



2023. Ex. 9. A statement prepared by a law enforcement officer in connection with the incident, which the Individual provided as an attachment to the PSIR, indicated that the accuser alleged that the Individual was intoxicated at the time of the offense. *Id.* at 50. The statement further indicated that the Individual had initially denied knowing the accuser when confronted by law enforcement officers before admitting that he did know the accuser but denying that he had committed the offense. *Id.*

The LSO issued the Individual letters of interrogatory on June 27, 2023 (First LOI), and September 21, 2023 (Second LOI), concerning his alcohol use and the circumstances of his arrest. Ex. 4; Ex. 6. The Individual represented that he consumed two or three alcoholic drinks on the day of his citation for Sexual Battery in response to the First LOI. Ex. 5 at 13. In his response to the Second LOI, the Individual asserted that he consumed alcohol in moderation, approximately four times weekly, and admitted that he had consumed alcohol to the point of intoxication approximately three times in the preceding twelve months. Ex. 7 at 22–23.

On November 13, 2023, the Individual met with a DOE-contracted psychologist (DOE Psychologist) for a psychological evaluation. Ex. 16 at 59. During the evaluation, the Individual reported having consumed one to three alcoholic drinks over the preceding month. *Id.* at 67. However, alcohol testing indicated that the Individual had consumed greater amounts of alcohol. *Id.* The DOE Psychologist subsequently issued a report of the psychological evaluation (Report) in which he opined that the Individual met sufficient diagnostic criteria for a diagnosis of Alcohol Use Disorder (AUD) under the *Diagnostic and Statistical Manual of Mental Disorders – Fifth Edition (DSM-5)*,<sup>3</sup> engaged in “heavy alcohol consumption,” and binge consumed alcohol to the point of impaired judgment. *Id.* at 70.

The LSO subsequently issued the Individual a Notification Letter advising him that it possessed reliable information that created substantial doubt regarding his eligibility for access authorization. Ex. 1. In a Summary of Security Concerns (SSC) attached to the letter, the LSO explained that the derogatory information raised security concerns under Guidelines D, E, G, and J of the Adjudicative Guidelines. Ex. 2.

The Individual exercised his right to request an administrative review hearing pursuant to 10 C.F.R. Part 710. Ex. 3. The Director of the Office of Hearings and Appeals (OHA) appointed me as the Administrative Judge in this matter, and I conducted an administrative hearing. The LSO submitted nineteen exhibits (Exs. 1–19). The Individual submitted two exhibits (Exs. A–B). The Individual testified on his own behalf. Hearing Transcript, OHA Case No. PSH-24-0109 (Tr.) at 3, 9. The LSO offered the testimony of the DOE Psychologist. *Id.* at 3, 47.

## II. THE NOTIFICATION LETTER AND THE ASSOCIATED SECURITY CONCERNS

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<sup>3</sup> The DOE Psychologist did not specify the severity of the Individual’s AUD in the Report. At the hearing, the DOE Psychologist testified that the Individual met two diagnostic criteria for AUD, and therefore that he had diagnosed the Individual with AUD, Mild. Tr. at 58.

The LSO cited Guideline D (Sexual Behavior) of the Adjudicative Guidelines as a basis for its substantial doubt regarding the Individual's eligibility for access authorization. Ex. 2 at 8–9. Actions that may raise concerns under Guideline D include “[s]exual behavior that involves a criminal offense; reflects a lack of judgment or discretion; or may subject the individual to undue influence of coercion, exploitation, or duress. These issues, together or individually, may raise questions about an individual’s judgment, reliability, trustworthiness, and ability to protect classified or sensitive information.” Adjudicative Guidelines at ¶ 12. The SSC cited the Individual’s citation for Sexual Battery and subsequent prosecution for the offense. Ex. 2 at 8–9. The LSO’s allegation that the Individual engaged in sexual behavior of a criminal nature justifies its invocation of Guideline D. Adjudicative Guidelines at ¶ 13(a).

The LSO cited Guideline E (Personal Conduct) of the Adjudicative Guidelines as another basis for its substantial doubt regarding the Individual’s eligibility for access authorization. Ex. 2 at 5–7.

Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual’s reliability, trustworthiness, and ability to protect classified or sensitive information. Of special interest is any failure to cooperate or provide truthful and candid answers during national security investigative or adjudicative processes.

