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October 17, 2007

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Hearing Officer's Decision

Name of Case: Personnel Security Hearing

Date of Filing: May 15, 2007

Case Number: TSO-0497

This Decision concerns the eligibility of XXXXXXXXXXXX (the Individual) to possess an access authorization under the Department of Energy (DOE) regulations entitled "Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material."^{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.^{2/} In the present case, the Individual's access authorization was denied by DOE following its receipt of certain derogatory information. After reviewing the evidence before me, I find the Individual's access authorization should not be granted.

I. Background

In 1995, the Individual was charged with Burglary and a Larceny/Firearms violation. In 1997, the Individual was arrested and charged with Battery Against a Household Member. In 1998 and 1999, the Individual was charged with Driving While Intoxicated (DWI). After completing his Questionnaire for National Security Positions (QNSP) on September 22, 2005, the Individual was interviewed by the Local Security Office (LSO). While completing his QNSP, the Individual failed to list the 1997 Battery Against a Household Member. In addition, the Individual gave apparently conflicting statements regarding his alcohol use prior to the 1997 incident during the PSI and during his interview with the DOE Consulting Psychiatrist, to which he was referred by the LSO in November 2006. The DOE Consulting

^{1/} 10 C.F.R. Part 710.

^{2/} 10 C.F.R. § 710.5(a).

Psychiatrist interviewed the Individual and reviewed the Individual's Personnel Security File.^{3/} In his November 16, 2006 report, he diagnosed the Individual with alcohol abuse.^{4/}

On March 20, 2007, the LSO issued a Notification Letter to the Individual, indicating the information described above created a substantial doubt as to the Individual's eligibility for an access authorization under Criteria J^{5/} and L.^{6/} 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."^{7/} Criterion L refers to information indicating that the Individual has "engaged in any unusual conduct or is subject to any circumstances which tend to show that the individual is not honest, reliable, or trustworthy."^{8/}

Upon receipt of the Notification Letter, the Individual requested a hearing. The OHA Acting Director appointed me as the Hearing Officer in this case.^{9/} I convened a hearing in this matter.^{10/}

At the hearing, the Individual represented himself. He offered his own testimony and the testimony of his co-habitant, a co-worker, and his foster mother.^{11/} The LSO presented one witness, the DOE Consulting Psychiatrist. The LSO entered 8 exhibits into the record.

^{3/} DOE Ex. 8.

^{4/} *Id.* at 29.

^{5/} *Id.* at § 710.8(j).

^{6/} *Id.* at § 710.8(l).

^{7/} *Id.* at § 710.8(j).

^{8/} *Id.* at § 710.8(l).

^{9/} 10 C.F.R. § 710.25(a), (b).

^{10/} 10 C.F.R. § 710.25(g).

^{11/} The witness was not the Individual's formal foster mother, however, the Individual lived with the witness for six or seven years from the time he was 19 years old.

II. The Hearing

A. The Individual

The Individual testified about his misuse of alcohol. He testified that he has abused alcohol and, three weeks prior to the hearing, he consumed alcohol to excess. Tr. at 44.

With regard to the incorrect information on his QNSP, the Individual testified that he did not read the question on the QNSP correctly when he failed to list his arrest for Battery Against a Household Member. The Individual explained that although he was arrested in 1997, the charges were dismissed. Tr. at 40. He testified that, because the charges were baseless and quickly dismissed, he did not realize he needed to list the arrest on the QNSP. Tr. at 25.

The Individual testified about the concern raised in the Notification Letter as to his purportedly discrepant statements in the August 3, 2006 PSI and to the DOE Consulting Psychiatrist regarding whether alcohol was involved in his 1997 battery arrest. The Individual testified that

Q. during the PSI you say you didn't consume alcohol prior to the arrest?

A. No, in the PSI it asked if it was involved. The question was, was alcohol involved, and my answer was no.

Q. Okay.

A. And then Dr. Ulwelling asked me if I had consumed alcohol before this incident, and I said yes. So I think that's the issue. I'm saying alcohol wasn't involved, but I'm not denying that I did consume alcohol before.

Q. So you weren't lying to the PSI?

A. No.

Tr. at 40-41.

