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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:	April 1, 2013)	Case No.: PSH-13-0039
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Issued : July 3, 2013

Hearing Officer Decision

Janet R. H. Fishman, Hearing Officer:

This Decision concerns the eligibility of XXXXXXXXXXXXXXXX (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 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 not be restored at this time.

I. Background

The Individual is employed by the DOE in a position that requires him to hold a DOE security clearance. In October 2012, the Individual was charged with Aggravated Driving While Intoxicated (ADWI), which resulted in the Local Security Office (LSO) conducting a personnel security interview with him.

On March 5, 2013, the LSO sent a letter (Notification Letter) to the Individual advising him that it possessed reliable information that created a substantial doubt regarding his eligibility to hold a security clearance. In an attachment to the Notification Letter, the

^{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.

LSO explained that the derogatory information fell within the purview of one potentially disqualifying criteria set forth in the security regulations at 10 C.F.R. § 710.8, subsection (l) (hereinafter referred to as Criterion L).^{2/}

Upon his receipt of the Notification Letter, the Individual exercised his right under the Part 710 regulations by requesting an administrative review hearing. The Director of the Office of Hearings and Appeals (OHA) appointed me the Hearing Officer in the case, and I subsequently conducted an administrative hearing in the matter. At the hearing, the Individual presented his own testimony and the testimony of eight witnesses. The LSO submitted 13 exhibits into the record.

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 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). Thus, an Individual is afforded the utmost latitude in the presentation of evidence to mitigate the security concerns at issue.

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, as to whether the

^{2/} 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).

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 cites Criterion L as the basis for suspending the Individual's security clearance. To support its Criterion L allegations, the LSO relies on the Individual's six alcohol-related arrests and thirty-one traffic citations. The Individual's alcohol-related arrests and multiple traffic citations raise a security concern under Criterion L, because this criminal conduct creates doubt about his judgment, reliability and trustworthiness, all of which can raise questions about the Individual's ability or willingness to comply with laws, rules, and regulations. *See* Guideline J ¶ 30 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). In addition to the arrests and traffic citations, the LSO cites the Individual's denial at the PSI that he consumed alcohol prior to his 2012 ADWI arrest, but yet, he refused a breathalyzer. Further, the officer who issued the ADWI stated that he could smell alcohol on the Individual. This information, when taken together, tends to show that the Individual has "questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations" which can "raise questions about an individual's reliability, trustworthiness and ability to protect classified information." Adjudicative Guideline E ¶ 15.

IV. Findings of Fact

The Individual was charged with ADWI in October 2012. DOE Ex. 1 at 3; DOE Ex. 5; DOE Ex. 6; DOE Ex. 12 at 9-10, 13, 17. At the PSI conducted in November 2012, the Individual stated that he had not consumed alcohol prior to his ADWI arrest. DOE Ex. 12 at 9-10, 11. At the hearing, he stated that he had not consumed alcohol for at least a month prior to the hearing. Tr. at 57. He stated, and his mother confirmed, that he pleaded guilty to the charge on the advice of his attorney. Tr. at 12, 57. The Individual and his parents claimed that the police in the town where he was arrested are "overzealous." Tr. at 11, 25, 59.

As to the other alcohol-related arrests and multiple traffic violations, the alcohol-related arrests all occurred over four years prior to the most recent ADWI, with the most recent occurring in March 2009. DOE Ex. 1 at 1-2. The traffic violations all occurred over nine years prior to the hearing. DOE Ex. 1 at 2. The Individual did not deny the arrests or the traffic citations.

The Individual's parents, aunt, uncle, and friend all testified that he is an honest, upstanding, and trustworthy person. Tr. at 10, 16, 20, 27, 33. The friend stated that the Individual is "the most straightforward guy that I've been lucky to know." Tr. at 33. He continued that the Individual is a great role model for the friend's son and the Individual's own nephew. Tr. at 31. The Individual's aunt and his father testified that

the Individual is always available when someone asks for his assistance. Tr. at 16, 25. His father asserted that the Individual's willingness to help others, as exemplified by his picking up an intoxicated friend even though he was sleeping, is the reason he is currently in this situation. Tr. at 25.

