

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).^{2/} DOE Ex. 1 at 1-2.

The Notification Letter informed the Individual that he was entitled to a hearing before a Hearing Officer in order to resolve the substantial doubt concerning his eligibility for access authorization. The Individual requested a hearing on this matter, and I was appointed the Hearing Officer. I conducted a hearing within the required regulatory time frame. At the hearing, the DOE introduced 17 exhibits into the record of this proceeding and presented the testimony of a DOE psychologist. The Individual presented the testimony of five witnesses, in addition to testifying himself.

II. Regulatory Standards

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 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.

^{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 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 “[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. Such conduct or circumstances include, but are not limited to, criminal behavior, a pattern of financial irresponsibility, ... or a violation of any commitment or promise upon which DOE previously relied to favorably resolve an issue of access authorization eligibility.” 10 C.F.R. § 710.8 (l).

B. Basis for the Hearing Officer's Decision

In personnel security cases arising under Part 710, it is my role as the Hearing Officer to issue a Decision that reflects my comprehensive, common-sense judgment, made after consideration of all the relevant evidence, favorable and unfavorable. Such a decision must consider whether granting or restoring 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 cites three criteria as the basis for denying the Individual's security clearance, Criteria H, J, and L. To support the Criteria H and J allegations, the LSO lists the DOE psychologist's diagnosis that the Individual meets the criteria set forth in the *Diagnostic Statistical Manual of the American Psychiatric Association IVth Edition TR (DSM-IV-TR)* for Alcohol-Related Disorder, Not Otherwise Specified (hereinafter referred to as NOS), and five alcohol related incidents in his past, including:

1. In March 2012, he failed a breath alcohol test (hereinafter referred to as BAT) on reporting for work.
2. In November 2009, he was charged with Open Container.
3. In February 2009, he was arrested and charged with Driving While Intoxicated (DWI) and Open Container.
4. In June 2000, he was arrested and charged with Public Intoxication.
5. In April 1999, he was arrested and charged with Driving Under the Influence (DUI).

DOE Ex. 1 at 1-2. 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 Guideline G 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); *Personnel Security Hearing*, Case No. TSO-0927 (November 30, 2010).^{3/}

To support the Criterion L allegations, the LSO lists the Individual's four criminal charges including the November 2009 Open Container, February 2009 DWI, June 2000 Public Intoxication, and April 1999 DUI. DOE Ex. 1 at 2. Under the Adjudicative Guidelines, any "[a]llegation or admission of criminal conduct, regardless of whether the person was formally

^{3/} Decisions issued by the Office of Hearings and Appeals (OHA) after November 19, 1996, are available on the OHA website located at <http://www.oha.doe.gov>. The text of a cited decision may be accessed by entering the case number of the decision in the search engine located at <http://www.oha.doe.gov/search.htm>.

charged, formally prosecuted or convicted” can raise questions about an individual's reliability, trustworthiness, and ability to protect classified information. Adjudicative Guidelines ¶ 31(c). Accordingly, based on the derogatory information listed above, I find that the LSO properly raised security concerns under Criterion L.

IV. Findings of Fact

The facts in this case are undisputed. In April 1999, the Individual was arrested and charged with DUI, after consuming five beers. DOE Ex. 1 at 2; Tr. at 73. In June 2000, he was arrested and charged with Public Intoxication. DOE Ex. 1 at 2; Tr. at 75-77. He consumed alcohol prior to his arrest. Tr. at 77. In February 2009, the Individual was charged with DWI and Open Container, after consuming some alcohol. DOE Ex. 1 at 2; Tr. 78-80. In November 2009, the Individual was charged with Open Container. DOE Ex. 1 at 1; Tr. at 61, 87. He consumed five beers prior to the charge. DOE Ex. 1 at 1; Tr. at 87-88. In addition to the four alcohol-related incidents, the Individual had a positive BAT in March 2012. DOE Ex. 1 at 1-2. Upon reporting to work in March 2012, the Individual was asked to submit to a BAT. The BAT showed a higher than allowable level of alcohol in the Individual's system. DOE Ex. 13 at 4-5; DOE Ex. 12 at 3-4; DOE Ex. 12 at 3; Ex. 15 at 15-16. As a result of the positive BAT and subsequent PSI, in May 2012, the Individual was evaluated by a DOE psychologist. After the evaluation, the DOE psychologist concluded that the Individual met the *DSM-IV-TR* criteria for Alcohol-Related Disorder, NOS. DOE Ex. 1 at 1; DOE Ex. 9 at 6. The DOE psychologist recommended that the Individual continue “aftercare treatment with a focus on abstinence for at least nine months post-violation and random BATS for 12 months post-violation. DOE Ex. 9 at 6.

