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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: March 26, 2015	)	Case No.: PSH-15-0023
	)	

Issued: August 5, 2015,

Administrative Judge Decision

Shiwali G. Patel, Administrative Judge:

This Decision concerns the eligibility of XXXXXXXXXXXX (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.[2]

I. BACKGROUND

The individual is an employee of a DOE contractor and holds a suspended access authorization. After the individual was arrested and charged with operating a vehicle while under the influence and failure to grant right of way, a Local Security Office (LSO) summoned the individual for a Personnel Security Interview (PSI) with a personnel security specialist in October 2014. DOE Exhibit (Ex.)[6]. After the PSI, the LSO referred the individual to a 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. Ex. 4. Based on this Report and the rest of the individual's personnel security file, the LSO determined that derogatory information existed that cast into doubt the individual's eligibility for access authorization. The LSO

[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.

informed the individual of this determination in a letter that set forth the DOE's security concerns and the reasons for those concerns. Ex.1. The Notification Letter also informed the individual that he was entitled to a hearing before an Administrative Judge 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 Administrative Judge in this case. The DOE introduced seven exhibits into the record of this proceeding (Exs. 1-7), and called the DOE psychologist as a witness. The individual introduced 5 exhibits (Exs. A-E), and presented only his testimony. *See* Transcript of Hearing, Case No. PSH-15-0023 [hereinafter cited as "Tr."].

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, an Administrative Judge 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 granting the individual a security clearance would compromise national security concerns. 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 review 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] In support of its Notification Letter, the LSO cited the following: 1) a DOE psychologist concluded that the individual is a user of

[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 psychologist or licensed clinical psychologist, 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 psychologist or a licensed clinical psychologist as alcohol dependent or as suffering from alcohol abuse." 10 C.F.R. § 710.8(j).

alcohol habitually to excess without adequate evidence of rehabilitation or reformation and that his consumption causes or may cause a significant defect in his judgment or reliability; 2) in September 2014, the individual was arrested and charged with operating under the influence (OUI) and failure to grant right of way after sideswiping another vehicle, and he admitted at the PSI that he consumed four beers and one shot of whiskey before that accident; and 3) in 1975, the individual was arrested and charged with intoxication after he got into a car accident, and he admitted during his PSI that he had beer before the accident. Ex. 1.

I find that each of these allegations is valid and well supported by the record in this case. *See* 10 C.F.R. § 710.27(c) (requiring Administrative Judge to "make specific findings based upon the record as to the validity of each of the allegations contained in the notification letter"); Tr. at 39. I further find that this information adequately justifies the DOE's invocation of Criteria J and H, as it raises significant security concerns related to excessive alcohol consumption, which often leads to the exercise of questionable judgment or the failure to control impulses, and calls into question the individual's future reliability and trustworthiness. *See Revised Adjudicative Guidelines for Determining Eligibility for Access to Classified Information,* The White House (December 19, 2005) (Adjudicative Guidelines) at ¶ 21 (Guideline G).

IV. FINDINGS OF FACT

For the most part, the individual does not dispute the DOE psychologist's report, but the individual specifically contends that he has now demonstrated reformation and rehabilitation. Ex. 4; Tr. at 39. Thus, based on the report and the testimony at the hearing, I make the following findings.

In 1975, when the individual was within the legal age of drinking in the jurisdiction where he resided, he was arrested for public intoxication after he got into a car accident while driving home from a party. Ex. 4 at 6. At the hearing, the individual testified that he could not remember how much he had to drink that night. Tr. at 30. However, he did not dispute that he was arrested and submitted an investigative report from that incident into the record. *Id.*; Ex. C. That case was eventually dismissed after the officer failed to respond to the docket call. Tr. at 31; Ex. E.

The next time that the individual was arrested was almost forty years later in September 2014, for an OUI and failure to grant right of way while he was out of town on a business trip. Tr. at 32; Ex. 1. He began drinking alcohol that afternoon at a sports bar at around 5:00 PM, when he had consumed a 16-ounce glass of beer. Tr. at 13; Ex. 4 at 5. At 6:00 PM, he had a shot whiskey and then at 7:00 PM, he consumed another 16-ounce glass of beer. *Id*. He did not have anything to eat then because he ate a late lunch. Tr. at 13. He left the bar at around 8:00 PM and drove to a couple of other bars, but then returned to the bar where he had drinks earlier. Tr. at 14. At 9:00 PM and at 10:00 PM, he had another glass of beer with food. *Id.* At around 11:00 PM, he left the bar in his car and returned to his hotel. *Id.* Upon returning to his room at the hotel, he took a short nap for about 15 or 30 minutes and then decided to leave his hotel and drive around to find other hotels in the area to stay at for future business trips. Tr. at 15; Ex. 4 at 5. This was at around 11:50 PM. Ex. 4 at 6. At around 1:20 AM, while driving on a narrow two-lane dark street in a residential neighborhood and trying to work his GPS unit, the individual sideswiped another vehicle, by the front quarter panel of his car hitting the front quarter panel of another vehicle. Tr. at 12,16. No one was injured in the accident, both of the vehicles were damaged and the police arrived. Tr. at 16; Ex. 4 at 6. The arresting officer

