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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: August 11, 2016) Case No.: PSH-16-0070
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Issued: November 22, 2016

Administrative Judge Decision

Wade M. Boswell, Administrative Judge:

This Decision concerns the eligibility of XXXX XXXX XXXX (hereinafter referred to as “the individual”) to hold an access authorization¹ 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 fully discussed below, after carefully considering the record before me in light of the relevant regulations and Adjudicative Guidelines, I have determined that the individual’s access authorization should be granted.

I. Background

The individual is employed by a DOE contractor in a position that requires him to hold a DOE security clearance. During the security investigation of the individual, a criminal background check revealed that the individual had been arrested 13 years ago for Driving While Intoxicated. Additionally, a source reported to an investigator that the individual had

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.

recreationally used marijuana and had abused prescription medication. See Exhibit 3 at 2. Following receipt of the investigation report, the Local Security Office (LSO) conducted a personnel security interview (PSI) with the individual in December 2015 on various topics, including the individual's alcohol and drug use. *See* Exhibit 5. Since the PSI did not resolve concerns about the individual's alcohol and drug usage, the LSO referred the individual for evaluation by a DOE consulting psychiatrist, who conducted a psychiatric evaluation of the individual in March 2016. *See* Exhibit 4.

Since neither the PSI nor the psychiatric evaluation resolved the security concerns arising from the individual's alcohol and drug usage, the LSO informed the individual in a letter dated July 11, 2016 (Notification Letter), that it possessed reliable information that created substantial doubt regarding his eligibility to hold a security clearance. In the Notification Letter, the LSO explained that the derogatory information fell within the purview of four potentially disqualifying criteria set forth in the security regulations at 10 C.F.R. § 710.8, subsections (h), (j), (k), and (l) (hereinafter referred to as Criterion H, Criterion J, Criterion K, and Criterion L, respectively).² *See* Exhibit 1.

Upon his receipt of the Notification Letter, the individual exercised his right under the Part 710 regulations by requesting an administrative review hearing. *See* Exhibit 2. The Director of the Office of Hearings and Appeals (OHA) appointed me the Administrative Judge in the case and, subsequently, I conducted an administrative hearing in the matter. At the hearing, the LSO introduced five numbered exhibits into the record and presented the testimony of one witness, the DOE consulting psychiatrist. The individual introduced eight lettered exhibits (Exhibits A – D)³ into the record and presented the testimony of four witnesses, including that of his Alcoholic Anonymous sponsor, his Employee Assistance Program (EAP) counselor, his substance abuse treatment counselor and therapist, and himself. 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.⁴

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.

² See Section III below.

³ At the hearing, which was conducted by video-teleconference, the individual presented nine exhibits. These were provisionally accepted, subject to the individual transmitting them to OHA within seven days. One document (which the individual had labelled as “Exhibit C”) was unable to be transmitted due to technical difficulties and, therefore, is not included in the record of the case. Accordingly, the record contains no Exhibit C.

⁴ OHA decisions are available on the OHA website at www.energy.gov/oha/office-hearings-and-appeals. A decision may be accessed by entering the case number in the search engine at www.energy.gov/oha/security-cases.

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 granting or restoring his or her 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 or her 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.

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 previously noted, the LSO cited four criteria as the basis for denying the individual’s security clearance: Criterion H, Criterion J, Criterion K, and Criterion L. Criterion H concerns information that a person has “an 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). It is well established that “certain emotional, mental, and personality conditions can impair judgment, reliability, or trustworthiness.” *See* Guideline I 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). Conduct influenced by such psychological conditions can raise questions about an individual’s ability to protect classified information. With respect to Criterion H, the LSO relied upon the March 23, 2016, written evaluation of the DOE consulting psychiatrist in which he opined that the individual met the criteria set forth in the *Diagnostic Statistical Manual of the American Psychiatric Association, IVth Edition, Text Revision (DSM-IV-TR)*, for both Alcohol Abuse and Opioid Abuse, both in full early

remission. Further, the DOE psychologist opined that until the individual achieved rehabilitation from these disorders, they would continue to cause a significant defect in his judgment and reliability. Ex. 1 at 3-4; Ex. 4 at 15-16.

Criterion J refers to information indicating that an individual 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). Excessive alcohol consumption raises a security concern because it can lead to questionable judgment and the failure to control impulses, which in turn can raise questions about a person’s reliability and trustworthiness. *See* Adjudicative Guidelines at Guideline G; *Personnel Security Hearing*, Case No. PSH-11-0035 (April 19, 2012). With respect to Criterion J, the LSO relies upon, *inter alia*, (1) the March 2016 written evaluation of the DOE consulting psychiatrist that the individual suffered from Alcohol Abuse, in full early remission, without adequate evidence of rehabilitation or reformation; (2) the individual’s 2003 arrest for Driving While Intoxicated; and (3) the individual’s acknowledgment during the PSI that, from 2006 to 2011, he drank to intoxication once a week and, from 2011 to 2015, he drank to intoxication three times a month. Ex. 1 at 3; Ex. 4 at 15-16.

