

*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 XXXXXX's.

**United States Department of Energy
Office of Hearings and Appeals**

In the Matter of: Personnel Security Hearing)
)
Filing Date: December 9, 2021) Case No.: PSH-22-0025
)
)
_____)

Issued: May 13, 2022

Administrative Judge Decision

Janet R. H. Fishman, Administrative Judge:

This Decision concerns the eligibility of XXXXXXXXXXXXXXXX (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, "Procedures for Determining Eligibility for Access to Classified Matter and 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 an access authorization should not be granted to the Individual.

I. BACKGROUND

The Individual is employed by a DOE contractor in a position that requires him to hold a security clearance. The local security office (LSO) determined that derogatory information regarding the Individual existed, including his numerous alcohol-related arrests, and asked a DOE-consulting Psychologist (DOE Psychologist) to evaluate him. Subsequently, the LSO issued the Individual a letter in which it notified him that it possessed reliable information that created substantial doubt regarding his eligibility to hold a security clearance. In a Summary of Security Concerns (SSC) attached to the letter, the LSO explained that the derogatory information raised security concerns under Guideline G (Alcohol Consumption) and Guideline J (Criminal Conduct) of the Adjudicative Guidelines. Ex. 1 at 1-4.

The Individual exercised his right to request an administrative review hearing pursuant to 10 C.F.R. Part 710. Ex. 2. The Director of the Office of Hearings and Appeals (OHA) appointed me as the Administrative Judge in this matter, and I subsequently conducted an administrative hearing. The LSO submitted eight exhibits (Ex. 1–8) and the testimony of the DOE Psychologist.

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.

Hearing Transcript (Tr.) at 71. The Individual offered one exhibit (Ex. A), testified on his own behalf, and offered the testimony of two friends (Individual's Friends). Tr. at 9, 17, 24.

II. THE NOTIFICATION LETTER AND THE ASSOCIATED SECURITY CONCERNS

The LSO cited Guideline G (Alcohol Consumption) as the first basis for its determination that the Individual was ineligible for access authorization. Ex. 1. "Excessive 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 ¶ 21. The LSO cited the DOE Psychologist's report which determined that the Individual met the diagnostic criteria for Alcohol Use Disorder (AUD), Moderate, under the *Diagnostic and Statistical Manual of Mental Disorders – Fifth Edition (DSM-5)*, along with the Individual's criminal record of twelve alcohol-related arrests and charges. Ex. 1 at 1-2. The LSO's assertions justify the LSO's invocation of Guideline G. Adjudicative Guidelines at ¶ 22(c)–(d).

The LSO also cited Guideline J (Criminal Conduct) as a basis for its determination that the Individual was ineligible for access authorization. Ex. 1. "Criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. By its very nature, it calls into question a person's ability or willingness to comply with laws, rules, and regulations." Adjudicative Guidelines at ¶ 30. The LSO cited the Individual's twenty-two arrests (including alcohol and non-alcohol related arrests) as justification for raising Guideline J. Ex. 1 at 2-4. The Individual's twenty-two arrests justifies the LSO's invocation of Guideline J. Adjudicative Guidelines at ¶ 31(b).

III. REGULATORY STANDARDS

A DOE administrative review proceeding under Part 710 requires me, as the Administrative Judge, to issue a Decision that reflects my comprehensive, common-sense judgment, made after consideration of all 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 Dep't 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).

The individual must come forward at the hearing with evidence to convince the DOE that granting or restoring 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 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 AND HEARING TESTIMONY

The Individual was arrested on twenty-two occasions on a variety of charges between 1978 and 2017. Ex. 1 at 2-4; Tr. at 26-44. He admitted the charges raised by the LSO were true, although he disputed the validity of the underlying actions that resulted in some of the arrests. Tr. at 26-44. The twenty-two charges include twelve alcohol-related offenses, comprised of ten Driving While Intoxicated (DWI) charges,² one Battery of a Household Member charge, and one Involuntary Manslaughter While Intoxicated charge. Ex. 1 at 1-2; Tr. at 26-44. The Individual claimed that he was “railroaded” on the 2007 Battery of a Household Member charge, because he was teasing his girlfriend with a mop when she leaned and caused a small scratch. *Id.* at 31. This incident occurred after he consumed alcohol. *Id.* at 31-34. The Individual explained that the charge of Involuntary Manslaughter while Intoxicated resulted from his truck being hit by a motorcyclist at a high rate of speed. *Id.* at 43-44. The motorcyclist died as a result of the accident. *Id.* The Individual asserted that, while he had consumed some alcohol prior to the accident, he was not intoxicated. *Id.*

After explaining the multitude of charges, the Individual testified that he knew he had a problem with alcohol, because he was jailed as a result of some of the charges. Tr. at 47. He explained to the DOE Psychologist that he attended Alcoholics Anonymous (AA) in the early 1990s when his girlfriend at the time complained that he was consuming too much alcohol. Ex. 5 at 6. He acknowledged that around 1998 he attended alcohol counseling. *Id.* He also stated to the DOE Psychologist during the evaluation that there would be long periods of time when he completely abstained from alcohol, usually after an alcohol-related incident. Ex. 5 at 6.

