

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 three potentially disqualifying criteria set forth in the security regulations at 10 C.F.R. § 710.8, subsections (f), (j) and (l) (hereinafter referred to as Criteria F, J and L, respectively).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 one witness, his manager. The DOE Counsel called one witness, the DOE psychiatrist. Both the DOE and the individual presented 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

² Criterion F pertains to information that a person has "[d]eliberately misrepresented, falsified, or omitted significant information from a Personnel Security Questionnaire, a Questionnaire for Sensitive (or National Security) Positions, a personnel qualifications statement, a personal security interview, written or oral statements made in response to official inquiry on a matter that is relevant to a determination regarding eligibility for DOE access authorization, or proceedings conducted pursuant to § 710.20 through § 710.31." 10 C.F.R. § 710.8(f). 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). Finally, 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).

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 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 three potentially disqualifying criteria as bases for suspending the individual's security clearance, Criteria F, J and L. To support its reliance on Criterion F, the LSO alleges that the individual deliberately provided false and misleading information regarding his arrests, drug use and alcohol use on his November 19, 1985 and February 11, 1986, Personnel Security Questionnaires (PSQs), during his November 3, 1986 and February 12, 2014, Personnel Security Interviews (PSIs), during an April 11, 1985, Office of Personnel Management Interview and in response to a December 2, 2013, LSO request for information. From a security standpoint, false statements made by an individual in the course of an official inquiry regarding a determination of eligibility for DOE access authorization raise serious issues of honesty, reliability and trustworthiness. The DOE security program is based on trust, and when a security clearance holder breaches that trust, it is difficult to determine to what extent the individual can be trusted again in the future. *See* Guideline E 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*).

To support Criterion J, the LSO cites the individual's 1990 and 2013 Driving Under the Influence (DUI) arrests, alcohol use and the DOE consultant psychiatrist's opinion that the individual consumes alcohol habitually to excess. The excessive consumption of alcohol itself is a security concern because that behavior can lead to the exercise of questionable judgment and failure to control impulses, which in turn can raise questions about a person's reliability and trustworthiness. *See* Guideline G of the *Adjudicative Guidelines*.

As for Criterion L, the LSO again cites the individual's two DUIs, his failure to report his 2013 arrest until two months after the incident and the individual's July 2014 possession of a personal electronic device (cellular phone) at his worksite and subsequent Site Access Restriction. 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 id.* at Guideline E.

IV. Findings of Fact

The individual has a long history of alcohol use. In February 1990, the individual was arrested for DUI after taking a blood pressure medication, and then later consuming four beers at a bar over a two-hour period. According to the individual, on his way home he lost consciousness and was involved in an accident in which he broke the windshield of his vehicle with his head. He stated that his loss of consciousness was the result of his medication and not his use of alcohol. Again, in September 2013, the individual was arrested for DUI after attending a poker game and sampling home-brewed beer. He estimated that he consumed about eight beers, between 12 and 16 ounces. The individual's blood alcohol content was above 0.3 percent. He was placed on 12 months supervised probation and his driver's license was suspended for 60 days. During his February 2014 PSI, the individual admitted that from 2004 to January 2012, he consumed alcohol two to three times on a weekly basis. On these occasions, he stated that he consumed four to five beers and two whiskey drinks consisting of one and one-half ounces of whiskey. The individual stated that he began to reduce his consumption of alcohol in January 2012, when his wife died from cirrhosis of the liver. He also admitted that from January 2012 to the present, he consumed one to four beers once to twice monthly and was intoxicated twice monthly. On May 2, 2014, the DOE psychiatrist evaluated the individual and opined that the individual has developed alcohol tolerance through his regular consumption of alcohol which was evidenced by his BAC level of greater than 0.3 percent at the time of his 2013 DUI arrest. He further opined that based on the individual's excessive consumption, he is considered to consume alcohol habitually to excess. *See* DOE Exhibit 1.

