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December 4, 2002
DECISION AND ORDER
OFFICE OF HEARINGS AND APPEALS

Hearing Officer's Decision

Case Name: Personnel Security Hearing

Date of Filing: June 19, 2002

Case Number: VSO-0562

This Decision concerns the eligibility of XXX XXXXXXXX XXXXXXXX (hereinafter referred to as "the individual") to hold an access authorization under the 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 in this proceeding that the individual's security clearance should 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.

In this instance, the individual was granted a security clearance by DOE as a condition of his employment with a DOE contractor. However, on December 7, 2001, the DOE Office of Safeguards and Security (DOE Security) initiated formal administrative review proceedings by informing the individual that his access authorization was suspended pending the resolution of certain derogatory information that created substantial doubt regarding his continued eligibility. This derogatory information is described in a Notification Letter subsequently issued to the individual, and falls within the purview of potentially disqualifying criteria set forth in the security regulations at 10 C.F.R. § 710.8, subsection j. More specifically, Attachment 1 to the Notification Letter (Attachment 1) alleges that the individual “has been, or is, a user of alcohol habitually to excess, or has been diagnosed by a psychiatrist . . . as alcohol dependent or as suffering from alcohol abuse” (Criterion J). The bases for this finding are summarized below.

Attachment 1 states that on October 9, 2001, the individual was examined by a DOE consultant psychiatrist (DOE Psychiatrist). In his report, the DOE Psychiatrist states his medical opinion that the individual meets the *Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition (DSM-IV)* criteria for a mental condition, Alcohol Related Disorder Not Otherwise Specified. Although the individual did not meet the DSM-IV criteria for alcohol abuse or alcohol dependence, the DOE Psychiatrist determined that the diagnosed mental condition causes a significant defect in the individual’s judgment and reliability. In this regard, the report notes that the individual continued to drink despite the problems it has caused him in the past, and also notwithstanding that he was receiving medication, with potentially serious side effects, for the treatment of a malignant illness.

In a letter received by the DOE Office of Hearings and Appeals (OHA) on June 19, 2002, the individual exercised his right under Part 710 to request a hearing in this matter. 10 C.F.R. § 710.21(b). On June 20, 2002, I was appointed as Hearing Officer in this case. After conferring with the individual and the appointed DOE Counsel, 10 C.F.R. § 710.24, a hearing date was established. At the hearing, the DOE Counsel called a Personnel Security Specialist and the DOE Psychiatrist as witnesses. Apart from testifying on his own behalf, the individual called a co-worker and two supervisors. 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 "Exh.".

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 initially granted a "Q" level DOE security clearance in 1983, upon assuming his employment with a DOE contractor. The individual's "Q" access authorization was downgraded to an "L" access authorization in 1996 due to a change in his work responsibilities. However, in August 2000, the individual's employer requested that the individual "Q" access authorization be reinstated, again due to a revision of his work responsibilities. Pursuant to this request, a reinvestigation of the individual was performed and on February 28, 2001, a Personnel Security Interview (PSI) was conducted with the individual. During the PSI, the Personnel Security Specialist made inquiries regarding several matters, particularly the individual's past and current use of alcohol. The principal circumstances of the individual's alcohol use are summarized below.

The individual concedes that when he was teenager in high school, more than twenty years ago, he went through a period of excessive drinking due to immaturity and peer pressure. The individual states that he had a rebellious attitude and he and his friends thought it was "cool" to binge drink beer to the point of intoxication. During this time, the individual was arrested on three occasions. In the first two incidents, the individual was arrested for illegal possession of alcohol by a minor while in the company of his friends. In the final, more serious incident, the individual was arrested for Driving Under the Influence (DUI) at age seventeen, and was placed on probation. According to the individual, he was ashamed and disappointed with himself following the DUI arrest, and made a decision to drink more responsibly and to never drink before driving. While the individual continued to drink during his college years, the amount of his drinking declined principally due to financial restraints.

In 1985, the individual was involved in an incident at the workplace in which alcohol was an issue. On this occasion, some of the individual's co-workers purchased a few six-packs of beer and began sharing the beer with other workers, including the individual, after working hours in the parking lot. The workers were quickly informed, however, by security personnel that although the parking lot was outside the security fence it was nonetheless DOE grounds. Each worker, ten in all, therefore received a security infraction for consuming alcohol on DOE premises. Although the individual received an infraction, the individual did not purchase the beer and there is no indication that the individual was drinking excessively on this occasion. The individual was a relatively new employee at the time and was merely following the lead of more senior workers.

