

regulations at 10 C.F.R. § 710.8, subsections (h), (j), and (l) (hereinafter referred to as Criterion H, Criterion J, and Criterion L).^{2/}

Upon his receipt of the Notification Letter, the Individual exercised his right under the Part 710 regulations by requesting an administrative review hearing. The Director of the Office of Hearings and Appeals (OHA) appointed me the Administrative Judge in the case, and I subsequently conducted an administrative hearing in the matter. At the hearing, the LSO presented one witness, a DOE consulting psychologist (DOE psychologist); the Individual presented his own testimony and the testimony of two witnesses – his business associate and friend and his supervisor. The LSO submitted 11 exhibits into the record; the Individual submitted one exhibit.

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 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). Thus, an Individual is afforded the utmost latitude in the presentation of evidence to mitigate the security concerns at issue.

^{2/} Criterion H concerns information that a person has “[a]n illness or mental condition of a nature which, in the opinion of a psychiatrist or a licensed clinical psychologist, causes or may cause, a significant defect in judgment or reliability.” 10 C.F.R. § 710.8(h). Criterion J applies where an individual has been, or is, a user of alcohol habitually to excess or has been diagnosed by a psychologist as alcohol dependent or suffering from alcohol abuse. *Id.* § 710.8(j). Criterion L relates 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 interests of the national security . . .” 10 C.F.R. §710.8(l).

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

In February 2013, the Individual reported to the LSO that he had been involved in a motor vehicle accident and subsequently charged with DUI. DOE Ex. 4. During the October 2013 PSI, the Individual admitted that he knew he was intoxicated when he began driving his car. DOE Ex. 4; DOE Ex. 9 at 8-9. He stated that in 2010, he was also charged with DUI, but the charge was reduced to Reckless Driving. DOE Ex. 4; DOE Ex. 9 at 17-18. The Individual consumed 10 to 15 beers every weekend between February 2013 and October 2013. DOE Ex. 4; DOE Ex. 9 at 24-27. He also stated that he drove intoxicated many times, even though he knew he should not. DOE Ex. 9 at 34.

As support for its security concerns under Criteria H and J, the LSO relies on the opinion of the DOE psychologist, who diagnosed the Individual with alcohol use disorder, mild. In addition, the LSO cites the Individual's statements regarding his pattern of alcohol consumption and his Driving Under the Influence (DUI) arrests in 2013 and 2010. DOE Ex. 4, Enclosure 1 at 1-2. I find that there is ample information in the Notification Letter to support the LSO's reliance on Criteria H and J. 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.

As support for its security concerns under Criterion L, the LSO relies on the Individual's statements regarding his alcohol consumption and his DUI. DOE Ex. 4, Enclosure 1 at 2-3. I find that there is ample information in the Notification Letter to support the LSO's reliance on Criterion L. The Individual's vulnerability to blackmail, exploitation, and duress calls into question the individual's judgment, reliability, trustworthiness and his ability to protect classified information. *See* Adjudicative Guidelines at Guideline E.

IV. Findings of Fact and 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)^{3/} and the Adjudicative Guidelines. After due deliberation, I have determined that the Individual's access authorization should not be restored. 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.

As indicated above, the LSO has properly raised security concerns under Criteria H, J, and L. Accordingly, I now consider whether the Individual has submitted sufficient information to resolve these concerns.

A. Criterion H and Criterion J

The evidence before me indicates that the Individual has an alcohol problem, which peaked with his DUI in February 2013. The Individual began consuming alcohol at an early age and was undoubtedly drinking to excess prior to his marriage in 2001. DOE Ex. 11. During his marriage, between 2001 and 2012, the Individual did not consume alcohol. Tr. at 26. He testified that his wife did not consume alcohol and did not want alcohol in the house or around her young son. Tr. at 26. The Individual stated that he only consumed approximately four alcoholic beverages during his marriage. Tr. at 26. However, when the marriage dissolved, the Individual began consuming alcohol in excess again. Tr. at 29. He lived with a friend who consumed alcohol every evening. Tr. at 29. In addition, he would go out with a group of friends and consume alcohol. Tr. at 30. The Individual was last intoxicated three months prior to the hearing and currently consumes approximately six to 10 beers a week. Tr. at 38, 40. The Individual admitted he consumed two beers the night before the hearing. Tr. at 38.

The Individual was arrested for DUI in 2010 after his car ran out of gasoline on an exit ramp. Tr. at 30-31. The charge was eventually reduced to reckless driving, although the Individual was required to abstain from alcohol consumption for six months. Tr. at 32. In February 2013, the Individual was again arrested for DUI after flipping his car. Tr. at 35. His blood alcohol level was .23, over twice the legal limit. DOE Ex. 9 at 5. After the second DUI offense, the Individual was incarcerated for seven days, was sentenced to one-year probation, was levied \$8,000 in fines and costs, and was required to keep an interlock on his car for one year. Tr. at 37-38.

