

* The original of this document contains information which is subject to withholding from disclosure under 5 U.S.C. 552. Such material has been deleted from this copy and replaced with XXXXXXX's.

July 15, 2004

**DECISION AND ORDER
OFFICE OF HEARINGS AND APPEALS**

Hearing Officer's Decision

Case Name: Personnel Security Hearing

Date of Filing: January 16, 2004

Case Number: TSO-0077

This Decision concerns the eligibility of XXXXXX XXXXXXXX (hereinafter referred to as "the individual") to hold an access authorization under Department of Energy (DOE) regulations set forth at 10 C.F.R. Part 710, entitled "Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material."^{1/} A Department of Energy Operations Office (DOE) suspended the individual's access authorization under the provisions of Part 710. As set forth in this Decision, I have determined on the basis of the evidence and testimony presented that the individual's security clearance should not be restored.

I. Background

The provisions of 10 C.F.R. Part 710 govern the eligibility of individuals who are employed by or are applicants for employment with DOE, DOE contractors, agents, DOE access permittees, and other persons designated by the Secretary of Energy for access to classified matter or special nuclear material. Part 710 generally provides that "[t]he decision as to access authorization is a comprehensive, common-sense judgment, made after consideration of all relevant information, favorable and unfavorable, as to whether the granting or continuation of 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).

^{1/} An access authorization is an administrative determination that an individual is eligible for access to classified matter or special nuclear material. 10 C.F.R. § 710.5. Such authorization will be referred to variously in this Decision as an access authorization or security clearance.

The individual was granted a DOE security clearance as a condition of his employment with DOE. However, on September 24, 2002, DOE Security suspended the individual's access authorization and initiated formal administrative review proceedings pending the resolution of certain derogatory information that created substantial doubt regarding his continued eligibility. The derogatory information is described in a Notification Letter issued on April 9, 2003, and falls within the purview of potentially disqualifying factors stated in Section 710.8, paragraphs g and l of the security regulations. More specifically, the Notification Letter alleges that the individual "failed to protect classified matter . . . or violated or disregarded security or safeguards regulations to a degree which would be inconsistent with the national security," and that he "engaged in unusual conduct or is subject to circumstances which tend to show that he is not honest, reliable, or trustworthy." 10 C.F.R. § 710.8(g) and (l) (Criteria G and L). The bases for these findings are summarized below.

The derogatory information regarding the individual was primarily revealed by the individual himself during a Personnel Security Interview (PSI) conducted on January 25, 2002, and during interviews associated with a DOE counterintelligence polygraph examination conducted with the individual on June 12-13, 2002. Under Criterion G, the Notification Letter states that the individual admitted that he discussed classified information with a cleared person who did not have a "need to know," and that on another occasion he discussed classified matters in front of an uncleared person. Under Criterion L, the Notification Letter states that the individual revealed that he has engaged in conduct which is "totally inappropriate for someone who (1) holds a security clearance; (2) interacts with foreign nationals from sensitive countries, on a regular basis; and (3) represents the United States government overseas." The Notification Letter specifies a number of admissions by the individual in this regard, including that: (1) while working in a sensitive country during the 1990's, he had intimate relations with a number of foreign national women, and purchased the services of foreign national prostitutes three to five times; (2) the individual had a relationship with a foreign national who requested visas for his family and later provided the individual with a television set and VCR; (3) during a DOE business trip to a sensitive country, the individual drew an organization chart for a foreign national showing how the individual's DOE organization was structured; and (4) on a DOE business trip to a sensitive country in May 2002, the individual went out with his foreign national bodyguard and became so intoxicated that he slept at the bodyguard's apartment and could not remember much of what happened. Regarding the final incident, the individual failed to report what happened to the DOE Office of Counterintelligence during the standard debriefing upon his return.

In a letter received by the DOE Office of Hearings and Appeals (OHA) on January 16, 2004, the individual exercised his right under Part 710 to request a hearing in this matter. 10 C.F.R. § 710.21(b). On January 28, 2004, I was appointed as Hearing

Officer in this case. After conferring with the individual's counsel and the appointed DOE Counsel, 10 C.F.R. § 710.24, a hearing date was established. At the hearing, the DOE Counsel called as witnesses a DOE consultant-psychiatrist (DOE Psychiatrist) and a DOE Security manager (Security Manager) who conducted the PSI with the individual. Apart from testifying on his own behalf, the individual called a psychiatrist (Individual's Psychiatrist), his supervisor, a co-worker and two close friends. The transcript taken at the hearing will be hereinafter cited as "Tr.". Various documents that were submitted by the DOE Counsel and the individual during this proceeding constitute exhibits to the hearing transcript and will be cited as "DOE Exh." and "Ind. Exh.," respectively.

Summary of Findings

The following factual summary is essentially uncontroverted. However, I will indicate instances in which there are disparate viewpoints regarding the information presented in the record.

The individual was granted an "L" level DOE security clearance in June 1999, as an intern with a DOE contractor. In July 2001, the individual was hired as a DOE employee and requested a "Q" level access authorization as a condition of his work assignment which involves frequent foreign travel to a sensitive country. The Questionnaire for National Security Positions (QNSP) completed by the individual indicated that the individual had many close and continuing contacts with citizens of a sensitive country (Sensitive Country A) where the individual lived and worked after completing college. In addition, the background investigation of the individual indicated that there might be security concerns associated with the individual's use of alcohol. A Personnel Security Interview (PSI) was therefore conducted with the individual on January 25, 2002, to resolve these matters.

