

(Criterion H, J, and L, respectively), upon which the suspending official relied upon in making the decision to suspend the Individual's security clearance. Ex. 3.

The Notification Letter also informed the Individual that he was entitled to a hearing before an Administrative Judge² to present evidence to resolve these doubts. Ex. 1. The Individual requested a hearing in this matter. The LSO forwarded this request to OHA and the OHA Director assigned me as the Administrative Judge in this matter. The DOE introduced 12 exhibits (Exs. 1-12) into the record of this proceeding and offered the testimony of the DOE Psychologist at the hearing. The Individual presented the testimony of six witnesses in addition to his own testimony.

II. FACTUAL FINDINGS AND THE ASSOCIATED SECURITY CONCERNS

The Part 710 regulations require that I "make specific findings based upon the record as to the validity of each of the allegations" in the Notification Letter. 10 C.F.R. § 710.27(c). In this case, the Notification Letter cites Criteria H, J, and L of the criteria for eligibility for access to classified matter or special nuclear material set forth at 10 C.F.R. § 710.8. Ex. 1.³ I set forth my factual findings below.

A. Criteria H and J

The local police department records regarding the Individual's February 2012 arrest reflect that the Individual informed police officers that he had consumed a substantial amount of alcohol prior to his arrest.⁴ Ex. 8 at 11. During the subsequent March 2012 PSI, the Individual stated that in the summer of 2007 or 2008 he had been stopped for speeding. Before being stopped, the Individual reported that he had consumed one quarter of a fifth of tequila and that his blood alcohol content registered at 0.09. During the March 2012 PSI, the Individual confirmed that, before his arrest in February 2012, he had consumed a significant amount of alcohol. Ex. 8 at 11; Ex. 9; Ex. 12 at 18-19.

² Effective October 1, 2013, the titles of attorneys in the Office of Hearings and Appeals (OHA) changed from Hearing Officer to Administrative Judge. See 78 Fed. Reg. 52389 (August 23, 2013). The title change was undertaken to bring OHA Hearing Officers in line with the title used at other federal agencies for officials performing identical or similar adjudicatory work. See *Personnel Security Hearing*, Case No. PSH-13-0114 at 1 n.1 (2014).

³ Criterion H describes derogatory information suggesting that an individual may have "[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 describes information indicating that a clearance holder 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 refers to information indicating that an individual 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).

⁴ Local police arrested the Individual after an incident at a friend's house. The Individual entered a guest bedroom where another friend (alleged victim) was sleeping. The Individual allegedly performed or tried to perform various nonconsensual sexual acts while the alleged victim was sleeping. Ex. 8 at 4, 8.

After his examination of the Individual in March 2012, the DOE Psychologist issued an evaluative report (Report). Ex. 4. In the Report, the DOE Psychologist, after examining the Individual and reviewing the available information, diagnosed the Individual as suffering from Alcohol-Related Disorder, Not Otherwise Specified (NOS). Ex. 4 at 10. He also opined that, during the ages of 18 to 20, the Individual suffered from Alcohol Abuse. Ex. 4 at 9. The Individual is now 30 years old. The DOE Psychologist stated in the Report that the Individual's Alcohol-Related Disorder, NOS, was an illness that could cause and continue to cause significant defects in his judgment and reliability. Ex. 4 at 10.

I find that the LSO had ample grounds to invoke Criteria H and J. In his Report, the DOE Psychologist opined that the Individual's Alcohol-Related Disorder, NOS, constitutes an illness or condition that cause, or may cause, a significant defect in the Individual's judgment and reliability. 10 C.F.R. § 710.8(h); *see also* 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*) Guideline I at ¶ 27 and G at ¶ 21, 22(e). As such, this diagnosis falls within Criterion H. Additionally, this diagnosis raises security concerns about the Individual under Criterion J. Excessive alcohol consumption often leads to the exercise of questionable judgment or the failure to control impulses, and can raise questions, under Criterion J and Adjudicative Guideline G, about an individual's reliability and trustworthiness. 10 C.F.R. § 710.8(j); *Adjudicative Guidelines* G at ¶ 21.

B. Criterion L

In addition to having been stopped for speeding in the summer of 2007 or 2008, the Individual's court records indicate that the Individual was cited for speeding in December 2007 and January 2009. Ex. 10; Ex. 11.

