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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: July 23, 2013)
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Case No.: PSH-13-0093

Issued: November 8, 2013

Hearing Officer Decision

William M. Schwartz, Hearing Officer:

This Decision concerns the eligibility of XXXXXXXXXXXXXXXX (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 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 be restored.

I. Background

The individual works for a DOE contractor in a position that requires him to maintain a DOE security clearance. An arrest in December 2012 for Driving Under the Influence (DUI) and Illegal Possession of a Firearm and a diagnosis of Alcohol-Related Disorder raised security concerns in the opinion of the Local Security Office (LSO), and the LSO suspended the individual's security clearance. On June 18, 2013, 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

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.

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).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 Hearing Officer in the case. At the hearing that I conducted, the individual presented his own testimony and that of an on-site staff psychologist and three friends and co-workers, and the LSO presented the testimony of one witness, a DOE consultant psychologist. In addition to the testimonial evidence, the LSO submitted ten numbered exhibits into the record and the individual tendered two exhibits, which I have identified as Exhibits A and B. The hearing transcript in the case will be cited as “Tr.”

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 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

² Criterion H concerns information that a person suffers from “[a]n illness of 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). Criterion L concerns 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. Such conduct or circumstances include, but are not limited to, criminal behavior, ... or a violation of any commitment or promise upon which DOE previously relied to favorably resolve an issue of access authorization eligibility.” 10 C.F.R. § 710.8 (l).

appropriate hearsay evidence may be admitted. 10 C.F.R. § 710.26(h). An individual is thereby 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 cites three criteria as the bases for suspending the individual's security clearance, Criteria H, J, and L. With regard to Criteria H and J, the LSO relies on the opinion of a DOE consultant psychologist (DOE psychologist) who determined that the individual meets the criteria for Alcohol-Related Disorder, Not Otherwise Specified, as set forth in the *Diagnostic Statistical Manual of the American Psychiatric Association*, Fourth Edition Text Revised (DSM-IV-TR). She further determined that he has been a user of alcohol habitually to excess, and that the individual's Alcohol-Related Disorder is an illness or mental condition that causes or may cause a significant defect in judgment or reliability. In addition, the LSO cites the individual's December 2012 arrest for Driving Under the Influence (DUI) and Illegal Possession of a Firearm, his admission during a February 2013 personnel security interview (PSI) that he had consumed ten alcoholic beverages before the arrest, and his admission during his April 2013 psychological evaluation that his blood alcohol content after the arrest registered .2.

I find that there is ample information in the Notification Letter to support the LSO's reliance on Criteria H and J. 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. The DOE psychologist's conclusion that the individual's Alcohol-Related Disorder is severe enough to cause a significant defect in judgment—specifically, the poor judgment he displayed in December 2012 when he drove his vehicle while intoxicated and failed to realize the risk of having a handgun in the car with him—supports my finding in this regard.

As for Criterion L, the LSO cites as evidence of criminal conduct the December 2012 arrest and the individual's admission during the PSI that his handgun carry permit had expired and that he was aware that it was illegal to be in possession of a loaded firearm while under the influence of alcohol. Criminal activity creates doubt about a person's

judgment, reliability, and trustworthiness and by its very nature calls into question a person's ability or willingness to comply with laws, rules and regulations. *See* Adjudicative Guidelines at Guideline J. Consequently, I find that the LSO properly relied on Criterion J in this case.

IV. Findings of Fact

A. Criteria H and J

In his late teens and early 20s, the individual drank alcohol sporadically, but almost always to the point of intoxication. Ex. 4 (DOE Psychologist's Evaluation Report) at 4-5. After an eight-month period of abstinence at age 22, he resumed drinking alcohol, usually consuming a single beer in social settings, but drinking to intoxication once a year at a military celebration. In March 2012, however, the individual's pattern of alcohol consumption increased to three to four, and then six to eight, beers, two to four times weekly with a friend. Increased work demands curtailed his drinking from August to October, but as those demands lessened, he resumed drinking "a few beers" about once a week. *Id.* at 5.

In mid-December 2012, the individual was on sick leave, recovering from the flu, and about to return to work. One of his co-workers was celebrating a birthday, and invited the individual to join his celebration, already ongoing at a bar. Tr. at 88. The individual met the group, and drank alcohol with the others. He did not consume more alcohol than the others, and the celebrant did not observe that the individual appeared intoxicated. *Id.* at 89. Nevertheless, after consuming ten alcoholic drinks as the party moved among three locations over the course of seven hours, the individual lost his way as he was driving himself home. Ex. 10 (Transcript of PSI, February 26, 2013) at 7-15. He was pulled over, and failed a field sobriety test. *Id.* at 22. Upon inspecting the interior of the individual's vehicle, the officer found a handgun. *Id.* at 50. The individual was ultimately charged with DUI and Illegal Possession of a Firearm. The latter charge arose because the individual's permit to carry a handgun had expired three weeks earlier. *Id.* at 25. Of most concern to the individual was his recognition that he had no recollection of what happened while he was attempting to drive home that evening, a span that he estimates to be about an hour. *Id.* at 46; Tr. at 17-18.

