

concerns under the provisions of 10 C.F.R. § 710.8 (j) (Criterion J). In addition, the LSO finds that the individual has a pattern of criminal conduct from 1994 until 2010 that indicates a disregard for laws, rules and regulations that raises concerns under 10 C.F.R. § 710.8(l) (Criterion L). Enclosure 2, DOE Ex. 1.

The individual requested a hearing (hereinafter ‘the hearing’) to respond to the concerns raised in the Notification Letter. On November 28, 2011, the Office of Hearings and Appeals Director appointed me the Hearing Officer in this case. At the hearing I convened in this matter, I received testimony from twelve witnesses. The LSO presented the testimony of the DOE-consultant Psychiatrist. The individual testified and presented the testimony of his girlfriend, his girlfriend’s mother and father, his mother, his sister, his alcohol counselor, his employing company’s owner, his general supervisor, his project supervisor, and a co-worker. Discussion at the hearing centered on the individual’s misuse of alcohol and his past conduct that formed the bases for the LSO’s Criteria J and L concerns, as well as the individual’s recent conduct and efforts to address these issues.

II. APPLICABLE STANDARDS

A DOE administrative review proceeding under this Part is not a criminal case, in which the burden is on the government to prove the defendant guilty beyond a reasonable doubt. In this type of case, we apply a different standard, which is designed to protect national security interests. A hearing is ‘for the purpose of affording the individual an opportunity of supporting his eligibility for access authorization.’ 10 C.F.R. § 710.21(b)(6). The burden is on the individual to come forward at the hearing with evidence to convince the DOE that granting or restoring his access authorization ‘would not endanger the common defense and security and would be clearly consistent with the national interest.’ 10 C.F.R. § 710.27(d). This standard reflects a presumption against granting or restoring a security clearance. *See Dep’t of Navy v. Egan*, 484 U.S. 518, 531 (1988) (the ‘clearly consistent with the interests of national security test’ for the granting of 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).

III. ANALYSIS OF TESTIMONY AND FINDINGS OF FACT

A. Criterion J Concerns

1. The Individual’s Use of Alcohol Habitually to Excess

The LSO invokes Criterion J when an individual has been or is a user of alcohol habitually to excess, or has been diagnosed by a psychiatrist or licensed clinical psychologist as suffering from alcohol abuse or dependence without adequate evidence of rehabilitation or reformation. 10 C.F.R. § 710.8 (j). In her 2011 Report, the DOE-consultant Psychiatrist opined that the individual used alcohol habitually to excess. Report at 14. The use of alcohol habitually to excess is not a psychiatric diagnosis and does not rise to the level of a psychiatric illness or mental condition. Nonetheless, the habitual use of alcohol to excess is a security concern under Criterion J because it can lead to the exercise of questionable judgment. *See Revised*

Adjudicative Guidelines for Determining Eligibility for Access to Classified Information, Assistant to the President for National Security Affairs (December 29, 2005) (Adjudicative Guidelines), Guideline G, ¶ 21. In his request for a hearing, the individual admitted to his use of alcohol in excess and indicated his willingness to participate in a rehabilitation program. At the hearing, he testified that when he read the DOE-consultant Psychiatrist's Report for the first time in December 2011, he recognized that he had a problem with alcohol, particularly the excessive amount of alcohol that he occasionally consumed. Hearing Transcript (TR) at 162-164.

Based on this evidence, I find that the individual's admitted excessive consumption of alcohol constitutes derogatory information under Criterion J. Alcohol misuse is a security concern because it 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* Adjudicative Guidelines, Guideline G.

2. Whether the Individual Has Resolved the Criterion J Concerns

In deciding whether an individual has mitigated a security concern, a Hearing Officer must consider all relevant factors having a bearing on an individual's fitness to obtain or retain a security clearance. *See* 10 C.F.R. § 710.7(c). According to the Adjudicative Guidelines, among the factors that may serve to mitigate security concerns raised by an individual's alcohol disorder or excessive use of alcohol are: that the alcohol misuse happened so long ago, was so infrequent, or happened under such circumstances that it is unlikely to recur or does not cast doubt on the individual's current reliability, trustworthiness, or good judgment. Other factors that may mitigate alcohol-related concerns are: that the individual has provided evidence of actions undertaken to overcome an alcohol problem and has established a pattern of abstinence or responsible use; that the individual has completed a treatment program and has demonstrated an established pattern of modified consumption of alcohol or abstinence; or that the individual is a current employee who is participating in a counseling or treatment program without a history of previous treatment or relapse and is making satisfactory progress. Adjudicative Guidelines, Guideline G, ¶ 23; *see, e.g., Personnel Security Hearing*, Case No. TSO-1020 (September 9, 2011) (individual resolved concerns raised by alcohol dependence disorder by proving that he received therapy for alcohol dependence problem and that he had abstained from alcohol for 18 months).¹

At the hearing, the individual presented testimony and other evidence to establish that he currently is abstaining from alcohol and that he is at low risk for resuming the consumption of alcohol to excess. He asserted that he last consumed alcohol on July 4, 2011, and that he last consumed an excessive amount of alcohol in March 2011. He stated that he recently began meeting with an alcohol counselor, and is prepared to take the steps necessary to maintain his sobriety. I summarize the testimony of the individual and his witnesses below.