asked the individual whether he would take a breath test after the individual reported to him that he consumed four beers earlier. Ex. 4 at 6. The individual refused because he believed that if he did not take the breath test, the officer would only give him a ticket and return him back to the hotel. *Id.* Instead, the individual was arrested and charged with OUI and failure to grant right of way. Tr. at 17.

The individual called his manager about eight or nine hours later to report the accident. Tr. at 36, 49. When he returned to his home, he reported the incident to the person in his office who is in charge of security. Tr. at 36. At the time of the accident, that individual was on several medications for his blood pressure, cholesterol and allergies, and he was aware that it was not recommended that he consume alcohol with his medications because of the side effects it causes. Tr. at 45. The individual acknowledges that the decision to leave his hotel room close to midnight was affected by his alcohol consumption. Tr. at 38. He also admits that the alcohol he consumed, his sleepiness and distraction by the GPS unit contributed to the accident. Ex. 4 at 6. The DOE psychologist opined that given the individual's size and the amount of alcohol he consumed over six hours, that his blood alcohol content (BAC) was .09. Ex. 4 at 6. At the hearing, he agreed that the individual's actual BAC at the time of the accident, which was approximately two and a half hours after his last alcoholic beverage, would have been reduced, but not by a considerable amount. Tr. at 60.

The individual testified that there were costs he incurred as a result of this incident, including the bond that he posted for about $2,500 or $5,000, three trips back to the offense jurisdiction for court appearances and participation in an alcohol program that cost $100 to apply for and approximately $2,500 in legal fees. Tr. at 17-18. The alcohol program that he participated in was a three-day diversion program that he needed to complete in order for his charges to be dismissed. Tr. at 19. He participated in that program in December 2014, and it lasted a total of 25 to 30 hours. Tr. at 20.

Through that program, the individual learned the effects of alcohol on him and why people consume alcohol and he asserted his plans for the future with regard to alcohol. Tr. at 20-21. He chose to abstain from alcohol and has not consumed alcohol since the accident. Tr. at 21, 24. The individual realized that he used to consume alcohol when he was in social settings and that he can still have the camaraderie he previously associated with alcohol without involving it anymore. Tr. at 24. He has also started to avoid places where there is alcohol. For example, when he is playing golf, he will not stop at the clubhouse where he used to consume beer. *Id.* He also no longer goes into bars, his wife also does not drink and she has been supportive of him not drinking. Tr. at 25. Even when he has been at a wedding where champagne was offered for the toast, he filled his glass with water instead. *Id.* While he has been tempted by alcohol, he has not had any trouble staying away from it, stating that the program taught him how to overcome any temptation to drink. Tr. at 37. He also learned about the negative effects of alcohol on his health and emotions and how it impairs judgment. Tr. at 35. However, the program was not for the individual's treatment; it was educational and consisted of group lectures. Tr. at 41. The individual also never sought the assistance of the Employee Assistance Program (EAP)'s alcohol program at his facility. Tr. at 38. Currently, he is not enrolled in any program for his alcohol consumption. Tr. at 46.

After the accident, the individual also submitted a hair strand to test for alcohol on March 13, 2015. Tr. at 25; Ex. A. Approximately 1.23" of his hair was tested, which tested the last two months and two weeks for alcohol, and it came back negative for Ethyl Glucuronide (EtG). Ex. A. He also

submitted into the record an abstract from an article indicating that testing hair strands for EtG is for monitoring alcohol abuse. Ex. B. He testified that if requested, he would be willing to submit himself to similar testing at his own expense. Tr. at 28.

When the individual was in college, he reported that he drank to the point of intoxication weekly, likely becoming intoxicated several times each week by consuming approximately four 12-ounce beers three times a week over a two-hour period. Ex. 4 at 7. From 1979 to 1991, he consumed alcohol at the same level, and when it decreased in 1991, he still became intoxicated about once a week. *Id*. During the five years before the accident in September 2014, the individual consumed alcohol about three times each week. Tr. at 32. Because his doctor advised that he consume no more than two beers a day, which he interpreted to mean no more than 14 beers a week, he consumed a few beers three times a week. Tr. at 33. About twice a month, he consumed six beers during a four-hour or longer time span while watching a sports game. Tr. at 43, 50-51. He also admitted to drinking eight beers in six hours on three occasions in the year before his accident while he would be watching a sports game. Tr. at 52. He often drank at home while watching sports and his wife would sometimes consume a little beer with him. Tr. at 33. About half of the times when he drank, he would be alone, and the other half, he would be drinking socially. Ex. 4 at 7. When asked whether or not he considers himself to be an alcoholic, the individual responded that he does not believe that he needs alcohol treatment. Tr. at 32, 56. He did not agree with the DOE psychologist that he drank heavily during the time before the 2014 arrest, and he testified that his wife and children never complained about nor questioned his consumption of alcohol. Tr. at 39-40. He testified that he still has beer in his home because he has adult children who consume beer. Tr. at 34. When asked whether he has thought of removing the beer from his home, he stated that he probably could but that he and his wife "just haven't" and that there are others who may want to consume the alcohol. Tr. at 34, 57. He testified that he is committed to abstaining from alcohol forever. Tr. at 44.

