, which placed them in a more favorable light.

The individual's first alcohol-related arrest occurred on September 16, 1997, when the individual drank four beers within four hours at a club, while celebrating a friend's birthday. When he decided to leave the club, his vehicle would not start, so he began walking home along the highway. Ex. 23. About three-quarters of the way home, a public safety officer stopped him and charged him with public intoxication, a charge which was ultimately dismissed. Ex. 30 at 71-75. The individual testified that after that evening, he "decided not to drink for a long time." Tr. at 74.

On two occasions, one in 1998 and one in 1999, the individual wrote a check to a retailer that was rejected by the banks for insufficient funds. The amount of each check was less than $50. Ex. 26 at 9; Ex. 31 at 12, 14. Unbeknownst to the individual, he was charged with Theft of Property by Check in February 1998 and again in April 1999. Eventually, the individual learned of these charges when he appeared at the motor vehicle office to report a change of address. He resolved the charges by making restitution and paying a fine of $500. Ex. 31 at 16, 18-19. During a PSI conducted shortly after these charges, the individual stated that, when he wrote the checks, he did not know they would bounce. In addition, he told the interviewer that he was not notified by the bank because he had moved twice within the preceding year and the bank was not aware of his current address. *Id.* at 20. At the hearing, the individual testified that he had rectified the matter as soon as he learned about it, and faces no financial difficulties now. Tr. at 74-75, 81.

The individual received his first DWI arrest in November 2009. While dining with his family at a restaurant, he drank four beers within two-and-one-half hours. Ex. 30 at 15. Neither he nor any of his family believed he had consumed too much alcohol to be driving. *Id.* at 16. A police officer stopped him for speeding and smelled alcohol on his breath. He refused to take a breath alcohol test, was charged with DWI, and was taken to a detention center. *Id.* at 19, 21. After bonding out, he reported the arrest at his workplace and sought assistance from the Employee Assistance Program which, in turn, recommended professional treatment and counseling. *Id.* at 33. He completed a 20-session intensive outpatient program (IOP) for alcohol and drug addiction. *Id.* at 35; Tr. at 27. At a PSI three months after the incident, while undergoing treatment, the individual stated that he would abstain from alcohol in the future. Ex. 30 at 80.

In August 2014, the individual was arrested a second time for DWI. At a PSI shortly after the arrest, he explained that he was driving after drinking and a police officer pulled him over at around 2:30 in the morning. Ex. 28 at 12. He refused to take an alcohol breath test, because he had consumed five beers in the previous five hours and doubted he could pass the test. *Id.* at 14. He stated that he did not feel impaired at the time, and for that reason he drove. *Id.* at 24. He told the interviewer that he had not consumed any alcohol since the night of that arrest, that he had begun an alcohol treatment program, and that he gets intoxicated about once a year. *Id.* at 25, 28, 40. He stated, however, that he stopped drinking after his arrest in 2009, and was abstinent until December 2013. *Id.* at 42-43. In January 2014, he resumed drinking, with a new friend, consuming a few beers

"every two weeks," maintaining that he has not been intoxicated since then, including the night of his August arrest. *Id.* at 44-45, 50. He stated that since age 25, he has always limited his drinking to no more than two beers a day. *Id.* at 53. He admitted, however, that he has drunk alcohol to excess twice, on the nights of his 2009 and 2014 arrests, and both incidents were triggered by sad events involving his children. *Id.* at 52. The most recent arrest occurred shortly after one of his daughters told him that she and her family, including seven of his grandchildren, would be moving to another state. *Id.* at 54.[3] He began another IOP shortly after the arrest, attending sessions four nights a week, two and a half hours per night. *Id.* at 58. He again stated that he intended to stop drinking alcohol completely and attend the once-weekly aftercare program offered by the same provider indefinitely. *Id.* at 20, 62, 68.

The DOE psychologist evaluated the individual in November 2014. At the evaluation, the individual told the DOE psychologist that he had completed his IOP a few weeks earlier, but had not yet begun attending the aftercare program due to work constraints. Ex. 14 at 4-5. He told the DOE psychologist that he would begin attending aftercare when it was next offered, three days after the evaluation. *Id.* at 5. He was not attending Alcoholics Anonymous (AA) meetings but stated that he would seek out a chapter near his home. *Id.*