During the PSI, the individual stated that after graduating from college in 1994, the individual was employed by a news agency in Sensitive Country A from 1994 to 1995. Then, from 1995 to 1997, the individual worked for the U.S. Embassy in that country as a Consular Assistant reviewing visa applications and interviewing visa applicants. The individual associated with various citizens of that country during this period of residency in Sensitive Country A. The individual revealed during the PSI that he had intimate relations with a number of women and cohabited with one of these women during his employment at the U.S. Embassy. The individual further revealed that he used the services of prostitutes on three to five occasions, usually at gatherings with friends at sauna parties. Two of these parties were arranged by an acquaintance who is a national of Sensitive Country A (Foreign National Friend). The individual stated that during his years of residency in Sensitive Country A, he drank socially but there may have been a time or two when he "lost control of his faculties."

In 1997, the individual returned to the United States and entered into a masters degree program in foreign policy. Upon receiving his degree, the individual took an internship working with a DOE-sponsored laboratory (DOE Laboratory) in June 1999. The individual was granted a DOE "L" security clearance and was given an internship assignment back in Sensitive Country A for a one-year period, from December 1999 to November 2000. During this time period, the individual had a girlfriend, a citizen of Sensitive Country A. The individual had intimate relations with this girlfriend but did not cohabit with her. On one occasion when the individual was out with his girlfriend, the individual consumed alcohol excessively to the degree that the individual believes that he may have had a blackout. The individual also used the services of a prostitute on one occasion during 2000 at the apartment of a friend who is a U.S. citizen. The individual also associated with his Foreign National Friend on a few occasions during his internship assignment. On the final occasion in 2000, the Foreign National Friend borrowed \$2000 from the individual which was never returned. The individual has had no contact with the Foreign National Friend since that time.

Four months following the PSI, in May 2002, the individual took a trip to another sensitive country (Sensitive Country B) pursuant to his assigned duties as a DOE employee. For all trips to sensitive countries, DOE employees are required to submit to a "pre-briefing" and debriefing by the DOE Office of Counterintelligence (CI) and file a trip report. In this context, DOE employees are required to report certain contacts with foreign nationals, in accordance with DOE orders and regulations. Pursuant to the May 2002 trip, the individual reported to CI that, during a business meeting, an official of Sensitive Country B asked the individual to draw an organizational chart of his DOE program office. The individual drew a rough sketch of the organizational chart but the official then jokingly asked where CI fit into the picture. The individual reported that he brushed the question aside without responding.

On June 12-13, 2004, the individual was required to submit to a CI exculpatory polygraph. The polygraph is customarily administered to DOE employees making frequent visits to sensitive countries and poses a number of security questions pertaining to espionage, sabotage, terrorism, unauthorized disclosure of classified information and unauthorized foreign contacts. The individual ultimately passed the polygraph examination. However, during interviews conducted by the examiners with the individual before and after the polygraph examination, the individual provided information further raising the concerns of DOE Security.

First, the individual provided information to the polygraph examiners about the Foreign National Friend that the individual did not provide during the PSI. The individual revealed that in 1996, the Foreign National Friend solicited the individual's assistance in obtaining visas for his family when the individual was employed as Consular Assistant at the U.S. Embassy. The Foreign National Friend obtained the visas after the individual provided favorable information regarding the Foreign

National Friend to the deciding official. The Foreign National Friend subsequently gave the individual a television set and VCR which the individual returned when he left the country in 1997. Prior to leaving the country, however, the individual stated that in 1997, another foreign national informed the individual that his Foreign National Friend had been kidnaped and requested that the individual provide visas to secure his release. The individual stated that he did not provide the visas.

Second, during the pre-test interview, the individual indicated that he may have revealed classified information on two occasions. The individual stated that during a job interview in 2001, he talked generally about classified information with a cleared person who did not have a need to know. The individual also stated that while on a DOE trip in February or March 2002, he may have discussed classified information in front of an uncleared DOE employee at the direction of his DOE Team Lead.

Finally, the individual revealed to the polygraph examiners that following his trip to Sensitive Country B in May 2002, he chose not to report to CI his involvement during that trip with a foreign national bodyguard assigned to his team and with a foreign national woman he met. The facts are essentially as follows. On the first evening of their visit, the individual happened to meet the bodyguard in the lobby of the hotel where they were staying. The bodyguard and the individual are close in age and the individual is fluent in the native language. The individual asked the bodyguard what there was to do in the town. After having a drink and a conversation, they decided to go out to a local restaurant. At the restaurant, the individual followed the lead of the bodyguard as they introduced themselves to a small group of women. They danced, had a few drinks and later went to one of the women's apartment. After a few hours at the apartment, the individual and the bodyguard took two of the women back to their hotel. The individual took the foreign national woman with whom he was paired to his hotel room where they engaged in sex. The woman left the individual's hotel room at approximately 6:00 a.m. The woman was a visitor to the town and happened to be staying at the same hotel as the individual. The individual bumped into the woman later that same day at approximately 5:00 p.m. in the lobby of the hotel. They returned to his hotel room and again had sexual relations.

A few nights later, the individual and the bodyguard went out to the same restaurant, this time accompanied by another American, and they ordered a bottle of vodka. At some time during the evening, the individual informed the bodyguard that he was concerned about their going out together and that he was required to report unusual activities. The bodyguard asked the individual that he not report their drinking together and what transpired with the women because the bodyguard felt he would get in trouble with his superiors for consorting with the individual in this manner. Later, the other American left the restaurant but the individual and bodyguard remained and finished the bottle of vodka. At this point, the individual was very intoxicated and vaguely remembers leaving the restaurant and going to a bowling alley with the

bodyguard. The individual was taken by the bodyguard from the bowling alley to the bodyguard's apartment to sleep. However, the individual does not remember anything from his vague recollection of the bowling alley until early the next morning when he was walked back to his hotel by the bodyguard. According to the individual, the bodyguard's request at the restaurant was not the reason the individual chose not to report his contacts with the bodyguard or the foreign national woman during the CI debriefing upon his return. Instead, the individual maintains that he did not believe he was required to report these incidents under DOE rules.

