

United States Department of Energy
Office of Hearings and Appeals

In the Matter of:	Personnel Security Hearing))	
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Filing Date:	April 4, 2014))	Case No. PSH-14-0032
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Issued: May 29, 2014

Administrative Judge Decision

Diane DeMoura, Administrative Judge:

This Decision concerns the eligibility of XXXXXXXXXXXXX (“the Individual”) to hold an access authorization under the Department of Energy (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.”¹ For the reasons detailed below, after carefully considering the record before me in light of the applicable regulations and the Adjudicative Guidelines, I find that the DOE should not grant the Individual access authorization at this time.

I. BACKGROUND

The Individual is employed by a DOE contractor and is an applicant for DOE access authorization. DOE Exhibit (“Ex.”) 3. During the application process, the Individual completed a Questionnaire for National Security Positions (QNSP) in June 2013, and participated in a November 2013 Personnel Security Interview (PSI). DOE Exs. 7, 8. After the PSI, the local security office (LSO) referred the Individual to a DOE consultant-psychologist (“the DOE psychologist”) for an evaluation. The DOE psychologist evaluated the Individual in December 2013, and issued a report. DOE Ex. 6. In a February 2014 Notification Letter, the LSO

¹ Access authorization, also known as a security clearance, is an administrative determination that an individual is eligible for access to classified matter or special nuclear material. 10 C.F.R. § 710.5.

informed the Individual that there existed derogatory information that raised security concerns under 10 C.F.R. §§ 710.8 (h) and (j) (Criteria H and J, respectively).² *See* DOE Ex. 1 (Summary of Security Concerns). The Notification Letter also informed the Individual that he was entitled to a hearing before an Administrative Judge³ in order to resolve the security concerns.

The Individual requested a hearing on this matter. DOE Ex. 2. The LSO forwarded his request to the Office of Hearings and Appeals, and I was appointed the Administrative Judge. At the hearing, the DOE counsel introduced nine exhibits into the record (DOE Exs. 1-9) and presented the testimony of one witness, the DOE psychologist. The Individual testified on his own behalf, and offered the testimony of three additional witnesses: his uncle, his brother, and a long-time friend. The Individual did not submit any exhibits. *See* Transcript of Hearing, Case No. PSH-14-0032 (hereinafter cited as “Tr.”).

II. REGULATORY STANDARD

The regulations governing the Individual’s eligibility for access authorization are set forth at 10 C.F.R. Part 710, “Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material.” The regulations identify certain types of derogatory information that may raise a question concerning an individual’s access authorization eligibility. 10 C.F.R. § 710.10(a). Once a security concern is raised, the individual has the burden of bringing forward sufficient evidence to resolve the concern.

In determining whether an individual has resolved a security concern, the Administrative Judge considers relevant factors, including “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 of the individual at the time of the conduct; the voluntariness of 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,” and the impact of the foregoing on the relevant security concerns. 10 C.F.R. § 710.7(c). In considering these factors, the Administrative Judge also consults adjudicative guidelines that set forth a more comprehensive listing of relevant factors and considerations. *See* 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).

² Criterion H concerns information that a person has “an illness or mental condition of a nature which, in the opinion of a board-certified psychiatrist, other licensed physician 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 conduct indicating that the Individual has “been, 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).

³ 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).

Ultimately, the decision concerning eligibility is “a comprehensive, common-sense judgment made after consideration of all relevant information, favorable and unfavorable” 10 C.F.R. § 710.7(a). In order to reach a decision favorable to the individual, the Administrative Judge must find that “the grant or restoration of access authorization to the individual will not endanger the common defense and security and is clearly consistent with the national interest.” 10 C.F.R. § 710.27(a). “Any doubt as to an individual’s access authorization eligibility shall be resolved in favor of the national security.” *Id.* See generally *Dep’t of the Navy v. Egan*, 484 U.S. 518, 531 (1988) (the “clearly consistent with the interests of national security” test indicates that “security clearance determinations should err, if they must, on the side of denials”).

