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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: March 22, 2018) Case No.: PSH-18-0029
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Issued: June 26, 2018

Administrative Judge Decision

Kimberly Jenkins-Chapman, Administrative Judge:

This Decision concerns the eligibility of XXXXXXXXXXXX (hereinafter referred to as “the Individual”) for access authorization under the Department of Energy’s (DOE) 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 For the reasons set forth below, I conclude that the Individual’s security clearance should not be restored.

I. BACKGROUND

The Individual works for a DOE Contractor and has held a security clearance for several years. On June 10, 2017, the Individual was involved in a physical altercation with a friend and was later charged with felony battery. Ex. 7 at 2, 5. He timely reported the incident to his supervisor. The Local Security Office (LSO) conducted a personnel security interview (PSI) of the Individual and referred him to a DOE Psychologist for an alcohol use evaluation. Ex. 10. The DOE Psychologist (the Psychologist) evaluated the Individual on October 26, 2017. *Id.* During the evaluation, the Individual intentionally misled the DOE Psychologist as to his current alcohol consumption, as evidenced by a blood test conducted that day. *Id.* at 8. On November 1, 2017, the DOE Psychologist issued a report in which he concluded that the Individual meets the criteria set forth in *Diagnostic and Statistical Manual of the American Psychiatric Association, Fifth Edition (DSM-5)* for Alcohol Use Disorder, Mild. *Id.* The Individual’s security clearance was suspended. The LSO began the present administrative review proceeding by issuing a Notification Letter to the Individual informing him that he was entitled to a hearing before an Administrative Judge in order to resolve the substantial doubt regarding his eligibility for a security clearance. *See* 10 C.F.R. § 710.21.

¹ Under the regulations, “Access authorization” means 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). Such authorization will also be referred to in this Decision as a security clearance.

The Individual requested a hearing and the LSO forwarded the Individual's request to the Office of Hearings and Appeals (OHA). The Director of OHA appointed me as the Administrative Judge in this matter. At the hearing I convened pursuant to 10 C.F.R. § 710.25(d), (e) and (g), I took testimony from the Individual, his mother, his twin sister, his fiancée, and the DOE Psychologist. See Transcript of Hearing, Case No. PSH-18-0029 (hereinafter cited as "Tr."). The LSO submitted nine exhibits, marked as Exhibits 1 through 9 (hereinafter cited as "Ex."). The Individual submitted two exhibits, marked as Exhibits A and B.

II. THE NOTIFICATION LETTER AND THE ASSOCIATED SECURITY CONCERNS

As indicated above, the Notification Letter informed the Individual that information in the possession of the DOE created a substantial doubt concerning his eligibility for a security clearance. That information pertains to Guidelines E, G, and J of the *National Security Adjudicative Guidelines for Determining Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position*, effective June 8, 2017 (Adjudicative Guidelines).

Under Guideline E, Personal Conduct, the LSO alleges that the Individual intentionally misled the DOE Psychologist when he stated that he had not consumed alcohol since June 2017. Ex. 1 at 1. The Guidelines provide that "[c]onduct 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 information." Adjudicative Guidelines at ¶ 15. Accordingly, this allegation adequately justifies the LSO's invocation of Guideline E.

Under Guideline G, Alcohol Consumption, the LSO alleges that the Individual meets the criteria for Alcohol Use Disorder, Mild, and that the Individual continues to consume alcohol. Ex. 1 at 1–2. As additional support for invoking Guideline G, the LSO lists the Individual's June 2017 arrest and four other alcohol-related incidents, as well as his statements that he became intoxicated once a month between August 2016 and August 2017. *Id.* at 2. The Guidelines provide 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 ¶ 21. Among those conditions set forth in the Guidelines that could raise a disqualifying security concern are "alcohol-related incidents at work, such as reporting for work or duty in an intoxicated or impaired condition . . . regardless of whether the individual has been diagnosed with alcohol use disorder." *Id.* at ¶ 22(b). Guideline G further provides that a "diagnosis by a duly qualified medical or mental health professional . . . of [an] alcohol use disorder" "could raise a security concern and may be disqualifying." *Id.* at ¶ 22(d). Accordingly, this allegation adequately justifies the LSO's invocation of Guideline G.

