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August 12, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Hearing Officer's Decision

Name of Case: Personnel Security Hearing

Date of Filing: March 31, 2005

Case Number: TSO-0218

This Decision concerns the eligibility of XXXXXXXXXXXXXXXX (hereinafter "the individual") to hold an access authorization.¹ The regulations governing the individual's eligibility 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." This Decision will consider whether, based on the testimony and other evidence presented in this proceeding, the individual should be granted a security clearance. As discussed below, I find that access authorization should be granted in this case.

I. BACKGROUND

This administrative review proceeding began with the issuance of a Notification Letter by a Department of Energy (DOE) Office, informing the individual that information in the possession of the DOE created substantial doubt pertaining to his eligibility for an access authorization in connection with his work. In accordance with 10 C.F.R. § 710.21, the Notification Letter included a statement of the derogatory information causing the security concern.

The security concern cited in the letter involves the individual's excessive use of alcohol. According to the letter, a DOE consultant psychiatrist diagnosed the individual as alcohol

1/ An access authorization (or 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.

dependent, in early remission, without adequate evidence of rehabilitation or reformation. His diagnosis was based on an August 3, 2004 evaluation and documented in an August 5, 2004 report to the DOE. In the report, the DOE consultant psychiatrist recommended that in order to demonstrate rehabilitation from alcohol dependence, the individual should complete two years of sobriety and treatment. The consultant psychiatrist stated that ongoing participation in Alcoholics Anonymous would be satisfactory treatment, but he recommended that the individual participate in at least two meetings per week through March 2005. The report stated that the individual claimed abstinence from alcohol since January 2003 and began an alcohol treatment program in March 2003. Therefore, as of the time of the evaluation, the individual had not completed the two years of rehabilitation and abstinence that the consultant psychiatrist believed were necessary.

In his report, the consultant psychiatrist raised a further concern. He noted that the individual had an abnormally elevated Gamma GT liver enzyme level. Specifically, the individual's level was 59 units of gamma-glutamyltransferase (Gamma GT or GGT), whereas the normal reference is 5-40 units. The DOE consultant psychiatrist pointed out that excessive alcohol use is the most common cause of abnormal Gamma GT elevation and that the individual was negative for the next most common causes: infectious hepatitis, liver-damaging medications, obesity or symptomatic acute medical illnesses. In the report, he stated that "abnormally elevated Gamma GT levels generally return to normal a few days to a few weeks after sobriety is begun. Given his past history of documented episodes of excessive drinking, the most likely cause for his laboratory test results is excessive drinking. His laboratory test results raise the suggestion-but do not prove-that he currently is consuming alcohol excessively enough to cause liver damage." He further pointed out that at "least 70 percent of individuals with a high GGT level are persistent heavy drinkers-i.e. consuming eight or more drinks daily on a regular basis." Given the elevated GGT levels, the DOE consultant psychiatrist stated that the elevated GGT levels "cast some doubt on [the individual's] claims of recent sobriety."

According to the Notification Letter, the matters raised in the consultant psychiatrist's report represent a concern under 10 C.F.R. § 710.8(j) (Criterion J), which relates to alcohol abuse, dependence or habitual use to excess.

The letter also referred to a number of occasions during the past 10 years in which the individual was involved in alcohol-related

arrests in connection with driving. The letter specifically referred to the most recent DWI, which took place in December 2002, as well as other DWIs in the 1990s and 1980s. The letter also noted several incidents involving marijuana possession. For example, the letter cited an instance in 2001, in which the individual tested positive for marijuana in a random drug screen conducted by a former employer.² In addition, the letter noted that the individual admitted being terminated from employment on two occasions in connection with testing positive for marijuana and alcohol. The letter also noted that in the 1970s the individual served prison time for burglary. According to the letter, these events represent a concern under 10 C.F.R. § 710.8(1)(Criterion L), which pertains to reliability.

The Notification Letter informed the individual that he was entitled to a hearing before a Hearing Officer in order to respond to the information contained in that letter. The individual requested a hearing, and that request was forwarded by the DOE Office to the Office of Hearings and Appeals (OHA). I was appointed the Hearing Officer in this matter. In accordance with 10 C.F.R. § 710.25(e) and (g), the hearing was convened.