The DOE psychologist did not determine that the individual met the criteria for either Alcohol Abuse or Alcohol Dependence as set forth in the *Diagnostic Statistical Manual of the American Psychiatric Association*, Fourth Edition Text Revised (DSM-IV-TR). Instead, based on his review of the individual's personnel security file and his own interview with the individual, he concluded that the individual uses alcohol habitually to excess. *Id.* at 6. He reached this opinion because the individual "clearly demonstrated a history of alcohol misuse in the past, marked by two alcohol-related convictions," and admitted to driving under the influence of alcohol roughly once a month for many years. *Id.* He did not find adequate evidence of rehabilitation or reformation: he noted that the individual had completed an IOP in 2009 and had recently completed a second IOP. The first, in his opinion, was unsuccessful, as evidenced by the 2014 DWI arrest, and nothing suggested to him that the second IOP would lead to a better outcome. *Id.* He recommended the following treatment to achieve rehabilitation: 12 months of total abstinence and attendance at aftercare meetings; participation in AA meetings three times per week, including evidence of working the 12-Step program with a sponsor; weekly counseling (in lieu of one AA meeting per week); and random alcohol testing by his employer. *Id.* The DOE psychologist concluded that the individual's diagnosis as a user of alcohol habitually to excess demonstrated a significant defect in judgment or reliability. *Id.*

At the hearing, a counselor associated with the treatment and counseling center the individual attended in 2009 and 2014 testified. She confirmed that the individual had completed two IOPs, five years apart. Tr. at 12-13. She stated that after his completion of the 2009 IOP, her impression was that the individual had not fully accepted that he had an alcohol problem and that he intended to manage his alcohol consumption rather than

[3] Shortly after the arrest, a second daughter announced that she and her family would also be moving out of state. *Id.*

abstain in the future, as her program recommended. *Id.* at 15. She last saw him in September 2014, after he had received his second DWI in five years. *Id.* at 13. At that time, she found him more willing to stop drinking and to "accept the idea that he and alcohol have a fairly strong history of strong consequences." *Id.* at 17. She was, however, unwilling to comment on the individual's prognosis because she had not seen him for several months. *Id.* She did state that the individual's motivation for seeking treatment was external—his desire to maintain his employment—and could not comment regarding any internal motivation to remain abstinent. *Id.* at 19, 22-23. The individual asked the counselor to provide the dates he had attended aftercare since completing his 2014 IOP. When she recited one date in December 2014 and three in February 2015, he stated that he had attended at least five times, and as recently as two to three weeks before the hearing. *Id.* at 25. The counselor consented to reviewing her record and informing the parties if additional evidence of attendance were located. *Id.* at 26. Through the DOE Counsel, the counselor informed me that no additional attendance sheets containing the individual's name were located. E-mail from DOE Counsel to Administrative Judge (May 20, 2015).

The individual's mother and brother also testified at the hearing. They explained that they are a family of non-drinkers, and that no alcohol is kept in the mother's home, where the individual has lived for the past five years. *Id.* at 48-49, 60. Neither has considered that the individual has an alcohol problem, and neither has more than a passing knowledge of the ramifications of his alcohol-related legal issues. *Id.* at 50, 62, 65. Both spoke very highly of the individual's devotion and generosity to his family. *Id.* at 52, 54, 67. His supervisor also spoke highly of his dependability and work ethic, and though she had never observed the individual's work affected in any way by alcohol, she did attest to his sadness and struggle when both of his daughters and their families moved away in 2014. *Id.* at 37-40.

At the hearing, the individual offered additional details regarding family issues that, in his opinion, caused him to drink to excess and ultimately receive two DWI arrests. He explained that his son passed away in 2008, leaving behind his fiancée and their child. He promised on his son's grave that he would make sure the fiancée completed college; he kept his promise, but at great financial cost. Tr. at 76. At about the same time, one of his daughters was pregnant with a baby who was diagnosed with a heart condition before birth. She needed to complete her pregnancy near a specialty hospital located in a distant city, and the individual covered her living expenses for seven months. *Id.* at 79-80. By 2009, he was unable to maintain mortgage payments on his house; he lost the house and moved in with his mother. *Id.* at 76. Similar to his daughters moving away in 2014, these were family matters that were beyond his control and, he believed, led him to drink beyond his self-imposed limits. *Id.* at 83.

The individual also testified that he is more serious about his alcohol problem since the 2014 arrest. He admitted that, despite his treatment following his 2009 DWI arrest, he had not learned his lesson. *Id.* at 85. He testified that he was now attending an aftercare program regularly since completing the IOP portion of his treatment. According to the individual, he began attending aftercare on the first Monday following October 7, 2014, the date he completed his IOP program. *Id.* at 87-88. He maintained that he attended every week until three weeks before the hearing, when he received the exhibit notebook

for this hearing and became disheartened. *Id.* at 87, 89-90, 112. When confronted with the testimony of the treatment program counselor, who could not locate more than four session attendance sheets bearing his name, the individual contended that more attendance sheets must exist and would prove he attended regularly. *Id.* at 88-89. The DOE counsel pointed out that, when questioning the counselor, the individual had insisted that he had attended five times, not weekly. *Id.* After reviewing the evidence before me, I conclude that the individual attended four aftercare sessions between October 2014 and the date of the hearing. In addition to those sessions, the individual attended four AA meetings in the two weeks prior to the hearing. *Id.* at 95. Moreover, the individual freely admitted that he has a problem with alcohol, that alcohol has adversely affected his life, and that he intends to abstain from alcohol in the future. *Id.* at 92.