Under Guideline J, Criminal Conduct, the LSO alleges that the Individual has engaged in criminal activity based upon the Individual's June 2017 arrest and seven other charges. Ex. 1 at 3. A summary is provided below:

<u>Date</u>	<u>Citation or Arrest</u>
June 10, 2017	Aggravated Battery-Deadly Weapon (felony)

April 22, 2014	Speeding
2013	Speeding
2013	No Seatbelt, No Insurance
November 2, 2011	Receiving Stolen Property
July 24, 2010	Driving Under the Influence; Possession of Alcohol by a Minor; Failure to Yield (The Individual stated that he continued to consume alcohol in violation of his probation for his previous alcohol-related infraction.)
October 17, 2009	Minor in Possession of Alcohol
September 12, 2009	Public Affray

Id. at 3. The Guidelines provide that “[c]riminal 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. One of the conditions set forth in the Guidelines that could raise a disqualifying security concern is: “a pattern of minor offenses, any one of which on its own would be unlikely to affect a national security eligibility decision, but which in combination cast doubt on the Individual's judgment, reliability, or trustworthiness.” *Id.* at ¶ 31(A). Accordingly, the Individual’s pattern of disregard for the law justifies the LSO’s invocation of Guideline J.

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 restoring 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 restoring 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 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.

The discussion below reflects my application of these factors to the testimony and exhibits presented by both sides in this case.

IV. FINDINGS OF FACT

On June 10, 2017, the Individual was on a camping trip with friends. Ex. 13 at 9, 11. He and his friends began consuming alcohol around 9:00 AM. Ex. 13 at 29. Between noon and 1:00 PM, the Individual began cooking lunch. Ex. 13 at 11. An argument started between the Individual and one of his friends. *Id.* The friend physically accosted the Individual and, in the course of the altercation, received a cut on his ear from the spatula the Individual was holding. *Id.* at 14–16. Though witnesses told police that they did not believe that the Individual intentionally wielded the spatula as a weapon, the friend pressed charges and the Individual was arrested for felony Battery with a Deadly Weapon. Ex. 7 at 2, 5. The Individual, seeking to put the entire incident behind him as quickly as possible, pleaded guilty to a misdemeanor and was given a deferred sentence contingent upon successful completion of probation. Ex. 13 at 32, 40–41. The terms of his probation included an alcohol education course, an anger management course, restitution for the victim’s medical expenses, and abstinence from alcohol. *Id.* at 35, 47; Tr. at 11–13.

The Individual timely reported the incident to his supervisor. The DOE Contractor required the Individual to complete alcohol and drug classes, and to submit to random alcohol and drug testing as part of an evaluation of his fitness for duty. Ex. 13 at 46; Tr. at 16. The Individual was subsequently interviewed by the LSO. During the PSI, the Individual admitted to having consumed alcohol in violation of his probation for a prior offense when he was in college. He admitted to four criminal events while he was in college, three of which were alcohol-related. He also admitted to three traffic violations between college and his June 2017 arrest. The Individual stated that he had not consumed any alcohol during his fitness for duty period. Ex. 13 at 52.

Because the Individual had been consuming alcohol when the June 2017 incident occurred, the LSO referred him to the Psychologist, who evaluated the Individual on October 26, 2017. Ex. 10. During the evaluation, the Individual told the Psychologist that he had not consumed alcohol since June 2017. *Id.* at 8. The Psychologist performed a PEth test on the Individual, a test which measures amounts of alcohol byproduct in the blood. *Id.* A positive result on the test is 20 ng/ml. The Individual’s result was 680 ng/ml. *Id.* On November 1, 2017, the Psychologist issued his report, concluding that the Individual meets the criteria set forth in the *Diagnostic and Statistical Manual of the American Psychiatric Association, Fifth Edition (DSM-5)* for Alcohol Use Disorder, Mild. *Id.*

At the hearing, the Individual testified on his own behalf and presented testimony from four witnesses: his EAP Counselor, his supervisor, a colleague, and a friend who is also his colleague and former supervisor. The DOE Psychologist also testified.