Finally, the Individual testified that the two DWIs he received in 1998 and 1999 did violate his probation for a felony larceny/firearms offense. Tr. at 42. He testified that he was not taking his probation seriously and he believes his behavior was based on his immaturity. Tr. at 41.

B. His "Foster" Mother

The "foster" mother and the Individual are currently good friends. Tr. at 8. The Individual began living with her family in 1995 when he was 19 years old. Tr. at 8, 10. She stated that he stayed with them for six or seven years. Tr. at 8. The altercation leading to the Individual's 1995 arrest for Battery Against a Household Member was started by her son. Tr. at 9-10. The Individual became involved because he was protecting her from her son. Tr. at 10. Although she and the Individual had consumed alcohol prior to the incident, it was not a cause of the incident. Tr. at 11-12. She stated that in 1995, the Individual probably drank more alcoholic beverages than he should, but she has not seen him intoxicated in the last six years. Tr. at 12.

The "foster" mother testified that in December 1995 the Individual found a firearm where he was working and brought it home. Tr. at 20. Subsequently, the police asked him about the firearm. Tr. at 20. He returned home and told his "foster" mother that he was going to take it back. Tr. at 20. She testified he told her he did not know why he took it. Tr. at 20. She also testified that he did not do anything improper with the firearm. Tr. at 20.

She stated that she has been involved in some security issues and believes that the Individual is mature enough and trustworthy enough to keep information to himself. Tr. at 13-15. She testified that he understands security and the mission of the DOE. Tr. at 15.

The "foster" mother testified that the Individual is very honest. Tr. at 16. He once broke a window in the family car. He could have lied about it, but he owned up to breaking the window. Tr. at 16. He always told the truth. Tr. at 16. She never regretted allowing the Individual to live with her family. Tr. at 17.

C. His Co-Habitant

The Individual's Co-Habitant testified that she has known the Individual for 10 years. Tr. at 22. They have been dating for one year and have lived together for three and one half months. Tr. at 22. The Co-Habitant testified that the Individual consumes alcohol. Tr. at 23. He has two beers a night, one before and one after dinner. Tr. at 24. She has seen the Individual intoxicated approximately five times in the last year. These five instances of intoxication occurred at either a bar or a softball game. Tr. at 24. She testified that he is completely honest and a more mature person than when she first met him in 1997. Tr. at 25.

D. His Supervisor

The Individual's Supervisor testified that the Individual has leadership skills and knows "how to get things done." Tr. at 81. The Individual's word is good. Tr. at 86. When he

says he will do something, it is done. The Individual has never lied to him. Tr. at 86. The Supervisor testified that when he is unavailable, he will often leave the Individual in charge. Tr. at 87.

He testified that he has seen the Individual consume alcohol and has probably seen him intoxicated. Tr. at 83. He testified that he believes he has seen him hung-over at work as evidenced by bloodshot eyes, however, the Individual's work was not affected. Tr. at 88.

E. The DOE Consulting Psychiatrist

At the hearing, the DOE Consulting Psychiatrist confirmed his diagnosis of alcohol abuse. Tr. at 52. He testified that he agreed with the Individual that there were two weaknesses in his diagnosis. However, he testified that those weaknesses were offset by other factors in the Individual's past. Tr. at 51. The first weakness was that, if you believe the Individual and his "foster" mother, the arrest involving the family members was not alcohol-related. Tr. at 51-52. However, the DOE Consulting Psychiatrist testified that there were at least three other alcohol-related incidents in the Individual's record and that he would only need two incidents to support his diagnosis of alcohol abuse. Tr. at 52-53.

The second weakness in his diagnosis is that the last incident occurred in 1999, eight years prior to the hearing. Tr. at 53. The DOE Consulting Psychiatrist testified

And that's the second point that he brought up that I thought was an iffy or difficult area in the conclusion in my report, that it's so long ago. You could argue, good heavens, that the last episode being eight years ago, why would you say that there is a problem, and why would it be an issue today? The things that concerned me and made me think it was an active problem were a couple of things, basically. Well, maybe even before going into those two I should point out that he had a history of very severe alcohol-related problems, and serious neglect of taking responsibility for his problems, and kind of ignoring sanctions that were put on him.

