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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: December 11, 2013)
) Case No.: PSH-13-0128
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Issued : March 24, 2014

Administrative Judge Decision

Wade M. Boswell, Administrative Judge:

This Decision concerns the eligibility of XXXXXXXXXXXX (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 restored.

I. Background

The individual is employed by a DOE contractor in a position that requires him to hold a DOE security clearance and participate in the Human Reliability Program (HRP).² After the individual reported to work for his regularly scheduled morning shift on Saturday, June 22, 2013, he was advised to report for a random breath alcohol test (BAT). On the initial BAT, which was conducted over three hours after the individual had reported to

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.

² The HRP is a security and safety reliability program designed to ensure that individuals who occupy positions affording access to certain materials, nuclear explosive devices, facilities, and programs meet the highest standards of reliability and physical and mental suitability. *See* 10 C.F.R. § 712.

work, the individual's blood alcohol content (BAC) registered .029 g/210L and, on the follow-up BAT conducted 17 minutes later, his BAC registered .022 g/210L. Exhibit 6. His facility prohibits employees from reporting to work with a BAC at or above .020 g/210L. As a result, the individual was suspended by his employer for four days, without pay. *See* Exhibit 11. Subsequent to his return to work, the Local Security Office (LSO) conducted a personnel security interview (PSI) with the individual on July 17, 2013. *See* Exhibit 15. As a result of the positive BAT and concerns raised during the PSI with respect to the individual's alcohol consumption, the individual was referred for evaluation by a DOE consulting psychologist, who submitted a psychological assessment dated September 6, 2013. *See* Exhibit 7.

Since neither the PSI nor the DOE psychologist's evaluation resolved the security concerns arising from the individual's alcohol usage, the LSO informed the individual in a letter dated October 30, 2013 (Notification Letter), that it possessed reliable information that created substantial doubt regarding his eligibility to hold a security clearance. In an attachment to the Notification Letter, the LSO explained that the derogatory information fell within the purview of two potentially disqualifying criteria set forth in the security regulations at 10 C.F.R. § 710.8, subsections (h) and (j) (hereinafter referred to as Criterion H and Criterion J, respectively).³ *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 16 numbered exhibits into the record and presented the testimony of one witness, the DOE consulting psychologist. The individual, represented by counsel, introduced two lettered exhibits (Exhibits A and B) into the record and presented the testimony of nine witnesses, including that of himself and that of his licensed professional counselor who supervised his alcohol treatment program. 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

³ Criterion H relates to 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 . . ." and 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(h) and (j).

⁴ OHA decisions are available on the OHA website at www.oha.doe.gov. A decision may be accessed by entering the case number in the search engine at www.oha.doe.gov/search.htm.

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 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 two criteria as the bases for suspending the individual’s security clearance: Criterion H and Criterion J. 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* 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. PSH-11-0035 (April 19, 2012). With respect to Criterion J, the LSO noted (1) the individual’s positive BAT result on a random screening at his place of employment in June 2013, (2) his self-reported patterns of alcohol consumption during the PSI and during the screening for an alcohol treatment program, and (3) his being cited in 1983 and 1984 as a “Minor in Possession of Alcohol.” *See* Ex. 1. Additionally, the LSO relied upon the report of the DOE consulting psychologist, dated September 6, 2013, which concluded

that the individual has been a user of alcohol habitually to excess over the prior several years, without adequate evidence of rehabilitation or reformation. *Id.*; Ex. 7 at 7.

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* Adjudicative Guidelines at Guideline I. 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 on the September 2013 report of the DOE consulting psychologist which concluded that the individual’s “consumption of alcohol habitually (frequently) to excess (intoxication)” is a condition that can cause a significant problem in the individual’s judgment or reliability. Ex. 1; Ex. 7 at 8.

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

IV. Findings of Fact

Except as discussed below, the individual did not contest the accuracy of the facts cited by the LSO in the Notification Letter.