Criterion K concerns information that a person has “[t]rafficked in, sold, transferred, possessed, used, or experimented with a drug or other substance listed in the Schedule of Controlled Substances established pursuant to section 202 of the Controlled Substances Act of 1970 (such as marijuana, cocaine, amphetamines, barbiturates, narcotics, etc.) except as prescribed or administered by a physician licensed to dispense drugs in the practice of medicine...” 10 C.F.R. § 710.8(k). Use of an illegal drug or misuse of a prescription drug raises concerns about an individual’s reliability and trustworthiness, as well as a person’s ability or willingness to comply with laws, rules and regulations. *See* Adjudicative Guidelines at Guideline H. With respect to Criterion K, the LSO relies upon, *inter alia*, (1) the March 2016 written evaluation of the DOE consulting psychiatrist that the individual suffered from Opioid Abuse, in full early remission, without adequate evidence of rehabilitation or reformation; and (2) the individual’s acknowledgment during the PSI of his (a) experimental use of hashish, mushrooms and ecstasy between 2000 and 2005, (b) prior routine use of cocaine (2001 to 2006) and marijuana (1998 to 2011), and (c) dependence and abuse of prescription hydrocodone (2008 to 2012). Ex. 1 at 4; Ex. 4 at 16.

Criterion L concerns information that an individual has engaged in conduct “which tends to show that the individual is not honest, reliable, or trustworthy...” 10 C.F.R. § 710.8(l). Conduct reflecting questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations raises questions about an “individual’s reliability, trustworthiness and ability to protect classified information.” Adjudicative Guidelines at Guideline E. With respect to Criterion L, the LSO alleges criminal conduct on the part of the individual, including using (1) the individual being charged in 2002 for Racing on Streets and being arrested and charged in 2003 for Driving While Intoxicated and (2) the individual’s involvement with controlled substances, as described above with respect to Criterion K. Ex. 1 at 5.

In light of the information available to the LSO, the LSO properly invoked Criterion H, Criterion J, Criterion K, and Criterion L.

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)⁵ and the Adjudicative Guidelines. After due deliberation, I have determined that the individual's access authorization should be granted. The specific findings that I make in support of this decision are discussed below.

A. Administrative Judge Evaluation of the Evidence and Findings of Fact: Criteria H, J and K Security Concerns

The individual does not contest the factual accuracy of the allegations set forth by the LSO in the Notification Letter nor does he contest the facts or conclusions set forth by the DOE consulting psychiatrist in the psychiatric evaluation. Ex. 2; Tr. at 102-104.

Following the PSI, the individual scheduled an appointment with his employer's EAP. Immediately after an initial EAP session, the individual decided to abstain from alcohol and has been abstinent since January 2016. *Id.* at 84-86, 104. He had previously been abstinent from illicit controlled substances. The following month he began participating in Alcohol Anonymous (AA) and, the month thereafter, began working with an AA sponsor who testified at the hearing. *Id.* at 44. In March 2016, the individual also met with a substance abuse treatment program and commenced a 20-week outpatient treatment program focused on relapse prevention. *Id.* at 49-52. The individual testified that it is his intent to not consume alcohol or misuse controlled substances in the future. *Id.* at 104-107.

Shortly after commencing his treatment program, the individual was evaluated by the DOE consulting psychiatrist who concluded that the individual met the *DSM-IV-TR* criteria for Alcohol Abuse and Opioid Abuse, both in early full remission, without adequate evidence of reformation or rehabilitation. Ex. 4 at 15-16. To evidence adequate reformation and rehabilitation, the DOE consulting psychiatrist opined that the individual would need to complete the treatment program that he had commenced and maintain his abstinence from alcohol and illicit drugs for a total of 12 months. *Id.* at 16.

⁵ 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.

At the hearing, the individual's treatment counselor (with whom he is also doing individual therapy) testified that the individual had completed the required 20 weeks of an intensive outpatient program for treatment of substance abuse, had participated in the program actively and completed all of the requested projects between sessions, and had attended sessions beyond the required 20 weeks of treatment. Tr. at 52-53, 56-57, 63. The treatment counselor testified at the hearing that he had diagnosed the individual with both alcohol and opioid use disorders prior to the commencement of his treatment program, but as of the date of the hearing opined that the individual had a "very, very good" prognosis and had evidenced adequate rehabilitation and reformation. *Id.* at 49, 53-54.

