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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: May 22, 2013	)	Case No.: PSH-13-0064
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	)	

Issued: October 11, 2013

Hearing Officer Decision

Steven J. Goering, Hearing Officer:

This Decision concerns the eligibility of XXXXXXXXXXXXX (hereinafter referred to as "the individual") for access authorization under the regulations set forth at 10 C.F.R. Part 710, entitled "Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material."[1] For the reasons set forth below, I conclude that the DOE should not restore the individual's access authorization at this time.[2]

I. BACKGROUND

The individual is an employee of a DOE contractor and holds a suspended access authorization. A Local Security Office (LSO) summoned the individual for an interview (PSI) with a personnel security specialist on November 29, 2011, Exhibit 9, after the individual was arrested on September 2, 2011, and charged with driving under the influence (DUI). After the PSI, the LSO referred the individual to a local board-certified psychologist (hereinafter referred to as "the DOE psychologist") for an agency-sponsored evaluation. The DOE psychologist prepared a written report, setting forth the results of that evaluation, and sent it to the LSO. Exhibit 11. Based on this report and the rest of the individual's personnel security file, the LSO determined that derogatory

[1] An access authorization is an administrative determination that an individual is eligible for access to classified matter or special nuclear material. 10 C.F.R. § 710.5. Such authorization will be referred to in this Decision as access authorization or a security clearance.

[2] Decisions issued by the Office of Hearings and Appeals (OHA) are available on the OHA website located at http://www.energy.gov/oha.

information existed that cast into doubt the individual's eligibility for access authorization. The LSO informed the individual of this determination in a letter that set forth the DOE's security concerns and the reasons for those concerns. Exhibit 1. The Notification Letter also informed the individual that he was entitled to a hearing before a Hearing Officer in order to resolve the substantial doubt concerning his eligibility for an access authorization.

The individual requested a hearing in this matter. The LSO forwarded this request to OHA, and the OHA Director appointed me the Hearing Officer in this case. The DOE introduced 14 exhibits into the record of this proceeding, and presented the testimony of the DOE psychologist. The individual introduced two exhibits, and presented the testimony of four witnesses in addition to his own testimony.

II. REGULATORY STANDARDS

The criteria for determining eligibility for security clearances set forth at 10 C.F.R. Part 710 dictate that in these proceedings, a Hearing Officer must undertake a careful review of all of the relevant facts and circumstances, and make a "common-sense judgment . . . after consideration of all relevant information." 10 C.F.R. § 710.7(a). I must therefore consider all information, favorable and unfavorable, that has a bearing on the question of whether restoring the individual's security clearance would not endanger the common defense and be clearly consistent with the national interest. Specifically, the regulations compel me to consider the nature, extent, and seriousness of the individual's conduct; the circumstances surrounding the conduct; the frequency and recency of the conduct; the age and maturity of the individual at the time of the conduct; the absence or presence of rehabilitation or reformation and other pertinent behavioral changes; the likelihood of continuation or recurrence of the conduct; and any other relevant and material factors. 10 C.F.R. § 710.7(c).

A DOE administrative proceeding under 10 C.F.R. Part 710 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). Once the DOE has made a showing of derogatory information raising security concerns, the burden is on the individual to produce evidence sufficient to convince the DOE that granting or restoring 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 regulations further instruct me to resolve any doubts concerning the individual's eligibility for access authorization in favor of the national security. 10 C.F.R. § 710.7(a).

III. NOTIFICATION LETTER AND ASSOCIATED SECURITY CONCERNS

The Notification Letter cited derogatory information within the purview of two potentially disqualifying criteria set forth in the security regulations at 10 C.F.R. § 710.8, subsections (h) and (j) (hereinafter referred to as Criteria H and J, respectively). Exhibit 1.[3] Under Criterion J, the LSO cited two arrests of the individual, one for DUI and Leaving the Scene of an Accident on May 18,

[3] Criterion H relates to information indicating that the individual has an "illness or mental condition of a nature which, in the opinion of a psychiatrist or licensed clinical psychiatrist, causes or may cause, a significant defect in judgment or reliability." 10 C.F.R. § 710.8(h). Under Criterion J, information is derogatory if it indicates that the individual has "[b]een, or is, a user of alcohol habitually to excess, or has been diagnosed by a psychiatrist or a licensed clinical psychiatrist as alcohol dependent or as suffering from alcohol abuse." 10 C.F.R. § 710.8(j).