The additional information provided by the individual during the CI polygraph interviews was referred to DOE Security. The reported blackout incident with the foreign national bodyguard in May 2002 added to the concerns of DOE Security regarding the individual's consumption of alcohol. DOE Security therefore referred the individual to a DOE consultant psychiatrist (DOE Psychiatrist) who evaluated the individual on November 25, 2002. In his report, dated December 3, 2002, concluded that the individual has a history of alcohol abuse and that his use of alcohol could cause a defect in his judgment and reliability.

The individual's security clearance was suspended on September 24, 2002. Since that time, the individual has taken approximately a dozen DOE trips to Sensitive Country B. There have been no further reported incidents of inappropriate conduct by the individual while on foreign travel.

II. Analysis

A DOE administrative review proceeding under 10 C.F.R. Part 710 is not a criminal matter, in which the burden is on the government to prove the defendant guilty beyond a reasonable doubt. *See Personnel Security Hearing*, Case No. VSO-0078, 25 DOE ¶ 82,802 (1996). In this type of case, we are dealing with a different standard designed to protect national security interests. A hearing is "for the purpose of affording the individual an opportunity of supporting his eligibility for access authorization." 10 C.F.R. § 710.21(b)(6). Once DOE Security has made a showing of derogatory information raising security concerns, the burden is on the individual to come forward at the hearing with evidence to convince the DOE that 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 Department of Navy v. Egan*, 484 U.S. 518, 531 (1988) ("clearly consistent with the national interest" standard for the granting of security clearances indicates "that security determinations should err, if they must, on the side of denials"); *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).

I have thoroughly considered the record of this proceeding, including the submissions of the parties, the evidence presented and the testimony of the witnesses at the hearing convened in this matter. 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): 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 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. After due deliberation, it is my determination that the individual's access authorization should not be restored since I am unable conclude that such restoration would not endanger the common defense and security and would be clearly consistent with the national interest. 10 C.F.R. § 710.27(d). The specific findings that I make in support of this determination are discussed below.

A. Criterion G; Failure to Safeguard Classified Information

The proper safeguarding of classified information goes to the very heart of maintaining national defense and security. Thus, the failure to protect classified information in accordance with security regulations raises very serious concerns. As stated in the *Adjudicative Guidelines* of 10 C.F.R. Part 710, “[n]oncompliance with security regulations raises doubt about an individual's trustworthiness, willingness, and ability to safeguard classified information.” Guideline K, Security Violations, ¶ 33, 66 Fed. Reg. at 47070; see *Personnel Security Hearing*, Case No. TSO-0007, 28 DOE ¶ 82,913 (2003).

In the present case, the Notification Letter specifies two incidents where the individual apparently failed to properly safeguard classified information. First, during a job interview with the Nuclear Regulatory Administration (NRC) in 2001, the individual purportedly talked generally about classified information with a cleared person who did not have a need to know. Secondly, while on a DOE trip in February or March 2002, the individual reportedly discussed classified information in front of an uncleared employee at the direction of his DOE Team Lead. Both of these incidents were reported by the individual himself during his pre-test interview in connection with a CI polygraph examination conducted with the individual on June 12-13, 2002. Tr., Vol. I at 198-99; see DOE Exh. 16 (Results of Polygraph Examination) at 3, 6. On the basis the individual's reporting of these two incidents, I find that DOE Security properly invoked Criterion G. However, I find that in both instances, the individual has sufficiently mitigated the associated security concerns.

Regarding the first incident, the individual testified that during the NRC interview, he told the sole interviewer that as an intern for the DOE Laboratory, he read a cable that was classified "Secret." Tr., Vol. II at 106. The individual maintained, however, that he did not discuss the contents of the cable. *Id.* at 106-07. The polygraph report is not in conflict with this testimony, stating that: "[The individual] related that he never informed his interviewers the information was classified. He denied providing details and only used vague language during his discussion. During further interview, [the individual] acknowledged he never disclosed classified information to his interviewers, because he did not provide details of the subject he discussed and only discussed the general subject in broad terms." DOE Exh. 16 at 3. Since this is the only evidence in the record concerning this matter, I find that the individual has overcome the concerns of DOE Security with respect to this incident.

The second incident requires greater explanation. According to the polygraph examination report, the individual stated during the pre-test interview that: "[The individual] discussed classified matters in front of [a team member] who was uncleared at the time because he was 'between organizations' . . . [The individual] explained that his Team Lead . . . directed him to have the discussion in front of [the uncleared team member] as long as the [uncleared team member] sat in the corner of the room, away from the classified documents. This directive was complied with and the classified discussion transpired." DOE Exh. 16 at 5. However, the individual testified at the hearing that the information that he gave the polygraph examiners was incorrect due to a faulty memory of what transpired. According to the individual, he has since spoken with other members of the team who uniformly recall that during the incident in question, a classified discussion did not take place in the presence of the uncleared member of the team. Tr., Vol. II at 108-09. One of the team members testified at the hearing and described the meeting in great detail. This witness corroborated that while the Team Lead gathered the entire team in one office where classified material was present, no classified discussion of the material took place. Tr., Vol. II at 12-16. On the basis of this testimony, I am satisfied that the individual did not fail to safeguard classified information.

