

access authorization. In an attachment to the Notification Letter, the LSO explained that the derogatory information fell within the purview of three potentially disqualifying criteria set 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 respectively).²

Upon receipt of the Notification Letter, the individual filed a request for a hearing. The LSO transmitted the individual's hearing request to the Office of Hearings and Appeals (OHA), and the OHA Director appointed me as the Administrative Judge in this case. At the hearing that I convened, the individual presented his own testimony and that of four witnesses. The DOE Counsel called two witnesses, the DOE psychologist and a DOE consultant-psychiatrist. Both the DOE and the individual submitted a number of written exhibits prior to the hearing.

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 denial"); *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 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.

B. Basis for Administrative Judge's Decision

² 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 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 relates, in relevant part, 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 interest of the national security. . . ." 10 C.F. R. § 710.8(l).

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 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 bases for suspending the individual's security clearance: Criteria H, J and L. To support Criterion H, the LSO relies on the diagnosis of the DOE psychologist that the individual suffers from Alcohol Abuse, and the expert's opinion that Alcohol Abuse is a mental illness that could cause a significant defect in the individual's judgment and reliability. As for Criterion J, the LSO cites the DOE psychologist's opinion, the individual's alcohol-related arrests as well as his alcohol use. *See* Exh. 1.

I find that the information set forth above constitutes derogatory information that raises questions about the individual's alcohol use under both Criteria H and J. First, a mental condition such as Alcohol Abuse can impair a person's judgment and reliability and trustworthiness. *See* Guideline I 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). Second, the excessive consumption of alcohol itself is a security concern because that behavior can lead to the exercise of questionable judgment and the failure to control impulses, which in turn can raise questions about a person's reliability and trustworthiness. *See id.* at Guideline G.

To support its reliance on Criterion L, the LSO cites the individual's criminal conduct, including four alcohol-related arrests and one alcohol-related citation. Criminal activity creates a doubt about a person's judgment, reliability and trustworthiness and by its very nature, it calls into question a person's ability or willingness to comply with laws, rules and regulations. *See* Guideline J of the Adjudicative Guidelines.

IV. Findings of Fact

The individual has had a number of alcohol-related arrests. In February 2007, he was arrested and charged with Aggravated Driving Under the Influence (DUI) and Reckless Driving and in March 2007, he was cited with Minor in Possession of Alcohol. Exh. 1. On August 8, 2010, the individual was arrested and charged again with Aggravated DUI and Reckless Driving. *Id.* Later, on August 12, 2012, he was arrested and charged with Battery Against a Household Member. The individual admitted to consuming three mixed drinks and one beer prior to the incident. Finally, on July 22, 2015, the individual was arrested and charged with Aggravated Driving While Under the Influence of Intoxicating Liquor or Drugs (2nd Offense), and Required Position and Method of Turning at Intersections. *Id.* He denied consuming any alcohol at the time. However, the deputy detected an odor of an alcoholic beverage coming from his breath, noticed he had bloodshot watery eyes, and appeared extremely nervous. *Id.* The individual refused to submit to a breathalyzer test. *Id.*

Based on this information, the individual was referred to a DOE psychologist for a psychological evaluation. On October 22, 2015, the DOE psychologist evaluated the individual. In his Report, he concluded that the individual met the Diagnostic Statistical Manual of Mental Disorders, IVth Edition TR (DSM-IV-TR) criteria for Alcohol Abuse. He further concluded that the individual used alcohol habitually to excess. The DOE psychologist also concluded that the individual possesses an illness or mental condition, which causes, or may cause, a significant defect in judgment and reliability. Exh. 4.

V. Analysis

I have thoroughly considered the record in 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. Based on the facts in this record, 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.

1. Criterion H and J: The Diagnosis of Alcohol Abuse

The individual does not dispute the DOE psychologist's diagnosis of Alcohol Abuse.⁴ Therefore, the focus of the analysis will be on whether the individual has demonstrated adequate evidence of rehabilitation or reformation.

a. Evidence of Rehabilitation and Reformation from Alcohol Abuse

During the hearing, the individual explained his July 2015 DUI. According to the individual, he was stopped by a police officer and accused of making a right turn from a left turn lane. Transcript of Hearing (Tr.) at 68 and 69. The individual testified that there was no kind of arrow or signage on the road to indicate that a right turn was prohibited. *Id.* After the individual was stopped, the police officer asked him if he had anything to drink and the individual's response was "no." *Id.* at 69. The individual testified that the police officer asked him to perform field sobriety tests which

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.