III. DEROGATORY INFORMATION AND ASSOCIATED SECURITY CONCERNS

As stated above, the LSO issued a Notification Letter informing the Individual that the DOE possessed certain derogatory information which raised doubts regarding his eligibility to hold DOE access authorization. According to the Notification Letter, this information raises security concerns under Criteria H and J of the Part 710 regulations. See DOE Ex 1. As a basis for its concerns, the LSO cited the following information regarding the Individual’s alcohol use: (1) the Individual’s self-reported pattern of alcohol consumption; (2) the DOE psychologist’s opinion that the Individual is a user of alcohol habitually to excess, which is a mental condition that causes, or may cause, a significant defect in his judgment or reliability; (3) the Individual’s past alcohol-related citations and arrests;⁴ and (4) the Individual’s admission that he continued to consume alcohol following his 2003 DWI arrest, in violation of one of the conditions of his probation. *Id.*

It is well-settled that excessive use of alcohol raises security concerns because “excessive alcohol consumption often leads to the exercise of questionable judgment or the failure to control impulses, and can raise questions about an individual’s reliability and trustworthiness.” Adjudicative Guidelines, Guideline G, ¶ 21. Similarly, certain mental conditions “can impair judgment, reliability, or trustworthiness.” *Id.*, Guideline I, ¶ 27. Therefore, there is no question that the diagnosis of such a condition by a duly qualified mental health professional may raise security concerns. In light of the Individual’s self-reported pattern of alcohol use, his past alcohol-related legal incidents, and the DOE psychologist’s determination that the Individual was a user of alcohol habitually to excess, I find that the LSO properly invoked Criteria H and J with respect to the information cited regarding the Individual’s alcohol consumption.

The LSO cited as an additional security concern under Criterion H the DOE psychologist’s opinion that the Individual’s “self-protective lack of candor is concerning and that his difficulty being fully truthful is an illness or mental condition which causes or may cause a significant defect in judgment or reliability.” *Id.* Upon review of the record of this case, I find that there are insufficient facts to support a finding that there exists a separate security concern under Criterion H with respect to the Individual’s candor.

⁴ The Individual had the following alcohol-related legal citations and arrests: Minor in Possession in 2000 (month not specified in the record), Driving Under the Influence (DUI) by a Minor in March 2000, Open Container in January 2003, Driving While Intoxicated (DWI) in January 2003.

As noted above, certain mental conditions impacting judgment, reliability, or trustworthiness may raise security concerns under Criterion H. In addition, a formal diagnosis of a disorder is not required in order to invoke Criterion H. Adjudicative Guidelines, Guideline I, ¶ 27; *see also Personnel Security Decision*, OHA Case No. PSH-13-0006 (2013). For example, certain personality traits or behaviors may be considered “mental conditions” that may significantly impair an individual’s judgment or reliability. *See, e.g.*, *Personnel Security Decision*, OHA Case No. PSH-12-0136 (2013); *Personnel Security Decision*, OHA Case No. PSH-13-0006 (2013); *Personnel Security Decision*, OHA Case No. PSH-13-0061 (2013). In those cases, however, the traits or behaviors at issue were of a persistent or pathological nature, and raised serious doubts regarding the individual’s ability to, *inter alia*, control impulses, accurately perceive reality, and exercise sound judgment in making decisions. In one case, the Agency’s mental health expert defined “mental condition” as “enduring mental tendencies . . . over time, they are repeated. It represents something more than just a mistake that the person has made.” *Personnel Security Decision*, OHA Case No. PSH-12-0136 (2013).