B. Criterion L; Unusual Conduct

Citing 10 C.F.R. § 710.8(l), the Notification Letter further alleges that the individual "has engaged in unusual conduct or is subject to circumstances which tend to show that he is not honest, reliable, or trustworthy, or which furnishes reason to believe that he may be subject to pressure, coercion, exploitation, or duress which may cause him to act contrary to the best interests of national security." At the hearing, the Security Manager, who conducted the PSI with the individual, explained the concerns of DOE Security. According to the Security Manager, the individual "has placed himself in compromising situations and questionable situations from a security point of view on numerous occasions and he's failed to follow rules in reporting. We felt that he has

very consistently bad judgment over a period of time in his behavior.” Tr., Vol. I at 174-75. The Security Manager also expressed concerns with the individual’s use of alcohol, particularly while overseas, noting the opinion of the DOE Psychiatrist that the individual has been a user of alcohol habitually to excess and has suffered from alcohol abuse. *Id.* at 175. I will address separately the security concerns relating to the individual’s conduct, his use of alcohol^{2/} and his alleged failure to follow DOE reporting requirements. As explained below, I am left with unresolved doubts regarding the individual’s suitability to hold a DOE security clearance.

(1) Individual’s Conduct

Based upon the information provided by the individual, it is apparent that he has engaged in conduct that bears negatively upon his judgment and reliability. The individual stated that he used the services of prostitutes three to five times while in Sensitive Country A.^{3/} The first four of these incidents occurred during the period from 1994-97 when the individual lived in Sensitive Country A, working first at a news agency and then as a Consular Assistant at the U.S. Embassy. The prostitutes generally were solicited by the individual and friends at sauna parties where alcohol was consumed. Tr., Vol. I at 178, Vol. II at 58; DOE Exh. 24 (PSI) at 92-97.^{4/} Two of

^{2/} The Security Manager testified that the initial version of the Notification Letter included a charge based upon the DOE Psychiatrist’s report that the individual has “[b]een, or is, a user of alcohol habitually to excess, or has been diagnosed by a psychiatrist . . . as suffering from alcohol abuse.” 10 C.F.R. § 710.8(j); *see* Tr., Vol. I at 170-74. Apparently, this additional charge was included in the version of the Notification Letter originally served upon the individual, but inadvertently omitted from the version submitted into the record of this proceeding. Despite this omission, the parties presented evidence and testimony at the hearing on the issue of the individual’s use of alcohol. The individual’s use of alcohol is clearly relevant to the conduct issues presented under Criterion L and I will therefore consider the matter in that context.

^{3/} The individual conceded during the PSI that he considers his previous use of prostitutes “embarrassing.” DOE Exh. 24 (PSI) at 90-91. At the hearing, the individual testified that he is “not sure” whether prostitution is illegal in Sensitive Country A, but observed that “it’s not very open, but culturally . . . it’s much more common than here.” Tr., Vol. II at 142. In my view, it was poor judgment on the part of the individual to engage in this kind of activity in a foreign country without knowing the possible legal consequences of his conduct.

^{4/} The individual has apparently given inconsistent accounts regarding whether he himself paid the prostitutes. The DOE Psychiatrist stated in his report, and confirmed during his testimony, that the individual told him that “I never paid for it.” DOE Exh. 10 at 1; Tr., Vol. I at 97. However, when asked during the PSI how much the prostitutes charged, the individual responded: “[O]nce I paid \$50. I think once I paid \$70. But I think part of that was to cover other people.” DOE Exh. 24 (PSI) at 98.

these parties were arranged by the individual's Foreign National Friend who obtained the individual's assistance in securing visas for his family and later gave the individual a TV and VCR. Tr., Vol. II at 63, 65-66.^{5/} The individual reported at the PSI that there were a few times during the 1994-97 time period that he "lost control of his faculties" due to the consumption of alcohol. DOE Exh. 24 (PSI) at 51; Tr., Vol. II at 136.

The individual returned to the United States in 1997 to begin graduate study. Upon graduation, the individual took a job as an intern with the DOE Laboratory in June 1999, and then returned to Sensitive Country A from December 1999 to November 2000 on an intern training assignment. The individual reports that some time in 2000, he again used the services of a prostitute while at the apartment of an American friend. Tr., Vol. II at 60-61. The individual also reported that there was one occasion in 2000 he drank excessively while out with his girlfriend and believes that he may have had a "blackout." Tr., Vol. II at 144-45; Ind. Exh. 3 at 4. Finally, in May 2002, while on his first official trip to Sensitive Country B as a DOE employee, the individual decided to go out with a foreign national bodyguard assigned to the individual's team on two separate evenings. On the first evening, the individual and bodyguard introduced themselves to two foreign national women at a restaurant, and the evening ended with the individual having sex with one of the women in his hotel room. The individual had sexual relations with the woman again on the evening of the next day. Two nights later, the individual and bodyguard went to the restaurant and to a bowling alley. At the restaurant, the bodyguard asked the individual not to report their socializing. Later that evening, the individual got so intoxicated that he had a blackout and cannot remember what occurred when he was taken to the bodyguard's apartment to sleep before being returned by the bodyguard to his hotel early the next morning. Tr., Vol. II at 75-87, 146.

In examining the individual's conduct over the past several years, I must agree with the Security Manager that the individual has demonstrated a pattern of poor judgment. The individual began working in Sensitive Country A immediately after graduating from college and certainly some of his behavior during the 1994-97 time frame can be attributed to youthful indiscretion among peers. Further, the individual

^{5/} During the PSI, the individual stated that one of the sauna parties may have been attended by a former ideological military officer of Sensitive Country B. See DOE Exh. 24 (PSI) at 95-96. At the hearing, however, the individual clarified that he had no way of knowing if that were actually the case. Tr., Vol. II at 62.

was not a federal employee at that time.^{6/} However, these mitigating factors do not apply to the incidents which occurred in 2000 and 2002,^{7/} when the individual held a DOE security clearance. Moreover, the incident in May 2002 involving the bodyguard occurred less than four months after the PSI when the individual was placed on notice that DOE Security had concerns with his foreign contacts and use of alcohol.^{8/} I now turn to the matter of the individual's alcohol consumption since his lapses in judgment are apparently intertwined with his drinking.