Adjudicative Guidelines at ¶ 15. The SSC cited the Individual’s statement to law enforcement officers that he did not know the woman who accused him of committing Sexual Battery, the Individual’s claim in response to the First LOI that he was not intoxicated when he allegedly committed the Sexual Battery offense, and the Individual’s representation during the psychological evaluation that he had consumed one to three alcoholic drinks over the prior month. Ex. 2 at 6–7. The LSO’s allegations that the Individual deliberately provided false or misleading information to government officials, in response to a personnel security questionnaire, and to a mental health professional involved in making a recommendation relevant to his eligibility for access authorization justify its invocation of Guideline E. Adjudicative Guidelines at ¶ 16(a)–(b).

The LSO cited Guideline G (Alcohol Consumption) of the Adjudicative Guidelines as an additional basis for its substantial doubt regarding the Individual’s eligibility for access authorization. Ex. 2 at 4–5. “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 SSC alleged that the Individual engaged in “heavy alcohol consumption” and binge consumption of alcohol to the point of impaired judgment based on the results of alcohol testing and the opinion of the DOE Psychologist, cited the DOE Psychologist’s determination that the Individual met sufficient diagnostic criteria for a diagnosis of AUD under the *DSM-5*, and noted the Individual’s Sexual Battery and DUI offenses. Ex. 2 at 4–5. The LSO’s allegations that the Individual engaged in alcohol-related incidents away from work, habitually or binge consumed alcohol to the point of impaired judgment, and was diagnosed with AUD by a duly qualified mental health professional justify its invocation of Guideline G. Adjudicative Guidelines at ¶ 22(a), (c)–(d).

The LSO cited Guideline J (Criminal Conduct) of the Adjudicative Guidelines as the final basis for its substantial doubt regarding the Individual’s eligibility for access authorization. Ex. 2 at 7–

8. “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 SSC cited the Individual’s Sexual Battery, DUI, and underage possession of alcohol offenses. Ex. 2 at 7–8. The LSO’s allegations that the Individual engaged in numerous instances of unlawful conduct justify its 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 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 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) (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 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). An individual is afforded a full opportunity to present evidence supporting his or her 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. *Id.* § 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 1992, the Individual was cited for unlawful possession of alcohol as a minor. Ex. 18 at 197; *see also* Ex. 16 at 65 (reflecting the Individual’s claim to the DOE Psychologist that the alcohol belonged to a friend and that he had not consumed any when he was cited). In 2010, the Individual was arrested and charged with DUI. Ex. 18 at 197; *see also* Ex. 16 at 52 (indicating that the Individual’s blood alcohol content was measured at .165 following his arrest). The Individual pleaded guilty and was sentenced to probation and ordered to pay a fine. Ex. 16 at 66; Ex. 18 at 197.

On June 24, 2023, the Individual and his wife volunteered for a public event in his community at which alcohol was served. Ex. 9 at 31; Tr. at 15–17, 19–20. When his volunteer shift ended and he was participating in the event as an attendee, the Individual consumed alcohol to the point of intoxication. Tr. at 22–23. The Individual approached a woman working as a security officer at the event (Accuser) who he had previously met at other public events. Ex. 7 at 25 (reflecting information provided by the Individual in response to the Second LOI); Ex. 16 at 60. Later that day, the Accuser approached a law enforcement officer and reported that the Individual had non-

consensually grabbed her buttocks and kissed her neck. Ex. 9 at 50 (containing a narrative provided by the law enforcement officer who cited the Individual). The Accuser also told the law enforcement officer that the Individual was intoxicated at the time of the alleged assault. *Id.* The law enforcement officer interviewed a witness who reported having observed the Individual “wrap his arms around [the Accuser’s] shoulders” and that the Accuser “appeared uncomfortable with the interaction.” *Id.* at 48.

The law enforcement officer questioned the Individual regarding the incident. *Id.* at 50. The Individual initially denied knowing any of the security officers at the event before admitting that he knew several of them. *Id.* The Individual then denied that he had any contact with any security officers, but subsequently asked whether the law enforcement officer’s questions pertained to the Accuser and admitted that he “put his arm around [her] and touched her shoulder in order to see a tattoo.” *Id.* After making this admission, the Individual denied that he knew the Accuser in response to additional questions from the law enforcement officer and refused to cooperate further. *Id. see also* Tr. at 18 (testifying at the hearing that he made this statement because, although he had previously interacted with the Accuser and knew her by appearance, he did not know the Accuser’s name). The law enforcement officer subsequently cited the Individual for Sexual Battery (Misdemeanor). Ex. 9 at 51.

