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DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Hearing Officer's Decision

Name of Case: Personnel Security Hearing

Date of Filing: April 2, 2002

Case Number: TSO-0028

This Decision concerns whether XXXXXXXXXXXX ("the Individual") is eligible for access authorization. As explained below, I have concluded that the Individual has not demonstrated his eligibility for access authorization.

I. The Applicable Regulations

The Department of Energy (DOE) regulations governing this matter are set forth at 10 C.F.R. Part 710. Those regulations describe the criteria and procedures for determining eligibility for access to classified matter or special nuclear material, i.e., "access authorization" or a "security clearance."

An individual is eligible for access authorization if such authorization "would not endanger the common defense and security and would be clearly consistent with the national interest." 10 C.F.R. § 710.7(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"); *Dorfmont v. Brown*, 913 F.2d 1399, 1403 (9th Cir. 1990) (strong presumption against the issuance of a security clearance). Thus, the standard for eligibility for a clearance differs from the standard applicable to criminal proceedings in which the prosecutor has the burden of proof.

Derogatory information is information that raises doubt whether an individual is eligible for a clearance. 10 C.F.R. § 710.8. Derogatory information includes, but is not limited to, the

information specified in the regulations. *Id.* In considering derogatory information, the DOE considers various factors including the nature of the conduct at issue, the frequency or recency of the conduct, the absence or presence of reformation or rehabilitation, and the impact of the foregoing on the relevant security concerns. *Id.* § 710.7(c). The ultimate decision concerning eligibility is a comprehensive, common sense judgment based on a consideration of all relevant information, favorable and unfavorable. *Id.* § 710.7(a).

If a question concerning an individual's eligibility for a clearance cannot be resolved, the matter is referred to administrative review. 10 C.F.R. § 710.9. The individual has the option of obtaining a decision by the manager at the site based on the existing information or appearing before a hearing officer. *Id.* § 710.21(3). Again, the burden is on the individual to present testimony or evidence to demonstrate that he is eligible for access authorization, i.e., that access authorization "will not endanger the common defense and security and will be clearly consistent with the national interest." *Id.* § 710.27(a).

II. Background

Prior to his employment with the DOE, the Individual was arrested and convicted for driving under the influence of alcohol on two separate occasions. The first arrest occurred in December 1995; the second in January 1998. DOE Ex. 13.

The Individual listed the 1995 and 1998 DUI convictions on the security questionnaire that he completed in November 2000. DOE Ex. 13. During a July 2001 personnel security interview, a DOE security specialist discussed those convictions with the Individual and referred him to a DOE consulting psychiatrist. The psychiatrist interviewed the Individual and issued a September 2001 report. DOE Ex. 19. Based on the Individual's statements during the interview, the DOE psychiatrist characterized the Individual's alcohol consumption as "essentially light to moderate." *Id.* at 5. Noting that the December 1995 and January 1998 convictions were the only evidence of a possible maladaptive pattern of drinking, the DOE psychiatrist did not diagnose the Individual with an alcohol problem. *Id.* As a result, the Individual was granted a clearance.

On September 21, 2002, at approximately 1:30 A.M., the Individual was involved in an automobile accident. DOE Ex. 12. The local police arrived at the scene shortly thereafter. The Individual was charged with DUI and cited for refusal to take a blood alcohol level test. *Id.*

The police report describes the incident as follows. When the police arrived, the Individual was not in the car. The Individual told the police that he was "confused." The Individual acknowledged that the car belonged to him but denied driving the car or knowing who was driving the car. The Individual had a small cut on the side of his head, but refused medical treatment. The Individual identified himself as a police officer. The Individual "could not stand up without the help of the vehicle or poles on the sidewalk," "had a strong odor of alcohol emitting from both body and breath," "had bloodshot watery eyes," and speech which was "extremely slurred." The Individual reported consuming 3 beers and 2 Hennessys between 9:30 and 10:30 that evening. The Individual refused to perform field sobriety tests or to take a blood alcohol test, on the ground that he was not driving. On the issue of whether the Individual was driving, a witness identified the Individual as being in the car immediately after the accident. The witness, a resident, stated that he heard an accident, called 911, and then went outside to see if anyone was hurt. The witness stated that he saw the Individual lying across the front of the inside of the car with his back against the passenger door. The witness stated that the Individual was "just coming to" and "looked extremely dazed." The witness stated that the Individual stepped outside the car and, once the police arrived, the witness went inside. Based on the foregoing, the officer concluded that he had probable cause to believe that the Individual was driving under the influence of alcohol.

