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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:	August 17, 2015) Case No.: PSH-15-0066
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Issued: December 1, 2015

Administrative Judge Decision

Kimberly Jenkins-Chapman, Administrative Judge:

This Decision concerns the eligibility of xxxxxxxxxxxxxxxxxxxxxx (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 be restored.

I. Background

The individual is employed by a DOE contractor in a position that requires him to hold a DOE security clearance. In December 2014, as part of a background investigation, the Local Security Office (LSO) conducted a Personnel Security Interview (PSI) of the individual to address concerns about his alcohol use. In addition to the PSI, the LSO requested the individual’s medical records and recommended a psychological evaluation of the individual by a DOE consultant psychologist (DOE psychologist). The DOE psychologist examined the individual in February 2015 and memorialized his findings in a report. According to the DOE psychologist, the individual suffered from alcohol abuse from 1994 through 1998, and continued to drink habitually to excess until at least 2005. The DOE psychologist further concluded that the individual does not have an illness

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.

or mental condition of a nature which causes or may cause a significant defect in judgment or reliability.

In May 2015, the LSO sent a letter (Notification Letter) advising the individual that it possessed reliable information that created substantial doubt regarding his eligibility to hold an access authorization. In an attachment to the Notification Letter, the LSO explained that the derogatory information fell within the purview of one potentially disqualifying criterion set forth in the security regulations at 10 C.F.R. § 710.8, subsection (l) (hereinafter referred to as Criterion L).²

Upon receipt of the Notification Letter, the individual filed a request for a hearing. The LSO transmitted the individual's hearing request to the Office of Hearings and Appeals (OHA), and the OHA Director appointed me as the Administrative Judge in this case. At the hearing that I convened, the individual presented his own testimony and that of four witnesses. Both the LSO and the individual submitted a number of written exhibits prior to the hearing.

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 side of denial"); *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 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 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

² Criterion L relates, in relevant part, 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 interest of the national security. . . ." 10 C.F. R. § 710.8(l).

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 in favor of the national security. *Id.*

III. The Notification Letter and the Security Concerns at Issue

As previously noted, the LSO cites Criterion L as the basis for suspending the individual's security clearance. *See* DOE Exh. 1.

To support its reliance on Criterion L, the LSO cites the individual's criminal conduct, including five alcohol-related arrests. The LSO also cites the individual's admission that he drove a vehicle while intoxicated between 1992 and 2005 a total of at least 26 to 32 times. Criminal activity creates a doubt about a person's judgment, reliability, and trustworthiness and by its very nature, it calls into question a person's ability or willingness to comply with laws, rules and regulations. *See* Guideline J 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).

IV. Findings of Fact

On November 17, 2014, the individual was arrested and charged with Aggravated Driving While the Intoxicated (DWI) and Reckless Driving. As a result, a PSI was conducted on December 19, 2014. During the PSI, the individual admitted to four additional alcohol-related arrests: an October 1993 citation for Consumption by a Minor, a December 1995 arrest for DWI, a June 1996 citation for Drinking on the Lake, and a December 1998 arrest for Aggravated DWI. During an October 2008 PSI, the individual also admitted that he drove a vehicle while intoxicated between 1992 and 2005 a total of at least 26 to 32 times.

On February 23, 2015, the individual was referred to a DOE psychologist for an evaluation. The DOE psychologist diagnosed the individual with Alcohol Abuse for the period 1994 through 1998. He further concluded that the individual continued to drink habitually to excess until at least 2005 and probably until 2011. While the DOE psychologist found that the individual still occasionally drank to a significant level of intoxication, he did not believe that he warranted a diagnosis under the Diagnostic and Statistical Manual of Mental Disorder IVth Edition. He found that there was adequate evidence of rehabilitation as the individual's drinking to intoxication about once a year indicated an appropriate degree of control. The DOE psychologist concluded that the individual did not have an illness or mental condition of a nature which causes or may cause a significant defect in judgment or reliability.

V. Analysis

I have thoroughly considered the record in 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)³ and the Adjudicative Guidelines. After due deliberation, I have determined that the individual's access authorization should be restored. Based on the facts in this record, I 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.

During the hearing, the individual did not dispute any of the security concerns outlined in the Notification Letter. Rather, the individual readily acknowledged that he began drinking alcohol at an early age. Transcript of Hearing (Tr.) at 64. He testified that other than the 2014 charge for DWI, all of his alcohol-related charges occurred over 17 years ago when he was in his late teens and early twenties. The individual testified that when he was younger, he lived in a town where drinking was the norm for most young people. Around the age of 24, the individual realized that his life was headed in the wrong direction and he decided to move out of town and to change his life for the better. *Id.* at 65. According to the individual, he became a different person between 1998 and 2014; he had two daughters and he consciously made decisions to improve his life. *Id.* He explained that he was in a major car accident on the night that he was charged with DWI in November 2014. *Id.* at 67. The individual testified that for six to eight months prior to the accident he was completely sober as he was training for an athletic competition. *Id.* On the night of the accident, however, the individual testified that he was having dinner and celebrating his competition with friends. *Id.* at 69. He acknowledged that he drank at the restaurant and accepted an offer from an acquaintance and two ladies at the restaurant for a ride home. *Id.* at 71. The individual further testified that he made a conscious decision not to drive, that his acquaintance drove his car and that he was riding in the back seat when the accident occurred. *Id.* at 72. The individual testified that a jury found no evidence that he was in the driver's seat at the time of the accident. He credibly testified and submitted documentary evidence to demonstrate that a jury found him not guilty of DWI and that a jury acquitted him as to the charge of reckless driving. Individual's Exh. I.