The Individual submitted the PSIR disclosing his citation for Sexual Battery to the LSO on June 26, 2023. *Id.* at 30–31. On June 27, 2023, the LSO issued the Individual the First LOI. Ex. 4. In his response, the Individual represented that he consumed “approximately 2 to 3 [alcoholic] drinks” during the event on June 24, 2023. Ex. 5 at 13. On September 21, 2023, the LSO issued the Individual the Second LOI. Ex. 6. In his response, the Individual represented that he usually consumed one or two canned cocktails or alcoholic seltzers four times weekly. Ex. 7 at 22. The Individual indicated that he consumed alcohol to the point of intoxication, which he defined as “six to seven [alcoholic] drinks in a short period of time,” three times within the prior twelve months. *Id.* at 23. He further indicated that the last time he had consumed alcohol to intoxication was on June 24, 2023 – the date he was cited for Sexual Battery. *Id.* The Individual acknowledged having interacted with the Accuser at the event on June 24, 2023, but denied that he had committed Sexual Battery and represented that his interactions with the Accuser were “professional.” *Id.* at 25–26.

The Individual’s wife and close family members learned of his citation for Sexual Battery shortly after the event. Tr. at 44. In October 2023, the Individual’s wife initiated divorce proceedings. Ex. 16 at 65. The Individual concluded that his citation for Sexual Battery was a significant contributing factor to his wife’s decision to seek the divorce. *Id.*; Tr. at 44. The divorce was finalized in May 2024. Tr. at 15.

On November 13, 2023, the Individual met with the DOE Psychologist for a psychological evaluation. Ex. 16 at 59. The Individual represented to the DOE Psychologist that he had consumed alcohol to intoxication “4-5 times over the last year” and had been trying to “slowly cut back on alcohol” over several months preceding the psychological evaluation. *Id.* at 66. The Individual told the DOE Psychologist that he had consumed only “1-3 drinks of alcohol over the past 30 days.” *Id.* at 67; *see also* Tr. at 42 (testifying at the hearing that he had intended to communicate that he consumed one to three alcoholic drinks per sitting and not one to three drinks in total during this

period). The Individual acknowledged that his alcohol consumption had caused him relationship difficulties in the past with his family and an ex-wife. Ex. 16 at 60, 67. The DOE Psychologist administered the Alcohol Use Disorder Identification Test (AUDIT),<sup>4</sup> a ten-question questionnaire concerning the frequency and quantity of alcohol use, to the Individual. *Id.* at 68. The results of the AUDIT were positive, indicating a risk of alcohol misuse. *Id.*

Immediately following the clinical interview, the Individual provided samples for two laboratory tests: an ethyl glucuronide (EtG)<sup>5</sup> test and a phosphatidylethanol (PEth)<sup>6</sup> test. The EtG test was negative for traces of alcohol consumption. *Id.* at 67, 73. However, the PEth test was positive at 192 ng/mL. *Id.* The DOE Psychologist relied on a journal article concerning the use of the PEth test in the national security context in estimating the Individual's alcohol consumption based on the results of the PEth test. *Id.* at 67 (excerpting the journal article); *see also* William Ulwelling & Kim Smith, *The PEth Blood Test in the Security Environment: What it is; Why it is Important; and Interpretative Guidelines*, J. OF FORENSIC SCI., July 2018 (Article). According to the Article, a study found that a PEth of 186 ng/mL was the mean for men who engaged in binge drinking which the study defined as consumption of five or more alcoholic drinks per sitting at least twice monthly. Ex. 16 at 67; Article at 4.