2001, and a second for DUI on September 2, 2011. Also under Criterion J, the LSO cited statements by the individual that he consumed about a six-pack of beer on weekends and that, in the mid-1990s to early 2000s, he drank about a 12-pack of beer on weekends. To support Criterion H, the LSO cited the DOE psychologist's report, in which he concluded that the individual's "lack of maturity leaves significant questions as to his judgment and reliability." Exhibit 11 at 4.

The above information adequately justifies the DOE's invocation of Criterion J, and raises significant security concerns. Excessive alcohol consumption often leads to the exercise of questionable judgment or the failure to control impulses, and can raise questions about an individual's reliability and trustworthiness. *See Revised Adjudicative Guidelines for Determining Eligibility for Access to Classified Information* (*Adjudicative Guidelines*), The White House (December 19, 2005) at Guideline G (under which conditions that could raise a concern include "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").

However, I do not find information in the record adequate to justify the invocation of Criterion H in this case. As noted above, Criterion H relates to information that the individual has an "illness or mental condition of a nature which, in the opinion of a psychiatrist or licensed clinical psychiatrist, causes or may cause, a significant defect in judgment or reliability." 10 C.F.R. § 710.8(h). In the present case, after preparing a report of his January 9, 2012, evaluation of the individual, the DOE psychologist submitted a letter dated July 16, 2012, to the LSO, in which he concluded that "while I have concerns about [the individual]'s ability to be accountable for his actions, especially in interactions with authority figures, this not a product of an illness or mental condition." Exhibit 11.

At the hearing in this matter, the DOE psychologist testified that he "had concerns about the inconsistent reporting and the histories but I had what I felt to be reliable testing that did not demonstrate a mental condition or disorder. . . . Immaturity and oppositionality are not mental conditions." Hearing Transcript (Tr.) at 124, 131. Having reviewed the record, particularly in light of the opinions expressed by the DOE psychologist in his report, his subsequent letter, and his hearing testimony, I do not find from the record that the individual has an "illness or mental condition" of any kind, and therefore do not find a basis for the invocation of Criterion H in this case.

IV. FINDINGS OF FACT AND ANALYSIS

The individual is 39 years old, and has worked for various DOE contractors and subcontractors since 1996. He held a clearance in his current job until it was recently suspended. According to the individual, when he was in his twenties, he drank more heavily than he does currently. Exhibit 9, 2009 PSI at 8 ("12 pack on a Saturday . . . on the weekends"); Tr. at 115-16. The individual described his May 2001 DUI as "probably the end of my heavy consumption years." Tr. at 104. On the day of that incident, the individual was at a lake "all day drinking and was way, way, way out of line as far as the amount." *Id.* at 86. On the way back from the lake, while towing a boat, the individual stopped at a gas station where he caused some damage with his vehicle, after which he left the scene and went home, where he was eventually arrested. *Id.* at 86-89.

Though the individual did not hold a security clearance at the time of his 2001 DUI arrest, the incident was discussed during the individual's 2009 PSI, during which the interviewer explained the

basis for a security concern stemming from the use of alcohol. Exhibit 9, 2009 PSI at 11. The interviewer asked the individual if he understood "that as long as you hold a clearance, you'll be periodically reinvestigated, and should the abuse of alcohol be something that comes to our attention, again, you could . . . lose a security clearance for that?" *Id.* at 12. The individual indicated that he understood this. *Id.* The individual received a similar warning in a follow-up interview in January 2010. Exhibit 9, 2010 PSI at 18.

On September 2, 2011, the individual traveled by motorcycle with friends to see a band play. He testified that they arrived at the venue at approximately 6:00 pm and left at about 10:30 pm, and that, while there, he drank three 16-ounce cans of beer (the equivalent of four standard 12-ounce cans of beer), and also ate. Tr. at 105-06. On the way back home, the individual and one of his friends were stopped by police, who "said initially it was for illegal helmet and asked us if we had been drinking." *Id.* at 105. After doing a field sobriety test, "they said they felt I was borderline and wanted to take me in for a Breathalyzer." *Id.* According to the individual, his blood alcohol content was measured at 0.09%. Exhibit 12 at 2.

In response to a September 27, 2011, Letter of Interrogatory, the individual stated that he drank beer "weekly, less than 12 on weekends." *Id.* at 3. During his November 29, 2011, PSI, the individual stated that he drank "not over a six-pack on the weekends . . . and that's including Friday, Saturday and Sunday. . . . [It] usually is always at home. I never go out." Exhibit 9, 2011 PSI at 7.