At the evaluation, the Individual reported to the DOE Psychologist that he had attended AA for several weeks in the early 1990s. Tr. at 6. Further, he related that he had attended an alcohol awareness class in 1999 and a three-week outpatient alcohol program. *Id.* While undergoing an employment-related physical in 2015 when previously employed by the contractor, the Individual admitted to the LSO the amount of alcohol he was consuming. *Id.* at 48-49; Ex. 5 at 6. As a result of those admissions, he testified, the LSO informed him that the only way for him to keep his employment was to consult the Employee Assistance Program (EAP). Tr. at 50; Ex. 5 at 6. According to the Individual, in order to continue with EAP, the EAP counselor required the Individual to be abstinent and undergo weekly testing. Tr. at 50; Ex. 5 at 6. The Individual initially abstained from alcohol after meeting with the EAP counsel, but not long after, he was laid off from his employment, and as a result did not implement the EAP counselor’s plan. Thereafter, he began consuming alcohol again. Tr. at 51; Ex. 5 at 6.

At the February 2021 evaluation, the Individual stated to the DOE Psychologist that he was consuming four to six 12-ounce cans of beer approximately four to five times per week. Ex. 5 at 6. Despite this claim, the Individual averred that he had not consumed alcohol since Christmas 2020. *Id.* Yet the Individual’s post-evaluation laboratory tests indicates significant alcohol consumption within a month of the evaluation. Ex. 5 at 8, 21. At the hearing, the Individual testified that he did not remember the exact date of his last alcohol consumption prior to his evaluation, and that during the evaluation the DOE Psychologist had asked him to “guess.” Tr. at 53.

Finally, the Individual testified that he was not surprised by his AUD diagnosis. Tr. at 56. He also stated that he did not read the report, because it was “uncomfortable reading.” *Id.* The Individual

² One of the ten charges was Driving Under the Influence from October 1998. Ex. 1 at 3. For ease of reading, I have referred to it as a DWI.

admitted that he only recently read the DOE Psychologist's recommendations, including that he be abstinent and attend individual counseling with a certified alcohol counselor and AA for a minimum of two years. *Id.* at 57; Ex. 5 at 9. He asserted that he had reduced his alcohol consumption, but he recently consumed a few beers the night before he started attending the EAP on March 29, 2022. *Id.* at 58; Ex. A. As of the hearing date, the Individual had attended two sessions at EAP. Ex. A. In order to continue with EAP, the EAP counselor requires him to attend weekly group counseling sessions, individual counseling, and AA. Tr. at 59. He avowed that he was going to see his Personal Care Physician two weeks after the hearing and ask for an order for the Phosphatidylethanol (PEth) blood tests with the results to be delivered to the LSO. *Id.*

The Individual's two friends testified that the Individual infrequently consumed alcohol with them. Tr. at 11, 20. One friend testified that he was convinced the Individual consumes alcohol because the friend believes everyone does. *Id.* at 10. The other friend stated that the Individual never appeared intoxicated or "hung over." *Id.* at 20. Both friends asserted that the Individual was very trustworthy and honest. *Id.* at 11, 21.

The DOE Psychologist briefly discussed the criteria that the Individual met to warrant a diagnosis of AUD, Moderate. Tr. at 65. Those criteria include persistent desire or unsuccessful attempts to reduce his consumption; cravings and urges to use alcohol; recurrent use despite failure to fulfill obligations at work and home; continued use despite persistent interpersonal problems; occupational activities reduced due to use; and recurrent use in situations where it is physically hazardous. Ex. 5 at 8; Tr. at 64-65. The DOE Psychologist testified that he recommended permanent abstinence because the Individual continued relapsing into heavy alcohol consumption, and he has had numerous alcohol-related incidents. Tr. at 65. He continued that he recommended individual counseling with a certified alcohol counselor and active participation in AA for a minimum of two years. *Id.* at 65; Ex. 5 at 9. In his report, the DOE Psychologist defined active participation as a minimum of six meetings a week, obtaining a sponsor, and showing evidence of working the "steps." Ex. 5 at 9.