As noted earlier, in February 2012, the Individual was arrested and charged with four sexual criminal offenses, three of which were felony offenses.⁵ Ex. 8; Ex. 12 at 8-9. When the alleged victim awoke and discovered that the Individual was attempting to perform a sexual act on him, the victim began to hit the Individual. The Individual then left the house and drove to his parent's house. The Individual then sent the victim a text message by phone stating "I'm sorry that is all. It was a misunderstanding, we didn't touch other than you kicking my a** [expletive]. I'm sorry." Ex. 4 at 4. During a custodial interview made following his arrest, the Individual stated that he had sexual contact with the alleged victim. Further, the Individual stated that during the time when the Individual committed the alleged criminal sexual offenses, the alleged victim of the crimes was asleep.⁶ Ex. 8 at 4, 8.

⁵ These charges were resolved by a plea bargain where the Individual pled "no contest" to a charge of Aggravated Battery, a third degree felony, with the original charges dropped. The Individual was granted a conditional discharge and agreed to three years of supervised probation followed by two years of unsupervised probation. Additionally, the Individual was not required to be registered as a sex offender. Ex. 6 at 2-3.

⁶ The Notification Letter alleges that, at this interview, the Individual also stated that the sexual contact at issue was not consensual. An examination of the local police report for the February 2012 arrest does not indicate that the Individual verbally admitted that the sexual conduct was not consensual. Ex. 8 at 4. Nonetheless, I find that, from

Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. *Adjudicative Guidelines*, Guideline E, ¶ 15, 16(b). Further, criminal activity or association with persons involved in criminal activity creates doubt about a person's judgment, reliability and trustworthiness. By its very nature, criminal activity calls into question a person's ability or willingness to comply with laws, rules and regulations. *Adjudicative Guidelines*, Guideline E, ¶ 16(g); Guideline J, ¶ 30(c). Given the Individual's February 2012 arrest and other information that indicates that the Individual provided misleading statements to local police and the alleged victim, the LSO was justified in invoking Criterion L. 10 C.F.R. § 710.8(l).

III. REGULATORY STANDARDS

The criteria for determining eligibility for security clearances set forth at 10 C.F.R. Part 710 dictates 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). In considering these factors, the Administrative Judge also consults the *Adjudicative Guidelines* that set forth a more comprehensive listing of relevant factors.

A DOE administrative 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).

IV. ANALYSIS

A. Criteria H and J

At the hearing, the Individual testified that the last time he consumed alcohol was in February 2012, just prior to his arrest. Tr. at 12. The initial motivation for his abstinence was that consumption of alcohol was forbidden as one of the conditions of his release from jail after his

the Individual's reported statements made during the arrest that the alleged victim was asleep, one can conclude that the Individual impliedly admitted that the sexual acts in question were non-consensual.

arrest. Tr. at 22. As time went on, he began to realize the impacts that alcohol has had on his life. Tr. at 23. Before the arrest, the Individual began to receive therapy from a licensed Clinical Psychologist (Individual's Psychologist) for depression and now continues to receive therapy. Tr. at 12. In his therapy, the Individual wants to address his alcohol issues and the other problems that underlie his alcohol problem – apathy and depression. Tr. at 12. As part of his treatment program, the Individual has been practicing yoga as a spiritual pathway. Tr. at 12. As a result of contemplation, he believes that his bouts of excessive alcohol consumption were triggered by an “absolute lack of something better to do.” Tr. at 13. The Individual also believes that he has a large issue with “helplessness.” Tr. at 13. Because of his probation, the Individual is required not to consume alcohol or to frequent establishments that serve liquor. Tr. at 17. Nonetheless, the Individual testified that, once his probation is ended, he will not rule out having an occasional beer. Tr. at 19. The Individual says that he is firmly opposed to consuming alcohol with the intent of getting intoxicated. Tr. at 26-27.

Three of the Individual's friends and the Individual's father testified that since the 2012 arrest they have not observed the Individual consume alcohol. All expressed confidence that the Individual realizes the seriousness of the consequences of becoming intoxicated and will not do it again in the future. Tr. at 80-81, 91-97, 104-06; Tr. at 124-25. Further, the three friends have observed the Individual in social settings where alcohol was offered, yet the Individual did not partake in consuming alcohol. Tr. at 80-81, 91-97, 104-06.

The Individual's Psychologist testified that she has been seeing the Individual since January 2012.⁷ Tr. at 52. The Individual's initial complaint was his feelings of being lost and uncertain about his future. Tr. at 52-53. In her opinion, the Individual's problem with alcohol abuse was intertwined with his other problems. Tr. at 54. Because of the Individual's legal restrictions after his arrest, the Individual immediately gave up consuming alcohol. The Individual's Psychologist believes that the Individual had no problems in stopping his alcohol consumption. Tr. at 54. Nonetheless, she believed that the Individual was in denial about the extent of his alcohol problem and concurred with the diagnostic findings in the Report. Tr. at 60. The Individual's Psychologist testified that the Individual's risk of relapsing into alcohol misuse is now low since the Individual knows that the consequences of alcohol intoxication are severe. Tr. at 67. She believes that, because the Individual lives with his parents, he has an effective support system to aid his current abstinence. Tr. at 67-68. Additionally, the Individual's Psychologist believes that the Individual has several friends who also act as a significant support system for the Individual. Tr. at 68.