During the course of the individual's background investigation, the LSO discovered that the individual provided inconsistent and misleading statements regarding his alcohol use, drug use and arrests on a number of occasions. On his November 19, 1985 and on February 11, 1986 PSQs, the individual elected not to respond to questions that would have required him to disclose his 1980 arrest, as well as his marijuana and other drug usage. During a November 1986 PSI, the individual admitted that he had used marijuana and had manufactured hashish on one occasion in 1980. Although the individual was formally charged with the manufacture of hashish, his charge was reduced to misdemeanor possession of a controlled substance as a result of plea bargaining. In addition, during an OPM interview on April 11, 1995, the individual described being arrested

for felony possession of a controlled substance, hashish. He denied that he ever used hashish and that he only smoked marijuana on one or two occasions while attending college. *Id.*

Also, on December 2, 2013, in response to the LSO's request for information regarding his alcohol use, the individual, stated that he began brewing beer in 1993 and consumed two to three beers, two to three times a month on a Friday or Saturday at home, or one to two glasses of beer while watching sporting events with friends at a bar. He also stated that he did not normally drink to the point of intoxication, but estimated that it would take four glasses of beer for him to become intoxicated. He further admitted that the last time he was intoxicated was September 2013, when he was charged with DUI. However, during his February 2014 PSI, the individual admitted to trying to "down play" his use of alcohol in his responses to the LSO because he thought he would lose his clearance. *Id.*

In addition to the individual's alcohol use and falsifications, during his February 2014 PSI, the individual admitted that he did not report his September 2013 arrest for DUI until November 2013, two months after the incident occurred. He also admitted that in July 2014, he was cited for being in the possession of a personal electronic device (cellular phone) onsite within a limited area. The individual relinquished the device for a security review and was placed on a Site Access Restriction pending the outcome of the investigation. *Id.*

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 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.

A. Criterion F

The key issue under Criterion F is whether the individual has brought forward sufficient evidence to demonstrate that he can now be trusted to be consistently honest and truthful with the

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.

DOE. In considering this question, I found that the nature of the individual's misrepresentations was serious. The individual's lack of candor concerning his arrests, illegal drug use and alcohol use could increase his vulnerability to coercion or blackmail and raises important security concerns. The DOE must rely on individuals who are granted access authorization to be honest and truthful. This important principle underlies the criteria set forth in 10 C.F.R. § 710.8(f).

During the hearing, individual acknowledged that he provided misleading responses on his security questionnaires regarding his 1980 arrest, as well as his marijuana and other drug usage. Transcript of Hearing (Tr.) at 49. He testified that his attorney at the time advised him not to respond to questions that would have required him to disclose his arrest and drug usage. *Id.* at 50. Although he acknowledged that the security questionnaires did not provide a reporting exception for expunged charges, he reiterated that he relied on the advice of his attorney not to disclose this information because his 1980 arrest which was reduced to a misdemeanor related to a controlled substance that was eventually expunged. He testified that he interpreted his attorney's recommendation to cover up his marijuana use as well because he was using marijuana at the same time he experimented with and manufactured hashish. *Id.* at 52. The individual testified that he now understands that it was wrong to provide misleading responses on his questionnaires, but asserts that he did not intend to deceive.

The individual also acknowledged that he did not report his 1990 DUI until several years after the arrest. He testified that he forgot to report it since he was not actually convicted of DUI. *Id.* at 55. The individual also acknowledged that, subsequent to his 1990 arrest, he received periodic training on the reporting criteria. He stated that he did not intend to deceive the DOE, but rather he just did not remember the arrest until his supervisor instructed him to report it. See DOE Exh. 9 and 10. In addition to this arrest, the individual acknowledged during the hearing that he did not report his September 2013 DUI until November 2013. *Id.* at 61. He explained that on the night of the occurrence, he was not charged with DUI and that he was taken to the hospital, given a blood test and then sent home. According to the individual, it was not until he received documentation in the mail, a summons, that he realized he was charged with DUI. He testified that he immediately reported the DUI after he received the documentation. *Id.* Again, the individual asserted that he had no intention to deceive the DOE.