At the hearing, the DOE Psychologist did not hear any testimony that altered his recommendations regarding rehabilitation or reformation. Tr. at 65, 68. He did testify that the fact that the Individual is reengaging with EAP and will be getting monthly PEth tests is positive sign. *Id.* at 66. However, because the Individual had undergone treatment before, without success, the DOE Psychologist expressed concern that the Individual lacked insight into his AUD diagnosis. *Id.* at 67. He asserted that he "would expect . . . an acknowledgment [by the Individual] that . . . this is going to be difficult. . . . Even the honest acknowledgment [that] I miss drinking, or I had a craving for alcohol." *Id.* He also expressed concern that it had been over a year since the evaluation, and the Individual had not begun any attempt at rehabilitation or reformation until just prior to the hearing. *Id.* at 68.

V. ANALYSIS

A. Guideline G

The LSO's reliance on the DOE Psychologist's determination that the Individual met the diagnostic criteria for AUD, Moderate, under the *DSM-5*, and twelve alcohol-related arrests and charges justify the LSO's invocation of Guideline G. Adjudicative Guidelines at ¶ 22(a), (d), (e). An individual may mitigate security concerns under Guideline G 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;
- (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;
- (c) the individual is participating in counseling or a treatment program, has no previous history of treatment and relapse, and is making satisfactory progress in a treatment program; and,
- (d) the individual has successfully completed a treatment program along with any required aftercare, and has demonstrated a clear and established pattern of modified consumption or abstinence in accordance with treatment recommendations.

Adjudicative Guidelines at ¶ 23(a)–(d).

None of the mitigating conditions under Guideline G have been met by the Individual in this case. Regarding the first mitigating factor, the Individual admitted that he consumed alcohol less than a month prior to the hearing. No unusual circumstances existed that led the Individual to his alcohol use at that time. Likewise, the Individual has not met the second, third, or fourth mitigating factor. Although he admitted that alcohol created complications in his life, the only evidence of his addressing the difficulties brought forth by his alcohol use is his very recent attendance at the EAP as shown by the letter from the EAP counselor stating that he had attended two sessions. Further, he has demonstrated no pattern of abstinence since he last consumed alcohol less than a month prior to the hearing. Also, the Individual has a history of treatment and relapse, having attended AA previously in the early 1990s, an alcohol-awareness class in 1999, and a three-week outpatient alcohol program, also in 1999 prior to his evaluation with the DOE Psychologist.

Accordingly, I find that the Individual has not resolved the security concerns asserted by the LSO under Guideline G.

B. Guideline J

The Individual's numerous arrests justify the LSO's invocation of Guideline J. Adjudicative Guidelines at ¶ 31(b). An individual may mitigate security concerns under Guideline J if:

- (a) so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances, that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment;
- (b) the individual was pressured or coerced into committing the act and those pressures are no longer present in the person's life;
- (c) [there is] no reliable evidence to support that the individual committed the offense; and
- (d) there is evidence of successful rehabilitation; including, but not limited to, the passage of time without recurrence of criminal activity, restitution, compliance with the terms of parole or probation, job training or higher education, good employment record, or constructive community involvement.

Adjudicative Guidelines at ¶ 32(a)–(d).

Although all the Individual's most recent criminal charge occurred over five years prior to the hearing date, I still find that none of the mitigating factors have been satisfied. Regarding the first factor, the Individual has not shown that he is rehabilitated or reformed from his AUD, which was a contributing factor in twelve of the arrests. The Individual has had 10 DWIs, and claimed at the hearing that his most recent offense occurred because he "could no longer trust" his designated driver. Tr. at 45. Therefore, until he has controlled his alcohol use, he has not shown that his criminal behavior is unlikely to recur, especially given his past treatment and attempts at abstinence and AA. *See, e.g., Personnel Security Decision*, OHA Case No. PSH-17-0038 (2017) (stating "[w]hile the individual's DUI and DWIs occurred over a decade ago, the individual is not only still consuming alcohol but is continuing to exercise poor judgment due to his alcohol consumption"). As to the second factor of mitigation, there is no evidence that he was pressured or coerced into committing the acts that resulted in his arrest. Likewise, the Individual has admitted that he committed the offenses listed by the LSO. Finally, although there has been a significant passage of time since his last arrest, as mentioned above, the fact remains that most of the arrests involved alcohol, and he has not mitigated the alcohol-related concerns.

Thus, I find that the Individual has not resolved the security concerns asserted by the LSO under Guideline J.

VI. CONCLUSION

In the above analysis, I found that there was sufficient derogatory information in the possession of DOE to raise security concerns under Guidelines G and J of the Adjudicative Guidelines. After considering all the relevant information, favorable and unfavorable, in a comprehensive, common-sense manner, including weighing all 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 SSC. Accordingly, I have determined that the Individual's access authorization should not be granted. This Decision may be appealed in accordance with the procedures set forth at 10 C.F.R. § 710.28.

Janet R. H. Fishman
Administrative Judge
Office of Hearings and Appeals