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United States Department of Energy
Office of Hearings and Appeals

In the Matter of: Personnel Security Hearing)
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Filing Date: August 7, 2018) Case No.: PSH-18-0062
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Issued: November 21, 2018

Administrative Judge Decision

James P. Thompson III, Administrative Judge:

This Decision concerns the eligibility of XXXXXXXXX (hereinafter referred to as "the Individual") to hold an access authorization under the United States Department of Energy's (DOE) regulations, set forth at 10 C.F.R. Part 710, Subpart A, entitled "General Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material."[1] As discussed below, after carefully considering the record before me in light of the relevant regulations and the *National Security Adjudicative Guidelines for Determining Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position* (June 8, 2017) ("Adjudicative Guidelines"), I conclude that the Individual's access authorization should not be restored.

I. BACKGROUND

The DOE employs the Individual in a position that requires him to hold a security clearance. In January 2018, the Individual reported that he was arrested and charged with, among other things, Driving While Intoxicated (DWI). The Local Security Office (LSO) conducted a Personnel Security Interview (PSI) of the Individual, and based upon information provided by the Individual during the PSI, the LSO referred the Individual for a psychological assessment. A DOE-contractor psychologist ("Psychologist") subsequently conducted an evaluation of the Individual in April 2018.

The Individual's conduct and the Psychologist's evaluation raised unresolved security concerns. Therefore, in a Notification Letter dated July 16, 2018 ("Notification Letter"), the LSO informed the Individual that it possessed reliable information that created substantial doubt regarding the Individual's

[1] The regulations define access authorization as "an administrative determination that an individual is eligible for access to classified matter or is eligible for access to, or control over, special nuclear material." 10 C.F.R. § 710.5(a). This Decision will refer to such authorization as access authorization or security clearance.

eligibility to hold a security clearance. In an attachment to the Notification Letter, the LSO explained that the derogatory information raised security concerns under "Guideline G, Alcohol Consumption."

The Individual exercised his right to request an administrative review hearing pursuant to 10 C.F.R. Part 710. The Director of the Office of Hearings and Appeals (OHA) appointed me as the Administrative Judge in the case, and I subsequently conducted an administrative hearing in the matter. At the hearing, the DOE Counsel introduced thirteen numbered exhibits (Exs. 1–13) into the record and presented the testimony of the Psychologist. The Individual introduced two exhibits (Exs. A and B) into the record in addition to his own testimony. The hearing transcript will be cited as "Tr." followed by the relevant page number.

II. THE NOTIFICATION LETTER AND THE ASSOCIATED SECURITY CONCERNS

The LSO cited Guideline G as the basis for suspending the Individual's security clearance. Guideline G states that "[e]xcessive alcohol consumption often leads to the exercise of questionable judgment or the failure to control impulses, and can raise questions about an individual's reliability and trustworthiness." Adjudicative Guidelines at ¶ 27. The Summary of Security Concerns contained in the Notification Letter asserted the following: (1) the Psychologist concluded the Individual is "habitually (frequently) drinking alcohol to a level of intoxication that impairs his judgement, reliability, and trustworthiness" without adequate evidence of rehabilitation; (2) the Individual was arrested and charged with DWI and related charges in January 2018 after he failed a test of breath for the presence of alcohol, admitted to consuming one alcoholic beverage, and admitted that he had an open bottle of whiskey on the floorboard of his vehicle; and (3) the Individual admitted to consuming alcohol every night of the week. Ex. 1 at 1.

III. REGULATORY STANDARDS

The regulations require me, as the Administrative Judge, to issue a Decision that reflects my comprehensive, common-sense judgment, made after consideration of all of the relevant evidence, favorable and unfavorable, as to whether the granting or continuation of a person's 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). The regulatory standard implies that there is a presumption against granting or restoring a security clearance. *See Department of Navy v. Egan*, 484 U.S. 518, 531 (1988) ("clearly consistent with the national interest" standard for granting 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).