Finally, with respect to the individual's alcohol use, the individual admitted that he downplayed his alcohol use in response to the LSO's request to provide an alcohol profile. *Id.* at 66. He testified that he understated his use because he was afraid that he would lose his clearance. *Id.* According to the individual, this was the only instance where he intentionally misled DOE.

To determine whether the individual has mitigated the Criterion F concerns, I considered the relevant factors set forth in Adjudicative Guideline E. I find that none of the relevant factors apply in this case. Specifically, the individual did not meet ¶ 17(a) because the individual did

not make prompt, good-faith efforts to correct his falsifications before being confronted with the facts during his 2014 PSI. He did not meet ¶ 17(b) because his omissions were not caused by improper or inadequate advice of authorized personnel concerning the security clearance process. In addition, the individual did not meet ¶ 17(c) because the individual's verified falsifications were serious. Moreover, it is well-settled in previous cases of this office that where there exist security concerns attributable to irresponsible behavior, such as falsifications of security questionnaires or other forms of dishonesty, a subsequent pattern of responsible behavior is of critical importance in mitigating those concerns. In this case, as of the date of the hearing, it has only been nine months since the individual admitted his falsifications and since the DOE learned of his misrepresentations. While at the hearing I found the individual to be credible and forthright regarding his misrepresentations, not enough time has passed for the individual to establish a pattern of honest and responsible behavior sufficient to mitigate the concerns raised by his dishonest conduct or to allow me to conclude at this time that the individual's irresponsible conduct is unlikely to recur in the future.⁴ See *Adjudicative Guidelines* at Guideline E. Considering this, and the entirety of the record, I must conclude that the very serious concerns raised under Criterion F have not yet been resolved.

B. Criterion J

The Criterion J concerns raised by the LSO are predicated on the individual's two DUIs, his alcohol use, as well as the DOE psychiatrist's opinion that the individual consumes alcohol habitually to excess. During the hearing, the individual testified that between 2002 and 2012, he drank approximately six to seven drinks per session, two to three times a week. *Id.* at 74. He further testified that he began to decrease his alcohol consumption in 2012, but acknowledged on the night of his September 2013 DUI, he consumed potentially between 17 and 19 drinks. *Id.* at 75. He stated that after this incident, he realized he had developed a tolerance to the effects of alcohol. *Id.* at 76. According to the individual, after his 2013 DUI, he was placed on one year of alcohol-free probation which he admitted to violating once in March 2014 after his mother's memorial service. The individual also testified that he completed a DUI program in which he attended alcohol awareness classes. He asserted that he has abstained from alcohol since March 7, 2014 when he had a health scare related to his diabetes. *Id.* at 80. The individual testified that he plans to remain abstinent.

⁴ Guideline E Paragraph 17 outlines the conditions that could mitigate security concerns raised under Criterion F. Paragraph 17 (a) states that "the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts." Paragraph 17 (b) states that "the refusal or failure to cooperate, omission, or concealment was caused or significantly contributed to by improper or inadequate advice of authorized personnel or legal counsel advising or instructing the individual specifically concerning the security clearance process." Paragraph 17(c) states that "the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment." Finally, Paragraph 17(e) states that "the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress." The *Adjudicative Guidelines* at Guideline E.

The DOE psychiatrist testified that after evaluating the individual in April 2014, he believed the individual had developed a tolerance to the effects of alcohol. *Id.* at 29. He testified that the individual's BAC was 0.30 percent after his September 2013 arrest, noting that it was four times above the legal limit. *Id.* at 28. According to the psychiatrist, the individual told him that he has been sober since March 7, 2014 and expressed his wishes to maintain his sobriety and improve his health. *Id.* at 30. The DOE psychiatrist noted that according to the terms of the individual's one-year alcohol-free probation, the individual is not to drink alcohol from February 14, 2014 until February 15, 2015. He stated, however, that he would like the individual to remain abstinent for one year in order to address his alcohol problem. The DOE psychiatrist also stated that he is not satisfied with the individual's minimal intervention efforts thus far and opined that the individual should participate in a more intensive ongoing alcohol treatment program. *Id.* at 40 and 41.