⁴ The individual disputes his July 2015 DUI and asserts that he was under the influence of alcohol at the time of the incident.

he performed, but after feeling vulnerable based upon the officer's questions and demeanor, the individual refused to submit to a breathalyzer test. *Id.* at 72. The individual acknowledged that his refusal to take a breathalyzer test may have been a poor decision and may have shown a lack of maturity. *Id.* at 71. He testified that he believed the officer was accusing him of something that he did not do. *Id.* at 72. The individual testified that he was then taken to jail and was not asked to submit to a breathalyzer test again. Because of the individual's previous DUI charges, the individual was required to have an Interlock device installed on his car. The individual testified that, after a plea, his DUI charge was reduced to a Careless Driving offense. *Id.* at 76; Exh. B. He stated that while in jail he was placed in a Soberlink program which required him to "blow" into a device five times a day to monitor his alcohol use. According to the individual, he remained in this program for two months after his release. *Id.* at 77. The individual maintains that he has not consumed any alcohol since the night before his arrest. *Id.* at 79. He testified that upon his release from jail, he voluntarily sought the advice of an alcohol counselor in the Employee Assistance Program (EAP) and has met with him weekly since that time. The individual further testified that he has also attended individual therapy with another alcohol counselor on three occasions. *Id.* at 88. Finally, the individual maintains that he has abstained from alcohol since July 2015 and has focused on maintaining a healthy lifestyle. *Id.* at 84. When asked about his future intentions regarding his total abstinence from alcohol, the individual testified that he will take it "day by day" and follow the guidance of his alcohol counselors. He reiterated that his lifestyle and future goals do not involve alcohol. *Id.* at 93.

During the hearing, the individual also offered the testimony of his EAP alcohol counselor, two managers and a friend. The EAP counselor testified that the individual consulted with him after his July 2015 DUI, and that he reported to him that he had not consumed alcohol on the day of his arrest. He testified that the individual has been consistent in his reporting about the DUI. *Id.* at 11. The EAP counselor noted that the individual disputed the DUI charge and that the charge has been dropped to a lesser offense of Careless Driving. According to the EAP counselor, the individual has discussed his past drinking habits with him, consuming periodically two drinks with meals, and testified that the individual appears to have his alcohol consumption under control. The EAP counselor has met with the individual for 14 sessions and believes the individual has been compliant with his recommendations regarding his alcohol consumption. *Id.* at 15. He testified that he reviewed the DOE psychologist's report and agrees with the diagnosis of Alcohol Abuse. However, he believes the individual has matured a lot and is headed in the right direction. The EAP counselor stated that he is satisfied that the individual has not been drinking since July. *Id.* at 23. Both of the individual's supervisors testified that the individual is honest and reliable and that they have never seen any indication on the job that the individual has an alcohol problem. *Id.* at 38 and 54. In addition, the individual's friend who has known the individual for eight years testified that the individual is reliable and trustworthy. *Id.* at 48.

The DOE psychologist listened to all the testimony at the hearing before testifying himself. He testified that he met with the individual twice, but last evaluated him on October 22, 2015 and concluded that he is suffering from Alcohol Abuse. *Id.* at 121. The DOE psychologist testified that he asked the individual to submit to a Gamma-Glutamyltransferase Test (GGT) as part of his evaluation. He noted that this test determines whether the individual is likely to be a frequent heavy user of alcohol. According to the DOE psychologist, the individual's test results showed an elevated level of the GGT liver enzyme at 113 international units per liter (IU/L) with a normal range of 0 to 65 IU/L. The DOE psychologist testified that this test provided strong evidence that

the individual had been drinking heavily, and had been drinking far more than he was reporting. *Id.* at 107; Exh. 5. Although he acknowledged that there are several conditions that can raise a person's GGT value, he testified the individual does not have any of those conditions. He also dismissed the individual's use of supplements as contributing to the individual's elevated GGT value.⁵ The DOE psychologist testified that the individual is in denial regarding his alcohol consumption and noted that the individual has not followed the recommendations he suggested in his report. He specifically noted that the individual has not participated in an intensive outpatient alcohol treatment program and has not yet participated in a group process such as Alcoholics Anonymous (AA). *Id.* at 113. The DOE psychologist further testified that, although the individual is consulting with two alcohol counselors, there is no objective evidence that the individual has not been drinking. *Id.* at 114. He stated that he has questions about the individual's truthfulness regarding his alcohol consumption and indicated that the only objective evidence in the record still remains the individual's GGT value which suggests that he has likely been drinking. *Id.* Finally, the DOE psychologist testified that the individual has not yet established adequate evidence of rehabilitation and opined that the individual should abstain from alcohol for one year. *Id.* at 115. He further suggested that the individual should undergo random testing to monitor his drinking. *Id.* at 116.

