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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 13, 2004

Case Number: TSO-0090

This Decision concerns the eligibility of XXXXXXXXXXXXXXXX (hereinafter "the individual") to hold an access authorization.¹ The regulations governing the individual's eligibility are set forth at 10 C.F.R. Part 710, "Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material." This Decision will consider whether, based on the testimony and other evidence presented in this proceeding, the individual's suspended access authorization should be restored. As discussed below, I find that restoration is warranted in this case.

I. BACKGROUND

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

The security concern cited in the Letter involves the individual's excessive use of alcohol. The Notification Letter stated that the individual was arrested in January 1990 and on September 18, 2002, for driving while intoxicated (DWI). After the 2002 DWI, the

1/ An access authorization (or security clearance) is an administrative determination that an individual is eligible for access to classified matter or special nuclear material. 10 C.F.R. § 710.5.

individual was sent for an evaluation by a DOE consultant psychiatrist. In that evaluation, which took place on April 24, 2003, the DOE consultant psychiatrist diagnosed the individual as suffering from alcohol abuse. His diagnosis was documented in an April 25, 2003 report to the DOE. In the report, the DOE consultant psychiatrist recommended that in order to demonstrate rehabilitation from alcohol abuse, the individual should abstain from alcohol for one year and enter into an alcohol counseling program for one year. The report stated that as of the time of the evaluation, the individual had not taken those steps and that the individual was not rehabilitated. According to the Notification Letter, this constitutes derogatory information under 10 C.F.R. § 710.8(j)(hereinafter Criterion J).²

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

At the hearing, the individual was represented by an attorney. The individual testified on his own behalf, and presented the testimony of an internist who specializes in medical/legal review (consultant internist); a psychiatrist (individual's psychiatrist); his therapist; his wife; and three friends/co-workers. The DOE Counsel presented the testimony of the DOE consultant psychiatrist.

II. Hearing Testimony

I will first describe the initial testimony of the DOE consultant psychiatrist, which was based on his April 2003 evaluation. Next, I will discuss the testimony of the individual's three expert witnesses: the consultant internist; the individual's psychiatrist; and his therapist. These three witnesses offered evidence that updated and completed the information in this case, thereby offering some new perspectives on the conclusions about the individual that the DOE consultant psychiatrist reached in April

2/ Criterion J security concerns relate to an individual's use of alcohol habitually to excess, or to an individual's having been diagnosed by a psychiatrist or licensed clinical psychologist as alcohol dependent or as suffering from alcohol abuse.

2003. I will then set forth the DOE consultant psychiatrist's updated views based on the new information provided by the three other experts. Thereafter, I will discuss the testimony of the other witnesses.

A. The DOE Consultant Psychiatrist; the Individual's Consultant Internist; the Individual's Psychiatrist; and the Therapist

In the first portion of his testimony, the DOE consultant psychiatrist reiterated the diagnosis that he reached in April 2003, which was that this individual suffers from alcohol abuse. Further, as of the date of the evaluation, the psychiatrist did not believe that the individual had demonstrated reformation/rehabilitation. He gave several reasons for his conclusion. He believed that the individual needed a one year alcohol therapy program. Based on what he learned from the individual through the evaluation interview, the DOE consultant psychiatrist concluded that the individual had not completed such a program. Transcript of Personnel Security Hearing (Tr.) at 27.

Further, the DOE consultant psychiatrist believed that the individual should demonstrate at least one year of sobriety. During the April 2003 evaluation, the individual told him that he had been abstinent from alcohol since the September 2002 DWI. The DOE consultant psychiatrist was doubtful about this assertion. He noted that the individual's blood test, performed in conjunction with the April 2003 psychiatric evaluation, indicated an elevated gamma GT (GGT) liver enzyme level in this individual. In the DOE consultant psychiatrist's view, this elevation suggested, but did not prove, that the individual may have been continuing to use alcohol, in spite of his assertion to the contrary. The DOE consultant psychiatrist indicated that there could be a number of other factors, including medications, that could produce the elevated GGT levels. However, the DOE consultant psychiatrist indicated that to his knowledge the individual was not taking any such medications. Tr. at 10-12.

The individual's attorney directed the DOE psychiatrist's attention to information in the Individual's Exhibit Book indicating that the individual had been experiencing severe hip pain for a period of about four months, which coincided with the psychiatric evaluation. Tr. at 51-54. Individual's Exhibit Book, Exhibit F. ³

3/ The Exhibit Book was submitted at the hearing. It was in this (continued...)

Exhibit F is a copy of notes dated June 10, 2003, drafted by the individual's personal physician, indicating that the individual had been experiencing hip pain for four months and had been using significant doses of ibuprofen to ease the pain. After reviewing that exhibit, the DOE consultant psychiatrist indicated that he usually asks whether an individual is taking any medications. He surmised that the individual in this case did not reveal that he was using medication for hip pain because, in all likelihood, he purchased it over-the-counter and he did not consider it prescription medication. Tr. at 54.