On November 22, 2023, the DOE Psychologist issued the Report. Ex. 16 at 71. Based on the results of the alcohol testing and the information contained in the Article, the DOE Psychologist determined that the Individual had significantly underreported his alcohol consumption in the month preceding the clinical interview. *Id.* at 67. Based on the laboratory testing, the results of the AUDIT, and the Individual's description of his alcohol consumption, and considering this information in light of the evidence that the Individual was minimizing his alcohol consumption, the DOE Psychologist concluded that the Individual met sufficient diagnostic criteria for a diagnosis of AUD under the *DSM-5* and engaged in "a pattern of heavy alcohol consumption and binge drinking . . ." *Id.* at 70. The DOE Psychologist recommended that the Individual demonstrate rehabilitation or reformation by completing an outpatient alcohol rehabilitation program followed by aftercare and abstaining from alcohol for "over 12 months" with PEth testing at least every two months to document the Individual's abstinence from alcohol. *Id.*

On February 1, 2024, the Individual pleaded guilty to an amended charge of Battery to resolve the charges stemming from his citation for Sexual Battery. Ex. 13 at 52. On February 22, 2024, the Individual was sentenced to one year of probation, pursuant to which he was required to undergo an alcohol and drug evaluation and complete a substance misuse education class, and to pay a fine and court costs. *Id.* at 55. The Individual paid the fine and all required costs on the same day he was sentenced. *Id.* at 56.

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<sup>4</sup> The Report indicates that the DOE Psychologist administered the AUDIT-C, an abridged format of the AUDIT. Ex. 16 at 68. The DOE Psychologist testified at the hearing that he had administered the complete AUDIT to the Individual. Tr. at 66.

<sup>5</sup> An EtG test measures the presence of ethyl glucuronide, a metabolite of ethanol, in a subject's urine. *See* Ex. 16 at 73. According to the DOE Psychologist, an EtG test can detect traces of alcohol consumption that occurred up to 48 to 96 hours prior to the test. *Id.* at 67.

<sup>6</sup> PEth, a compound produced in the presence of ethanol, is a biomarker for alcohol consumption that can be used to detect whether a subject consumed alcohol within several weeks of sample collection. Ex. 16 at 67, 72-73.

The Individual began meeting with a licensed counselor (Individual's Counselor) on March 6, 2024. Ex. A at 1. The Individual met with the Individual's Counselor five times from March 6, 2024, to the date of the hearing. Tr. at 36–37. The Individual learned through counseling that “busyness” and other stressors were triggers that led him to consume alcohol as a coping mechanism. *Id.*

The Individual underwent the court-ordered drug and alcohol evaluation on March 27, 2024. Ex. B at 2. The Individual indicated during the evaluation that he typically consumed one to two drinks “at the end of work to wind down” and that he had most recently consumed alcohol on March 22, 2024, when he consumed three alcoholic drinks. *Id.* at 7. The clinician conducting the evaluation concluded that the Individual did not meet sufficient diagnostic criteria for a diagnosis of a substance use disorder but recommended that the Individual participate in individualized therapy in addition to his counseling. *Id.* at 8. The clinician noted that the Individual's lack of motivation for treatment presented a problem “of high clinical significance . . . .” *Id.* at 5.

The Individual testified at the hearing that he had been diagnosed with anxiety by a mental health provider who prescribed him medication to manage his anxiety. Tr. at 33–35. The Individual represented that he had previously used alcohol as a coping mechanism for anxiety, and that his anxiety medication had helped him to manage his psychological symptoms through means other than alcohol. *Id.* at 35. The Individual testified that, as of the date of the hearing, he typically consumed one or two alcoholic drinks twice weekly. *Id.* He indicated that his sister, who he said was a participant in Alcoholics Anonymous, was part of his support system. *Id.* at 37–38. The Individual acknowledged that alcohol “ha[d] been a problem throughout [his] life” and that alcohol-related treatment was “something [he] need[ed] to pursue” in the future. *Id.* at 39–40.

The Individual testified that he did not know whether he committed the touching alleged by the Accuser because his intoxication on June 24, 2023, impaired his memory of his behavior. *Id.* at 43. The Individual indicated that his family was aware of the Accuser's allegations and denied that he was susceptible to blackmail related to the accusations. *Id.* at 44–45.