At the hearing, the individual testified on his own behalf, and presented the testimony of his brother, two co-workers, his AA sponsor, his personal physician, and a counselor from his alcohol therapy program. The DOE Counsel presented the testimony of the DOE consultant psychiatrist.

II. Hearing Testimony

The individual does not dispute the diagnosis of the DOE consultant psychiatrist. Accordingly, the testimony focused on the steps the individual has taken to resolve the DOE's concerns about his alcohol use and his reliability. The following is a summary of the witnesses' testimony.

A. The Individual

The individual readily admitted that he had a problem in the past with excessive alcohol use. He stated that he is an alcoholic, but has no intention to use alcohol in the future. Transcript of Hearing (hereinafter Tr.) at 67-69. He has changed his activities

²/ The individual was terminated from his position for this infraction.

from alcohol-centered to family-centered, and drinks sodas and iced tea instead of alcohol. Tr. at 74-75.

He testified that his last use of alcohol was on January 10, 2003. He further stated that from March through December 2003, he attended and successfully completed an alcohol treatment program, associated with his 2002 DWI (DWI treatment program). See Individual's Hearing Exhibit A. Tr. at 80. During that period he began attending AA. He continues to attend AA meetings and "alumni" meetings of the DWI treatment program. He also views his family as part of his support system. Tr. at 76. He stated that he is devoted to his family, which helps him remain abstinent. Tr. at 82-83. His intent for the future is to stay sober. Tr. at 85. He indicated that his "next DWI is prison time, and I want to be able to wake up out here. . . go to work. . . go to school, to a movie. . . ." Tr. at 86.

B. AA Sponsor

The AA sponsor stated that he met the individual during the DWI treatment program. The AA sponsor ran the treatment program, as well as a local AA meeting. He testified that the individual completed the DWI program and he also became the individual's AA sponsor during the time of the DWI program. He stated that the individual has been participating in AA for more than two years. At the beginning, he saw the individual about three times a week, and now sees him about twice a week at AA meetings. He stated that the individual is a serious and involved participant at the meetings, and is dedicated to helping others. He testified that the individual has on his own run the meetings, which are attended by 45-50 people.

The witness stated that he has sponsored 20 people and believes that he has the experience to know if they have resumed alcohol use. According to the sponsor, one indication of resumed use is that an AA participant will cease coming to meetings, and cease calling the sponsor. The sponsor stated that the individual has never ceased coming to meetings, except on a few occasions, when he called to alert the sponsor that he would be out of town and unable to attend. He believes that the individual has genuinely changed his life around. Tr. at 10-22.

C. Alcohol Counselor

This witness was the alcohol counselor associated with the individual's DWI treatment program. He stated that the individual

began attendance some time in early 2003 and graduated in December 2003. He described the program as an intensive outpatient program with two group counseling sessions per week. The witness stated that the individual worked hard in his 12-step (AA) program and was good at sharing his insights. He also indicated that the individual is part of an alumni group of the DWI treatment program, and he has therefore had ongoing contact with the individual even after his formal DWI program ended in December 2003. Tr. at 56-61. He stated that the program included multiple urinalyses and breath tests for alcohol and drugs. He stated that the individual never failed an alcohol or drug test. He stated that the chance that the individual used drugs or alcohol during the nine-month testing period is remote. He indicated that the individual's elevated GGT levels might have been caused by an alcohol-related liver condition that did not self-correct, even with the individual's abstinence. Overall, he did not believe that the individual had broken his abstinence dating from January 2003. Tr. at 60, 63-65.

D. Individual's Brother

The individual's brother testified that the last time the individual used alcohol was shortly after his last DWI in December 2002. He stated that since the individual gave up alcohol his pattern of life has changed. During the time that the individual was drinking, he would isolate himself from his family and they would not see him for weeks, or even months, at a time. According to the brother, he now sees the individual daily, and the individual is a regular part of family life. The individual is available on the spot to participate in family events, and care for their mother. He is very close to his children, grandchild and nephews. Tr. at 39-49.