The individual's consultant internist testified next. This witness provided further insight into the causes of elevated GGT liver enzyme levels. He gave testimony and discussed documentary evidence indicating that elevated GGT liver enzyme levels may be caused by large doses of Tylenol and ibuprofen. Tr. at 63; Individual's Exhibit Book, Exhibit D. This witness testified that the individual told him that he was taking large doses of Tylenol and ibuprofen at the time he was evaluated by the DOE consultant psychiatrist. Tr. at 74; see also Tr. at 89. The individual's internist believed that this was a better explanation for the elevated GGT liver enzymes than the continued use of alcohol. Tr. at 74-75.

The individual's psychiatrist testified about his evaluation of the individual, which took place shortly before the hearing in June 2004. He believed the individual's assertion that he last used alcohol in September 2002, at the time of the DWI. Tr. at 105. He was aware of the individual's use of Tylenol and ibuprofen for pain, and believes that use of these medications can cause hepatotoxicity (liver toxicity). He testified that the use of these medications was a reasonable explanation for the elevated GGT level, as opposed to continued drinking. Tr. at 105, 115. This witness believed the individual turned to alcohol to relieve some of the stressors in his life. He testified that the individual was rehabilitated from alcohol abuse, and that there is a good chance that the individual will stay in remission from alcohol use. He based this on what he learned from the individual about his

3/ (...continued)

form that the information regarding the hip pain was first disclosed. Therefore, the DOE consultant psychiatrist, the DOE Counsel and the Hearing Officer did not have an opportunity to review it prior to the hearing.

rehabilitation program, and on the individual's assertions about his strong commitment to his family. Tr. at 105-114.

The therapist testified that she is a psychiatric social worker. She was formerly on the staff of a local family counseling program, and in this context treated the individual for his alcohol problems. Tr. at 121-24. She stated that during the period October 2002 to January 2003, she saw the individual for two hours a day, four days a week for ten weeks as part of a group alcohol therapy program. During that period, she also provided him with some individual counseling. She found the individual to be a serious and committed participant in the treatment program, which he completed successfully. Tr. at 127-30. See also Individual's Exhibit Book, Exh. H. She noted that as part of his therapy program, the individual also attended AA meetings. She believes that he has the tools for understanding how to remain abstinent, even in a crisis. She also indicated this individual is very committed to his family, so that if he feels he is even "getting close to trouble" he will seek help. Tr. at 131, 139. She believed his assertion that he has been abstinent since September 2002. Tr. at 130.

After hearing the new, updated information provided by these three experts, the DOE consultant psychiatrist revised his opinion. He was persuaded that the individual's use of Tylenol and ibuprofen was a plausible explanation for his elevated GGT liver enzyme levels, rather than the continued use of alcohol. Tr. at 91, 94. The DOE consultant psychiatrist therefore believed that the individual had been abstinent for a period of about 21 months, exceeding the one year period that he thought was necessary in this case. Tr. at 116, 214. After listening to the testimony of the therapist regarding the rehabilitation program that the individual attended, the DOE consultant psychiatrist indicated that in his view the individual had received adequate therapy for his alcohol abuse. Tr. at 212. He further testified that he thought there was a good prognosis for this individual. Tr. at 214.

B. The Individual

The individual agreed with the alcohol abuse diagnosis of the DOE consultant psychiatrist. Tr. at 206. He testified that after his DWI in January 1990, he abstained from alcohol use for about ten years, and then gradually increased his consumption, until the September 2002 DWI. Tr. at 188-91. See also Transcript of November 27, 2002 Personnel Security Interview at 22; DOE Consultant Psychiatrist's Report at 3. The individual believes he is now

rehabilitated. He stated that in addition to his alcohol treatment program with the therapist, he attended Alcoholics Anonymous sessions three times a week for about two to three months, and then continued a bit longer at a reduced attendance level. Tr. at 198. He also stated that he met with the Employee Assistance Program (EAP) Counselor at his work site for six sessions of therapy after the 2002 DWI. Tr. at 196. He testified that he has not used alcohol since the 2002 DWI. Tr. at 199, 207. He indicated that he has no intention to use alcohol again. Tr. at 210. His motivation for remaining abstinent is his devotion to his children and his wife. He recognized that if he is involved with alcohol it may cause his family distress and disruption. Tr. at 206, 210. He spoke at length about his commitment to his family. He takes his responsibilities as a father and husband very seriously. He stated that from his therapy he has learned how to deal with the stress in his life that caused him in the past to turn to alcohol. He stated that if things are not going well, he talks to his mother, brother or a friend, or uses some of the relaxation techniques he learned in this EAP therapy. Tr. at 208-09. He further testified that he was in extreme hip pain at the beginning of 2003 for which he used ibuprofen and Tylenol. He believed that he used four to six 500 milligram tablets or more per day. Tr. at 192. ⁴