In this case, there is no evidence that the Individual has demonstrated a persistent or repeated pattern of dishonesty or lack of candor impairing his judgment or reliability. Rather, the only instances in which the Individual was, arguably, less than candid occurred during the PSI and in his earlier interview with an investigator from the Office of Personnel Management, conducted as part of the background investigation for his security clearance, when he minimized the amounts and frequency of his drinking. *See* DOE Ex. 6 at 3-4, 6, 8. The Individual was more forthright in this regard when he met with the DOE psychologist, and admitted that he may have minimized his alcohol consumption in the earlier interviews because he was afraid that the truth about his past alcohol use could negatively impact his ability to obtain a security clearance. *Id.* at 8. In his evaluation report, the DOE psychologist expressly stated that the Individual “is not a pathological liar, as he did not seem to lie about things in general and gradually told more of the truth over time. His admission of his motive to protect his career opportunity is usually not seen in sociopathic personalities.” *Id.* In his testimony at the hearing, the DOE psychologist testified that he emphasized the Individual’s “self-protectiveness” in his report primarily because of the deliberateness of the act. Tr. at 131. However, he acknowledged that the Individual did not demonstrate a general problem with candor. Rather, it was only with “how much he drinks and how often he becomes intoxicated . . . that’s an important piece. It is not broader that I can discern in him.” Tr. at 132 The DOE psychologist further stated, “to call what he did lying is pejorative. To call it minimization, to call it self-protectiveness . . . is probably more accurate. He doesn’t have a generalized tendency to be pathological.” Tr. at 130.

In light of the DOE psychologist’s opinion that the Individual’s less than candid responses were linked solely to questions regarding his past alcohol consumption, and the absence of any evidence of a more general or pervasive pattern of dishonesty or lack of candor which either caused, or may cause, significant defects in the Individual’s judgment or reliability,⁵ I conclude that the facts in this case are insufficient to give rise to a separate Criterion H concern regarding the Individual’s candor. Rather, based on the record before me, I conclude that the Individual’s past minimization of his alcohol consumption is a product of the alcohol-related condition with which he was diagnosed, which I will address in my analysis below.

⁵ To the contrary, the record indicates that, except for the minimization of his drinking described above, the Individual is exceedingly candid, honest, and trustworthy. *See* Tr. at 15, 55, 58, 71, 130.

IV. FINDINGS OF FACT

The Individual is currently thirty-three years of age. He began consuming alcohol at age fifteen or sixteen, typically drinking three to six beers one night every weekend. DOE Ex. 6 at 2. The Individual's alcohol consumption increased over the next several years, particularly after he began attending college. *Id.* While in college, he drank several nights per week, and drank to intoxication several nights per month. *Id.*

The Individual's drinking pattern in college resulted in several alcohol-related legal incidents in a short period of time. In March 2000, the Individual consumed eight to ten beers over an eight or nine hour period. During his drive home, the Individual was pulled over for a non-moving traffic violation, and ultimately cited for DUI by a Minor. *Id.* at 3; DOE Ex. 8 at 23-35. Within weeks of his DUI citation, the Individual received another alcohol-related citation, Minor in Possession, during an evening out with his friends. DOE Ex. 6 at 4; DOE Ex. 8 at 36-43. In January 2003, the Individual received a citation for Open Container after the vehicle in which he was a passenger was pulled over for speeding, and the police officer observed that the Individual and other passengers were drinking beer. DOE Ex. 6 at 3; DOE Ex. 8 at 15-21. Finally, also in January 2003, while driving home after a Super Bowl party at which he had been drinking, the Individual was stopped by a police officer who observed the Individual swerve while driving. The Individual failed field sobriety tests and refused to take a Breathalyzer test at the scene. He was cited for, and later pled guilty to, DWI and was sentenced to eighteen months of probation, fifty hours of community service, and completion of a week-long alcohol education course. The Individual was also prohibited from drinking alcohol as a condition of his probation. DOE Ex. 6 at 4-5; DOE Ex. 8 at 7-14.

Nonetheless, the Individual continued drinking after his 2003 DWI arrest, albeit at a reduced level. DOE Ex. 6 at 5. After his probation ended, the Individual's drinking again increased. *Id.* By 2005, he was drinking three to five times per week, and drinking to intoxication two to three times per month. *Id.* Between 2006 and 2010, the Individual again reduced his alcohol consumption, largely because of his work schedule and his living situation at the time, yet he still drank to intoxication several times per year. *Id.* The Individual estimated that, in more recent years, he typically consumed one or two beers after work during the week (more when watching football) and four to six beers on Friday and Saturday nights, and drank to intoxication once or twice per month. *Id.* at 6.