There are clearly times, however, when the individual drinks away from home. A friend of the individual, who plays in a band with him and testified at the hearing, was asked how often he had seen the individual intoxicated and responded: "I don't know. 75 percent of the time that we play out he may have had too much to drink. And I have driven him home several times but, yes." Tr. at 23. He testified that the band practices during the week and usually plays on Fridays, on "average once a month, maybe 1.5 times a month." *Id.* at 26.

In addition, another friend of the individual testified that they spend time together on weekends at a lake. *Id.* at 36. He and the individual have their own boats. *Id.* at 44. "[W]e camp out and cook out. And stand around in the sand and the water and enjoy the day." *Id.* at 36. On these occasions, they usually drink. *Id.* at 37-38. He stated that he usually buys a twelve-pack of beer for the weekend, and the individual buys his own beer. *Id.* at 44-45.

The *Adjudicative Guidelines* list the following conditions that could mitigate security concerns raised under Guideline G (Alcohol Consumption):

> (a) so much time has passed, or the behavior was so infrequent, or it happened under such unusual circumstances that it is unlikely to recur or does not cast doubt on the individual's current reliability, trustworthiness, or good judgment;
>
> (b) the individual acknowledges his or her alcoholism or issues of alcohol abuse, provides evidence of actions taken to overcome this problem, and has established a pattern of abstinence (if alcohol dependent) or responsible use (if an alcohol abuser);

> (c) the individual is a current employee who is participating in a counseling or treatment program, has no history of previous treatment and relapse, and is making satisfactory progress;
> (d) the individual has successfully completed inpatient or outpatient counseling or rehabilitation along with any required aftercare, has demonstrated a clear and established pattern of modified consumption or abstinence in accordance with treatment recommendations, such as participation in meetings of Alcoholics Anonymous or a similar organization and has received a favorable prognosis by a duly qualified medical professional or a licensed clinical social worker who is a staff member of a recognized alcohol treatment program.

Adjudicative Guidelines at ¶ 23.

In this case, over two years have passed since the individual's second DUI arrest, and it has been over twelve years since his first DUI arrest, 10 years earlier. Thus, the likelihood of recurrence of another such incident would appear to be lower than if there were a history of more alcohol-related problems, occurring more recently and frequently. On the other hand, when the individual was being investigated for a clearance in 2009 and 2010, and was warned about this issue in two separate PSIs, the passage of over eight years since his 2001 DUI arrest allowed for a confidence in the individual's future behavior that, in retrospect, was misplaced, given his subsequent DUI arrest in 2011.

In the individual's favor is the fact that, unlike after his first DUI arrest, the individual participated in alcohol awareness programs after the second incident. The individual submitted certification of his attendance in 2012 at a 12-hour DUI program and a Mothers Against Drunk Driving Victim Impact Panel, required as part of his probation after his 2011 DUI charge, which the individual testified was reduced to a charge of reckless driving. Exhibits A and B; Tr. at 106-07. While this could be considered an abbreviated form of counseling or treatment, I note that the DOE psychologist recommended in his report more substantial treatment, specifically that the individual "enter an individual therapy with an experienced substance abuse counselor who would both educate him and create a structure of accountability within which he could operate." Exhibit 11 at 4.

Nonetheless, in his hearing testimony, the DOE psychologist noted apparent changes in the individual since his January 2012 evaluation. "I think that today there is much more self-responsibility and awareness that other people are looking at this seriously. And that he too is joining that level of seriousness . . . . I think there is every indication that he takes this seriously and understands how seriously the Department takes it . . . ." Tr. at 125, 126.

My impression of the individual's hearing testimony is similar, in that he appears to understand that the DOE is concerned by his two DUI arrests, and he is determined not to "drink and get behind the wheel, as far as drinking and driving goes." *Id.* at 112. The individual also appears to recognize at least the potential that a more serious problem could arise from his use of alcohol. "[A]s far as having a problem where it might develop into something that my father went through; all I can say is watching him go through that is not something that I'm ever going to put myself into, I'm not going down that same road." *Id.* at 112-13. He does not believe, however, that he currently has a problem. "I really don't. If I did, I would like to think that I could make the necessary changes and stop." *Id.* at 111.

I believe, however, that there is cause for continued concern in this case, based upon the amount of alcohol the individual still may be consuming on a regular basis. This is well illustrated by the individual's friend's testimony that when their band is playing at a local venue, which takes place once or twice a month, "75 percent of the time . . . he may have had too much to drink." *Id.* at 23. At the end of this testimony, the individual interjected, "I mean, I'm not drunk 75 percent of the time. I may be like over the legal limit when we are playing but, you know, intoxicated I don't think that that is what you meant, right?" *Id*. at 28. Thus, while there may be a dispute at to whether the individual would qualify as "drunk" (a more subjective term), it does appear the individual may drink to a level of legal intoxication on a regular basis. *See also id.* at 125 (testimony of DOE psychologist that he is "concerned about these boating weekend binges. That is potentially real trouble."); *id.* at 134 ("I wanted to highlight for [the individual] that if he were enjoying a grill and a park ranger would say would you do a Breathalyzer he would be over the limit and would have a public intoxication charge.").