An individual must come forward at the hearing with evidence to convince the DOE that granting or restoring the individual's access authorization "will not endanger the common defense and security and will be clearly consistent with the national interest." 10 C.F.R. § 710.27(d). The individual is afforded a full opportunity to present evidence supporting his eligibility for an access authorization. The Part 710 regulations are drafted so as to permit the introduction of a very broad range of evidence at personnel security hearings. Even appropriate hearsay evidence may be admitted. 10 C.F.R. § 710.26(h). Hence, an individual is afforded the utmost latitude in the presentation of evidence to mitigate the security concerns at issue.

IV. FINDINGS OF FACT

In January 2018, the Individual was arrested and charged with DWI after he failed a breathalyzer test with a Blood Alcohol Content (BAC) reading of .11. Ex. 11 at 8, 10. That night, the Individual went to a pool hall and remained there for about two and a half hours. *Id.* at 8. After leaving the pool hall, the Individual was stopped by a law enforcement officer after making a left turn from the right lane into a bar parking lot. Ex. 8 at 4. During the traffic stop, the Individual admitted that he had consumed alcohol. *Id.* The officer also discovered a bottle of whiskey with a broken seal on the vehicle's floorboard. *Id.* The Individual was eventually transported to a police station where he submitted to a chemical test of breath. *Id.* at 3.

During the PSI, the Individual stated that he only consumed one mixed drink of whiskey and coke at the pool hall before he started driving. Ex. 11 at 9. He also stated that the bartender later told him that the whiskey and coke contained a "double" serving of alcohol. Ex. 9 at 3. The Individual stated that he did not feel intoxicated that night. Ex. 11 at 48. As for the bottle of whiskey in the vehicle, the Individual explained that it had been given to him as a gift the day before, and he had consumed a "shot" when he received it. *Id.* at 19. He stated that he consumed his only alcoholic drink on the night of his DWI at the pool hall at about 7:15 p.m. Ex. 9 at 3. The police record demonstrates that he was stopped in his vehicle at about 8:34 p.m. Ex. 8 at 4.

The record contains differing accounts provided by the Individual as to the amount of alcohol he regularly consumes. At the time of the PSI, he stated that over the last thirty years he had consumed one to two whiskey and coke drinks each night of the week. Ex. 11 at 37. He later changed his reported consumption to one to two drinks on a weekend night, but not every weekend, for a total of about four or five drinks a month. *Id.* 41-42. He also stated that he had stopped drinking since his DWI, that he did not believe he had a drinking problem, and he intended to continue drinking. *Id.* at 47, 55-56. During the Psychologist's evaluation, which occurred a couple of months after the PSI, the Individual stated that he had been consuming alcohol every night of the week—including the weekend. Ex. 9 at 6. The Psychologist administered a Phosphatidylethanol (PEth) test and an ethyl glucuronide (EtG) test, and the results coupled with the Individual's reported consumption indicated to the Psychologist that the Individual had been drinking heavily and frequently during the period leading up to the Psychologist's evaluation. *Id.* at 5-6. As for the night of the DWI, the Psychologist opined that the Individual "had to have consumed much more alcohol than he is reporting in order to have registered a .11 g/210L an hour after he left the bar." *Id.* at 4.

After completing the evaluation, the Psychologist concluded that the Individual habitually consumes alcohol to the point of intoxication that impairs his judgment, reliability, and trustworthiness without adequate evidence of rehabilitation. *Id.* at 8. The Psychologist concluded that the Individual could demonstrate reformation by permanently abstaining from consuming alcohol, as demonstrated by twelve months of abstinence with accompanying laboratory test results evincing the same, or rehabilitation by participating in an intensive outpatient substance abuse program, aftercare meetings, and a group program such as Alcoholics Anonymous multiple times a week for at least nine months. *Id.*

At the start of his hearing testimony, the Individual stated that he did not, and has never had, a problem with alcohol. Tr. at 10. However, he later stated that while he has never been in trouble as a result of his alcohol use, in retrospect, he recognized the frequency of his alcohol use as a problem. *Id*. at 69.