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.

A. Mitigating Evidence

1. Lay Testimony

At the hearing, the Individual testified that he agreed with the DOE psychologist's diagnosis of Alcohol-Related Disorder, NOS. Tr. at 71. He stated that the day he had the positive BAT, he entered an Intensive Outpatient Treatment Program (IOP). Tr. at 94. He asserted that he never missed a day of class or aftercare. Tr. at 94. He attended Alcoholics Anonymous (AA), but he finds the IOP's aftercare more professional. Tr. at 100. He testified that he is seeing his psychologist on a regular basis. Tr. at 97. They discuss stress management, family problems,

and what triggered his alcohol consumption. Tr. at 95. Although he has been in situations where alcohol is present and his brother consumes alcohol in his presence, he has not consumed alcohol since the positive BAT. Tr. at 99.

The Individual was diagnosed with diabetes in 2009. Tr. at 25, 43, 51, 88. The Individual, his wife, and his brother testified that there is a long, distressing history of diabetes in their family. Tr. at 26, 51, 52, 90. In 2009, after the diabetes diagnosis, he reduced his alcohol consumption. Tr. at 25, 43, 51, 89, 105. The Individual and his brother testified that his health concern is a motivating factor in him remaining abstinent. Tr. at 51-52, 105. The Individual, his wife, and his brother testified that while he did reduce his alcohol consumption after his diagnosis of diabetes in 2009, he did not completely abstain.^{4/} Tr. at 26, 43-44, 51, 88, 107. The Individual and his wife testified that the evening prior to his positive BAT, the Individual received some startling, and unwelcome, family news. Tr. at 28, 91. The news caused him to consume more that evening than he would typically consume, leading to the positive BAT. Tr. at 28, 91.

His wife, his brother, and his friend testified that the Individual has not consumed any alcohol since March 2012. Tr. at 31, 47, 53, 57. Both his wife and his brother stated that the Individual has been present where alcohol has been served, but he has refrained from consuming any. Tr. at 47, 53, 56. The Individual's wife, brother, and friend revealed that the Individual is open about his treatment. Tr. at 40-41, 54-55, 141. He has told them that the therapy is helping. Tr. at 54, 141. His brother stated that the Individual's attitude about attending the IOP and aftercare has been upbeat. Tr. at 55. The Individual's brother and friend testified that the Individual is serious about his treatment. Tr. at 55, 141, 143. The friend stated, "I think he's taking it very seriously." Tr. at 141.

2. Expert Testimony

After listening to all the testimony at the hearing, the DOE psychologist did not modify his opinion regarding the Individual's rehabilitation and reformation. Tr. at 113. He still believes the Individual needs nine months of abstinence to show rehabilitation and reformation. Tr. at 113. He stated that it is not unusual that the Individual did not like AA, and he opined that there are positive indicators in the Individual's recent history. Tr. at 112-13, 120-21, 132. First, the DOE psychologist declared that the fact that the Individual went to the IOP immediately after the BAT reflects positively on his motivation. Tr. at 132. Second, the fact that he is in individual therapy increases the Individual's potential for sobriety. Tr. at 121. To conclude, the DOE psychologist stated that, while he still believes the Individual should not be considered rehabilitated or reformed until he has been abstinent for nine months, the Individual is at a low risk for relapse.^{5/} Tr. at 150.