(2) Individual's Use of Alcohol

DOE Security's concerns relating to the individual's use of alcohol are substantially based upon the report of the DOE Psychiatrist. In his report, the DOE Psychiatrist concluded:

[The individual] has a history of alcohol abuse. Based on my evaluation it is clear that [the individual] has been a user of alcohol habitually to excess and has suffered from alcohol abuse within the meaning of 10 CFR 710.8(j). [The individual's] use of alcohol could cause a defect in his judgment and reliability with the meaning of 10 CFR 710.8(h). It is my medical opinion under 10 CFR 710.7(c) that there is NOT adequate evidence of rehabilitation and reformation and behavioral changes. I encouraged [the individual] to abstain from alcohol.

DOE Exh. 10 at 2. In reaching his conclusion, the DOE Psychiatrist referenced the individual's history of drinking, beginning with the individual's college years. The DOE Psychiatrist particularly noted occasions when the individual drank excessively while in sensitive countries. According to the DOE Psychiatrist, "[the individual]

^{6/} The individual stated that as a Consular Assistant at the U.S. Embassy from August 1995 to July 1997, "I was a personal services contractor, and I was not a federal employee." Tr., Vol. II at 45.

^{7/} The Notification Letter describes another incident on the May 2002 trip when the individual diagrammed the organizational chart of his DOE office at the request of an official of Sensitive Country B. See Tr., Vol. II at 89-95. However, the individual's supervisor made it clear during his testimony that the individual did not act inappropriately, but that the respective delegations exchange organizational charts on occasion to clarify functional roles. Tr., Vol. I at 285-87. I therefore do not give this matter further consideration.

^{8/} The individual acknowledged at the hearing that Security Manager informed him at the outset of the PSI that DOE Security had unresolved concerns regarding "my alcohol consumption, rate of, and my contacts with foreigners of sensitive countries." Tr., Vol. II at 53, 134.

reports that when in [a sensitive country] he is often required to attend evening functions and that drinking shots of vodka . . . is expected. . . . He has experienced a loss of control over his drinking 3-4 times. This means going to a drinking function and drinking significantly more than one intends to.” *Id.* at 1.

The individual has presented substantial evidence in rebuttal of the DOE Psychiatrist’s diagnosis, including the report and testimony of his own psychiatrist (Individual’s Psychiatrist) who rendered a diagnosis that strongly contradicts the opinion of the DOE Psychiatrist. According to the Individual’s Psychiatrist, “[the individual] has had occasional episodes where he drank too much -- but that alone does not suffice as a criterion for a diagnosis of habitual alcohol abuse. . . . His drinking pattern strikes me as typical for a male his age who is single and who is socializing in his overseas work with a peer group where toasting is a traditional part of the culture. [The individual’s] use of alcohol is that of a social drinker, not a problem drinker.” Ind. Exh. 3 at 7 (emphasis in original). The Individual’s Psychiatrist concludes in her report that “[t]here is simply no evidence that [the individual’s] use of alcohol has caused a significant defect in his judgment and reliability. . . . [The individual] does not meet the criteria as suffering from alcohol abuse, withdrawal, or dependency.” *Id.*; see Tr., Vol. I at 107-14, 117-20.^{9/}

The individual’s close friends, supervisor and co-workers, who have all traveled and socialized with the individual, concurred in their testimony that the individual does not have a drinking problem. See Tr., Vol. I at 148, 276, 307; Tr., Vol. II at 17; Ind. Exh. 7 at 2; Ind. Exh. 9 at 1-2. In addition, the individual has submitted a “drinks per day” diary covering the period June 2003 through August 2003, indicating that he is a moderate drinker. See Ind. Exh. 8. At the hearing, the individual conceded that he drinks to excess “once in a very rare while” but maintains that he has never placed alcohol above the importance of his job. Tr., Vol. II at 112-13. According to the individual, he has traveled back to Sensitive Country B on DOE business “a dozen” times since the alcohol incident in May 2002, and he has not drunk excessively in any of those visits. Tr., Vol. II at 88.^{10/}

^{9/} The Individual’s Psychiatrist contested the opinion of the DOE Psychiatrist on a number of grounds. For instance, the DOE Psychiatrist stated in his report that the individual has a family history of alcoholism and specifically that “[h]is father was alcoholic.” The Individual’s Psychiatrist disagreed with this assessment noting that the individual’s father “would have one or two episodes a year in which he would seclude himself for two days and then drink through those entire two days.” Tr., Vol. I at 108.

^{10/} The individual’s supervisor testified that there have been other instances where a new DOE team member has had an episode of excessive drinking when attempting to socialize with nationals of Sensitive Country B, and learned from the experience. See Tr., Vol. I at 301-02.

After weighing the evidence presented, I find that the individual has substantially mitigated the security concerns associated with his use of alcohol. I find the report and testimony of the Individual's Psychiatrist more persuasive than the report and testimony of the DOE Psychiatrist,^{11/} and conclude that the individual is not, nor has he been, a user of alcohol habitually to excess and he is not suffering from alcohol abuse. During his testimony, the DOE Psychiatrist acknowledged that the individual did not meet the diagnostic criteria specified in the *Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition (DSM-IV)* for Substance Abuse, Alcohol. Tr., Vol. I at 19.^{12/} Further, the DOE Psychiatrist appeared to recant his characterization of the individual's drinking as "habitual" during his testimony, stating that "there's no evidence that [the individual] is an habitual user He appears to have more of a binge-type issue going on here." Tr., Vol. I at 82-83.