Tr. at 53-54. Furthermore, the DOE Consulting Psychiatrist testified that the Individual had been diagnosed previously with alcohol dependence. Tr. at 54. In addition, the Individual showed an increase in tolerance for drinking alcoholic beverages. Tr. at 55. After listening to all of the testimony, the DOE Consulting Psychiatrist still believes his diagnosis of alcohol abuse is accurate.

The DOE Consulting Psychiatrist testified about two of the Individual's current behaviors that concern him and further support his diagnosis of alcohol abuse. Tr. at 57. First is the Individual's past assurances that he would stop drinking to excess. DOE Ex. 5 at 162; DOE

Ex. 3 at 14. During his PSI, the Individual stated that he has stopped drinking to excess. DOE Ex. 5 at 162. Then, during his interview with the DOE Consulting Psychiatrist, the Individual stated that he consumed alcohol in moderation and controlled his consumption. Tr. at 58; DOE Ex. 3 at 14. However, testimony at the hearing contradicted those statements. His Co-Habitant testified at the hearing that the Individual currently gets intoxicated five or six times a year. Tr. at 58. The Individual testified he was publicly intoxicated only three weeks prior to the hearing. Tr. at 44. The DOE Consulting Psychiatrist testified that the contradiction between the Individual's current behavior and his previous assurances that he would not consume alcohol in excess support his alcohol abuse diagnosis. Tr. at 58.

Next, the DOE Consulting Psychiatrist testified that the Individual's liver enzyme levels were elevated at the time of their interview. Tr. at 58. The elevated liver enzyme level indicates that the Individual was drinking excessively enough to damage his liver and "most likely indicates that his past severe alcohol abuse problem continues to the present." DOE Ex. 3 at 14; Tr. at 60.

The DOE Consulting Psychiatrist concluded that the fact that the Individual has not had a serious alcohol-related incident within the last eight years is a positive indicator for his future alcohol consumption. Tr. at 74. Conversely, the Individual had been told that he should cease consuming alcohol for at least one year and has failed to take that advice. Tr. at 74. The DOE Consulting Psychiatrist testified that the Individual's admission that he had been intoxicated in public three weeks prior to the hearing is evidence that the Individual is a high risk for having serious alcohol-related problems. Tr. at 77.

III. Standard of Review

Under Part 710, DOE may suspend an individual's access authorization where "information is received that raises a question concerning an individual's continued access authorization eligibility."^{12/} After a question concerning an individual's eligibility for an access authorization has been properly raised, the burden shifts to the individual who must come forward with convincing factual evidence that "the grant or restoration of access authorization to the individual would not endanger the common defense and security and would be clearly consistent with the national interest." See 10 C.F.R. § 710.27(a).

In considering the question of the Individual's eligibility for access authorization, I have been guided by the applicable factors prescribed in the regulations: 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

^{12/} 10 C.F.R. § 710.10(a).

maturity of the Individual at the time of the conduct; the voluntariness of the 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 continuance or recurrence; and other relevant and material factors. 10 C.F.R. § 710.7(c). After consideration of all the relevant information in the record, I conclude that a significant security concern was raised by the derogatory information. Consequently, it is my decision that the Individual's access authorization should not be restored.

IV. Findings and Conclusions

A. Criterion J

My review of the testimony presented in this case, as well as the other evidence contained in the record, leads me to find that the Individual has an alcohol problem that raises a security concern. After a question concerning an individual's eligibility for an access authorization has been properly raised, the burden shifts to the individual who must come forward with convincing factual evidence that "the grant or restoration of access authorization to the individual would not endanger the common defense and security and would be clearly consistent with the national interest." See 10 C.F.R. § 710.27(a).

The DOE Consulting Psychiatrist's testimony that the Individual is a high risk for a serious alcohol-related problem was very convincing. In his report and during his testimony, he stated that the Individual should be abstinent for one year in order to show rehabilitation or reformation. This has not occurred. The Individual's own evidence regarding his alcohol use indicates he continues to consume alcohol to excess. The Individual admitted he had been intoxicated three weeks prior to the hearing. The Individual's Co-Habitant testified that he still consumes alcohol and he still gets intoxicated. Consequently, I find that the concern raised by the DOE Consulting Psychiatrist's diagnosis of alcohol abuse has not been mitigated by the evidence provided by the Individual.