The DOE Psychologist, after listening to all of the testimony, opined that the probability of the Individual drinking to intoxication is low. Tr. 143. In support of his conclusion, the DOE Psychologist noted that the Individual has met the treatment recommendations listed in the Report – 12 months of abstaining from consuming alcohol and therapy for 12 to 18 months. Tr. at 142-43; *see* Ex. 4 at 10. The DOE Psychologist opined that he has a high level of confidence that the Individual will not drink to intoxication again. Tr. at 145-46. In his opinion, the Individual should not risk the possibility of consuming alcohol to intoxication because of the

⁷ The Individual's Psychologist inadvertently testified that she had been seeing the Individual since January 2000. *See* Ex. 4 at 5 (Individual informing DOE Psychologist that he started to see the Individual's Psychologist in January 2012).

DOE Psychologist's belief that the Individual's judgment becomes poorer as he gets closer to intoxication. Tr. at 143. As additional support for his prognosis, the DOE Psychologist testified as to his belief that the Individual is getting effective therapy with the Individual's Psychologist. Tr. at 145.

The Criteria H and J security concerns arise from the Individual's diagnosis as suffering from Alcohol-Related Disorder, NOS. After reviewing the evidence before me, I find that the Individual has resolved the Criteria H and J concerns. As of the date of the hearing, the Individual has demonstrated 21 months of abstinence from alcohol and has met all of the treatment requirements outlined in the DOE Psychologist's Report. Both medical experts have opined that once the Individual is freed from his legal restrictions, there is a high probability that the Individual will not use alcohol to excess. All of the above factors are recognized as mitigating factors under the *Adjudicative Guidelines*. See *Adjudicative Guidelines*, Guideline G ¶ 23 (b),(c),(d), Guideline I, ¶ 29 (b), (c). Given the severe consequences, the Individual has experienced as a result of his intoxication, in which is now under supervised court probation for three years and now has a criminal record, I find that the expert's opinions are well supported as to the probability of the Individual engaging in problematic alcohol use. In all, I find that the Individual has resolved the Criterion H and J security concerns arising from the derogatory information contained in the Notification Letter.

B. Criterion L

The concerns raised by the Criterion L derogatory information are the Individual's history of criminal conduct and the Individual's failure to provide truthful or accurate statements regarding the incident resulting in his arrest in February 2012. After considering all of the evidence, I find that the Individual has not resolved all of the Criterion L concerns raised in this case.

1. History of Criminal Conduct

The Individual believes that the three traffic incidents which occurred during the period 2007 to 2009 are sufficiently old that they should have no relevance regarding a determination as to his eligibility to receive a security clearance. Ex. 2 at 2. Further, the Individual points out that he has modified his behavior and that he has received no further citations since 2009. Ex. 2 at 2.

As to the February 2012 arrest, the Individual testified as to his belief that the alleged victim had given him consent to perform the sexual activity that formed the basis for the charges. Tr. at 32-33; Ex. 12 at 10. Further, the Individual believes that the investigation of the alleged offense was flawed since it was conducted by a "paramilitary, blatantly homophobic police force." Tr. at 30-31. He further alleges that the local police did not handle the incident in a proper and objective manner and that the interview statements were inaccurate.⁸ Tr. at 32. The Individual also alleges that the original interview with the alleged victim, as well as his own, was lost by the local police, only to be rediscovered two months later. Tr. at 32.

⁸ In the March 2012 PSI, the Individual also suggests that his statements to the police may have been affected by his lack of sleep, his intoxication, or possible head trauma from the physical affray he and the alleged victim had immediately after the incident. Ex. 12 at 34-36.