Notwithstanding, I do not find that the individual has fully mitigated the security concerns under Criterion L regarding his lapses in judgment in the use of alcohol. While the individual may not be a habitual user of alcohol or suffer from alcohol abuse, his own psychiatrist concedes that the individual has had "infrequent episodes of alcohol abuse." Two of these episodes have occurred in 2000 and in 2002, when the individual was holding a DOE clearance and on assignment by DOE in a sensitive country. In both instances, the individual was well aware of the expectations placed upon him. The individual was interviewed in 1999 to obtain an L clearance as a DOE Laboratory intern. According to the interviewer's report, the individual stated that: "[The individual] did blackout at a party when they were having a drinking contest. This happened in college sometime in 1992 or 1993. This was the only time he had a blackout. Subject does not allow himself to drink this much anymore because of his current and future employment." DOE Exh. 29 (emphasis supplied). The record indicates, however, that after the individual was granted a DOE security clearance and sent on his intern assignment to Sensitive Country A, there was an occasion in 2000 that he became so intoxicated that he believes he had a blackout. Tr., Vol. II at 144-45.

Similarly, in seeking to obtain a "Q" clearance, the individual was admittedly put on notice during the PSI in late January 2002, that the DOE had concerns regarding his

^{11/} It is apparent that the Individual's Psychiatrist examination was more in-depth. The Individual's Psychiatrist interviewed the individual for three hours and issued a seven-page report describing her findings in substantial detail. In contrast, the DOE Psychiatrist interviewed the individual for 50-55 minutes, Tr., Vol. I at 42, and his two-page report is summary in nature.

^{12/} Rather than the *DSM-IV*, the DOE Psychiatrist explained that "[the individual] admitted that he had tried to cut down on his drinking and had felt guilty about his drinking, which are two of the four questions that are part of a test called CAGE, C-A-G-E. An affirmative response increases one's concern about problematic drinking." Tr., Vol. I at 19.

association with foreign nationals and his use of alcohol. See Tr., Vol. II at 53, 134. ^{13/} Despite this knowledge, the individual became so intoxicated while on assignment in Sensitive Country B in May 2002, that he had a blackout and was taken helplessly to the apartment of a bodyguard, a national of the sensitive country, before being returned to his hotel. The individual reports that he has had no other incidents of excessive use of alcohol during the dozen trips to Sensitive Country B he has taken since 2002. Nonetheless, I find that his prior lapses in judgment and reliability in his use of alcohol to be very serious,^{14/} and I am not fully convinced that his “infrequent episodes of alcohol abuse” will not reemerge under circumstances which might cause him to act contrary to the best interests of national security. Consequently, I find that security concerns under Criterion L associated with the individual’s use of alcohol have not been fully mitigated.

(3) Individual’s Failure to Report

The Notification Letter further alleges that the individual’s failure to report certain matters bear negatively upon his trustworthiness and reliability. First, the individual failed to fully disclose during the PSI the depth of his involvement with his Foreign National Friend when the individual lived in Sensitive Country A from 1995-1997. Second, upon returning from his trip to Sensitive Country B in May 2002, the individual did not report the incidents involving the foreign national bodyguard during his mandatory CI debriefing. These matters are considered separately below.

During the January 2002 PSI, the individual informed the Security Manager that his Foreign National Friend arranged two sauna parties involving prostitution and attended by the individual, and that the individual had not seen the Foreign National Friend since 2000 when he borrowed \$2000 from the individual that was never returned. However, the individual did not disclose information that he later provided to the polygraph interviewers in June 2002, that: (1) the Foreign National Friend solicited the individual’s assistance in obtaining visas for his family when the

^{13/} During the PSI, the individual stated that he tended to drink more when in the sensitive countries concerned, but assured the Security Manager as follows: “[I]t’s expected to drink more there . . . it’s the cultural norm . . . But I would never let it get out of control.” DOE Exh. 24 (PSI) at 47-48. However, the individual did in fact lose control of his drinking within four months of making this assurance.

^{14/} The Security Manager speculated that during the May 2002 blackout incident, the individual may have been placed in an embarrassing or compromising position at the bodyguard’s apartment that might one day subject him to coercion or blackmail: “[T]here could be photos . . . things that are set up that they could bring forward a few years later.” Tr., Vol. I at 197.

individual was employed as a Consular Assistant at the U.S. Embassy;^{15/} (2) after obtaining such assistance, the Foreign National Friend gave the individual a television set and VCR which the individual later returned; and (3) in 1997, another foreign national informed the individual that the Foreign National Friend had been kidnaped and requested that the individual provide visas to secure his release.

At the hearing, the individual testified that he did not intentionally withhold information concerning the Foreign National Friend from the Security Manager during the PSI, but addressed the matters raised by the Security Manager. Tr., Vol. II at 101. The individual differentiated that the polygraph examiners asked "broader" questions which summoned more detailed responses. I have examined the transcript of the PSI and find that the questions involving the Foreign National Friend were asked in the context of a discussion concerning the individual's use of foreign prostitutes, and that the individual responded to the questions being posed. See DOE Exh. 24 (PSI) at 102-05. I therefore accept the individual's explanation concerning this matter.

However, I am led to a different conclusion regarding the individual's decision not to report the incidents that occurred on the May 2002 business trip to Sensitive Country B. As described in the factual summary, the individual had close contact with two foreign nationals, the bodyguard assigned to his team and a woman with whom he had sexual relations. On one occasion, the individual went out with the bodyguard to a restaurant where they met two women and had an evening of dancing and drinking. The evening ended with the individual having sex with one of the women in his hotel room. The woman left his hotel room early the next morning but he met her coincidentally the same day and had sexual relations with her again in his room. Two evenings later, the individual went out with the bodyguard again and the bodyguard asked the individual not to report the events of their evening together with the women. The individual later became so intoxicated that he cannot remember what happened from the time they went to a bowling alley until being brought back to the hotel by the bodyguard the next morning.