The individual began consuming alcohol as a teenager and, in separate incidents in 1983 and 1984, was cited and fined as a “minor in possession” of alcohol. Ex. 14 at 1; Tr. at 89. Other than these two incidents, he has not been arrested or involved in other criminal activity. *Id.* at 90.

The individual has inconsistently reported his patterns of adult alcohol consumption. Ex. 7 at 3 – 6; Ex. 8 at 9; Ex. 15 at 75 – 85. When questioned about these inconsistencies, he has stated that he does not keep a “count” of the number of beers that he is drinking and that he “never [has] put that much thought into how much [he] drank or how much [he] buy[s].” Ex. 7 at 3; Tr. at 101, 116. Notwithstanding the foregoing, the DOE consulting psychologist testified that he believes the individual knows more about his patterns of alcohol consumption than he states, which is consistent with my own conclusions as the Administrative Judge in this matter. *Id.* at 148. Based on the individual’s various self-reports and the analyses of both the DOE psychologist and the individual’s treatment counselor, I conclude that, since 1994, the individual has drunk to intoxication once every month or two and that, in more recent years, the individual’s alcohol consumption escalated to 12 to 18 beers per week, with the individual feeling impaired as a result of his consumption of alcohol twice monthly. Ex. 7 at 3; Ex. 8 at 9; Tr. at 113, 132, 140. Both experts testified that the individual had developed increased tolerance for alcohol and expressed concerns that he had the potential to develop alcohol dependency if his pattern of alcohol consumption continued. *Id.* at 123, 129, 133, 139, 141 – 142.

The individual's alcohol consumption was limited to beer and was usually confined to days when he would not need to report to work the following day. Throughout the individual's current employment of seven years with a DOE contractor and his prior employment of 17 years with a state government, he has been subject to random BATs. Until June 2013, he tested negative on all of those tests. *Id.* at 77 – 79, 88 – 89.

On June 21, 2013, the individual and his girlfriend went out for dinner and unexpectedly met friends, some of whom they had not seen in 30 years. The individual consumed multiple beers and, feeling impaired when they left the restaurant at around 10 pm, asked that his girlfriend drive him home. *Id.* at 90 – 92. He does not remember the number of beers that he drank that evening as he “wasn't counting them” when he was drinking. *Id.* at 115. He overslept the next morning, arriving at work at 6 am, later than his scheduled starting time. *Id.* at 90 – 92. He was notified that he had been randomly selected for a BAT. At 9:18 am, his BAC measured .029 and, at 9:35 am, his BAC measured .022, both readings in excess of his facility's prohibition on reporting to work with a BAC at or exceeding .020. Immediately following his positive BAT, the individual was suspended from work for four days, without pay, and referred to an alcohol treatment program. Ex. 5 at 1; Ex. 11 at 1 – 2.

The DOE consulting psychologist evaluated the individual on September 6, 2013. Based on the BAT results, the DOE psychologist calculated that the individual had likely consumed nine beers the evening before the test and had a BAC of .10 (i.e., exceeding legal intoxication) at the time he had driven to work on the morning of the random BAT. Ex. 7 at 5 – 6. The DOE psychologist concluded that the individual did not meet the *Diagnostic Statistical Manual of the American Psychiatric Association IVth Edition Text Revision (DSM-IV-TR)* criteria for “Alcohol Dependence” or “Alcohol Abuse,” but that the individual had been for the prior several years a user of alcohol habitually to excess, without evidence of adequate rehabilitation or reformation, and that such alcohol use can cause a significant problem in the individual's judgment or reliability. *Id.* at 6 – 7. The DOE psychologist opined that the individual could evidence adequate rehabilitation and reformation by abstaining from alcohol for a minimum of six months (which would demonstrate that he could control his consumption of alcohol) and completing an intensive outpatient program (IOP) for alcohol treatment. *Id.* at 7.