The DOE Psychologist indicated that the Individual's anxiety could have contributed to the Individual's alcohol misuse, and that the Individual's anxiety medication could be beneficial to addressing his alcohol misuse. *Id.* at 66–67. However, he opined that the Individual's AUD was not in partial or sustained remission because the Individual continued to consume alcohol against treatment recommendations and continued to meet diagnostic criteria for AUD. *Id.* at 60–62, 68. He further opined that the Individual had not demonstrated rehabilitation or reformation due to failing to comply with the DOE Psychologist's treatment recommendations. *Id.*

## **V. ANALYSIS**

### **A. Guideline D**

Conditions that could mitigate security concerns under Guideline D include:

- (a) the behavior occurred prior to or during adolescence and there is no evidence of subsequent conduct of a similar nature;
- (b) the sexual behavior happened so long ago, so infrequently, or under such unusual circumstances, that it is unlikely to recur and does not cast doubt on the individual's current reliability, trustworthiness, or judgment;
- (c) the behavior no longer serves as a basis for coercion, exploitation, or duress;
- (d) the sexual behavior is strictly private, consensual, and discreet; and
- (e) the individual has successfully completed an appropriate program of treatment, or is currently enrolled in one, has demonstrated ongoing and consistent compliance with the treatment plan, and/or has received a favorable prognosis from a qualified mental health professional indicating the behavior is readily controllable with treatment.

Adjudicative Guidelines at ¶ 14.

The Individual's alleged Sexual Battery is the only instance of alleged inappropriate sexual conduct on the part of the Individual in the record. While the Individual's alleged conduct was unlawful and casts doubt on his judgment, the alleged offense was a misdemeanor citation the legal consequences of which were relatively minor in nature. *See* 10 C.F.R. § 710.7(c) (requiring consideration of, among other things, the "seriousness of the conduct" in applying the Adjudicative Guidelines). In light of the fact that the alleged offense was a misdemeanor citation, and the absence of evidence that the Individual has engaged in similar conduct in the past, I am satisfied that the Individual's behavior was so infrequent that the second mitigating condition is applicable. *Id.* at ¶ 14(b).

The third mitigating condition is likewise applicable. The Individual's wife learned of his conduct and initiated divorce proceedings shortly thereafter. The Individual's family is also aware of his alleged conduct. As those close to the Individual have already learned of his alleged conduct, and he has already suffered the associated consequences via his wife divorcing him, I find that there is no basis for the Individual to be coerced, exploited, or subjected to duress through threatened disclosure of his conduct. Thus, the third mitigating condition is applicable. *Id.* at ¶ 14(c).

Based on the applicability of the aforementioned mitigating conditions, I find that the Individual has resolved the security concerns asserted by the LSO under Guideline D.

## **B. Guideline E**

Conditions that could mitigate security concerns under Guideline E include:

- (a) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts;



- (b) the refusal or failure to cooperate, omission, or concealment was caused or significantly contributed to by advice of legal counsel or of a person with professional responsibilities for advising or instructing the individual specifically concerning security processes. Upon being made aware of the requirement to cooperate or provide the information, the individual cooperated fully and truthfully;
- (c) the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment;
- (d) the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that contributed to untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur;
- (e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress;
- (f) the information was unsubstantiated or from a source of questionable reliability;  
and
- (g) association with persons involved in criminal activities was unwitting, has ceased, or occurs under circumstances that do not cast doubt upon the individual's reliability, trustworthiness, judgment, or willingness to comply with rules and regulations.

Adjudicative Guidelines at ¶ 17.

The first mitigating condition is not applicable to any of the Individual's allegedly deceptive acts. The Individual's evasive statements to the law enforcement officer to the effect that he did not know the accuser came after the law enforcement officer confronted him with the Accuser's allegations and he never corrected his false claim not to have known her. The LSO was in possession of the law enforcement records containing the Accuser's allegation that the Individual was intoxicated before the Individual admitted that he was in response to the Second LOI. Finally, the Individual was confronted with the DOE Psychologist's conclusion that he had underrepresented his alcohol consumption in the clinical interview before testifying at the hearing that he had consumed more than one to three drinks in the month prior to the clinical interview. Accordingly, the first mitigating condition is inapplicable. *Id.* at ¶ 17(a).

The second mitigating condition is irrelevant to the facts of this case because the Individual does not claim to have acted on the advice of counsel or another representative in any of the situations cited by the LSO under Guideline E. *Id.* at ¶ 17(b).