The individual has had no reported alcohol-related incidents since 1985, and his consumption of alcohol has generally declined since that time. During the year prior to the February 28, 2001 PSI, the individual usually consumed a beer after work, although not every night, and consumed three to four beers on the weekend but not in succession. The Personnel Security Specialist who conducted the PSI was not unduly concerned with the individual's recent level of alcohol consumption. However, the

Personnel Security Specialist was alarmed and expressed her concern to the individual upon receiving information that the individual drank alcohol while undergoing treatment for a serious illness, as described below.

In December 2000, the individual was diagnosed with lymphoma and, upon the advice of his oncology specialist, the individual began taking chemotherapy treatment in January 2001. The individual's chemotherapy involved a four-week cycle. On the first day of the cycle, the individual was given an injection of vincristine. Then, on the same day and continuing for the next four days, the individual was given two drugs ingested in pill form, cytoxan and prednazone, to rebuild blood corpuscles depleted by the chemotherapy injection. The individual's body was then given a time to recover before beginning another round of treatment four weeks after receiving the vincristine injection initiating the preceding round of chemotherapy treatment. One side effect of the individual's chemotherapy was a severe loss of taste and appetite for a period of two weeks after receiving the injection and taking the required medicines.

During the February 28, 2001 PSI, the individual informed the Personnel Security Specialist that two to three weeks after receiving his initial round of chemotherapy treatment, and prior to beginning his second round, his taste had returned and he decided to have one beer during the evening after work. Two days later, he decided to have another beer. The Personnel Security Specialist expressed her opinion to the individual that his decision to drink the two beers reflected poor judgment on his part. On the basis of this information and the individual's adolescent alcohol abuse, the Personnel Security Specialist determined that the individual should be referred to the DOE Psychiatrist for evaluation. In response to the critical reaction of the Personnel Security Specialist, the individual decided to abstain from alcohol pending completion of his chemotherapy treatments. The two beers that the individual drank between the first and second cycles was the only alcohol consumed by the individual during his chemotherapy.

The DOE Psychiatrist initially examined the individual on May 1, 2000. On the basis of his examination of the individual and pertinent material from the individual's security file, the DOE Psychiatrist concluded that the individual did not meet *DSM-IV* criteria for alcohol abuse or alcohol dependence, but nonetheless diagnosed the individual with Alcohol Related Disorder Not Otherwise Specified (NOS). In reaching this diagnosis, the DOE Psychiatrist stated in his report that: "[The individual] has continued to drink in what appears to be a maladaptive pattern, . . . [The individual] has continued to drink notwithstanding a history of repeated problems with the law as a teenager. He also has been reprimanded at work for drinking in what was still essentially part of the facility. He also has continued to drink even in between chemotherapy treatments for lymphoma. These indicate a defect in judgement and reliability." The DOE Psychiatrist noted, however, that the individual had stopped drinking at that juncture and appeared motivated to maintain his position with the

DOE contractor. The DOE Psychiatrist therefore recommended that the individual be considered an appropriate candidate for the Employee Assistance Program Referral Option (EAPRO). EAPRO is afforded to certain eligible employees and allows them to retain their security clearance based upon their compliance with a prescribed alcohol treatment and rehabilitation program. Two prerequisites for entering the program are that the employee have been abstinent from alcohol and agree to remain abstinent until its completion.

The individual was unaware of the recommendation contained in the report of the DOE Psychiatrist that the individual be offered EAPRO. In July 2001, the individual completed his six months of scheduled chemotherapy treatments, which proved to be successful in arresting his lymphoma. After receiving clearance from his treating physician, the individual resumed drinking alcohol, limited to a few beers on the weekend. Since his chemotherapy had ended, the individual did not believe that his drinking in moderate amounts would any longer be a concern to DOE.