E. Co-Workers

The individual brought forward two co-workers who have known him since 2002, or for about three years. They associate with him at work, but not socially. Co-worker I indicated that the individual never had any alcohol use problems on the job and that he was very reliable. Co-worker II stated that he knew the individual had used alcohol in the past but believed he had stopped drinking in the past several years. He was aware that the individual is involved with AA. He has traveled with the individual and has seen him in situations in which others were using alcohol, but has not seen the individual ever use alcohol. Tr at 26-36.

F. Individual's Physician

The individual's physician testified that shortly before the hearing, at the request of the individual, he performed several liver tests on the individual and tested the individual's GGT levels. He indicated that all of these tests were in the normal range. This was the first time he saw the individual, since the individual had just changed health plans. Therefore, this witness was not very familiar with the individual's overall health. While he did not know if the individual's previously elevated GGT levels were related to alcohol use, he did testify that the high levels could have been a "laboratory variance." Tr. at 72. He stated "sometimes if I were to repeat a blood test 10 different times, I can actually get . . . ten different answers." Id. He stated that while the elevated liver test could have been the result of alcohol use, "you could make the argument for other possible things as well." Tr. at 73.

G. DOE Consultant Psychiatrist

The DOE consultant psychiatrist reiterated his diagnosis that the individual was alcohol dependent. However, he believed that the individual had taken adequate steps towards rehabilitation. He was satisfied with the individual's alcohol treatment program and his participation in AA. He believed that the individual's AA sponsor was a very convincing witness with respect to the individual's rehabilitation efforts. Based on the testimony he had heard, he believed that the individual had been abstinent from alcohol since January 2003, as he claimed. After taking into consideration all the testimony at the hearing, the consultant psychiatrist believed that alcohol use was probably not the cause of the individual's 2004 elevated GGT level. ³ Tr. at 89-106.

III. Applicable Standards

A DOE administrative review proceeding under 10 C.F.R. Part 710 is not a criminal case, in which the burden is on the government to prove the defendant guilty beyond a reasonable doubt. In this type of case, we apply a different standard, which is designed to protect national security interests. A hearing is "for the purpose of affording the individual an opportunity of supporting his

^{3/} The consultant psychiatrist suggested, for example, that even normal fluctuations could have produced the elevated GGT level. Tr. at 100.

eligibility for access authorization." 10 C.F.R. § 710.21(b)(6). The burden is on the individual to come forward at the hearing with evidence to convince the DOE that granting or restoring his access authorization "would not endanger the common defense and security and would be clearly consistent with the national interest." 10 C.F.R. § 710.27(d).

This standard implies that there is a strong presumption against the granting or restoring of a security clearance. See Dep't of Navy v. Egan, 484 U.S. 518, 531 (1988) ("the clearly consistent with the interests of the national security test" for the granting of security clearances indicates "that security-clearance determinations should err, if they must, on the side of denials"); Dorfmont v. Brown, 913 F.2d 1399, 1403 (9th Cir. 1990)(strong presumption against the issuance of a security clearance). Consequently, it is necessary and appropriate to place the burden of persuasion on the individual in cases involving national security issues. Personnel Security Hearing (Case No. VSO-0002), 24 DOE ¶ 82,752 at 85,511 (1995).

Once a security concern has been found to exist, the individual has the burden of going forward with evidence to rebut, refute, explain, extenuate or mitigate the allegations. Personnel Security Hearing (VSO-0005), 24 DOE ¶ 82,753 (1995), aff'd, 25 DOE ¶ 83,013 (1995). See also 10 C.F.R. § 710.7(c).

IV. Analysis

A. Criterion J

As noted above, the individual does not dispute the DOE consultant psychiatrist's diagnosis that he suffered from alcohol dependence. The issue in this case is therefore whether the individual has demonstrated that he is reformed and/or rehabilitated from this condition. As discussed below, I find that the individual has met his burden to mitigate the concerns regarding his alcohol dependence.