At the hearing, the Security Manager was adamant that the individual was required to report these contacts by DOE rules. The Security Manager read pertinent provisions of the DOE Headquarters Facilities Master Security Plan, in effect from 1995 to 2003, which require that DOE personnel report "[a]ny unofficial contact with a foreign national from a sensitive country, as well as any association with a foreign national which is close and continuing, or more than casual in nature, whether in a

^{15/} The individual clarified at the hearing that he had no authority to issue or deny visas, but only to screen visa applications. However, the individual assisted his Foreign National Friend by providing information about him to the U.S. Embassy deciding official: "I told the consul what I knew about him, that I knew him to be well off. And I think he had visa applications for him and his family, and the consul issued him visas on the spot." Tr., Vol. II at 66.

business or social setting, or in any way raises a security concern.” DOE Exh. 35 at X-9; Tr., Vol. I at 185-86. The Security Manager also read from the individual’s 2001 DOE Security Refresher Briefing which defines “reportable” contact with a foreign national as “a relationship that involves: (1) bonds of affection and/or personal obligation, including financial relationships, and (2) sharing private time together in a public or private setting where sensitive professional and personal information is discussed.” DOE Exh. 34.^{16/} The Security Manager believes that the individual should have reported his contact with the foreign bodyguard, particularly under circumstances that he is unsure what happened or was discussed during his blackout. See Tr., Vol. I at 190-91.^{17/}

The individual maintains, however, that under the DOE CI reporting instructions he received, he had no obligation or responsibility to report his sexual encounters with the woman or the incidents with the bodyguard.^{18/} Concerning the woman, the individual testified that, “I’d always been told one-night stands weren’t required to be reported and I considered this to be a one-night stand.” Tr., Vol. II at 84. With respect to the bodyguard, the individual felt there was no need to report contacts with a foreign national who was officially assigned to his DOE Team. *Id.* at 87-88. The individual confirmed that the bodyguard asked him not to report their socializing because the bodyguard believed that he would get into trouble with his boss. *Id.* at 103-04. The individual asserted, however, that the bodyguard’s request had nothing to do with his decision not to report their interaction. According to the individual: “I had assessed the situation based on my own background and experience, and I had seen that I had been in control for the most part, and during the one part that I didn’t remember what happened, I also didn’t find that to be out of the ordinary. . . . And I knew he would be reported in the trip report and definitely didn’t consider him to be a -- that he was going to be a close and continuing contact.” *Id.*

Upon review of the evidence submitted respectively by the parties, it is apparent that CI instructs a less stringent reporting requirement to DOE foreign travelers than DOE

^{16/} Included with this submission is the individual’s 2001 Annual Individual Security Refresher Briefing Certification, duly signed and dated by the individual September 20, 2001, attesting that he read and understood his security requirements. DOE Exh. 34.

^{17/} The Security Manager also submitted into the record DOE Order 5670.3, dated September 4, 1992, which states that “all contacts with citizens of sensitive countries should be reported.” DOE Exh. 36; Tr., Vol. I at 188-89.

^{18/} Section 4d.(1) of DOE Order 551.IA (August 25, 2000), “Official Foreign Travel,” requires that “[a]ll Federal employees traveling to a sensitive country, regardless of whether they hold a security clearance, shall be provided appropriate pre-briefings and debriefings by, and at the discretion of, counterintelligence officers.”

Security.^{19/} Since it is CI that performs the individual's pre-briefing before travel and debriefing upon return, I find it reasonable that the individual would rely upon CI's interpretation of his reporting requirements. As explained below, however, I do not accept the individual's rationale for failing to report the incidents of his May 2002 trip even assuming the individual was attempting to follow CI's reporting dictates.

The instructions given to the individual by CI were apparently based upon DOE Notice 142.1, "Reporting Requirement: Close and Continuing Contact with Sensitive Country Foreign Nationals," that was submitted into evidence both by the individual and DOE Security. Ind. Exh. 2; DOE Exh. 33. The Notice was distributed by the Director of CI to all national laboratories and operations offices by memorandum dated August 17, 1999. DOE Notice 142.1 states, in pertinent part:

Close Contact

For DOE purposes, the term "close contact" with a foreign national is defined as a relationship that (a) involves bonds of affection and/or personal obligation, and/or (b) where the employee and foreign national share private time together in a public or private setting where sensitive professional and personal information is discussed or is the target of discussion.

Close contacts include:

(a) *Sexual or otherwise intimate relationships.* Personnel do not have to report one-time sexual or otherwise intimate contact with a foreign national if (a) there will be no future contact with the foreign national, and (b) the foreign national does not seek classified or sensitive information, and (c) there is no indication that personnel are the target of actual or attempted exploitation. . . . If personnel have sexual or otherwise intimate contact on more than one occasion with the same foreign national, regardless of circumstances or likelihood of follow-up contact, the relationship must be reported as close and continuing contact, even if there is no expectation of future contact.

Continuing Contact

...

(b) Regarding all other, essentially private, non-work related close contacts, such as dating relationships without sex and/or intimacy, and social and family friendships, whether of the same or opposite sex, . . . the

^{19/} One witness called by the individual is a Senior Analyst in CI and confirmed that she is aware that DOE Security instructs a different policy than CI with respect to reporting contacts with foreign nationals, stating that: "Yes, I am [aware of it]. And I know that it causes lots of confusion." Tr., Vol. I at 310.

relationship must be reported promptly when it has developed to the point where personal information is shared. . . . Some indicators that the relationship has developed to this point include:

...

- o the foreign national attempts to exploit you in any regard due to your relationship;

....