According to the individual, he has abstained completely from alcohol since the 2014 incident. He testified that he has no urge or craving for alcohol and that he has no plans to drink in the future. *Id.* at 82. The individual stated that he is currently engaged in a child custody dispute with his ex-wife and that it is very important for him to be present for his children. He testified that he does not want alcohol to "cloud" his judgment in any way. *Id.* at 83.

During the hearing, the individual also offered the testimony of an Employee Assistance Program (EAP) counselor, a licensed mental health counselor, a co-worker and his girlfriend. The EAP counselor testified that she first met with the individual on November 26, 2014, after the individual voluntarily reported that he had been in a car accident and was having trouble with his memory and stress. *Id.* at 12. The EAP counselor testified that she encouraged the individual to abstain from alcohol. *Id.* at 14. She believes the individual is now completely sober. *Id.* at 15. The EAP

³ 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.

counselor also testified that she has met with the individual for fifteen weekly sessions. She believes the individual is an honest and trustworthy person. *Id.* The licensed mental health counselor testified that the individual was referred to him by EAP after the car accident. *Id.* at 24. He noted that the individual appeared very anxious, but stated that he was very candid and did not minimize his alcohol use. *Id.* at 25. According to the counselor, the individual stated that he has not had a drink since the accident and believes the accident was a “wake up call” for the individual. *Id.* at 28. He also does not believe that the individual used alcohol as a means to deal with stress and noted that his last alcohol-related incident occurred more than 17 years ago. The counselor also opined that the individual’s admission, during his PSI, that he drove while intoxicated a total of 26 to 32 times between 1992 and 2005 was an exaggeration. *Id.* at 40. He believes the individual has an anxiety disorder and has focused his therapy on dealing with the individual’s stress. The counselor further opined that the individual is doing better with dealing with stress. He noted that the individual is now going to the gym and is sleeping better. The counselor also believes the individual is honest and trustworthy. Finally, both the individual’s co-worker and girlfriend testified that the individual is a reliable and trustworthy person. *Id.* at 47 and 54.

Criterion L

The DOE’s concerns under Criterion L relate to the individual’s criminal conduct, including his November 2014 arrest and charge with DWI, as well as four other alcohol-related incidents occurring between 1993 and 1998. In addition, the Criterion L security concerns relate to the individual’s admission during an October 2008 PSI that he drove a vehicle while intoxicated between 1992 and 2005, a total of 26 to 32 times.

Among the factors which could serve to mitigate the security concerns raised by the individual’s criminal conduct are (1) so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances that it is unlikely to recur and does not cast doubt on the individual’s reliability, trustworthiness, or good judgment; (2) the person was pressured or coerced into committing the act and those pressures are no longer present in the person’s life; (3) evidence that the person did not commit the offense; and (4) there is evidence of successful rehabilitation; including but not limited to the passage of time without recurrence of criminal activity, remorse or restitution, job training or higher education, good employment record, or constructive community involvement. *Adjudicative Guideline J* at ¶ 32 (a)-(d). In this case, with respect to the 1993, 1995, 1996 and 1998 alcohol-related incidents, over 17 years have elapsed since the criminal behavior happened. The individual is remorseful for his conduct and credibly testified that he changed his drinking habits when he realized the consequences of his actions. I find that these alcohol-related incidents have been mitigated by time and do not cast doubt on the individual’s reliability, trustworthiness or good judgment. With respect to the individual’s 2014 DWI, although he readily admitted that he had consumed alcohol prior to his accident, the individual has presented credible testimony and documentary evidence that he was not driving the car at the time of the incident. Finally, with respect to the individual’s admission that he drove a vehicle while intoxicated between 1992 and 2005 a total of 26 to 32 times, the individual credibly testified that he has changed his lifestyle, no longer consumes alcohol and does not intend to consume alcohol in the future. Again, I find that this admission does not cast doubt on the individual’s current honesty and reliability. In the end, I find that the individual has resolved the Criterion L concerns relating to his alcohol-related arrests and incidents.

VI. Conclusion

In the above analysis, I have found that there was sufficient derogatory information in the possession of the DOE that raised serious security concerns under Criterion 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 find that the individual has brought forth convincing evidence to resolve the security concerns associated with Criterion L. I therefore find that restoring the individual's access authorization would not endanger the common defense and security and would be consistent with the national interest. Accordingly, I find that the individual's access authorization should be restored.

Kimberly Jenkins-Chapman
Administrative Judge
Officer of Hearings and Appeals

Date: December 1, 2015