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United States Department of Energy
Office of Hearings and Appeals

In the Matter of:	Personnel Security Hearing	)
		)
Filing Date:	June 13, 2016	)
		) Case No.: PSH-16-0052
		)

Issued: September 2, 2016

Administrative Judge Decision

William M. Schwartz, Administrative Judge:

This Decision concerns the eligibility of XXXXX XXX XXXXX (hereinafter referred to as "the individual") to hold an access authorization[1] under the Department of Energy's (DOE) regulations set forth at 10 C.F.R. Part 710, Subpart A, entitled, "General Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material." As discussed below, after carefully considering the record before me in light of the relevant regulations and the Adjudicative Guidelines, I have determined that the individual's access authorization should be restored.

I. Background

The individual works for a DOE contractor in a position that requires that he hold a DOE security clearance. On October 23, 2015, the individual was arrested and charged with Driving Under the Influence of Liquor or Drugs (DUI) with a Breath Alcohol Content (BAC) of .20. The individual reported the incident to his security office, and on December 8, 2015, a Personnel Security Interview (PSI) was conducted by the Local Security Office (LSO). Because it was unable to resolve its concerns about his alcohol use, the LSO referred the individual to a DOE consultant psychologist (DOE psychologist) for a mental health evaluation. In her February 22, 2016, report of her evaluation of the individual, the DOE psychologist concluded that the individual has been a user of alcohol habitually to excess, a mental illness or condition that, in her opinion, causes or may cause a significant defect in judgment or reliability.

[1] Access authorization is defined as "an administrative determination that an individual is eligible for access to classified matter or is eligible for access to, or control over, special nuclear material." 10 C.F.R. § 710.5(a). Such authorization will be referred to variously in this Decision as access authorization or security clearance.

On May 9, 2016, the LSO sent a letter (Notification Letter) to the individual advising him that it had reliable information that created a substantial doubt regarding his eligibility to hold a security clearance. In the 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 (h), (j), and (l) (hereinafter referred to as Criteria H, J, and L, respectively).[2]

Upon his receipt of the Notification Letter, the individual exercised his right under the Part 710 regulations to request an administrative review hearing, and I was appointed the Administrative Judge in the case. At the hearing, the individual presented his own testimony and that of two other witnesses, his supervisor and his counselor, and the LSO presented the testimony of one witness, the DOE psychologist. In addition to the testimonial evidence, the LSO submitted 11 numbered exhibits into the record, and the individual submitted eight exhibits, identified as Exhibits A through H. The exhibits will be cited in this Decision as "Ex." followed by the appropriate numeric or alphabetic designation. The hearing transcript in the case will be cited as "Tr." followed by the relevant page number.

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 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 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

[2] Criterion H concerns information that a person suffers from "[a]n illness or mental condition of a nature which, in the opinion of a psychiatrist or licensed clinical psychologist, causes or may cause a significant defect in judgment or reliability." 10 C.F.R. § 710.8(h). 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). Criterion L concerns information that a person has "engaged 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. Such conduct or circumstances include, but are not limited to, criminal behavior…." 10 C.F.R. § 710.8(l).

broad range of evidence at personnel security hearings. Even appropriate hearsay evidence 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 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

As support for its security concerns under Criteria H and J, the LSO relies on the opinion of the DOE psychologist, who determined that the individual has been a user of alcohol habitually to excess, a mental illness or condition that, in her opinion, causes or may cause a significant defect in judgment or reliability. Ex. 1. In further support of these criteria, and with regard to Criterion L, the LSO cites:

- The individual's October 23, 2015, arrest for DUI and his admission during a PSI later that year that he had consumed three to four 16-ounce beers and two 20-ounce beers before the arrest;
- His December 27, 2009, arrest for DUI and his admission during the 2015 PSI that he had consumed four beers before the arrest;
- His 1986 citation for Minor in Possession of alcohol.

Id.

I find that there is ample information in the Notification Letter to support the LSO's reliance on Criteria H, J and L. The 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. In addition, criminal activity creates a doubt about a person's judgment, reliability and trustworthiness; by its very nature, it calls into question a person's ability or willingness to comply with laws, rules and regulations. *Id.* at Guideline J.