After duly reporting the arrest to his employer, the individual was evaluated by an on-site psychologist, who testified at the hearing. She arranged for suitable treatment for the individual, including counseling and alcohol abuse education. Ex. 10 at 35-37, 39. By the time the individual met with the DOE psychologist in April 2013, he had completed 16 hours of DUI education, two hours of counseling with a licensed clinical social worker, three hours of alcohol education, and about five hours of counseling with the on-site psychologist or her partner. He was scheduled to attend a victim impact class in May. He had been abstinent for four months, since the date of the arrest. He told the DOE psychologist that he could imagine resuming alcohol consumption, but if he did, he would limit himself to three drinks on any occasion, and never drive after drinking. Ex. 4 at 10. The DOE psychologist determined that the individual was "'appalled' and truly frightened" by his one-hour blackout while driving, during which he could have killed himself or others, and the psychologist considered this event a "wake-up call" for him.

Id. at 10-11. She felt that, despite his efforts, “the duration of the individual’s recovery from his Alcohol Disorder was insufficient to ensure rehabilitation,” and stated that six months of rehabilitation was necessary for recovery from his disorder. *Id.* at 11.

At the hearing, the individual testified about his alcohol consumption since seeing the DOE psychologist. He had committed himself to abstaining from alcohol until after the court hearing regarding his December 2012 arrest. He kept that commitment, despite a number of invitations to drink with friends, and had his first alcoholic drink on June 30, 2013, when he visited an estate with a friend and they tasted wines. *Tr.* at 8-9, 43. Both he and his friend estimated their total consumption at one to two glasses, and they toured the estate for several hours after drinking before he drove them back home. *Id.* at 24, 72.³ Since that event, he had consumed one or two beers on two occasions: a wedding and a party. *Id.* at 11. He continues to socialize with others who drink alcohol, but has assumed the role of designated driver when travel is involved and does not drink alcohol at all under those circumstances. *Id.* at 12. He attended a victim impact class in May. *Id.* at 19; Ex. B. He is subject to random drug and alcohol testing at work, and has had two physical examinations, including urine screens, since the arrest. *Tr.* at 25.

The individual discussed how the December arrest has changed his views on alcohol consumption. It took its toll on him both financially and emotionally. The legal ramifications of the arrest cost him thousands of dollars, and telling his mother about the arrest was extremely difficult for him, as he knew how disappointed she would be in him. *Id.* at 12, 18, 34. He also spoke of his fear when he realized he had blacked out while driving and was thankful he did not hurt anyone at that time. From that fear, he is committed to not driving after drinking. *Id.* at 13, 19, 34. He also stated that maintaining control of himself is important to him, and he learned from the blackout that alcohol can cause him to lose control, with potentially devastating consequences. *Id.* at 18-19, 34-35.

Other witnesses corroborated the individual’s testimony. The friend with whom he visited the estate confirmed that they each had four or five tastes of wine, which totaled no more than one to two glasses of wine. She also confirmed that they did not start driving home until several hours after the wine tasting. *Id.* at 72. She further stated that they rarely drink alcohol at all, even when it is readily available, referring to a recent celebration with an open bar. *Id.* at 74. The witness who celebrated his birthday in December testified that he had consumed alcohol with the individual in the past, and that the individual generally drank moderately and in control. *Id.* at 89. He and another witness both confirmed that the individual had talked with them about the arrest and its consequences, particularly his embarrassment and remorse about admitting it to his mother, and that the individual now serves as designated driver. *Id.* at 80-82, 90.

At the hearing, the on-site psychologist testified that she viewed the December incident as a one-time problem, not evidence of a pattern or habitual behavior. *Tr.* at 56. She observed that, in her sessions with him, the individual was embarrassed and contrite about the arrest and its ramifications at work and in his family. *Id.* at 62. When

³ After hearing the individual’s testimony regarding the wine tasting, the DOE psychologist stated her belief that wineries generally offer an ounce of wine at tastings, so the individual’s consumption was about the same as one standard 5-ounce serving. *Id.* at 24-25.

questioned about the individual's physical examinations and random screenings for evidence of alcohol consumption, the on-site psychologist stated that she had no first-hand knowledge, but if he had had a positive alcohol screening, she would have been notified, and she has never received such notification. *Id.* at 64-65.