On October 2, 2002, a DOE security specialist interviewed the Individual. DOE Ex. 6. In the interview, the Individual stated that the accident occurred when another vehicle ran a stop sign and broadsided him. *Id.* at 7. As for the police description of his behavior, the Individual denied some of the behavior and attributed the rest to a head injury that he sustained during the accident. *Id.* at 7-8. Most significantly, the Individual denied that he was under the influence of alcohol, stating that he had one beer between 10:00 and 10:30 P.M., i.e., approximately 3 hours before the accident. *Id.* at 19-20. Nonetheless, he told the security specialist that he had decided to stop drinking. *Id.* at 55-57. After the interview, the DOE security specialist referred the Individual to the same DOE psychiatrist who had interviewed the Individual in 2001.

In October 2002, prior to the Individual's interview with the DOE psychiatrist, the police department dismissed the DUI charge. DOE Ex. 12. The dismissal letter stated that the dismissal did not apply to the pending citation for refusing a blood alcohol test.

In November 2002, the DOE psychiatrist interviewed the Individual and, in January 2003, issued a report. DOE Ex. 8. The DOE psychiatrist diagnosed the Individual as a suffering from an "alcohol related disorder not otherwise specified" under the Diagnostics and Statistics Manual 4th ed., published by the American Psychiatric Association (the DSM-IV). *Id.* at 8. The DOE psychiatrist opined that the Individual's decision to continue to drink and drive reflected a defect in judgment. The DOE psychiatrist stated that the three DUI arrests suggested a diagnosis of alcohol abuse, but the three events did not occur within a 12-month period and, therefore, by themselves did not establish a diagnosis of alcohol abuse. *Id.* On the issue of rehabilitation, the DOE psychiatrist stated that the Individual reported that, after the accident, he decided to stop drinking and had done so; the DOE psychiatrist opined that a 12-month period of abstinence from alcohol consumption is usually considered the minimum requirement for rehabilitation. *Id.* In February 2003, the DOE psychiatrist issued a supplemental report. DOE Ex. 9. In that report he opined that the police report description of the Individual indicated "in all medical probability" alcohol intoxication. *Id.*

After his interview with the DOE psychiatrist, the Individual resolved his remaining legal problem - the restoration of his driver's license. At his December 2002 hearing with the motor vehicle administration, the Individual maintained that the police had not established probable cause for his arrest because the witness did not appear at the hearing and the Individual argued that the witness statement was hearsay. DOE Ex. 11. The motor vehicle administration agreed and, therefore, concluded that the Individual had no obligation to take a blood alcohol test. *Id.* Accordingly, the motor vehicle administration restored the Individual's license. *Id.*

In March 2003, the DOE notified the Individual that his DUI arrests and the DOE psychiatrist's diagnosis constituted derogatory information under 10 C.F.R. § 710.8(j) (Criterion J). DOE Ex. 4. The Individual requested a hearing, DOE Ex. 5, and I was appointed as the hearing officer.

Prior to the hearing, the Individual indicated that he would present testimony to support the explanation that he provided in the personnel security interview, i.e., that although he was driving the car, he was not driving under the influence of alcohol and his behavior was attributable to head trauma. In addition, the Individual denied having an alcohol problem.

Throughout the pre-hearing phase of the proceeding, which included two pre-hearing conferences, I suggested that the Individual identify documents and witnesses who could support his position that he was not driving under the influence of alcohol. See Letters dated April 1, 2003, April 29, 2003, and May 30, 2003. Specifically, I suggested that the Individual identify documents and witnesses to corroborate his version of the circumstances surrounding his DUI arrest and his description of his alcohol consumption in general. I referred the Individual to parts of the transcript of the personnel security interview where he mentioned various individuals familiar with these matters.

Prior to the hearing, both parties submitted hearing exhibits. At the hearing, the DOE submitted a curriculum vitae for the DOE security specialist. Also at the hearing, the Individual submitted a report of a consulting neurologist and an evaluation report concerning the Individual's military reserve duties.