In his Report, the DOE psychologist stated that the individual has been or is a use of alcohol habitually to excess since his college years. Ex. 4 at 8. The DOE psychologist testified that he does not change his recommendations from his Report. Tr. at 58. He believes that the individual needs to undergo treatment and that he does not fully appreciate the impact of his drinking behavior from his past. Tr. at 58. He also stated that during his testimony, the individual minimized his alcohol use in the past compared to what he told the DOE psychologist when he interviewed him. Tr. at 59. He maintains that there has not been adequate evidence of rehabilitation or reformation because the individual did not undergo a treatment program and due to the serious nature of his alcohol consumption, he needs more than an educational program. Tr. at 61. He recommends that the individual participate in a treatment program, even if it is less than what he initially recommended for the individual, which was an intensive outpatient program for four to six weeks followed by participation in an aftercare or relapse prevention group therapy session for at least an additional six months and attendance at Alcoholics Anonymous meetings once or twice a week for 12 months with a sponsor. Tr. at 62; Ex. 4 at 9. He stated that the general recommendation for the individual to remain abstinent for one year to demonstrate a low risk of relapse could be less than a year if the individual had committed to treatment and changed his life decisions. Tr. at 62.

V. ANALYSIS

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 not be restored.

In the end, OHA Administrative Judges accord deference to mental health professionals regarding issues of rehabilitation, reformation and risk assessment. In this case, the DOE psychologist presented compelling evidence why the individual still needs to undergo therapy before he can conclude that the individual is at a low risk of relapse, particularly given that the individual's pattern of consuming alcohol to intoxication dates back to when he was in college. Thus, his behavior is not mitigated as infrequent or occurring under such unusual circumstances. *See* Adjudicative Guideline G, ¶ 23(a).

Moreover, I am concerned that while the individual has acknowledged that alcohol contributed to his accident in September 2014, and has abstained from alcohol since then, he does not believe that he has a significant enough problem to need therapy. *See id.* at ¶ 23(b). He is not currently participating in a treatment or counseling program. *See id.* at ¶ 23(c). The program that he enrolled in last December was only a weekend-long, educational program and it was required in order for his charges to be dismissed. Further, I question how that program actually helped the individual identify the causes of his drinking habits. He testified that he learned that he consumed alcohol while in social settings, but he also told the DOE psychologist that about half of the time, he consumed alcohol while he was at home watching the game and not interacting with anyone else. It is also worth noting that when he consumed four beers and had a shot of whiskey before his 2014 accident, he did not testify that he was with anyone else, felt compelled to consume so much alcohol because he wanted to socialize or drank beers and had a shot of whiskey for comradery. He also showed poor judgment because he was aware of the side effects that consuming alcohol would have on him with his medication and when he refused to take the breath test, thinking that he would then only be given a ticket and sent back to the hotel.

I do commend the individual for having abstained from alcohol since his accident in September 2014, and for reporting his arrest to his manager soon afterwards. Nonetheless, given that he has not participated in a counseling or treatment program, I cannot conclude that he has demonstrated a clear pattern of abstinence or modification such that he is at a low risk for relapse. The DOE psychologist testified as such and I find his opinion compelling. *See* Adjudicative Guideline I, ¶ 29(c). Hence, considering all of the evidence in the record, I find that as of the time of the hearing in this matter, the individual has not sufficiently mitigated the concerns with regard to his alcohol use. Under these circumstances, given that I am to resolve "any doubts concerning the individual's eligibility for access authorization in favor of the national security," I cannot find that the individual has resolved the concerns related to his use of alcohol under Criteria H and J.

VI. CONCLUSION

As stated above, I have found that there was sufficient derogatory information in the possession of the DOE that raises serious security concerns under Criteria H and 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 associated with these criteria. 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 at this time. The parties may seek review of this Decision by an Appeal Panel under the regulations set forth at 10 C.F.R. § 710.28.

Shiwali G. Patel
Administrative Judge
Office of Hearings and Appeals

Date: August 5, 2015,