IV. Findings of Fact

The individual first started drinking alcohol at age 17 or 18. Ex. 4 at 4. At age 18 or 19, he was issued a citation for Minor in Possession; the local police found an unopened beer under the seat

of the vehicle he was driving. Ex. 11 at 13-14. Beginning at age 21, the individual would consume an average of three to six 12-ounce beers per week and an occasional glass of wine on the weekend with dinner. Ex. 4 at 4. He maintained that pattern until his recent abstinence, but admitted that he has been intoxicated, which he defined as having a BAC exceeding .08, four or five times since age 21, including the two incidents described below. *Id.*; Tr. at 37-38.

On December 27, 2009, the individual drank four beers over the course of roughly three hours at a family holiday dinner. After leaving the dinner, he was stopped by the police; he took a breathalyzer test, was found to have a BAC of .13, and was arrested for DUI. Ex. 4 at 4. His license was suspended, and he completed a court-ordered program for DUI offenders. In addition, he voluntarily sought help from his facility's Employee Assistance Program (EAP), through which he obtained one-on-one counseling and entered into, and successfully completed, a one-year abstinence agreement. Tr. at 31, 41.

The individual was arrested again for DUI on October 23, 2015. His uncle had died earlier in the day, the most recent of five family deaths within 18 months. The individual recalls that he drank three or four 16-ounce beers between 3:00 and 5:00 in the afternoon, while doing manual labor with some friends. He then drove home, and four hours later went to a restaurant, where he consumed two 20-ounce beers within an hour and a half. It was after leaving the restaurant that the police stopped him, determined that he had a BAC of .20, and arrested him. Ex. 4 at 4-5.

As a consequence of his 2015 arrest, the individual was required to attend an 18-month court-ordered program for DUI offenders, of which he has completed about half. Tr. at 52. He again voluntarily sought assistance from the EAP. Because this was his second DUI, the EAP asked that he enter into a two-year agreement to abstain from alcohol, as well as participate in counseling, six Alcoholics Anonymous (AA) meetings, and 24 random alcohol tests. He has maintained abstinence since his arrest nine months before the hearing, has met with his counselor 13 times, attended the required AA meetings within the first month of returning to the EAP for treatment, and has consistently passed each of the 19 alcohol tests he has been administered to date. *Id.* at 41, 43, 46; Ex. 4 at 5; Exs. B, F, H. He will continue to meet with his EAP counselor throughout the pendency of his two-year abstinence agreement, and will continue meeting with her beyond that period if recommended to do so. Tr. at 23.

In February 2016, the DOE psychologist evaluated the individual at the LSO's request. By the time of that evaluation, the individual had been working with the EAP counselor for nearly four months. While recognizing his efforts to address his involvement with alcohol, the DOE psychologist found discrepancies between his reported alcohol consumption and his blood alcohol content at the time of his DUI arrests and deduced that he was under-reporting the amount of alcohol he was drinking, both on the days he was arrested and in general.[3] She concluded that he habitually used alcohol to excess, though she stated that she lacked the evidence to conclude that he exhibited symptoms of Alcohol Use Disorder, Alcohol Dependence, or Alcohol Abuse. Ex. 4 at 9. She found that his reported abstinence of about four months and

[3] At the hearing, the DOE psychologist questioned the individual about what she felt was his intentional under-reporting of his alcohol consumption. He agreed with her that he may have been inaccurate in his estimates, admitting to her that he may have occasionally lost track of how much he was drinking. Tr. at 68-69. His response appears to have resolved her concerns about his candor.

voluntary participation in EAP programs did not constitute sufficient evidence of adequate rehabilitation, for which she would require completion of an outpatient alcohol program and abstinence for eight months. *Id.* at 10.

At the hearing, the individual explained that after meeting with the DOE psychologist, he decided to enroll in an intensive outpatient program (IOP) and to abstain from alcohol permanently. Tr. at 22. He started the IOP in mid-March 2016 and completed it in May 2016. *Id.* at 29, 77. He testified that he had no difficulty stopping his alcohol consumption and declared that he had been alcohol-free for 293 days. He has learned to use tools and coping skills to maintain his abstinence, and is surrounded primarily by non-drinkers, his girlfriend and his sisters. He is not uncomfortable, however, in situations where others are drinking alcohol while he does not. *Id.* at 23-25, 28. When asked why his response to his second DUI arrest is different from his reaction to his first DUI arrest, the individual explained that he regarded his first arrest as a "one-off, . . . it happens to a lot of people. But the second time around, [that] doesn't happen to a lot of people." *Id.* at 35-36, 50. Despite his counseling and voluntary (though shorter) abstinence agreement after the 2009 DUI arrest, his frame of mind was entirely different from his present mind-set. *Id.* at 33. He testified, "I've basically realized, and obviously the evidence suggests, that . . . alcohol is not something that works for me." *Id.* at 20.