The Individual did not dispute that his BAC was .11 on the night of his DWI, but he maintained that he had only consumed one alcoholic drink at the pool hall that evening. *Id.* 11-12, 44. He also stated that, while he did not notice that his drink was stronger than normal, perhaps due to simultaneously consuming french fries, he later learned from the bartender that his drink contained about ten to twelve ounces of whiskey. *Id.* at 13-14, 43, 48-49.

The Individual also attempted to clarify his previous statements regarding his consumption of alcohol. He stated that he was unable to recall his exact drinking pattern from 2007 to present and described it as random. *Id.* 19-23. However, he also stated that if he had a drink, it was probably two drinks at night spread out over three to four hours. *Id.* at 20. Then he said that if he had to describe his pattern of drinking, it would "probably be . . . a drink probably every other night" of the week *Id.* at 20-21. He then stated that on nights when he would drink, he would consume approximately two to three self-made whiskey and cokes that each contained "two fingers" worth of whiskey. *Id.* at 24. He also referred to drinking as a habit, such as his pattern of drinking after mowing the yard. *Id.* at 23, 75. A habit which he continued, even after getting rid of the whiskey in his home, by drinking a beer or two instead—despite not typically liking to drink or finish beer. *Id.* at 75. He furthermore testified that he has never felt intoxicated after consuming alcohol, including on the night of his DWI. *Id.* at 44-45, 72.

Finally, the Individual testified regarding his alcohol consumption after his DWI and after his evaluation with the Psychologist. He adamantly stated that he only consumed a total of four beers, divided evenly between two separate occasions, in the several months leading up to his evaluation with the Psychologist. *Id.* at 65, 99-100. The latter of those occasions occurred about two days before he took the PEth and EtG tests. *Id.* at 65. He also stated that he had not consumed any alcoholic beverages from April 2018 to the date of the hearing. *Id.* at 65. At the time of the hearing, he had not participated in any treatment or counseling related to his alcohol use aside from obtaining an assessment from a Veteran Affairs (VA) substance abuse counselor who evaluated him and who declined to diagnose him with a condition under the Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition.[2] *Id.* at 39; Ex. B.

After evaluating the testimony presented during the hearing, the Psychologist rendered his opinion that the Individual had not demonstrated rehabilitation or reformation regarding his problematic alcohol use. *See* Tr. at 98. The Psychologist also offered the opinion that the fact that the Individual did not feel intoxicated on the night of the DWI demonstrates that the Individual developed a tolerance by frequently drinking "a great deal" of alcohol. *Id.* at 88. Furthermore, the Psychologist stated that the combined PEth and EtG results contradict the Individual's testimony that he had only consumed four beers over the three months prior to his meeting with the Psychologist. *Id.* at 101.

V. ANALYSIS

I have thoroughly considered the record of this proceeding, including the submissions tendered in this case and the testimony of the Individual and Psychologist at the hearing. 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) and the Adjudicative Guidelines. After due deliberation, I have determined that the

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[2] The Individual was required to complete an alcohol assessment as a condition that resulted from his DWI criminal hearing. Tr. at 62-63. The VA counselor did not review the Psychologist's report. Tr. at 102.

Individual's access authorization should not be restored at this time. I cannot find that granting the individual a security clearance will not endanger the common defense and security, and that it is clearly consistent with the national interest. 10 C.F.R. § 710.27(a). The specific findings that I make in support of this Decision are discussed below.

A. Guideline G Concerns

Guideline G provides that a disqualifying security concern may be raised by "habitual or binge consumption of alcohol to the point of impaired judgment, regardless of whether the individual is diagnosed with alcohol use disorder." Adjudicative Guidelines at ¶ 22(c). Guideline G further provides that a security concern may be raised by "alcohol-related incidents away from work, such as driving while under the influence . . . , regardless of the frequency of the individual's alcohol use or whether the individual has been diagnosed with alcohol use disorder." *Id.* at ¶ 22(a). The record provides evidence to support the LSO's concern that the Individual has consumed alcohol habitually to the point of impairment and that the Individual was charged with DWI and possession of an open alcoholic container in his vehicle. The information contained in the Notification Letter therefore justified the LSO's invocation of Guideline G.