The individual testified that he last consumed alcohol to excess in March 2011, when he consumed several beers at a friend's house, and asked his girlfriend to drive him home. In a letter submitted into the record in February 17, 2012, this friend stated that he last consumed alcohol

¹ Decisions issued by the Office of Hearings and Appeals (OHA) are available on the OHA website located at <http://www.oha.doe.gov>. The text of a cited decision may be accessed by entering the case number of the decision in the search engine located at <http://www.oha.doe.gov/search.htm>.

with the individual in the March 2011 “timeframe” when “we had a few beers while we talked.” Letter of individual’s friend dated February 16, 2012. The individual’s girlfriend, who has lived with the individual since 2006, testified that the last time she saw the individual intoxicated was when she picked him up at his friend’s house in March 2011. TR at 16, 30-31. She stated that the individual also consumed some alcohol on July 4, 2011, but not to the point of intoxication. She stated that she has not seen the individual consume any alcohol since July 4, 2011, and she believes that he has been abstinent from alcohol since that date. TR at 26-27. The individual’s other relatives and his girlfriend’s parents also testified that they have not seen the individual consume alcohol since July 4, 2011, and that he did not consume alcohol to excess on that date. The individual’s work associates testified that the individual is a good employee and that they have never observed any behavior indicating a problem with alcohol. Based on this testimony, I find that as of the date of the hearing, the individual has been abstinent from alcohol since July 4, 2011, a period of six and a half months.

The individual’s counselor testified that she has had two counseling sessions with the individual. She stated that she has given him a provisional diagnosis of “adjustment disorder” and is trying to rule out a diagnosis of alcohol abuse. She stated that the individual’s treatment program will consist of individual sessions aimed at helping him to examine the role that alcohol has played in his life, and at helping him to set up a relapse prevention plan. TR at 116. She testified that they plan to meet every other week for three months, and then assess the need for additional counseling. TR at 118. She stated that the individual has a good prognosis because he is very motivated to do what he needs to do to address his alcohol problem. TR at 119. She testified that the individual reported to her that he has had no problems in maintaining abstinence from alcohol since July 2011. TR at 119-120.

After listening to the testimony at the hearing from the individual and his witnesses, the DOE-consultant Psychiatrist testified that at the time that she evaluated the individual in July 2011, he did not meet the criteria for substance abuse or dependence. She opined, however, that his reported use of illegal drugs and alcohol in the 1990s, as evidenced by his legal problems, was significant, and that the individual was able to stop his use of other substances more easily than alcohol when he became convinced that they were detrimental to his health. She stated that, in light of this history, the individual’s statement at their evaluation that he consumes alcohol three to four times a year and becomes intoxicated on half of those occasions was sufficient for her to conclude that there is a substantial risk that the individual will consume alcohol to the extent that it will impair his judgment and reliability, and that he is in need of alcohol education to lower his risk of drinking to excess. TR at 174-180.

The DOE-consultant Psychiatrist stated that she believed that the individual has done a good job in maintaining his abstinence from alcohol since July 4, 2011, and that, if he also had completed some intensive treatment, she would have found that period of time acceptable to demonstrate rehabilitation and reformation from his problem drinking. However, she testified that because the individual has just begun his alcohol counseling program, she believed that the individual needed to complete most of that treatment program before he would be at low risk for future excessive consumption of alcohol. She stated that the individual would benefit from a good relapse prevention program, and that he should develop a therapeutic alliance with the alcohol counselor that would address some of his other issues, such as carelessness and impulsivity. TR

at 185-187. She opined that twelve sessions with the alcohol counselor, along with continued abstinence during that period, would be sufficient for the individual to achieve the level of alcohol education and self-awareness necessary to meet the DOE's requirements for reliability and trustworthiness. TR at 191.

The DOE does not have a set policy on what constitutes reformation or rehabilitation from problematic drinking, but instead makes a case-by-case determination based on the available evidence. In making this determination, Hearing Officers properly give significant weight to the opinions of psychologists and other mental health professionals. *See, e.g., Personnel Security Hearing, Case No. TSO-0477 (2007)*. After considering the hearing testimony and evaluating the record as a whole, I find that the individual has not yet mitigated the Criterion J security concerns raised by the DOE-consultant Psychiatrist's findings. As noted above, I am convinced from the testimony of the individual and his witnesses that the individual last consumed alcohol to excess in March 2011, and has maintained abstinence from alcohol since July 4, 2011. I also find that the individual is motivated to address his alcohol problem and related personality traits that could affect his ability to drink responsibly in the future. However, I agree with the uncontroverted expert testimony of the DOE-consultant Psychiatrist that the individual needs additional alcohol counseling in order to be at low risk for misusing alcohol. At the time of the hearing, the individual had completed only two sessions with his alcohol counselor, who testified that she was still in the process of assessing the extent of the individual's alcohol problem. I conclude that this very limited exposure to alcohol counseling and education is not adequate to establish rehabilitation and reformation from his problem drinking, and I accept the DOE-consultant Psychiatrist's recommendation at the hearing that the individual needs to maintain his abstinence while completing twelve sessions of alcohol counseling in order to be at low risk for misusing alcohol in the future. I note that this recommendation for additional counseling is consistent with OHA precedent. *See, e.g., Personnel Security Hearing, Case No. TSO-0966 (2011)* (concerns raised by alcohol use mitigated after individual's participation in AA and counseling in addition to ten months of abstinence established a low risk of relapse); *Personnel Security Hearing, Case No. TSO-0853 (2010)* (individual who engaged in treatment and five and one-half months of abstinence demonstrated to be at low risk of relapse); *Personnel Security Hearing, Case No. TSO-0768 (2009)* (concerns raised by individual's alcohol use mitigated where psychiatrists agreed that risk of relapse was low). Accordingly, I conclude that the individual has not yet mitigated the LSO's Criterion J concern.