b. Administrative Judge's Evaluation of the Evidence

In the administrative process, Administrative Judges accord deference to the expert opinion of psychiatrists, psychologists and other mental health professionals regarding rehabilitation and reformation. *See Personnel Security Hearing, Case No. TSO-0728 (2009)*.⁶ At the outset, I am persuaded by the testimony of the DOE psychologist that the individual has not yet achieved adequate evidence of rehabilitation. Moreover, the Adjudicative Guidelines describe factors that could mitigate security concerns involving psychological conditions and alcohol consumption. *See Adjudicative Guideline, Guidelines G and I, ¶ 23 and ¶ 29, respectively.* In this case, the individual has not satisfied the following mitigating factors: (1) the individual has not readily acknowledged his alcohol problem, and has not yet established a pattern of responsible use; (2) the individual has not successfully completed an inpatient or outpatient alcohol program, nor has he demonstrated a clear and established pattern of abstinence in accordance with his treatment recommendations, i.e., he has not participated in recovery meetings such as AA or a similar organization, and has not received a favorable prognosis by a duly qualified medical professional; and (3) the DOE psychologist has not opined that the individual's condition has a low probability of recurrence. *Id.* For these reasons, I find that the individual has not sufficiently resolved the DOE's security concerns under Criteria H and J.

2. Criterion L: Criminal Conduct

⁵ A DOE consultant psychiatrist testified that the DOE psychologist submitted the individual's GGT test to him and he confirmed that the individual's value was 113. *Id.* at 98. He testified that, in the absence of any physical causes, this elevated GGT value suggests that the individual was using significant amounts of alcohol. *Id.* He also testified that there are no real studies that indicate that supplements such as Creatine elevate GGT levels. *Id.* at 99.

⁶ Decisions issued by OHA 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>.

The DOE's concerns under Criterion L relate to the individual's criminal conduct, including his 2007 DUI and his 2007 citation for Minor in Possession of Alcohol, his 2010 DUI, his 2012 arrest and charge with Battery Against a Household member and his most recent July 2015 DUI arrest and charge.

Among the factors which could serve to mitigate the security concerns raised by the individual's criminal conduct are (1) so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment; (2) the person was pressured or coerced into committing the act and those pressures are no longer present in the person's life; (3) evidence that the person did not commit the offense; and (4) there is evidence of successful rehabilitation; including but not limited to the passage of time without recurrence of criminal activity, remorse or restitution, job training or higher education, good employment record, or constructive community involvement. Adjudicative Guideline J at ¶ 32 (a)-(d). None of these mitigating factors apply in this case. Although the individual's 2007, 2010 and 2012 alcohol-related incidents occurred a number of years ago, his July 2015 DUI was recent and there has not been a sufficient passage of time since the criminal behavior occurred. In addition, the individual has not yet established evidence of successful rehabilitation as there has not been a sufficient amount of time without recurrence of criminal activity. Moreover, based on my conclusion that the individual's use of alcohol continues to be a security concern, I correspondingly find that the Criterion L security concern with the individual's reliability remains unresolved. After considering the "whole person," I am not yet convinced that the DOE can rely on the individual's ability to make sound judgment calls regarding the safeguarding of classified information. *See* Adjudicative Guidelines at (2)a. I therefore find that the individual has not sufficiently resolved the LSO's concerns under Criterion L.

VI. Conclusion

In the above analysis, I have found that there was sufficient derogatory information in the possession of the DOE that raised serious security concerns under Criteria H, J and 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 find that the individual has not brought forth convincing evidence to adequately resolve the security concerns associated with Criteria H, J and L. I therefore cannot find that restoring the individual's access authorization would not endanger the common defense and security and would be consistent with the national interest. Accordingly, I find 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.

Kimberly Jenkins-Chapman
Administrative Judge
Officer of Hearings and Appeals

Date: May 19, 2016