On September 21, 2001, another PSI was conducted with the individual. This PSI was scheduled by the Personnel Security Specialist specifically for the purpose of offering the individual EAPRO. However, after discussing EAPRO with the individual, the Personnel Security Specialist informed the individual that he was no longer eligible for EAPRO because he had resumed drinking alcohol. Instead, the Personnel Security Specialist again referred the individual to the DOE Psychiatrist for a second evaluation. The DOE Psychiatrist reexamined the individual on October 9, 2001, and again diagnosed the individual with Alcohol Related Disorder NOS for the same reasons described in his earlier report. In this instance, the DOE Psychiatrist stated that "[EAPRO] is not a viable option at this time. [The individual] said that he agrees that the program is a good one, but he does not feel that he has a problem with alcohol. He would not be an appropriate candidate for this program." Based upon the second report of the DOE Psychiatrist, the determination was made that the individual's security clearance should be suspended and referred for administrative review. The individual has continued to drink in moderation.

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 be restored since I 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. Criteria J; Alcohol Use

In his report to DOE, the DOE Psychiatrist diagnosed the individual with Alcohol-Related Disorder, Not Otherwise Specified (NOS) under criteria set forth in the *Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition (DSM-IV)*.^{2/} In explaining his diagnosis, the DOE Psychiatrist states in his report: "The examinee's use of alcohol has been maladaptive. During his teenage years, he certainly had alcohol abuse, if not dependence. This probably extended until his college years. . . . The examinee, notwithstanding the presence of his serious illness, continued to drink. In between chemotherapy cycles, he was still drinking. He said that he was drinking only one beer on two occasions, and shortly after he finished therapy he resumed drinking, although at a reduced amount by his report. The issue cited indicates a defect in judgement and reliability. The examinee's drinking continues despite the

^{2/} The *DSM-IV* states that the Alcohol-Related Disorder NOS category is for disorders associated with the use of alcohol that are not classifiable as Alcohol Dependence, Alcohol Abuse, Alcohol Intoxication, Alcohol Withdrawal, etc. *DSM-IV* at 204.

problems it has caused him in the past, and also notwithstanding that he was receiving medication with side effects for the treatment of a malignant illness.” Exh. 8 at 5. The past difficulties alluded to by the DOE Psychiatrist include two arrests for illegal possession of alcohol by a minor and an arrest for DUI while a teenager in high school, and then receiving an infraction in 1985 for drinking on company grounds.

On the basis of the report of the DOE Psychiatrist, I find that DOE Security properly invoked Criterion J in suspending the individual’s security clearance.^{3/} In other DOE security clearance proceedings, Hearing Officers have consistently found that a diagnosis related to excessive alcohol use raises important security concerns. *See, e.g., Personnel Security Hearing*, Case No. VSO-0079, 25 DOE ¶ 82, 803 (1996) (affirmed by OSA, 1996); *Personnel Security Hearing*, Case No. VSO-0042, 25 DOE ¶ 82,771 (1995) (affirmed by OSA, 1996); *Personnel Security Hearing*, Case No. VSO-0014, *aff’d, Personnel Security Review*, 25 DOE ¶ 83,002 (1995) (affirmed by OSA, 1995). In these cases, it has been observed that an individual’s excessive use of alcohol might impair his judgment and reliability, and render him susceptible to pressure, coercion and duress. These factors amplify the risk that the individual will fail to safeguard classified matter or special nuclear material. Accordingly, I will turn to whether the individual has presented sufficient evidence to mitigate the security concerns of DOE relating to his use of alcohol.

B. Mitigating Evidence

I find that the individual has presented evidence which fully mitigates the security concerns of DOE relating to the diagnosis of the DOE Psychiatrist. During the hearing, the DOE Psychiatrist stated that the principal basis for his diagnosis of Alcohol Related Disorder NOS was the individual’s decision to drink, albeit two beers, in the interim between two of his chemotherapy treatments: “The biggest concern of course was that the drinking continued at a time when he was diagnosed with a rather serious illness, and also at a time when he was in treatment with medications that are potentially rather toxic. . . . that certainly brings his judgment into question.” Tr. at 58. While the DOE Psychiatrist took into consideration the individual’s excessive

^{3/} I find in this case that the concern of DOE Security falls within the purview of Criterion J since the individual “has been . . . a user of alcohol habitually to excess,” albeit not since high school nearly 25 years ago. The individual has not been diagnosed as “alcohol dependent or suffering from alcohol abuse,” and the DOE Psychiatrist found no difficulty with the individual’s recent use of alcohol other than the two beers he consumed during chemotherapy. In view of the diagnosis of the DOE Psychiatrist, the Notification Letter might have stated an ancillary security concern under 10 C.F.R. § 710.8(h), which is applicable in circumstances where an individual has a “mental condition of the nature which, in the opinion of a board-certified psychiatrist . . . causes, or may cause, a significant defect in judgment or reliability.”