In December 2013, the DOE psychologist evaluated the Individual and determined that he did not currently meet the diagnostic criteria for an alcohol-related disorder. *Id.* However, the DOE psychologist concluded that the Individual was a user of alcohol habitually to excess, and his pattern of alcohol consumption caused or may cause a significant defect in his judgment or reliability. *Id.* at 8-9. With respect to how the Individual could demonstrate adequate evidence of rehabilitation or reformation from his alcohol-related condition, the DOE psychologist recommended that the Individual abstain from alcohol for nine months. *Id.* at 8. In addition, he recommended that the Individual actively participate in the Alcoholics Anonymous (AA) program, including obtaining a sponsor, working the program's twelve steps, and attending

meetings two times per week for a minimum of nine months. In the alternative, the Individual could complete an intensive outpatient program focused on substance abuse. *Id.*

V. ANALYSIS

In making a determination regarding the Individual's eligibility for DOE access authorization, I have thoroughly considered the record in this proceeding, including the hearing testimony and the documentary evidence. For the reasons set forth below, I cannot conclude that granting the Individual DOE access authorization "will not endanger the common defense and security, and is clearly consistent with national interest." 10 C.F.R. § 710.7(a).

A. The Individual's Mitigating Evidence

The Individual did not dispute any of the facts underlying the security concerns related to his alcohol consumption. Rather, he attempted to demonstrate that his current alcohol consumption is not of concern. The Individual last consumed alcohol five days before the hearing, when he had four beers while out for the evening. Tr. at 90. When asked whether he believed that he had a problem with alcohol, the Individual replied, "I could, but I don't think it's to the extent of a lot of people. It doesn't affect my work or family life, but maybe I do drink – maybe I did drink a little too much." Tr. at 90. In response to the DOE psychologist's assessment that he was a user of alcohol habitually to excess, the Individual stated that he "would agree with that somewhat." Tr. at 91. Nonetheless, the Individual did not adopt any of the DOE psychologist's recommendations. According to the Individual, there is no particular reason that he has not abstained from alcohol. He simply "like[s] to have a beer now and then." Tr. at 87. He has not participated in AA or a similar program because he has not had the time to do so, but recognized that he would "probably" benefit from such a program. Tr. at 91. However, according to the Individual, after he received the DOE psychologist's report in March 2014, he evaluated his drinking habits and he "really did slow down a lot." Tr. at 84.

The Individual also acknowledged that he minimized his past alcohol consumption in earlier interviews. He added that such behavior is "not typical of [his] character." Tr. at 109. The Individual added that his last alcohol-related legal incident occurred over ten years ago, noting that he has "been responsible" with his drinking over the last decade. Tr. at 93. He admitted, however, that he drove after drinking to excess more recently than that ("I would say two – two-plus years ago."). Tr. at 107. The Individual maintains that he has "made a pretty good effort to cut back" even though he has not completely abstained from drinking. Tr. at 110. The Individual does not feel that he needs to change, but he made clear that he is willing to abstain from drinking if it is required of him. Tr. at 93, 97, 110.

The Individual's witnesses each testified that, while the Individual may have consumed alcohol to excess in college, his drinking has decreased over the years. Tr. at 21-22, 26, 51-52, 60-61, 72-74. In addition, the witnesses all described the Individual as very honest and candid. Tr. at 15, 55, 58, 71. They all believed the Individual to be very reliable and responsible. Tr. at 35-36, 42-43, 70.