In November 2013, the Individual was evaluated by the DOE psychologist. DOE Ex. 11. After reviewing his personnel file and interviewing him, the DOE psychologist diagnosed the Individual as suffering from alcohol use disorder, mild. DOE Ex. 11 at 5. At the hearing, the DOE psychologist did not revise his diagnosis. Further, the DOE psychologist opined that the Individual was not rehabilitated or reformed. Tr. at 62. He recommended that the Individual

^{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.

continue with his current counselor, who has not been trained in harm reduction, relapse prevention or controlled drinking, because the Individual is comfortable with her and she is helpful to him. Tr. at 54, 68. But the DOE psychologist continued that the counseling should be structured toward the Individual's alcohol use. Tr. at 68. The DOE psychologist would also suggest, but not require, that the Individual not consume alcoholic beverages. Tr. at 59. The DOE psychologist opined that if the Individual does consume alcohol, he should not have more than two beers on any given day and those two beers should be consumed at least one hour apart. Tr. at 62.

In considering the evidence before me, I must look to the Adjudicative Guidelines to determine if the Individual has mitigated the properly raised alcohol-related security concerns. The relevant paragraph lists conditions that could mitigate this type of security concern, including:

- (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, ¶ 23(a)-(d). The general thrust of these guidelines is that a concern related to problematic alcohol use can be mitigated by circumstances indicating that the problematic use is no longer occurring and has a low risk of recurring in the future.

While the Individual may meet Adjudicative Guideline ¶ 23(c) as he is a current employee who is participating in counseling, has no history of previous treatment and relapse, and is making satisfactory progress, he has not met any of the other mitigating factors nor otherwise demonstrated that he has a low risk of relapse to alcohol dependence. Further, the DOE psychologist opined that the Individual is vulnerable to returning to his previous alcohol use. Tr. at 57.

The Individual does not meet Adjudicative Guideline ¶ 23(a) which requires that a significant amount of time has passed since the behavior, or that the behavior was infrequent or under such unusual circumstances that it is unlikely to recur. The Individual was arrested for DUI in February 2013. He has not abstained from alcohol since his arrest. Further, the circumstances leading to his DUI were not unusual or infrequent, although he testified that he now using taxicabs when he knows that he is going to be consuming alcohol. I cannot find that the Individual has satisfied this guideline.

The Individual also has not established a sufficient pattern of responsible use to satisfy Adjudicative Guideline ¶ 23(b). The DOE psychologist opined that the Individual is vulnerable “to returning to the kind of drinking where [he feels] okay to drive at a blood alcohol of point-two-three.” Tr. at 50. The DOE psychologist continued, “There is a history of problematic drinking followed by periods of abstinence and then problematic drinking. . . . [t]here is insight in that I should cut down because of these consequences but these are really catastrophic consequences.” Tr. at 56. He concluded that he would want to see the Individual more dedicated to solving his problematic alcohol consumption. Tr. at 56. In light of the DOE psychologist’s opinion that the Individual has not established a pattern of responsible use, along with the Individual’s testimony that he consumes approximately six to ten beers a week, was last intoxicated three months prior to the hearing, and consumed two beers the night before the hearing, I cannot find that the Individual has satisfied Adjudicative Guideline ¶ 23 (b).

Finally, I cannot find that the Individual has satisfied Adjudicative Guideline ¶ 23(d), *i.e.*, has completed a treatment program and received a favorable diagnosis from a medical professional or licensed alcohol treatment professional. The Individual’s counselor, who submitted an affidavit for the hearing, is not a licensed alcohol treatment professional. Ind. Ex. A. Nonetheless, the DOE psychologist testified that if he saw “[s]ome accountability that [the counselor] is following a manualized treatment for rational drinking, controlled drinking,” the Individual could continue seeing her because he is comfortable with her and she aids him. But, the DOE psychologist stressed that, if the Individual continues seeing his current counselor, he should do so with an emphasis on alcohol treatment. Tr. at 53. Finally, the DOE psychologist concluded that the Individual’s risk of relapse is high. Tr. at 66. Accordingly, I find that the Individual has not yet established a favorable prognosis, *i.e.*, a low risk of relapse.

Given the Individual’s continued alcohol consumption to intoxication, along with his failure to engage in alcohol treatment counseling, I cannot find that he has sufficiently mitigated the security concerns associated with Criterion H and Criterion J.

B. Criterion L

All the security concerns raised by the LSO under Criterion L were based on the Individual’s alcohol use. In the previous section, I concluded that he has not mitigated the Criteria H and J concerns raised by his alcohol use. Further, the DOE psychologist opined that the Individual is vulnerable to returning to consuming alcohol and driving a motor vehicle after his consumption. Tr. at 59. For these reason, I have determined that the Individual has not mitigated the concerns raised under Criterion L.

V. 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, both 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 the security concerns associated with Criteria H, J, and L. 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.

Janet R. H. Fishman
Administrative Judge
Office of Hearings and Appeals

Date: December 4, 2014