As an initial matter, I am convinced that, as he contends, the individual has been abstinent from alcohol since January 2003. The individual's AA sponsor and his brother, both of whom see him regularly, corroborated his testimony on this point. I found these two witnesses, in particular, to be highly credible. The individual's other witnesses, who saw him less often, also supported his abstinence claim.

I am therefore also convinced that his elevated GGT liver enzyme levels were not caused by use of alcohol at the time of his

psychiatric evaluation in August 2004. I do not believe that I must pinpoint the actual cause of the elevated GGT level. Suffice it to say that the record provides adequate information from which I can conclude that there are other probable causes for the elevated test levels besides alcohol use. *E.g.*, Tr. at 63 [liver problems associated with alcohol use that did not quickly self-correct], 72 [laboratory variance; Tylenol use], 97 [acetaminophen use; minor infection; exposure to toxins], 100 [high base-line GGT level].

In this regard, I note the testimony of the alcohol counselor who testified that the chance was very remote that the individual used alcohol during the March through December 2003 period, when he was in the DWI treatment program and undergoing regular testing. Tr. at 65. I find it very unlikely that the individual would have resumed alcohol use immediately thereafter at high enough levels so as to produce the elevated GGT results in August 2004. Tr. at 100 [at least 20 drinks per week or three drinks per day would be necessary]. The DOE consultant psychiatrist agreed that such behavior seemed psychologically improbable. Tr. at 99-100. Further, I think it unlikely that the individual could have resumed regular use of alcohol that would have been undetected by his AA sponsor and in the alumni group. Tr. at 101. Accordingly, I am convinced that as of the time of the hearing, the individual had been abstinent from alcohol for approximately 29 months. This was more than the two years of abstinence recommended by the DOE psychiatrist.

Furthermore, I am convinced that the individual has completed a sufficient rehabilitation program. As noted above, this included a nine-month DWI treatment program, with ongoing, active participation in the alumni group. Further, the individual has continued participation in AA for more than two years. The DOE consultant psychiatrist believed that this program was adequate and that the individual was rehabilitated. Tr. at 103. For these reasons, I am persuaded that he has resolved the Criterion J security concerns related to his use of alcohol.

B. Criterion L

The Notification Letter also raised Criterion L concerns regarding the individual's reliability. These concerns were in large part related to his arrests for DWI. As discussed above, the individual has resolved the Criterion J concerns regarding his alcohol use. I therefore believe that the associated reliability concerns are also resolved.

However, the notification letter also mentioned as a reliability concern the individual's possession of marijuana in 1975, and his positive test for marijuana in a 2001 drug screen performed by another (non DOE-related) employer. I believe that the individual's use of marijuana is now well in the past, and that he does not intend to use illegal drugs in the future. Tr. at 77-78. His witnesses confirmed that he does not use marijuana. Tr. at 14, 31, 36, 44-45. The DOE consultant psychiatrist testified that he did not believe marijuana use is a problem for this individual. Tr. at 103.⁴ See also Tr. at 7. I am therefore persuaded that the individual has resolved the Criterion L reliability concerns expressed in the notification letter.

V. CONCLUSION

The individual has fulfilled the key elements necessary for demonstrating rehabilitation in this case. He has remained abstinent for more than two years. He has completed an alcohol therapy program, and is committed to maintaining his connection with the program, as well as with AA. Moreover, the individual has a strong motivation to stay sober in the future: he is deeply committed to his family, and is proud of his job. I also believe that he is aware that any alcohol use in the future would have serious adverse effects on the quality of his life.

As the foregoing indicates, I am persuaded that the individual has resolved the Criteria J and L security concerns cited in the Notification Letter. It is therefore my decision that access authorization should be granted.

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

Virginia A. Lipton
Hearing Officer
Office of Hearings and Appeals

Date: August 12, 2005

^{4/} The notification letter also mentioned that the individual committed several burglaries, and spent time in prison in connection with a 1972 burglary of a high school. This took place when the individual was still a teenager. These events are now well in the past and deserve no further consideration.