B. The DOE Psychologist's Testimony

After listening to the hearing testimony, the DOE psychologist did not change his opinion or the recommendations that he offered in his December 2013 report regarding the Individual's alcohol consumption. Tr. at 123. The DOE psychologist testified that the Individual lacked insight into the concerns raised by his alcohol consumption, and appeared to neither accept nor understand that his drinking habits were problematic. Tr. at 122, 127-28. He also noted that the Individual lacked a strong support system to help him address his drinking. Tr. at 135. Finally, the DOE psychologist acknowledged that the Individual's decision to reduce his drinking after receiving his evaluation report in March 2014 was some evidence of rehabilitation. However, he opined that the Individual did so because he thought it was what the DOE expected him to do, rather than because he believed he needed to drink less. Tr. at 134-35. The DOE psychologist added, "[the Individual] is a good man and I think . . . he'll try to do what DOE wants him to do" Therefore, the DOE psychologist speculated, until the Individual himself accepts that he drinks too much, he is likely to willingly abstain for however long he is asked, and then resume his normal pattern of drinking. Tr. at 135.

C. Administrative Judge's Evaluation of Evidence

Among the factors that may serve to mitigate security concerns raised by an individual's alcohol use are that "so much time has passed, or the behavior was so infrequent, or it happened under such unusual circumstances that it is unlikely to recur or does not cast doubt on the individual's current reliability, trustworthiness, or good judgment," that "the individual acknowledges his or her alcoholism or issues of alcohol abuse [and] provides evidence of actions taken to overcome this problem . . .," and that "the individual has successfully completed inpatient or outpatient counseling or rehabilitation . . ., has demonstrated a clear and established pattern of modified consumption or abstinence in accordance with treatment recommendations . . . and has received a favorable prognosis by a duly qualified medical professional" Adjudicative Guidelines, Guideline G, ¶ 23. Similarly, with respect to evidence of certain mental conditions which cause, or may cause, significant defects in judgment or reliability, such as the Individual's use of alcohol habitually to excess in this case, the Adjudicative Guidelines identify the following possible mitigating factors: "demonstrated ongoing and consistent compliance" with a treatment plan; voluntary participation in counseling or treatment with a favorable prognosis by a duly qualified mental health professional; a recent opinion by a duly qualified mental health professional that the condition is under control "and has a low probability of recurrence or exacerbation;" and, "no indication of a current problem." Adjudicative Guidelines, Guideline I, ¶ 29.

After considering the hearing testimony and evaluating the record as a whole, I am unable to find that the Individual has mitigated the security concerns raised by his consumption of alcohol. The Individual has an admitted long-standing history of regular alcohol consumption, often to excess. That history includes several alcohol-related legal incidents and other risky behavior, such as driving while intoxicated. In addition, he failed to adopt any of the DOE psychologist's recommendations, leaving questions as to whether he is able to control his drinking. While the Individual represents that he reduced his alcohol consumption after reviewing the DOE psychologist's report, his unwillingness or inability to abstain at that point, when faced with the

recommendation that he do so, is concerning. Finally, the Individual repeatedly indicated at the hearing that he is willing to abstain in the future if required to do so, and it is obvious that he is a dedicated employee who will do what is asked of him. However, in the absence of any evidence to the contrary, serious doubts remain regarding the Individual's acceptance that his alcohol consumption is actually a problem, apart from the DOE's concerns. In this respect, I am convinced by the DOE psychologist's testimony that the Individual has not yet demonstrated rehabilitation or reformation from his alcohol-related condition. Consequently, I find that the Individual has not mitigated the security concerns cited under Criteria H and J regarding his alcohol consumption.

VI. CONCLUSION

In the above analysis, I found that there was reliable information that raised substantial doubts regarding the Individual's eligibility for a security clearance under Criteria H and J of the Part 710 regulations. After considering all of the relevant information, favorable and unfavorable, in a comprehensive, common-sense manner, including weighing all of the testimony and other evidence presented at the hearing, I find that the Individual has not presented sufficient information to fully resolve those security concerns. Therefore, I cannot conclude that granting the Individual a DOE access authorization "will not endanger the common defense and security is clearly consistent with the national interest." 10 C.F.R. § 710.7(a). Accordingly, I find that the DOE should not grant the Individual access authorization at this time.

The parties may seek review of this Decision by an Appeal Panel, under the regulation set forth at 10 C.F.R. § 710.28.

Diane DeMoura
Administrative Judge
Office of Hearings and Appeals

Date: May 29, 2014