Three of the Individual's co-workers testified that the Individual is an exemplary, conscientious worker who adheres to all the job requirements. Tr. at 38, 43, 48. One co-worker testified that he has never seen him take a shortcut, even when encouraged by his co-workers to do so. Tr. at 39.

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)^{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. Alcohol-Related Arrests and Multiple Traffic Violations

In considering the evidence before me, I first looked to the Adjudicative Guidelines. As an initial matter, I find that the Individual was arrested for ADWI in October and pleaded guilty. The Individual's entire mitigation attempt regarding the ADWI rests on his claim that he did not commit the offense. However, I cannot find for purposes of Guideline J at ¶ 32(c), that there is any "evidence that the person did not commit the offense." He claims, and is supported by his witnesses, that he was merely driving a car with someone who had consumed too much alcohol. He stated that he had not consumed alcohol for about a month prior to the arrest. Yet, the Individual refused to take a breathalyzer test at the time of the ADWI, claiming that a prior attorney told him the results are unreliable. In addition, the Individual pleaded guilty to the charge, also on the advice of counsel. Although I found the witnesses to be credible in their belief that the Individual did not commit the ADWI, based on the evidence presented to me, I cannot find that the Individual has sufficiently mitigated the concern raised by this alcohol-related arrest and conviction.

^{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.

In addition, I cannot find for the purposes of Guideline J at ¶ 32(d) that there is evidence of successful rehabilitation. Although five of his alcohol-related arrests and his thirty-one traffic citations are not recent, they do show a pattern of irresponsible behavior and an inability to comply with laws, rules, and regulations. Guideline J at ¶ 32(d) does allow for successful rehabilitation shown by a passage of time, but during such time passage there must not be a recurrence of criminal activity, as there is in this case with the Individual's 2012 ADWI arrest. The Individual does have a good employment record but that cannot outweigh his pattern of criminal conduct and failure to follow the law. Therefore, the Individual has not mitigated the Criterion L concern raised by his alcohol-related arrests and multiple traffic citations.

B. Individual's Statements during the PSI

The Individual maintains that he did not consume alcohol prior to his October 2012 ADWI. However, two police officers smelled alcohol emanating from his breath. DOE Ex. 5 at 2; DOE Ex. 6 at 8. In addition, he refused to take a breathalyzer at that time and pleaded guilty to the charge. Because of the inconsistencies between his statement and his actions, I cannot find that he has mitigated this security concern. The Individual and his mother claimed that he pleaded guilty to the ADWI because "100 percent of all DWIs in [the city] are convicted." Tr. at 11. The Individual's attorney submitted a letter claiming that "[b]ecause of the problems with the City Attorney's providing us the evidence timely, as well as other evidentiary issues as to the original validity of the stop by the police in the first place, we asked for a lesser plea to DWI 1st offense, non-aggravated." DOE Ex. 6 at 4. I find it difficult to believe that if the Individual had not been consuming alcohol, along with evidentiary problems and a question about the validity of the police stop, that he would have pleaded guilty to any charge.

In *Egan*, the Supreme Court stated that "[t]he clearly consistent standard indicates that security-clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531. Because I am unsure of whether the Individual actually consumed alcohol prior to the ADWI, and therefore, I am unsure whether the Individual made a false statement during the PSI, I must err on the side of caution and find that the Individual has not mitigated the security concern raised by his statement at the PSI. The Individual has the burden of showing that he did not make the false statement. As stated above, the regulatory standard implies that there is a presumption against granting or restoring a security clearance. *Egan*, 484 U.S. at 531; *Dorfmont*, 913 F.2d at 1403.

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 Criterion 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 not brought forth sufficient evidence to mitigate these security concerns associated with Criterion L. 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. The parties may seek review of this Decision by an Appeal Panel under the regulations set forth at 10 C.F.R. § 710.28.

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

Date: July 3, 2013