The individual's EAP counselor also testified at the hearing, confirming that she had been monitoring the individual's treatment program and had been counseling the individual since January 2016. *Id.* at 66, 73-74. She noted that the individual had been very accepting of her conclusions that he had an alcohol disorder, without the resistance or anger frequently encountered. *Id.* at 67-68. She opined at the hearing that the individual had a very good prognosis and had evidenced adequate rehabilitation of his substance use disorders as of the date of the hearing. *Id.* at 78-79.

The DOE consulting psychiatrist testified as the final witness of the hearing, having heard the testimony of all of the other witnesses. He noted the testimony of the individual's father with regard to the change in the individual's behavior after commencing sobriety and the testimony of the individual's AA sponsor as to the diligence and progress of the individual in the AA program. *Id.* at 112-114. He also noted that the individual had worked with his own psychiatrist to successfully transition off of a prescribed medication that tended to be addictive and was subject to being abused. *Id.* at 111. Finally, he noted the individual's successful completion of his treatment program. *Id.* at 112. He noted that, while he had originally wanted the individual to have completed 12 months of abstinence and that the individual had only 10 months of abstinence as of the date of the hearing, he did not believe the additional two months of abstinence would substantially increase his confidence. He concluded that, as of the date of the hearing, the individual had a low risk of relapse with respect to Alcohol Abuse and Opioid Abuse and had evidenced adequate rehabilitation and reformation with respect to both. *Id.* at 112, 115. He testified that, based on such rehabilitation and reformation, it was his opinion that the individual no longer had an illness or mental condition that causes or may cause a significant defect in his judgement or reliability. *Id.* at 116-117.

In regards to security concerns raised under Criteria H, J and K, Administrative Judges traditionally accord deference to the opinions of mental health professionals. Noting the individual's treatment program and abstinence, all three experts testifying at the hearing opined that, as of the date of the hearing, the individual had evidenced adequate rehabilitation and reformation with respect to his alcohol and opioid abuse. *Id.* at 49, 53-54, 78-79, 112, 115. *Cf.* Adjudicate Guidelines at Guideline G, ¶23(d), and at Guideline H, ¶26(d) (mitigation of security concerns relating to alcohol and drug is possible when an individual has completed rehabilitation and has a favorable prognosis from a mental health professional). As previously noted, the DOE consulting psychiatrist also opined at the hearing that, in light of the individual having demonstrated adequate rehabilitation and

reformation with respect to his alcohol and opioid abuse, the individual no longer had an illness or mental condition that could cause a significant defect in his judgment or reliability. Tr. at 116-117. *Cf.* Adjudicative Guidelines at Guideline I ¶29(e) (mitigation of security concerns relating to psychological issue is possible when there is no current psychological problem).

Based upon the foregoing, I find that the individual has resolved the Criteria H, J and K security concerns.

B. Administrative Judge Evaluation of the Evidence and Findings of Fact: Criterion L Security Concerns

With respect to Criterion L, the LSO alleged three categories of criminal conduct. The first related to the individual being arrested in 2002 for Racing on Streets. The individual testified that he does not remember the incident, but does not contest that it occurred. Tr. at 102, 106. The second related to the individual being arrested and charged in 2003 for Driving While Intoxicated. The individual testified that this incident had occurred. *Id.* The remaining criminal acts alleged by the LSO all relate to the individual's involvement with controlled substances. The individual acknowledges that all of this behavior occurred. *Id.* at 102.

The individual's traffic arrests both occurred approximately 13 years ago when the individual was 19 or 20 years old. There have been no similar instances since that time and, in light of the passage of time, this behavior is unlikely to recur and does not cast doubt on the individual's current reliability, trustworthiness or good judgment. *Cf.* Adjudicative Guidelines at Guideline J, ¶32(a).

The remaining incidents cited with respect to Criterion L all relate to the individual's involvement with illicit drugs for personal use. Many (although not all) of these incidents occurred over a decade ago, while the individual was a teenager or in his early twenties, and all relate to the individual's abuse of opioids. In light of the expert opinions offered at the hearing as to the individual having evidenced adequate reformation and rehabilitation of his Opioid Abuse, such behavior is unlikely to recur. *Cf.* Adjudicative Guidelines at Guideline J, ¶32(a) (mitigation of security concerns arising from criminal conduct based upon the elapse of time since criminal conduct), and ¶32(d) (mitigation of security concerns arising from criminal conduct based upon evidence of successful rehabilitation).

Based upon the foregoing, I find that the individual has resolved the Criterion L security concerns.

V. 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 Criteria H, J, K 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 Criteria H, J, K and L. Accordingly, I have determined that the individual's access authorization should be granted. The parties may seek review of this Decision by an Appeal Panel under the regulations set forth at 10 C.F.R. § 710.28.



Wade M. Boswell
Administrative Judge
Office of Hearings and Appeals

Date: November 22, 2016