The third mitigating condition is applicable to the Individual's statements to the law enforcement officer because, as he admitted at the hearing, he was so intoxicated at the time that he does not recall his behavior. I find it likely that the Individual's statements to law enforcement regarding

his interactions with the Accuser and subsequent claims that he did not know her were the product of intoxication-induced confusion. While the Individual's significant intoxication presents security concerns under Guideline G, I find that his intoxication was a unique circumstance that explained his inconsistent, confusing statements better than deceptiveness. *Id.* at ¶ 17(c).

However, the third mitigating condition does not resolve the other concerns raised by the LSO pursuant to Guideline E. The Individual's false claim in response to the First LOI that he was not intoxicated when he allegedly committed Sexual Battery and his claim to the DOE Psychologist that he had no more than three drinks in the thirty days prior to the clinical interview were recent and of significant importance to the adjudication of his eligibility for access authorization.<sup>7</sup> Although two instances of untruthful conduct is rather infrequent, I find that the Individual's false statements presented significant security concerns since they concerned critical aspects of the LSO's adjudication of his eligibility for access authorization. The Individual's willingness to falsely deny derogatory conduct under these circumstances outweighs the relative infrequency of the conduct, and therefore I find the third mitigating condition inapplicable to the Individual's false statements in response to the First LOI and to the DOE Psychologist. *Id.*

The fourth mitigating condition is inapplicable because the Individual did not allege that his counseling addressed untruthful behavior. *Id.* at ¶ 17(d). The fifth mitigating condition is irrelevant to the facts of this case because the LSO did not allege that the Individual's untruthfulness placed him at special risk of exploitation, manipulation, or duress. *Id.* at ¶ 17(e). The sixth mitigating condition is inapplicable because the LSO's allegations did not rely on unsubstantiated information or sources of questionable reliability. *Id.* at ¶ 17(f). The final mitigating condition is irrelevant because the LSO did not allege that the Individual associated with persons involved in criminal conduct. *Id.* at ¶ 17(g).

Having concluded that none of the mitigating conditions are applicable to the Individual's response to the First LOI or statement to the DOE Psychologist regarding his alcohol consumption in the thirty days prior to the clinical interview, I find that the Individual has not resolved the security concerns asserted by the LSO under Guideline E.

### **C. Guideline G**

Conditions that could mitigate security concerns under Guideline G include:

- (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;

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<sup>7</sup> The Individual claimed in his hearing testimony that he had not intended to deceive the DOE Psychologist and that he intended to communicate that he consumed one to three alcoholic drinks per occasion in the month prior to the clinical interview and not one to three alcoholic drinks in total. *Supra* pp. 5–6. In light of the DOE Psychologist's statement in the Report that he asked the Individual to clarify what he meant by one to three drinks, and that the Individual said "he had only consumed 1-3 drinks of alcohol over the past 30 days," I find it likely that the DOE Psychologist was precise in recording the Individual's self-described alcohol consumption and that the Individual intentionally underrepresented his alcohol consumption to the DOE Psychologist. Ex. 16 at 67.

- (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; or,
- (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.

The Individual claimed that he relatively infrequently consumed alcohol to intoxication since his 2010 DUI and that his alcohol-related Sexual Battery citation was an isolated and unusual occurrence. The DOE Psychologist inferred that the Individual consumed alcohol more frequently than he claimed based on the Individual's admission that his alcohol consumption had caused relationship issues, the Individual's self-described difficulty in reducing his alcohol consumption, and the evidence from the PEth test that the Individual was underreporting his alcohol consumption. *Supra* p. 6. The PEth test results and the interpretive guidance in the Article upon which the DOE Psychologist relied do not establish that the Individual regularly consumed alcohol to intoxication in of themselves. *See Personnel Security Hearing*, OHA Case No. PSH-24-0031 at 12–13 (2024) (finding that a PEth test is not capable of identifying how much alcohol an individual consumed with pinpoint precision or differentiating between regular consumption of moderate quantities of alcohol and less frequent consumption of alcohol to the point of intoxication). However, the PEth test results and interpretive guidance in the Article are strong evidence that the Individual substantially understated his alcohol consumption in the clinical interview. In light of the Individual's recent alleged criminal activity while intoxicated, his admission that alcohol had impaired his relationships, and the evidence from the PEth test that the Individual was significantly underreporting his alcohol consumption, I find that it was reasonable for the DOE Psychologist to infer that the Individual engaged in regular binge drinking or habitually consumed alcohol to the point of impaired judgment regardless of the Individual's claims to the contrary.