DOE Exh. 33 at 1-2 (emphasis supplied). Thus, the notice required that the individual report his contact with the foreign national woman since he admittedly had sex with her “on more than one occasion.” The individual’s friend and co-worker who testified at the hearing clearly understood this requirement: “It’s a matter of great amusement to us, a little. You could have relations with a woman and you don’t have to report that if it happens once. If you see her again, then it’s necessary to file a ‘Close and Continuing Contact’ report.” Tr., Vol. II at 22.

Similarly, I find that the individual was required to file a “Close and Continuing Contact” report with respect to the bodyguard. The individual’s relationship with the bodyguard became a “close contact” involving “bonds of affection and/or personal obligation” in that the bodyguard: (1) took the individual out, drank and consorted with the individual on two occasions; (2) facilitated the individual’s introduction to a woman with whom he later had sexual relations; and (3) took the individual to his own apartment and allowed him to sleep there overnight when the individual became so inebriated that he had a blackout and was unable to care for himself.^{20/} The contact became “continuing” when the bodyguard “attempted to exploit” their relationship by asking the individual not to report these activities.

I find disingenuous the individual’s assertion that he felt no need to report his personal involvement with the bodyguard because the bodyguard was officially assigned to his DOE Team and his name already appeared on the general trip report. DOE Notice 142.1 states that “[p]ersonnel are *not* required to report . . . *work-related contact* with foreign nationals, providing the contact has been coordinated with management and otherwise reported through contact reports or other operational reporting.” DOE Exh.

^{20/} The individual’s co-worker testified that DOE personnel should report to CI any unusual incidents that occur on foreign visits. Tr., Vol. II at 29-31. I asked the co-worker whether he considered it to be a reportable “unusual incident” if an employee experienced a blackout while alone with foreign nationals in a sensitive country. The co-worker responded: “Yes, if I thought that I was out with a bunch of friends, or a whole bunch of persons, and at one point in time my memory was a blank, I would think, oh my God . . . someone slipped me a drug or something . . . I might have been compromised somehow. And yes, I would report that. . . . if something like that happened to me, I’d probably call the embassy right away and report it.” *Id.* at 32.

33 at 3.^{21/} Clearly, the individual's contact with the bodyguard was not "work-related" and the nature of their relationship went substantially beyond the bodyguard's official duties with the individual's DOE Team. That the individual continues to maintain that he was not required to report his involvement with the bodyguard leads me to question his judgment and trustworthiness. Indeed, it might be fair to surmise from these circumstances that the individual's decision not to report his involvement with the bodyguard was not an oversight or due to a misunderstanding of the reporting requirements, but was an intentional effort to conceal his own conduct.^{22/}

(4) Other Mitigating Evidence

Based upon the testimony of his supervisor and co-workers, as well as evidence presented in the record, the individual is a trusted and valued employee. Tr., Vol. I at 282, 294, 314; Tr., Vol. II at 18; see Ind. Exh.'s 6, 7, 9. I further note that with the exception of the May 2002 incidents, the individual has generally been forthcoming and direct regarding his conduct. Indeed, a substantial portion of the derogatory information presented in the Notification Letter, particularly relating to the period 1995-2000, was openly provided by the individual. Finally, as noted above, the individual has had no further reported incidents of inappropriate conduct on approximately a dozen trips on DOE business he has taken since May 2002.

However, for the foregoing stated reasons, I have lingering doubts regarding the individual's judgment and reliability. The individual has displayed a pattern of poor judgment and unusual conduct accompanied by episodic alcohol abuse, which began in the mid-1990's and continued into 2000 and 2002 when the individual held a DOE security clearance. The poor judgment displayed by the individual in the incidents with the foreign national bodyguard in May 2002, was exacerbated by the individual's failure to report the incidents and his seeming inability to recognize that he should

^{21/} The CI reporting requirements were again modified by a memorandum from the CI Director dated October 30, 2000, entitled "Counterintelligence Reporting Requirements." DOE Exh. 32. Pertinent to the present case, this revision states that "DOE personnel are required to report professional contacts and relationships with sensitive country foreign nationals, whether they occur at one's worksite or abroad." *Id.* at 6. Thus, under this modification, the individual was required to report his relationship with the bodyguard despite the fact that he was assigned to the individual's DOE Team. The memorandum further stresses the importance of reporting such relationships to national security: "[T]he policy to report relationships is important. It is intended to help us know if a relationship we are developing with a citizen of a sensitive country is harmless or potentially harmful." *Id.* at 4.

^{22/} There is no indication that the individual would have ever divulged his activities with the bodyguard during the May 2002 trip if not induced by questioning during his CI polygraph examination on June 12-13, 2002.

have reported those incidents. Based upon the record, I find that a significant risk remains that similar lapses in judgment will recur and render the individual vulnerable to pressure, coercion and exploitation. Section 710.7(a) of the security regulations states that “[a]ny doubt as to an individual’s access authorization eligibility shall be resolved in favor of the national security.” I therefore find that the individual has failed to overcome the concerns of DOE Security under Criterion L.

III. Conclusion

As explained in this Decision, I find that DOE Security properly invoked 10 C.F.R. §§710.8(g) and (l) in suspending the individual’s access authorization. I find that the individual has mitigated the concerns of DOE Security under Section 710.8(g). However, I find that the individual has failed to sufficiently mitigate the concerns of DOE Security under Section 710.8(l). Consequently, I am unable to find that restoring the individual’s access authorization would not endanger the common defense and security and would be clearly consistent with the national interest. Accordingly, I have determined that the individual’s access authorization should not be restored. The individual may seek review of this Decision by an Appeal Panel in accordance with the provisions set forth in 10 C.F.R. § 710.28.

Fred L. Brown
Hearing Officer
Office of Hearings and Appeals

Date: July 15, 2004