Guideline G also provides that security concerns arising from alcohol consumption can be mitigated if (a) "so much time has passed, or the behavior was so infrequent, or it happened under such unusual circumstances that it is unlikely to recur or does not cast doubt on the individual's current reliability, trustworthiness, or judgment;" or (b) "the individual acknowledges his or her pattern of maladaptive alcohol use, provides evidence of actions taken to overcome this problem, and has demonstrated a clear and established pattern of modified consumption or abstinence in accordance with treatment recommendations . . . ."[3] *Id.* at ¶ 23(a)–(b). In this case, the Individual has not presented sufficient evidence to mitigate the LSO's Guideline G concerns.

First, while the Individual received his DWI almost a year ago, the Individual's PEth and EtG results indicate that he was continuing to consume alcohol as recently as April 2018. The Individual admitted as much, even if he disputes the quantity and frequency of consumption the Psychologist derived from those results. Given the Individual's significant history of alcohol consumption since 2007, his alleged period of abstinence, standing alone, does not establish a sufficient passage of time to mitigate the concern. Furthermore, the Individual admitted that he drank too frequently in the past, which he viewed as a problem, and he did not present any evidence to demonstrate that the circumstances surrounding his alcohol use or his DWI were unusual. Instead, he testified to the opposite: over the years he regularly consumed alcohol in the form of a particular alcoholic beverage and sometimes out of habit, such as after completing yard work. Further still, the only evidence to indicate the Individual is not currently consuming alcohol at a concerning level is his own testimony, which I am unable to rely upon given the numerous conflicting and unreliable statements the Individual provided regarding his alcohol use. As a result, I find that the Individual has not mitigated the Guideline G concerns due to the passage of time, the frequency of his behavior, or the circumstances surrounding his behavior.

Second, while the record may support a finding that the Individual acknowledges that he has a problem with consuming alcohol too frequently, it does not support a finding that he has therefore mitigated the

[3] The remaining mitigating conditions listed under Guideline G are patently inapplicable.

Guideline G concerns. As stated above, I do not find his testimony regarding his modified alcohol consumption reliable. In addition, the Individual did not follow any of the treatment or counseling recommendations contained in the Psychologist's report. Consequently, I do not find the Individual has presented evidence that he has taken action to overcome the problem. Furthermore, even accepting the Individual's testimony regarding his recent abstinence as evidence he has taken action to overcome the problem, he began abstaining approximately six months prior to the hearing, which is significantly less than the twelve months recommended by the Psychologist. And the Individual did not engage in any treatment or counseling recommended by the Psychologist or any other qualified professional. Thus, I do not find that the Individual has demonstrated a clear and established pattern of modified consumption or abstinence in accordance with treatment recommendations. For the reasons stated above, I do not find that the Individual has mitigated the security concerns presented by the LSO under Guideline G.

VI. CONCLUSION

In the above analysis, I found that there was sufficient derogatory information in the possession of the LSO that raised security concerns under Guideline G. As stated above, it is the Individual's burden to come forward with evidence to convince me that restoring his access authorization "will not endanger the common defense and security and will be clearly consistent with the national interest." After considering all of the relevant information, favorable and unfavorable, in a comprehensive, common-sense manner, including weighing all of the testimony and other evidence presented at the hearing, I find that the Individual has not brought forth sufficient evidence to resolve the security concerns set forth in the Notification Letter. I therefore cannot find that that restoring his access authorization would not endanger the common defense and security of the nation and would be clearly consistent with the national interest. Accordingly, I have determined that the Individual's access authorization should not be restored.

Either party may seek review of this Decision by an Appeal Panel pursuant to 10 C.F.R. § 710.28.

James P. Thompson III
Administrative Judge
Officer of Hearings and Appeals