B. Criterion L

Under Criterion L, the derogatory information consists of information that the individual has "engaged in any unusual conduct or is subject to any circumstances which tend to show that the individual is not honest, reliable, or trustworthy." 10 C.F.R. § 710.8(l). In this case, the LSO is challenging the Individual's trustworthiness. The LSO relied on four incidents: first, a felony Larceny/Firearms charge in 1995; second, the Individual failed to list his 1997 arrest for Battery Against a Household Member on the QNSP; third, the Individual's conflicting statements during the PSI and to the DOE Consulting Psychiatrist regarding his alcohol consumption prior to that arrest; and finally, the Individual's two violations of probation relating to the Larceny/Firearms charge.

Initially, I find that the Individual has explained his failure to list the arrest on the QNSP. Because the charges were quickly dismissed and he was acting in self-defense at the time, I am persuaded that he did not realize the arrest needed to be listed on the QNSP.

Q. Okay. And, um, why wasn't this incident brought up before?

A. I probably didn't think of it, um, would be my best answer. Um, nothing happened of it. It kind of went out of my mind.

* * *

A. Mm, I do remember it happening, I wasn't trying to hide anything. Um, but since nothing happened of it, I just didn't think of, of reporting it, 'cause it wasn't there, I mean some of the stuff I knew needed to be in this, 'cause kinda on the back I guess, I just didn't think of it, sorry.

DOE Ex. 5 at 186. I find the Individual's explanations for the incident and his misrepresentation to be credible and persuasive. He did not appear to be hiding any information in his background as he credibly and calmly discussed the incident during his testimony. I am convinced by the testimony that the Individual now fully understands that he should err on the side of full disclosure. It is important to note that the Individual did acknowledge on the QNSP four arrests: a 1995 Larceny/Firearms charge, a 1995 Burglary charge, a 1998 DWI, and a 1999 DWI. DOE Ex. 6 at 7. He omitted from his QNSP only the 1997 Battery Against a Household Member, which had been dismissed. In exercising my common-sense judgment based on the testimony and evidence in the record, I do not believe the Individual intended to misrepresent anything on his QNSP. *Personnel Security Hearing*, Case No. TSO-0262, 29 DOE ¶ 82,916 (2006).

Secondly, I find that the Individual has explained the discrepancy between his statement during the PSI and to the DOE Consulting Psychiatrist. He indicated that during the PSI, he was asked whether "alcohol or any illegal drugs [were] involved." DOE Ex. 5 at 186. He responded negatively. During his interview with the DOE Consulting Psychiatrist, he offered that he had "had a couple of drinks" prior to the incident, but it did not affect what had occurred. DOE Ex. 3 at 3. His "foster" mother confirms that although he had consumed one or two beers prior to the incident, alcohol was not a factor and did not contribute to his arrest. Tr. at 11-12. I find that the Individual has satisfactorily explained this discrepancy.

The remaining two incidents cited by the LSO under Criterion L happened many years ago. The Larceny/Firearms charge happened in 1995 and the violations of his probation occurred in 1998 and 1999. There are no similar incidents in the Individual's record since that time. The Individual was less than 20 years old when the first incident occurred. The last incident occurred over eight years ago and the testimony at the hearing indicated that

he has matured significantly since that time. Therefore, I find that he has also mitigated the Criterion L concern with regard to these matters.

V. Conclusion

Upon consideration of the record in this case, I find that Criterion J security concern regarding the Individual's eligibility for a security clearance has not been mitigated. The Criterion L concern has been mitigated. Therefore, I must conclude that the Individual has not shown that restoring his access authorization would not endanger the common defense and security, and granting his access authorization would be inconsistent with the national interest. 10 C.F.R. § 710.27(a). Consequently, it is my decision that the Individual's access authorization should not be restored. The Individual may seek review of this decision by an Appeal Panel. 10 C.F.R. § 710.28(b)-(e).

Janet R. H. Fishman
Hearing Officer
Office of Hearings and Appeals

Date: October 17, 2007