^{4/} While all three witnesses testified that he did stop consuming alcohol for approximately two months, they all confirmed that he had no intention of maintaining his abstinence. Tr. at 26, 43-44, 51, 88-89, 107. His brother testified that the Individual just "got scared" and that is why he stopped consuming alcohol for a short period. Tr. at 51-52, 107.

^{5/} As of the date of the hearing, the Individual had been abstinent for six months.

The Individual's psychologist agreed with the DOE psychologist's diagnosis of Alcohol-Related Disorder, NOS. Tr. at 10. She stated that the Individual completed the IOP and he has attended aftercare regularly. Tr. at 8, 11-12. She opined that he is more active in the program than the average participant. Tr. at 11-12. In their therapy sessions, the Individual and his psychologist speak about his family life, work, cravings and stress management. Tr. at 13. The Individual has maintained his abstinence. Tr. at 14. She opined that the Individual will not consume alcohol again because of his unique health concerns and family history and deaths. Tr. at 14, 15. Like the DOE psychologist, she concluded that the Individual is at a low risk for relapse. Tr. at 16.

B. Hearing Officer Evaluation of the Evidence

1. Criteria H and J Concerns

OHA Hearing Officers generally accord deference to the opinion of mental health professionals regarding the issue of rehabilitation and reformation. *See, e.g., Personnel Security Hearing, Case No. TSO-1057 (2011); Personnel Security Hearing, Case No. TSO-0562 (2008); Personnel Security Hearing, Case No. TSO-0462 (2001)*. However, as a Hearing Officer, my responsibility is to make an independent assessment of the seriousness of the risk to national security and the common defense posed by allowing an individual to possess a DOE access authorization. In that connection, I will consider those factors set forth at 10 C.F.R. § 710.7(c)^{6/} in deciding whether restoring the Individual's access authorization would endanger the common defense and security and would be clearly consistent with the national interest.

Although the DOE psychologist did not change his recommendation based on the hearing testimony that the Individual needs a total of nine months of abstinence to achieve rehabilitation or reformation, he nonetheless opined that the Individual is a low risk for relapse. The Individual's psychologist agreed that the Individual is a low risk for relapse. I found the Individual to be a credible witness whose intention is not to consume alcohol again. His family history, along with the problems that alcohol consumption has caused in his life, has frightened him. In addition, he honestly does not believe he needs alcohol in his life. His brother, his wife, and his friend confirm that he has not consumed alcohol and honestly does not seem to need it. The DOE psychologist and the Individual's psychologist persuaded me that the Individual's risk of relapse is acceptably low even though the Individual is three months short of fully achieving rehabilitation or reformation. After considering the "total person concept" set forth in the Adjudicative Guidelines and the Part 710 regulations, I find that the Individual has sufficiently mitigated the security concerns associated with the diagnosis of Alcohol-Related Disorder, NOS, and his alcohol-related incidents. *Personnel Security Hearing, Case No. TSO-803 (2010);*

^{6/} 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.

Personnel Security Hearing, Case No.TSO-1076 (2011) (restoring security clearance where both experts testified that risk of relapse was low).

2. Criterion L Concern

Prior to March 2012, the Individual had four alcohol-related incidents between 1999 and 2009. Because the Individual's alcohol use led to the concerns raised under Criterion L, and because I find that the risk is low that he will return to alcohol use, I find it unlikely that he will have any more alcohol-related incidents involving law enforcement. For this reasons I have determined that the Individual has mitigated the concerns raised under Criterion L.

VI. Conclusion

Upon consideration of the entire record in this case, I find that there was sufficient evidence that raised doubts regarding the Individual's eligibility for a security clearance under Criteria H, J and L of the Part 710 regulations. I also find that the Individual has presented sufficient information to resolve those concerns. Therefore, I conclude that restoring the Individual's access authorization "would not endanger the common defense and security and would be clearly consistent with the national interest." 10 C.F.R. § 710.27(a). Consequently, it is my decision that the Individual's access authorization should be restored at this time. The parties may seek review of this decision by an Appeal Panel. 10 C.F.R. § 710.28.

Janet R. H. Fishman
Hearing Officer
Office of Hearings and Appeals

Date: November 15, 2012