Eight witnesses testified at the hearing. The Individual testified and presented the testimony of five witnesses: the consulting neurologist, the Individual's wife, a friend, and two co-workers. The DOE presented two witnesses: the DOE security specialist and the DOE psychiatrist. The hearing transcript is cited as "Tr."

After the hearing, the Individual submitted a statement from a third co-worker, as well as a performance appraisal and a statement from his supervisor.

III. The Testimony

The discussion below highlights portions of the testimony relevant to the Individual's contention that he was not driving under the influence of alcohol at the time of the September 2002 accident and that he does not have an alcohol problem.

A. The Individual

At the hearing, the Individual largely reiterated what he had told the DOE security specialist.

The Individual testified that he was not under the influence of alcohol at the time of the September 2002 accident, stating that he had had one beer between 9:00 and 10:00 P.M., approximately three hours before the accident. Tr. at 98-99. The Individual testified that he had limited memory of the accident and its aftermath, and he attributed the police description of his behavior to a head injury sustained during the accident. *Id.* at 101-03, 115-17. The

Individual testified that he waited at the hospital for hours without being treated and ultimately left with his wife. *Id.* at 104-05. He testified that later he went to his health care provider where he had an evaluation and a followup CAT scan that showed bleeding in the brain. *Id.* at 106.

As for his consumption of alcohol in general, the Individual testified that from 1998 until the time of the September 2002 DUI arrest, his consumption was limited to a beer about once a month, mostly after reserve duty. *Id.* at 108. He further testified that after the September 2002 DUI arrest, he did not have any alcohol until February 2003 when he had one drink when he was out of the country on reserve duty. *Id.* at 97. He testified that he has not had any other alcohol since the incident. *Id.* at 119. Finally, he testified that he intends to continue to abstain from alcohol. *Id.* at 96, 119.

B. The Individual's Wife

The Individual's wife testified that the Individual contacted her at 3:00 A.M. the night of the accident, but did not recognize her voice. Tr. at 23-24. She testified that she arrived at the hospital at about 4:00 A.M. and that she did not detect any odor of alcohol and did not believe that he had been drinking. *Id.* at 19-20. She further testified they waited until after 6:00 A.M. and then left. *Id.* at 20, 21, 25. As for the Individual's alcohol consumption in general, she testified that his alcohol consumption occurred with friends either after reserve duty or in conjunction with watching sports events. *Id.* at 26. She did not testify specifically that the Individual has ceased engaging in such consumption. In fact, although the Individual's attorney questioned her about the Individual's alcohol consumption "a while back," her answers were not couched in the past tense. *Id.* at 26-27.

C. The Consulting Neurologist

The consulting neurologist testified that the Individual's September 2002 CAT scan indicated that the Individual had a head injury that could cause disorientation, confusion, belligerence or other uncooperative behavior. *See, e.g.,* Tr. at 31-32, 36-38. When asked if the foregoing symptoms were more consistent with head trauma than alcohol intoxication, the consulting neurologist said "yes" but then explained:

This unusual description of disorientation and lacking in cooperation is more consistent with head trauma than

inebriation, because there are no other - - it sounds like there are no other visible effects of alcohol

Id. at 45. When asked whether alcohol could have been a factor in the Individual's behavior, the neurologist testified that the head trauma was "more likely than not the cause" of the Individual's unusual behavior but that if the Individual had alcohol in him that could "certainly somewhat contribute to further unusual behavior." *Id.* at 63.

D. The Individual's Friend

The Individual's friend testified that he has known the Individual since 1988 and that they served in the same reserve unit from 1988 to 1998. Tr. at 66, 72. The friend testified that during that period, they would socialize and have drinks. The friend testified that he himself stopped drinking around August 1998. *Id.* at 68. The friend testified that after August 1998, he saw the Individual when they would run together. *Id.* at 73-74. The friend testified that he was called to active duty in January of this year and that since then "[e]very now and then" one of them stops by the other's house. *Id.* at 71, 74. The friend testified that his post-August 1998 contact with the Individual has not involved alcohol consumption by either of them. *Id.* at 67. Finally, the friend testified generally to the Individual's honesty and trustworthiness. *Id.* at 69-70.