The Individual admitted at the hearing that he is regularly consuming alcohol, and he did not produce the results of alcohol testing to show that he has reduced the volume of his alcohol consumption. In light of the Individual's unreliability in reporting how much alcohol he drinks, I find that the problematic alcohol consumption giving rise to the security concerns is ongoing and thus that no time has passed since the problematic behavior. For the reasons noted above, I find that the Individual's problematic alcohol consumption was neither infrequent nor occurred under unusual circumstances. As the Individual is continuing to drink alcohol against treatment recommendations, despite alcohol recently leading him to allegedly commit Sexual Battery, I find that the behaviors giving rise to the security concerns are not unlikely to recur. Thus, the first mitigating condition is inapplicable. Adjudicative Guidelines at ¶ 23(a).

The Individual has acknowledged that his alcohol use has been problematic but has not complied with the DOE Psychologist's treatment recommendation to abstain from alcohol. Accordingly, the second mitigating condition is inapplicable. *Id.* at ¶ 23(b). Although the Individual is participating in counseling, the counseling is not consistent with the alcohol-related treatment recommended by the DOE Psychologist. Moreover, the DOE Psychologist's opinion at the hearing indicated that the Individual was not making satisfactory progress and the court-ordered alcohol assessment provided by the Individual noted that he was unmotivated to receive treatment. For these reasons, I find the third mitigating condition inapplicable. *Id.* at ¶ 23(c). The fourth mitigating condition is inapplicable because the Individual does not allege that he has completed treatment or abstained from alcohol. *Id.* at ¶ 23(d).

For the aforementioned reasons, I find that none of the mitigating conditions under Guideline G are applicable in this case. Accordingly, the Individual has not resolved the security concerns asserted by the LSO under Guideline G.

#### **D. Guideline J**

Conditions that could mitigate security concerns under Guideline J include:

- (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) 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.

*Id.* at ¶ 32.

The Individual's alleged criminal conduct is sufficiently recent that he is still serving probation in connection with the offense. Moreover, the Individual has not resolved the problematic alcohol consumption that precipitated the offense. While I do not believe that the Individual is necessarily likely to commit Sexual Battery in the future, he is susceptible to committing criminal acts while under the influence of alcohol, like his prior DUI, until such time as he resolves his problematic alcohol consumption. Thus, I find the first mitigating condition inapplicable. *Id.* at ¶ 32(a).

The second mitigating condition is not relevant as the Individual does not allege that he was pressured or coerced into unwanted touching of the Accuser. *Id.* at ¶ 32(b).

The witness who cooperated with the law enforcement investigation of the Accuser's allegations did not corroborate the specific touching alleged by the Accuser but did report seeing the Individual engage in unwanted touching of the Accuser's shoulders in a way that made the Accuser uncomfortable. While this is not definitive evidence that the Individual engaged in the alleged conduct, the Individual admits that he was so intoxicated when the alleged conduct occurred that he cannot recall whether or not he committed it. In light of the evidence that the Individual engaged in some unwanted touching of the Accuser, and the fact that the Individual admittedly is unsure whether he committed the offense, I cannot find that there is no reliable evidence that the Individual committed the offense. Thus, the third mitigating condition is inapplicable. *Id.* at ¶ 32(c).

The Individual has provided some evidence of compliance with the terms of his probation by paying fines and fees and undergoing the court-ordered alcohol assessment. However, the Individual will remain on probation until February 2025 and has not provided evidence of completing the alcohol education class required under the terms of his probation. Under the circumstances, it is too early to find that the Individual has substantially complied with the terms of his probation. As the Individual has not submitted evidence of any other rehabilitation under the fourth mitigating condition, I find it inapplicable. *Id.* at ¶ 32(d).

For the aforementioned reasons, I find that none of the mitigating conditions under Guideline J are applicable to the facts of this case. Thus, 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 D, E, 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 brought forth sufficient evidence to resolve the security concerns under Guideline D, but not the security concerns under Guidelines E, G, and J. Accordingly, I have determined that the Individual's access authorization should not be restored. This Decision may be appealed in accordance with the procedures set forth at 10 C.F.R. § 710.28.

Phillip Harmonick  
Administrative Judge  
Office of Hearings and Appeals