After the testimony of the other witnesses, the DOE psychologist testified that, in her opinion, the individual had demonstrated adequate evidence of rehabilitation from his Alcohol-Related Disorder. She further stated that she now feels that the risk that the individual will resume drinking alcohol in an unhealthy manner is low. *Id.* at 102. This positive opinion contrasts with those she formed during her evaluation of the individual in April 2013. She explained at the hearing that, despite the solitary DUI arrest, she was troubled during the evaluation by the individual's alcohol history, particularly his gradual increase in consumption during 2012; in that context, the DUI merely represented one step on an unfortunate trajectory. *Id.* at 96. At that time, her primary concern was that the individual had been abstinent for only four months and, despite his efforts at education and his obvious remorse about the incident, she felt "he needed more time to solidify the gains" he had made. Ex. 4 at 11. By the time of the hearing, the individual had completed a period of abstinence of more than six months, as she had recommended and had resumed drinking alcohol, in the words of the DOE psychologist, "in very moderate ways." *Id.* at 101. She stated that his education impressed upon him that his former drinking habits were risky. She was not surprised that he had resumed drinking, as he had never promised that he would never drink again, nor had she recommended lifetime abstinence. Tr. at 100-01. She also stated that he was now not engaging in unhealthy drinking, which she defined as no more than 14 drinks in a week and no more than four on any occasion; in fact, his intention is to drink no more than three drinks on an occasion and no more than four in a week. *Id.* at 27-28. Finally, she expressed her opinion that the individual had learned from this experience and does not want to lose control again.

B. Criterion L

When the individual was arrested in mid-December 2012, he was charged with Unlawful Possession of a Weapon. The citation notes that the handgun carry permit for the weapon found in his vehicle had expired three weeks before the arrest. Ex. 6 at 2. At the hearing, the individual testified that he was aware that his permit needed renewal, but he had forgotten about it. This was the first time his permit was subject to renewal. Tr. at 38. He and his co-workers were temporarily working 80 or more hours per week and the renewal date passed without his realizing it. *Id.* at 38-39. He was required to surrender his gun at the time of the arrest. *Id.* at 22. The case was placed in judicial diversion for 30 days and then dismissed, although the handgun was permanently confiscated. *Id.* at 10, 22.

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 be restored. 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.

A. Criteria H and J

I find that the individual was properly diagnosed as suffering from Alcohol-Related Disorder, Not Otherwise Specified. Nevertheless, the record, in particular, the testimony of the individual, his friends and co-workers, and the on-site psychologist, establishes six months of abstinence, appropriate treatment, and a recent period of very moderate alcohol consumption. The concurrence of the mental health experts regarding his current status demonstrates to me the confidence they have in the individual's progress through treatment and his motivation to remain sober at all times. Furthermore, I am convinced that the individual has learned a great deal as the result of his December 2012 arrest, both through alcohol education and from enduring the financial and personal consequences of his actions, and is highly motivated to avoid a similar situation in the future. I have taken into consideration a number of mitigating factors in his favor, specifically, his acknowledgment of his alcohol problem, his abstinence, his voluntary participation in a treatment program, and the DOE psychologist's favorable prognosis of the individual and her assessment that he is at low risk of relapse. Adjudicative Guidelines at Guideline G, ¶ 23. After considering all the testimony and written evidence in the record, I am convinced that the individual has resolved the LSO's security concerns that arise from his alcohol use.

B. Criterion L

Criminal conduct by its very nature calls into question a person's ability or willingness to comply with laws, rules, and regulations. Adjudicative Guidelines at Guideline J. The conduct with which the individual was charged, having let his handgun carry permit expire, is not a serious crime nor, for that matter, one that arises from malicious intent. Nor was it one in a series of lesser offenses. It was rather an isolated incident of negligent oversight, and it occurred when he was working extraordinary hours. While the unintentional nature of the infraction and the conditions under which it occurred do not excuse the behavior, they do mitigate the security concerns this infraction raises. The individual is now fully aware of his responsibilities in this area, and moreover he has suffered financially in that he had to retain the services of an attorney and replace his handgun. Under these circumstances, I find it highly unlikely that this behavior will recur, and that it does not cast doubt on the individual's reliability, trustworthiness, or good judgment. Adjudicative Guidelines at Guideline J, ¶ 32(a).⁴

⁴ In the Notification Letter, the LSO also asserts that the individual acknowledged during the PSI that possessing a loaded firearm while under the influence of alcohol is illegal. Ex. 1; *see* Ex.10 at 53. I note that the arrest citation does not bear a charge related to this matter. Ex. 6 at 2. The individual stated at the PSI that he had not intended to break this law, as he understood it, as he had no intention of becoming intoxicated on the evening of the arrest. Ex.10 at 53. In any event, I find it unlikely that, in the future, he will be in possession of a loaded gun while under the influence of alcohol, for the same conclusion I reached, in Section V.A above, that he will not drink to intoxication in the future.

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 brought forth sufficient evidence to mitigate the security concerns associated with these criteria. I therefore 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 be restored.

William M. Schwartz
Hearing Officer
Office of Hearings and Appeals

Date: November 8, 2013