Upon consideration of the evidence in the record, I find that the individual has not presented sufficient evidence to mitigate the security concerns cited in the Notification Letter regarding his alcohol consumption. Among the factors that may serve to mitigate concerns raised by an individual's alcohol use are that "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," that "the individual acknowledges his or her alcoholism or issues of alcohol abuse [and] provides evidence of actions taken to overcome this problem . . . , " and that "the individual has successfully completed inpatient or outpatient counseling or rehabilitation . . . , has demonstrated a clear and established pattern of modified consumption or abstinence in accordance with treatment recommendations . . . and has received a favorable prognosis by a duly qualified medical professional" *Adjudicative Guidelines*, Guideline G, ¶ 23.

In this case, although the individual now acknowledges his alcohol problem, he has a long history of excessive alcohol consumption, punctuated by two alcohol-related arrests. According to the individual's self-report, he has abstained from alcohol since March 7, 2014. However, he has not yet completed his one year of alcohol-free probation. I am persuaded by the testimony of the DOE psychiatrist that the individual should abstain from alcohol for one year and should participate in a more intensive alcohol treatment program. For these reasons, I find that the individual has not yet adequately mitigated the DOE's security concerns under Criterion J.

C. Criterion L

The key issue under Criterion L is whether the individual has brought forward sufficient evidence to demonstrate that he is reliable and trustworthy, and that he is no longer subject to

pressure, coercion, exploitation or duress. For the reasons set forth below, I find that the individual has not provided sufficient information to resolve the Criterion L concerns at issue.

The DOE's concerns cited under Criterion L are the individual's two DUIs, his most recent DUI occurring in 2013, the individual's failure to report his 2013 arrest until two months after the incident and the individual's July 2014 possession of a personal electronic device (cellular phone) at this worksite and subsequent Site Access Restriction.

Among the factors which could serve to mitigate the security concerns raised by the individual's lack of judgment and criminal conduct are: (1) the passage of time, the infrequency of the behavior, or that the behavior happened under such unusual circumstances that it is unlikely to recur in the future; (2) the individual has acknowledged the behavior or has taken positive steps to alleviate the factors that caused untrustworthy, unreliable behavior and such behavior is unlikely to recur; (3) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress; and (4) association with persons involved in criminal activity has ceased or occurs under circumstances that do not cast doubt upon the individual's reliability, trustworthiness, judgment, or willingness to comply with rules and regulations. *Adjudicative Guidelines* at ¶ 17 (c), (d), (e) and (g). In this case the individual has acknowledged his behavior with respect to his failure to report his 2013 arrest until two months after the incident. During the hearing, he testified that he did not realize he was charged with DUI until he received notification in the mail. With respect to his possession of a cellular phone at his worksite, the individual testified that he forgot he had his cellular phone in his pocket when a security officer approached him. He further testified that he did not intend to keep the phone on the work site and would have turned it in if he had remembered it was in his pocket.

However, I am concerned that the individual's conduct is relatively recent, especially with respect to the individual's 2013 DUI. Similarly, as stated above with respect to the individual's falsifications, given the recency of the individual's lack of judgment and criminal conduct here, not enough time has passed for the individual to establish a pattern of responsible behavior sufficient to mitigate the concerns raised by his conduct or to allow me to conclude at this time that the individual's irresponsible conduct is unlikely to recur in the future. In addition, based upon my conclusion above that the individual's use of alcohol continues to be a significant security concern, I correspondingly find that the Criterion L security concern with the individual's reliability remains unresolved. After considering the "whole person," I am not yet convinced that the DOE can rely on the individual's ability to make sound judgment calls regarding the safeguarding of classified information. *See Adjudicative Guidelines* at (2)a. I therefore find that the individual has not sufficiently mitigated the LSO's concerns under Criterion L.

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 F, 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 cannot find that the individual has brought forth convincing evidence to resolve the security concerns. I therefore cannot 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 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.

Kimberly Jenkins-Chapman
Administrative Judge
Officer of Hearings and Appeals

Date: December 23 2014