The EAP counselor who testified at the hearing had worked with the individual from 2009 to 2011, after his first DUI arrest, as well as since his second DUI arrest, in 2015. *Id.* at 41. When asked about the difference in the individual's reaction to the two arrests, the counselor stated that, as a social drinker who did not drink to excess routinely, the individual did not experience serious consequences from his drinking, which allowed him to minimize the consequences after his first DUI. She believed, however, that he was truly surprised when he was arrested a second time, and had to look at his alcohol consumption differently. *Id.* at 42-43. He requested an unscheduled meeting with her following the DOE psychologist's evaluation, during which he sought the counselor's help to enroll in an IOP, which he began within the next week. *Id.* at 43. The counselor's concern was not his frequency of consumption, but rather his pattern of consumption when he does drink, and acknowledged his "life decision" not to drink in the future. *Id.* at 45. She stated that the individual has made significant progress with respect to his alcohol use, through his abstinence, his continuing treatment, and his willingness to continue recovery and maintenance activities. *Id.* at 45-46. She further observed that what the individual learned in his court-ordered DUI class, in his IOP, and in his conversation with the DOE psychologist "was an accumulation of factors that got him to the point that he was internally motivated to look at [his behavior toward alcohol] and to say . . . alcohol doesn't work for me." *Id.* at 51-52. The counselor also expressed her opinion regarding the individual's alcohol-related criminal arrests, stating that he shows no disregard for the laws of society. *Id.* at 59.

Finally, the DOE psychologist testified at the hearing. She stated in her February 2016 report that, though she did not observe distress or impairment that met the criteria for an alcohol-related diagnosis, she was concerned that his pattern of consumption had led to two DUI arrests with significantly high BAC readings. Ex. 4 at 9. She expressed her opinion in her testimony that, following the 2009 arrest, the individual wanted to be responsible and fulfilled his court-ordered and voluntary commitments, but was not motivated by a sense that his drinking was problematic. Tr. at 69-70. In contrast, she found that in the wake of his 2015 arrest, he has undergone a shift

in internal motivation, leading to a life decision to avoid alcohol, a commitment that was not imposed on him externally. *Id.* at 70. She also noted that the individual had no difficulty stopping his use of alcohol in 2009 or in 2015, and now spends the majority of his time in the company of non-drinkers. *Id.* at 75. While she maintained her initial position that the individual is still somewhat vulnerable to drinking again, she expressed her confidence that the risk of relapse is now low. *Id.* at 64, 74, 79. She based her opinion that the individual had demonstrated adequate evidence of rehabilitation or reformation on the individual's period of abstinence in excess of the eight months she recommended in her evaluation, his completion of the recommended IOP, and his internal motivation to make a lifelong commitment to abstinence. *Id.* at 77-79.

V. 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) and the Adjudicative Guidelines. After due deliberation, I have determined that the individual's access authorization should be restored. I 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.

I find that the individual was properly identified as using alcohol habitually to excess. Nevertheless, the record, in particular, the testimony of the individual, his EAP counselor, and the DOE psychologist, establishes a period of abstinence and an amount of alcohol treatment that satisfies the experts who testified at the hearing. The concurrence of the mental health experts (evidenced in hearing testimony and exhibits entered into the record) demonstrates to me the confidence they have in the individual's progress through treatment and his motivation to abstain from alcohol in the future.

I have taken into consideration a number of mitigating factors in his favor, specifically his abstinence, his voluntary participation and significant progress in a treatment program, and the DOE psychologist's favorable prognosis of the individual. Adjudicative Guidelines, Guideline G at ¶ 23(a), (b), (c). After considering all the testimony and written evidence in the record, I am convinced that the individual has resolved the LSO's security concerns that arise from his alcohol use.

I further find that the LSO's security concerns raised by the individual's history of law enforcement activity have been resolved. Because I have found, above, that he has resolved the security concerns regarding his alcohol consumption, for the same reasons, concerns about future criminal activity related to alcohol consumption are similarly resolved. Adjudicative Guidelines, Guideline J at § 32(a), (d).

VI. 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, 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 brought forth sufficient evidence to resolve the security concerns associated with these criteria. I therefore 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 be restored.

William M. Schwartz
Administrative Judge
Office of Hearings and Appeals

Date: September 2, 2016