4/ The notes of the individual's treating physician state that in June 2003, the individual told him that he was using ibuprofen to self-treat his hip pain. Individual's Hearing Exhibit F. The notes do not mention Tylenol. This is significant because, according to the testimony of the individual's internist, liver enzymes are more sensitive to Tylenol than to ibuprofen. Tr. at 74. Thus, ibuprofen alone may not have caused the elevated GGT liver enzymes. However, the individual testified that he was using both Tylenol and ibuprofen in large doses at the time of the April 2003 evaluation by the DOE consultant psychiatrist. Tr. at 192. He states that he might have told his own physician in June 2003 that he was taking ibuprofen because that was the product he may have been using during the week that he had his medical evaluation. Tr. at 193. I am persuaded by this explanation. Further, the individual might not have realized the connection between his high self-dosing of Tylenol and the elevated GGT levels. He therefore might not have thought to specifically reveal it to his treating physician. Accordingly, I find no reason for concern about this minor inconsistency in the
(continued...)

C. The Wife

The wife testified that after the individual's January 1990 DWI arrest, he did not use alcohol for about ten years. He then began gradually to use it again. Tr. at 164-66. She further testified that to her knowledge, the individual has not used any alcohol since the September 2002 DWI incident. Tr. at 176. She believes that he would seek counseling if he had a desire to return to alcohol use, and she would make sure he did so if she saw any danger signs. Tr. 179-80. She is confident that he will not return to use of alcohol. Tr. at 185.

D. Friends and Co-workers

The individual's supervisor testified that the individual is an excellent and reliable worker and that he has not seen the individual use alcohol. Tr at 149. A co-worker and friend testified that he sees the individual weekly at Little League games and he has never seen the individual use alcohol. He believes that the individual has taken his alcohol problem seriously. Tr. at 157. Another friend of the individual testified about his knowledge of the individual's drinking pattern.⁵ This witness stated that he and the individual used to shoot pool and drink alcohol at a local bar about three or four years ago. He stated that in the last two years, he has not seen the individual at the bar. Tr. at 159.

III. Applicable Standards

A DOE administrative review proceeding under 10 C.F.R. Part 710 is not a criminal case, in which the burden is on the government to prove the defendant guilty beyond a reasonable doubt. In this type of case, we apply a different standard, which is designed to protect national security interests. A hearing is "for the purpose of affording the individual an opportunity of supporting his eligibility for access authorization." 10 C.F.R. § 710.21(b)(6). The burden is on the individual to come forward at the hearing with evidence to convince the DOE that granting or restoring his access authorization "would not endanger the common defense and security and would be clearly consistent with the national interest." 10 C.F.R. § 710.27(d).

4/ (...continued)
individual's reporting about the types of drugs that he took for his hip pain.

5/ This witness testified by telephone.

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

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

IV. Analysis

As noted above, the individual in this case does not dispute the DOE consultant psychiatrist's diagnosis that he suffered from alcohol abuse. Tr. at 30, 206. The issue in this case is therefore whether the individual has demonstrated that he is reformed and/or rehabilitated from this condition. As discussed below, I find that the individual has met his burden to mitigate the concerns regarding his alcohol abuse.

As an initial matter, I am convinced that, as he contends, the individual has been abstinent from alcohol since the date of his DWI in September 2002. The individual's wife corroborated his testimony on this point. The individual's psychiatrist, his therapist and the DOE consultant psychiatrist were all convinced by his assertion. In this regard, I am persuaded that his elevated GGT liver enzyme levels can be explained by his high doses of Tylenol and ibuprofen at the time of the April 2003 blood test. Accordingly, I am convinced that as of the time of the hearing, the individual had been abstinent from alcohol for approximately 21 months.

The therapist was confident that he will continue to remain abstinent and that "the biggest marker for that is the fact that he did have ten years sober in the past." Tr. at 133. I note the DOE consultant psychiatrist's testimony that the individual's ten-year period of sobriety [after the 1990 DWI] is "exceptional." Tr. at 214. I think that his relapse, after the ten year hiatus, has increased the individual's understanding of the risks involved if

he uses alcohol and, if anything, made his commitment to abstinence stronger.

I am also persuaded that the individual has completed an adequate rehabilitation program. As indicated above, the individual had six therapy sessions with an EAP counselor at his work site. He then had several months of intensive alcohol counseling with the therapist. She indicated that he was an active participant in the program and completed it successfully. He also attended AA meetings for several months. The therapist, the individual's psychiatrist and the DOE consultant psychiatrist all agreed that this level of therapy was adequate treatment for the individual's alcohol abuse problem.

V. CONCLUSION

The individual has fulfilled the key elements necessary for demonstrating rehabilitation in this case. He has remained abstinent for nearly two years. He has completed an alcohol therapy program, and he now has the tools, including a strong support system, to cope with stress that might in the past have caused him to turn to alcohol. Moreover, the individual has a strong motivation to stay sober in the future: he is deeply committed to his wife and family, and I believe that he fully understands the hardship that his use of alcohol would impose on them. I also believe that he is aware that any alcohol use in the future would have serious adverse effects on his relationship with his wife and family.

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

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

Virginia A. Lipton
Hearing Officer
Office of Hearings and Appeals

Date: August 31, 2004