The individual has abstained from alcohol since June 22, 2013, and completed a 60-hour IOP for alcohol treatment on August 15, 2013. Ex. 10 at 6; Tr. 94, 96 – 97. As of the date of the administrative review hearing, the individual was continuing to participate in weekly aftercare sessions at the IOP treatment center. *Id.* at 95, 109, 120 – 121, 130 – 131. During the hearing, he testified that he could give the DOE a “100 percent assurance” that he would not consume alcohol in the future. *Id.* at 116.

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

Legitimate security concerns arose as a result of the individual's testing positive on a random BAT conducted by his employer, his historic patterns of alcohol consumption and the conclusion of the DOE consulting psychologist that the individual has been a user of alcohol habitually to excess without adequate evidence of rehabilitation or reformation. *See* Ex. 1. The question before me is whether those concerns have been mitigated.

At the administrative review hearing, both the individual's treatment counselor and the DOE consulting psychologist attended the entire hearing and testified as the final witnesses so that they would have the benefit of hearing the testimony of the other witnesses. Both were of the opinion that the individual's alcohol consumption prior to June 2013 reflected a serious alcohol concern (a "maladaptive pattern of alcohol use" that required intervention, according to his treatment counselor) and both observed that the individual had developed a tolerance for alcohol that put him at risk of future alcohol dependence. Ex. 8 at 2; Tr. at 123, 129, 132, 133, 139, 141 – 142. Although the DOE consulting psychologist had made no *DSM-IV-TR* diagnosis of the individual and the treatment counselor testified that she would not disagree with that conclusion, she believed it was a "close call" to not diagnose the individual as suffering from Alcohol Abuse. *Id.* at 123, 124, 133.

The individual credibly testified that he had not consumed alcohol since his positive BAT and that he had encountered no difficulties in maintaining his abstinence. *Id.* at 94 – 95. He also enrolled in a 60-hour IOP which he completed on August 15, 2013, and has continued in weekly aftercare meetings at the IOP treatment center since completion of the program. *Id.* at 95, 97. His treatment counselor, who supervised the IOP program and has had subsequent individual meetings with the individual, testified that the individual had fully participated in the IOP, had developed a good and improved understanding of alcohol through the IOP and had reflected an improved understanding of himself in the comments that he made when other group participants shared their experiences. *Id.* at 119 – 121, 135.

The DOE consulting psychologist noted that, as of the date of the hearing, the individual had completed eight months of sobriety, which was greater than the six months that he had required in his evaluation, and had completed an IOP and was participating in aftercare, even though aftercare had not been specified in his recommendations. *Id.* at

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.

138, 141, 145. Both experts testified that the individual was a very “concrete” person who tended not be reflective and had difficulty anticipating consequences, but was also someone with integrity who is likely to follow rules and maintain his commitments. *Id.* at 121 – 2, 130, 141, 144. At the hearing, the individual testified that he could give DOE a “100 percent assurance” that he would not drink alcohol again. *Id.* at 115.

With regard to security concerns raised under Criterion J and Criterion H, Administrative Judges traditionally accord deference to the opinions of mental health professionals. Noting the individual’s treatment program and abstinence, both experts opined that, as of the hearing, the individual had evidenced adequate rehabilitation and reformation with respect to his use of alcohol habitually to excess and that his prognosis is good. *Id.* at 124, 130, 145, 147. *Cf.* Adjudicate Guidelines at Guideline G, ¶23(d) (mitigation of security concerns relating to alcohol is possible when an individual has completed outpatient counseling along with any required aftercare and has demonstrated a clear and established pattern of abstinence in accordance with treatment recommendations). Both experts also opined at the hearing that in light of the individual’s having demonstrated adequate rehabilitation and reformation with respect to his alcohol usage, he no longer had an illness or mental condition that could cause a significant defect in his judgment or reliability. *Tr.* at 124, 145. *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). I find that the individual has resolved the Criterion H and Criterion J security concerns.

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 H and Criterion J. 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 mitigate the security concerns associated with Criterion H and Criterion J. Accordingly, I have determined that the individual’s access authorization should 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.

Wade M. Boswell
Administrative Judge
Office of Hearings and Appeals

Date: March 24, 2014