In his testimony and in the March 2012 PSI, the Individual challenges the propriety of the local police arresting him for criminal sexual activity given his assertions, after the arrest, that all of the underlying sexual acts were consensual or that the Individual had good reason to believe that the alleged victim gave his consent. In considering the Individual's assertions, it is important to bear in mind that a DOE administrative review proceeding under Part 710 is not a criminal proceeding, where the government has the burden of proving the defendant guilty beyond a reasonable doubt. The standard in this proceeding places the burden of proof on the Individual. *See* 10 C.F.R. § 710.27(d) *supra* at 4; *Personnel Security Hearing*, Case No. TSO-0001, *slip op.* at 3 (2002) (holding “[c]onsequently, it is necessary and appropriate to place the burden of persuasion on the individual in cases involving national security issues” after citing *Department of Navy v. Egan*, 484 U.S. 518, 531 (1988)). Other than his testimony, the Individual has provided little, if any, additional proof to substantiate his assertions.⁹ My review of the official police records regarding the arrest does not reveal anything would cause me question the accuracy of the police report. Further, the Individual's credibility regarding facts involving the incident is weakened by his admission that he was significantly intoxicated at the time of the incident and that he does not have a “crystal clear recollection” of the incident which led to his arrest. Tr. at 33. The Individual's credibility is also lessened by the fact that a number of his contemporary statements, as recorded in the police report, significantly differ from the account he gave of the incident during the March 2012 PSI. *See supra*. In sum, the Individual has not presented sufficient evidence to convince me that the security concerns raised by the Individual's arrest in February 2012 have been resolved.

Overall, while the traffic incidents during 2007 to 2009 happened a significant period of time ago and involved relatively minor offenses, the Individual's arrest in February 2012 is relatively recent and involved felony offenses. As such, the Individual's February 2012 felony arrest shows extremely poor judgment, even considering the fact that he was likely intoxicated during the incident. The seriousness of the incident of bad judgment has not been mitigated by his relatively recent period of exemplary behavior since his arrest. While the Individual has but one serious criminal incident on his record, such a single serious offense in itself can disqualify a person from receiving or holding a clearance. *Adjudicative Guidelines*, Guideline J, ¶ 31(a).

2. Inconsistent and Misleading Statements

The record in this matter also reveals instances where the Individual has given inconsistent answers regarding the incident. The Individual sent a text message to the alleged victim denying that there had been any inappropriate physical contact other than when the alleged victim discovered the act and began to hit the Individual. However, the alleged victim informed the responding police officers that the Individual had sexually assaulted him. Ex. 8 at 3-4. Further, the Individual stated at the hearing that he was not denying that there was sexual contact between himself and the alleged victim. Tr. at 32. Additionally, during the local police's initial interview,

⁹ I note that the local police record of the arrest states that local police officers four days later interviewed the alleged victim because of technical difficulties relating to the recording of the interview immediately after the February 2012 incident. Nonetheless, this fact does not in itself provide evidence that the summary of the original interview contained in the official written police record of the Individual's arrest is inaccurate.

the Individual stated that the alleged victim was asleep during the incident. Ex. 8 at 4. However, during the March 2012 PSI, the Individual stated that “I was never under the impression that [the alleged victim] was asleep.” Ex. 12 at 23. Further, as held above, none of the Individual’s assertions as to why he was inappropriately charged or that the local police record of the arrest was inaccurate is supported with evidence that would cause me to discount the concerns raised by the Individual’s arrest or the local police report of the underlying incident.¹⁰

The DOE security program is based on trust, and when a security clearance holder breaches that trust, it is difficult to determine to what extent that individual can be trusted again in the future. *See Adjudicative Guidelines*, Guideline E, ¶ 15; *see also, e.g., Personnel Security Hearing*, Case No. TSO-0727 (2009). The differing information the Individual has provided to various parties about the February 2012 incident raises serious security concerns. Accordingly, I find that the Individual has not presented sufficient evidence to resolve the concerns about his apparent lack of candor.

3. Criterion L Summary

Criterion L derogatory information describes derogatory information that puts into question the Individual’s judgment, reliability and trustworthiness. The Individual’s relatively recent felony arrest and his varying statements about the underlying incident raise serious security concerns. The Individual has failed to present sufficient evidence to resolve these concerns.

V. CONCLUSION

For the reasons set forth above, I conclude that the Individual has resolved the DOE’s security concerns raised under Criteria H and J. However, the Individual has not resolved the security concerns under Criterion L. Therefore, the Individual has not demonstrated that restoring his access authorization would not endanger the common defense and would be clearly consistent with the national interest. Accordingly, I find that the DOE should not restore the Individual’s access authorization. Review of this decision by an Appeal Panel is available under the procedures set forth at 10 C.F.R. § 710.28.

Steven J. Goering
Administrative Judge
Office of Hearings and Appeals

Date: February 14, 2014

¹⁰ In making this determination, I do not offer an opinion regarding whether the Individual, in fact, committed a crime during the incident leading to his arrest in February 2012. I hold only that the Individual has failed to present sufficient evidence by which I could discount the arrest or the reported facts surrounding the arrest in making my determination regarding the Individual’s eligibility to hold a security clearance.