E. The Co-workers

Two co-workers testified that the Individual was very responsible and loyal to his country. Tr. at 75, 136. The first co-worker testified that he has known the Individual for over a year, through work and working out. *Id.* at 76. The co-worker testified that the Individual was like an instructor or mentor to the other security officers concerning appropriate behavior for a clearance holder. *Id.* at 79. The second co-worker testified that he was known the Individual for two years, again through work and working out. *Id.* at 136. He testified generally that the Individual was responsible and honest. *Id.* at 137. Both the co-workers testified that they had never seen the Individual consume alcohol. *Id.* at 79, 137.

F. The DOE Security Specialist

The DOE security specialist testified concerning the DOE's consideration of the Individual's DUI arrest and citation for refusing a blood alcohol test. The DOE security specialist testified that her interview with the Individual did not resolve

the security concern that the Individual had an alcohol problem and, therefore, she referred the Individual to the DOE consulting psychiatrist for an evaluation. Tr. at 144. She testified that the Individual's history of DUIs, coupled with the diagnosis, led her to conclude that a security concern under Criterion J existed and to recommend administrative review. *Id.* at 144, 147. She testified that the Individual's statement in the personnel security interview that he would stop drinking was a mitigating factor, but that statement did not resolve the concern in light of the DOE psychiatrist's opinion that rehabilitation would require a minimum 12-month period of abstinence. *Id.* at 147.

G. The DOE Psychiatrist

The DOE psychiatrist listened to the testimony of all of the witnesses. The DOE psychiatrist testified that the testimony did not alter the opinions contained in his January and February 2003 reports. The DOE psychiatrist testified that the three DUI incidents warranted a diagnosis that the Individual had an alcohol-related disorder not otherwise specified under the DSM-IV. Tr. at 176. With respect to his failure to diagnosis the Individual as suffering from alcohol abuse, he testified that the known incidents suggested, but did not establish, that other events happened within the 12-month period used to diagnose abuse. *Id.* at 178. As to the neurologist's opinion that the head injury could have caused some of the Individual's behavior at the time of the latest incident, the DOE psychiatrist testified that the cause of the behavior was more likely alcohol intoxication. In particular, the DOE psychiatrist stated that the police report description of the Individual was "quite consistent with the DSM-IV criteria for acute alcohol intoxication." *Id.* at 181. The DOE psychiatrist also cited the documents concerning the Individual's visit to his health care provider, which indicated that the Individual did not report loss of consciousness or other symptoms associated with a head injury. *Id.* at 187-89. Finally, the DOE consulting psychiatrist cited the Individual's stated commitment to stop drinking as favorable evidence.

IV. Analysis

A. The Derogatory Information

The Individual argues that the DOE had an obligation to investigate the circumstances of the September 2002 DUI arrest and citation before concluding that it constituted derogatory information. This is not correct. Derogatory information under Criterion J includes information that an individual has:

(j) Been, or is, a user of alcohol habitually to excess, or has been diagnosed by a board-certified psychiatrist, other licensed physician or a licensed clinical psychologist as alcohol dependent or as suffering from alcohol abuse.

10 C.F.R. § 708.8(j) (Criterion J). Three DUI arrests and a psychiatric diagnosis of an alcohol disorder constitute derogatory information under Criterion J. *Id.* § 708.9; see, e.g., *Personnel Security Hearing* (VSO-0562), 28 DOE ¶ 82,894 at 86,170-71 (December 4, 2002), slip op. at 6-7. More importantly, the notion that the DOE has an obligation to investigate the circumstances surrounding derogatory information is inconsistent with the standard for granting access authorization, i.e., that access authorization "would not endanger the common defense and security and would be clearly consistent with the national interest." 10 C.F.R. § 710.7(a). Finally, although the DOE has the authority to conclude that it has received information that resolves a security concern, the DOE did not reach that conclusion in this case and, therefore, issued the notification letter. As explained below, the information in the possession of the DOE, even coupled with the information received in connection with the hearing, is insufficient to resolve the concern.

B. The Criterion J Concern

As noted above, the Individual maintains that he was not under the influence of alcohol at the time of his September 2002 DUI arrest. He attributes most of the behavior mentioned in the police report to a head injury, and he attributes the references to the odor of alcohol to police mistake or improper behavior. In support of police mistake or improper behavior, the Individual cites the dismissal of the DUI charge, the restoration of his license, and pending proceedings concerning local police conduct in general.