The DOE psychologist pointed out in his testimony why even what he characterizes as "heavy drinking" would not trigger a diagnosis of alcohol abuse or even an opinion of use of alcohol habitually to excess, given the lack of a sufficient number of consequential events such as relational, legal, financial, health, or occupational problems. *Id.* at 136-37; 139 ("[I]t is not an issue of abuse. It would be described as heavy drinking."). However, in order to raise a security concern under Criterion J, the Part 710 regulations do not require the opinion of an expert that an individual has been, or is, a user of alcohol habitually to excess, and the same logically would be true of the evaluation of any concern going forward.

With that in mind, and applying the "common-sense judgment" called for under the regulations, 10 C.F.R. § 710.7(a), I conclude that, while consuming alcohol to intoxication *on rare occasions* may be insufficient to present an unacceptable risk to the national security, the same is not necessarily true of holders of security clearances who, somewhat predictably, drink to intoxication *on a regular basis*. *See Personnel Security Hearing*, Case No. PSH-12-0085 (2012) (concern under Criterion J not resolved given risk, going forward, of impairment of the individual's judgment on a regular basis), *aff'd* (Appeal Panel, April 22, 2013).

While every case must be judged on its own merits, here there is evidence that, when the individual uses alcohol, his judgment can be, and has been, impaired to the point where he makes decisions clearly not in his best interest, such as riding his motorcycle home after drinking in 2011, despite a previous DUI arrest, and even though he held a clearance and had been clearly warned in 2009 and 2010 of the risk such behavior entails.[4] There is no reason to think that the individual's future use of alcohol to intoxication will not carry with it similar risks.

Though the individual testified that he drank less after his 2011 DUI arrest, *Tr.* at 108, the individual's wife, when asked whether "he drinks less or just does not go anywhere when he drinks," responded that he "[d]oesn't go anywhere when he drinks." *Id.* at 55; *but see id.* at 21 (testimony of friend that it "[s]eems like he has slowed down a little"). Similarly, while the individual characterized his first DUI arrest, in May 2001, as "the end of my heavy consumption years," *id.* at 104, his wife testified that the amount he drank after that arrest was '[a]bout the same. It didn't get

[4] In fact, choosing to drink at all in that context raises concerns regarding the individual's judgment, even when sober.

any heavier." *Id.* at 51. Given the testimony as a whole, I cannot find a basis for concluding that the individual significantly modified his consumption of alcohol after the 2011 DUI.

The DOE psychologist, nonetheless, expressed hope regarding the individual's future use of alcohol.

> There is something that is sort of a family kind of cultural tradition around these sort of cooking out, grilling out, hanging out, drinking kind of situations. And that makes me anxious but it is my hope that there has been enough information and the impact of the significance of his drinking has been made clear enough to where I'm seeing a different guy today than I saw when I evaluated him a year ago.

Id. at 128; *see also id.* at 140 ("I think the trajectory is that [the individual's use of alcohol] will be modified even more."), 129 ("He is talking like a guy who knows [future incidents are] just not an option.").

Although I share the DOE psychologist's *hope*, I note that the individual made similar statements in his 2009 and 2010 PSIs. Exhibit 9, 2009 PSI at 18-19 ("I'm gonna do everything in my power not to abuse alcohol. . . . I think I'm gonna be fine. I was, you know young and stupid and did stupid things back in the day"); *id.*, 2010 PSI at 19 ("I've got a good job and I don't want to screw it up"). Moreover, there is no apparent recognition by the individual that the amount and frequency of his *current* alcohol consumption may raise legitimate security concerns, and so there is a notable lack of determination by the individual to moderate his consumption going forward. Under these circumstances, for the reasons set forth above, I cannot find that the legitimate concerns in this case under Criterion J have been sufficiently resolved.

V. CONCLUSION

In the above analysis, I have found that there was sufficient derogatory information in the possession of the DOE that raises security concerns under Criterion J. 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 mitigate the security concerns at issue. 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. The parties may seek review of this Decision by an Appeal Panel under the regulations set forth at 10 C.F.R. § 710.28.

Steven J. Goering
Hearing Officer
Office of Hearings and Appeals

Date: October 11, 2013