B. Criterion L Concerns

As discussed above, the LSO finds in its Summary of Security Concerns that the individual has a pattern of criminal conduct from 1994 until 2010 that raises concerns under Criterion L. The LSO lists 29 incidents in which legal charges were made during this period, and alleges that these legal charges evidence a pattern of criminal conduct indicating that the individual has a disregard for laws, rules and regulations. Nine of these incidents, occurring from 1995 until 2002, involve alcohol charges such as DUI, driving with an open container of alcohol, and underage drinking. Eighteen other incidents, from 1997 until July 2010 involve vehicular offenses such as speeding, following too close, reckless driving, driving with a revoked license or without insurance, and improper parking. In addition, in 2004, police records indicate that the individual was "suspected" of battery upon his girlfriend for grabbing and twisting her arm as she

was attempting to leave his apartment, and in 1998 police records indicate that the individual was charged with domestic battery. Finally, in 1994, the individual was charged with "Cheating a Machine or Device." I agree with the LSO that this lengthy record of legal charges raises a Criterion L concern. Accordingly, I will now consider whether the testimony and evidence presented in this proceeding has mitigated this concern.

With respect to the individual's alcohol-related offenses, I find that the individual's planned alcohol treatment program and maintenance of his current abstinence from alcohol for the duration of that treatment will mitigate the LSO's concern that he will commit alcohol-related legal offenses in the future.

At the hearing, the DOE-consultant Psychiatrist observed that her evaluation of the individual and the testimony of his witnesses led her to conclude that the individual's substantial legal record was attributable to his carelessness rather than to an intentional disregard for the law. TR at 187-188. As noted above, the DOE-consultant Psychiatrist opined at the hearing that she believes that the individual's planned alcohol counseling will allow him to address his tendency to act carelessly or impulsively, and reform his behavior. TR at 197-198. I agree with the DOE-consultant Psychiatrist's finding that individual's alcohol counseling should assist him in acting with greater maturity and responsibility in other areas of his life where his carelessness or impulsiveness has resulted in traffic offenses or other possible legal violations. Of particular concern are the incidents involving possible domestic battery. The individual's girlfriend testified that the individual is a great parent and that they have an excellent relationship. However, she reported that on one occasion she called the police during a fight with the individual over an ex-girlfriend. She stated that the police did not separate them, and that no charges were filed.² TR at 16.

The individual police record indicates that he gradually has come to exercise greater responsibility in his personal conduct. He has not been involved in an alcohol-related legal incident since 2002. The individual testified that while he received two speeding tickets and a 'failure to yield' ticket in 2010, he was not involved in any traffic or other legal incidents in 2011. TR at 165. Based on the testimony of the business owner and his supervisors, I find that the individual has conducted himself reliably and responsibly in the job that he has held since early 2010. As discussed above, the individual accepts that he occasionally misuses alcohol and has initiated a counseling program to identify and address the issues and personality traits that result in irresponsible, excessive consumption of alcohol and other careless or impulsive actions. Accordingly, I find that when the individual completes this counseling, he also will mitigate the LSO's Criterion L concerns regarding his inability or unwillingness to comply with laws, rules and regulations.

IV. CONCLUSION

² With regard to the 1998 and 2004 incidents involving possible domestic battery, the individual stated that he was not aware of the 1998 charges until he received the Notification Letter, and that the 2004 incident consisted of false allegations by an ex-girlfriend arising from a child custody dispute. Individual's Request for Hearing at 2-3, DOE Exhibit 2; TR at 125-133.

For the reasons set forth above, I find that the individual was properly found to use alcohol habitually to excess, which is derogatory information under Criterion J, and that his alcohol related legal problems and other legal charges also raised a concern under Criterion L. Further, I find that this derogatory information under Criteria J and L has not yet been mitigated by evidence of rehabilitation and reformation. Accordingly, after considering all of the relevant information, favorable or unfavorable, in a comprehensive and common-sense manner, I conclude that the individual has not demonstrated that granting him an access authorization would not endanger the common defense and would be clearly consistent with the national interest. The individual or the DOE may seek review of this Decision by an Appeal Panel under the regulation set forth at 10 C.F.R. § 710.28.

Kent S. Woods
Hearing Officer
Office of Hearings and Appeals

Date: March 2, 2012