The police report indicates that the Individual was driving under the influence of alcohol. The report states that the Individual had "a strong odor of alcohol emitting from both body and breath" and that the Individual had bloodshot watery eyes and his speech was extremely slurred." DOE Ex. 12. The police report states that, when asked whether he had been drinking, the Individual reported drinking "three beers and two Hennessey." *Id.* The DOE psychiatrist opined that the description in the report indicates alcohol intoxication.

The Individual has not met his burden of establishing that the police report is incorrect. As explained below, the Individual has

presented insufficient evidence to resolve the concern that he drove while under the influence of alcohol.

As an initial matter, the Individual has demonstrated that he suffered some degree of head trauma in the accident. The police report refers to a cut, and it is undisputed that a subsequent CAT scan shows some bleeding in the brain. The witness statement reports that the Individual was "just coming to" and "dazed" immediately after the accident.

The Individual has not, however, demonstrated that he was not driving under the influence of alcohol. Although the neurologist opined that head trauma was the likely cause of the Individual's behavior at the scene of the accident, the neurologist acknowledged that alcohol consumption, if present, could have been a contributing factor to that behavior. Although the Individual testified that he was not under the influence of alcohol, the Individual did not present the testimony of anyone who was with him prior to or at the scene of the accident. Although the Individual presented the testimony of his wife, she did not see the Individual until two and half hours after the accident and, therefore, her testimony was not particularly probative. Similarly, the Individual did not present witnesses who were familiar with his alcohol consumption in general. Although the friend testified that he has not seen the Individual drink since August 1998, the friend testified that it was because he stopped drinking at the time and has since seen the Individual only infrequently during exercise or brief stops at each other's house. Accordingly, the foregoing evidence, even taken together, does not persuade me that the Individual was not driving under the influence of alcohol.

Finally, the fact that the DUI charge was dismissed and the Individual's license restored does not mean that the Individual was not driving under the influence of alcohol. There is no indication that the DUI dismissal and restoration of the Individual's license represents a conclusion that the Individual was not under the influence of alcohol at the time of his arrest. Indeed, the record suggests that concerns about probable cause that the Individual, rather than someone else, was driving, led to the dismissal and restoration.

Given the Individual's failure to establish that the police report is incorrect, the DOE psychiatrist's diagnosis of the Individual as suffering from an alcohol disorder not otherwise specified is well-founded. Moreover, the Individual has not presented any conflicting diagnosis. Accordingly, the only remaining issue is

whether the Individual has presented sufficient evidence to establish rehabilitation.

The Individual has not established rehabilitation. The Individual testified that since the September 2002 arrest, he has had one drink - in February when on reserve duty outside the country. This testimony is not adequate evidence of rehabilitation. The Individual has not provided corroborating testimony on the issue of his alcohol consumption: his wife testified that the Individual's drinking occurred in social events not involving her, and her testimony concerning the possibility of such events since September 2002 is unclear. In any event, even if there were corroboration for the Individual's abstinence and a lapse would not restart the running of the abstinence period, the Individual is still short of the 12-month period recommended by the DOE psychiatrist. DOE Ex. 8 at 8.

I recognize that the Individual has placed emphasis on the evidence that alcohol use has apparently not affected his job performance and that he has been an outstanding employee. That is certainly favorable evidence but it is not sufficient to resolve the security concern. Excessive alcohol use raises a security risk. As we have recognized, the fact that excessive alcohol use has not resulted in a security problem in the past does not guarantee that it will not do so in the future. See, e.g., *Personnel Security Hearing*, Case No. VSA-0174, 27 DOE ¶ 82,751 at 85,507 (1998). Accordingly, once an individual's alcohol use gives rise to a security concern, the individual must demonstrate rehabilitation from that use. As indicated above, the Individual has not made such a demonstration.

V. Summary and Conclusion

The Individual has not resolved the security concern that he has an alcohol problem. Because the security concern remains unresolved, I am unable to conclude that access authorization "would not endanger the common defense and security and would be clearly consistent with the national interest." 10 C.F.R. § 710.7(a). Accordingly, I conclude that the Individual should not be granted access authorization.

Janet N. Freimuth
Hearing Officer
Office of Hearings and Appeals

Date: August 8, 2003