drinking as a teenager, more than twenty years ago, the DOE Psychiatrist “felt that the other situations have been rather removed and he has functioned, I would say, rather well, since his teens and since the incident in 1985.” *Id.* The DOE Psychiatrist made it abundantly clear that he did not consider the individual’s level of drinking prior to contracting lymphoma to be a problem, but deemed only the individual’s decision to drink during chemotherapy to be “maladaptive” and reflecting a defect in judgment and reliability. Tr. at 66-67.^{4/}

However, the DOE Psychiatrist further clarified during the hearing that there were two essential premises for his diagnosis: first, that it is medically unwise and unsafe to consume any alcohol during the interim between chemotherapy treatments,^{5/} and second, that the individual had not received any guidance from his doctor before deciding to drink the two beers. Tr. at 60-61; 73-75.^{6/} Information provided by the individual at the hearing, however, established that the DOE Psychiatrist was incorrect in both respects.

The individual presented a letter from his treating physician, a specialist in the field of oncology, stating that “[t]hroughout patients’ chemotherapy treatments it would be okay to have an occasional beer on and off treatment.” Exh. 19. According to the individual’s testimony, his treating physician further stated that he would have instructed the individual that he must abstain from alcohol while undergoing chemotherapy, if it were a problem. Tr. at 138-39.

The individual further testified that contrary to the DOE Psychiatrist’s supposition, the individual had obtained specific guidance regarding the use of alcohol during chemotherapy before deciding to drink the two beers. Prior to beginning chemotherapy, the individual received several informational booklets from his

^{4/} Similarly, the Personnel Security Specialist testified that her primary concern, which led her to refer the individual to the DOE Psychiatrist, was the individual’s revelation that he drank two beers during the interim between his chemotherapy treatments. Tr. at 26.

^{5/} While admittedly not an expert in chemotherapy or oncology, the DOE Psychiatrist stated his belief on the basis of his medical training that the consumption of even moderate amounts of alcohol during chemotherapy treatment increases the probability of liver damage, due to the high toxicity of the chemotherapy drugs. Tr. at 59-60.

^{6/} During his psychiatric interview, the individual told the DOE Psychiatrist that he had informed his physician that he drank beer, when describing his lifestyle to his physician prior to beginning chemotherapy. Exh. 8 at 2. The individual reported that his physician did not tell him to abstain from all alcohol at that time. *Id.* The DOE Psychiatrist was nonetheless concerned that the individual did obtain clearance from his physician to drink the two beers after chemotherapy treatments had actually begun. Tr. at 75-76.

physician describing the effects and side effects of the chemotherapy drugs that would be administered, and the “dos and don’ts” while undergoing chemotherapy. Tr. at 122-23. The individual testified that none of the booklets said that he should abstain from alcohol but only that he should “keep it to a minimum.” Tr. at 123. The individual was forthright and convincing, and showed that he had exercised sound judgment, in describing the manner in which he reviewed all pertinent information before deciding to drink one beer on two separate evenings, for a total of two beers, during the three-week interim between his first and second chemotherapy treatments.^{7/}

After hearing the individual’s testimony, the DOE Psychiatrist rescinded his opinion that the individual’s decision to drink two beers while undergoing chemotherapy reflected a defect in the individual’s judgment and reliability. Tr. at 157-58. According to the DOE Psychiatrist, this was “information of which I was not aware of until today . . . that at the start of his chemotherapy he was actually given a statement or an instruction and this covered the use of alcohol.” Tr. at 157. The DOE Psychiatrist therefore withdrew his diagnosis of Alcohol Related Disorder NOS. Tr. at 158-59. I find that the withdrawal of the diagnosis and underlying opinion by the DOE Psychiatrist effectively nullifies the security concerns raised in the Notification Letter.

III. Conclusion

As explained in this Decision, I find that DOE Security properly invoked 10 C.F.R. § 710.8(j) in suspending the individual’s access authorization. However, for the reasons I have described above, I find that the individual has mitigated the legitimate concerns of DOE Security. I therefore 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 be restored. The DOE Office of Security Affairs 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: December 4, 2002

^{7/} The individual’s conduct in this respect was consistent with the description of the individual given by his friend (a co-worker) and supervisors who testified. These witnesses were uniform in their high praise of the individual’s good judgment and reliability. See Tr. at 93, 99-100, 109-11.