Finally, the individual testified that his non-alcohol-related criminal activity—writing bad checks—will not occur in the future. As mentioned above, as soon as he learned about these charges, he took care of the matter. *Id.* at 75. In addition, he explained that his finances are now in good condition. With no house payment, he is saving most of his income, to purchase another house in the future. Moreover, all of his family members are financially secure; his mother's retirement income renders her fully independent, his two daughters' spouses have well-paying jobs, and his son's fiancée, with her college education, is fully employed. *Id.* at 81-82.

In his testimony at the hearing, the DOE psychologist maintained his opinion that the individual consumes alcohol habitually to excess, having demonstrated a history of a pattern of misuse of alcohol. *Id.* at 121. After hearing the testimony of the other witnesses, including the individual himself, the DOE psychologist testified that, in his opinion, the individual has not yet demonstrated adequate evidence of rehabilitation or reformation. *Id.* To do so, the individual would, at a minimum, have to complete the recommendations he made in his report, which included a full year of abstinence and aftercare as well as participation in AA meetings. *Id.* at 122. He maintained his position that the individual's use of alcohol has attributed to a defect in judgment or reliability. *Id.* He stated that the individual must learn to self-monitor his desires to drink, which AA can help achieve. He could benefit from counseling, which might help him understand broader issues affecting his life, and from a great deal of support, which his family is not providing at this juncture. *Id.* at 126. Finally, he expressed his opinion that, until his current pattern changes, "and that pattern would involve help and support and vulnerability and openness, and reaching out to other people and good, firm, solid, heavy-duty relationships," he remains concerned about how the individual will respond to any future familial crisis. *Id.* at 128.

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) 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.

A. Criteria H and J: Alcohol

The individual has demonstrated a pattern of significant alcohol consumption for many years. I reach this conclusion because, despite his long-time, self-imposed consumption limit of one to two beers daily, he has surpassed this limit often—not just on the three occasions that resulted in arrests, but on an unquantified number of evenings when he drove a vehicle after exceeding his limit without being detected. The evidence suggests that the individual's self-control is not as reliable as he may believe it is. What is not clear to me is whether he will succeed in maintaining abstinence at this time. After his 2009 arrest, he remained abstinent for roughly four years before he resumed drinking alcohol, and within eight months of resuming, he received a DWI. While he maintains he was not intoxicated that evening, and his refusal to take an alcohol test allows him to maintain that belief, the fact is that he elected not to take the test because he feared he would not pass it. At that time, he himself was questioning his unwise alcohol consumption, and I continue to do so. I do, however, applaud the steps he has taken to alter his relationship with alcohol, in particular his abstinence for nine months.

Nevertheless, as of the date of the hearing, he had been engaged in rehabilitative efforts for about nine months, and the DOE psychologist felt that insufficient time had passed, and insufficient steps had been taken, for him to find the individual to be rehabilitated or reformed from his alcohol problem. I too am left with doubts as to whether the individual has reached a point in his rehabilitation that his future behavior toward alcohol will not raise further security concerns. I am therefore convinced that, despite the treatment he is receiving, it is too soon to conclude that the individual has resolved his alcohol problem. I have taken into consideration a number of mitigation factors in his favor, specifically, his acknowledgment of his alcohol problem, his abstinence, and his voluntary treatment program. Adjudicative Guidelines at Guideline G, ¶ 23. Despite these favorable factors, and after considering all the testimony and written evidence in the record, the evidence does not convince me that the individual has resolved the LSO's security concerns that arise from his alcohol use. Furthermore, with respect to the DOE psychologist's opinion that the individual's alcohol problem causes or may cause a significant defect in judgment or reliability, the DOE psychologist did not waiver from his original position, and I cannot point to anything in the record of this proceeding that weighs against it.

B. Criterion L: Criminal Behavior

The individual's pattern of criminal behavior is based on the three alcohol-related arrests discussed in detail above and the two incidents of writing bad checks in 1998 and 1999. Having considered the individual's explanation of the non-alcohol-related arrests, in particular their minimal amounts, the fact that he has not engaged in such behavior in more than 15 years, and evidence of his current and long-standing liquidity (notwithstanding the loss of his house, explained in detail), I find that the security concerns arising from these arrests have been resolved by the passage of time.

Adjudicative Guidelines at Guideline J, ¶ 32(a). The security concerns raised by the alcohol-related arrests, however, cannot be similarly resolved. Until the individual achieves rehabilitation or reformation from his problematic relationship with alcohol, further criminal behavior, most likely in the form of Driving While Intoxicated, as in the past, is likely to recur.

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 resolve all the security concerns associated with these criteria. I therefore cannot find that restoring the individual's access authorization will not endanger the common defense and is clearly consistent with the national interest. 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.

William M. Schwartz
Administrative Judge
Office of Hearings and Appeals

Date: June 25, 2015