The EAP Counselor testified that the Individual had completed an anger management program and an alcohol awareness program through the EAP office, as required by the court and the DOE Contractor. Tr. at 11–13. He also testified that the Individual had participated in three additional sessions with him after finishing the mandatory programs. *Id.* at 20. During their sessions, the Individual learned that his anger issues were more problematic when he consumed alcohol. *Id.* at 13. Neither the Counselor nor the DOE Contractor’s Occupational Medicine evaluator had identified the Individual as an alcoholic when he started treatment with EAP in July 2017. *Id.* at 15. The Individual had self-reported to the Counselor that he stopped consuming alcohol during

that treatment. *Id.* at 15–16. All of the Individual’s urine and breath tests were negative during that time. *Id.* at 16. The Counselor testified that he was not concerned about the Individual’s alcohol use when he was released from his programs in September 2016, and that he had no concerns regarding the Individual’s personal or criminal conduct. *Id.* at 17–18.

The Individual’s supervisor testified that she had some limited experience with the Individual outside of work, including several lunches and an annual Christmas party she hosted. *Id.* at 28. Though she served alcohol at her Christmas party, she has not seen the Individual drink to excess. *Id.* at 29. The Individual reported his recent arrest to her as soon as he could and has told her about the LSO’s security concerns. *Id.* at 29–30. She testified that the Individual is very trustworthy and reliable, and that he exhibits good judgment. *Id.* at 32–33. She further testified that the Individual follows all rules and regulations. *Id.* at 31. The Supervisor stated that she has had employees with alcohol problems in the past and that the Individual has not exhibited any of the issues that those employees have exhibited. *Id.* at 36.

The colleague had no contact with the Individual outside of work. *Id.* at 41. He testified that the individual is honest, forthcoming, hardworking, and pleasant to have in the workplace. *Id.* at 45. He testified that he has no reason to doubt the Individual’s trustworthiness. *Id.* at 45. The colleague also testified that, even when doing so would be easy or unnoticeable, the Individual never cut corners, and that he always followed the rules. *Id.* at 44.

The friend met the Individual in 2014 when he was acting superintendent of the work site. *Id.* at 48. About a year ago he moved to a different position and now works with the Individual closely and often. *Id.* at 54–55. In that time, they have begun to see each other outside of the workplace, going on fishing or hunting trips, meeting each other’s families, and attending Alcoholics Anonymous (AA) meetings together. *Id.* at 50–51. They have not consumed alcohol together and the friend has been supportive of the Individual’s sobriety, even acting as his AA sponsor and attending meetings with the Individual for moral support. *Id.* at 50–51. He testified to the Individual’s trustworthiness, reliability, good judgment, and even temper. *Id.* at 55. He also testified that he sees the Individual obeying all rules and laws, both at work and outside of work. *Id.* at 56.

The Individual began his testimony by admitting to being dishonest about his alcohol consumption when he met with the DOE Psychologist. *Id.* at 59–60. He acknowledged that he made a mistake. *Id.* at 60. He testified that his last alcoholic drink was just after the New Year in January 2018. *Id.* at 60. He stated that he has been attending AA meetings weekly since March, is going to private counseling once per month, and has had three individual sessions with the EAP Counselor. *Id.* at 60, 71. He has also taken several PEth tests at his own expense to show that he has not been consuming alcohol. *Id.* at 71. The Individual testified that the administrative review process has taught him how alcohol use and criminal conduct can harm not just himself, but others, including his family, colleagues, and friends. *Id.* at 67. He stated that he intends to maintain his abstinence, even if his clearance is not restored. *Id.* at 76–77, 85–86.

The Individual further testified that his June 2017 arrest was an isolated incident, different from his alcohol-related troubles during his college years. *Id.* at 63. He stated that his alcohol consumption decreased after college and, until the camping incident, he had not been in serious trouble since then. *Id.* at 63–65. He testified that, while his friends would not describe him as an “angry drunk,”

he would sometimes get angry when he was consuming alcohol. *Id.* at 66. However, he stated that the EAP anger management classes taught him new coping skills. *Id.* at 66.

The Individual testified that he abstained from alcohol during his fitness for duty evaluation period. *Id.* at 70. Apart from that, between June 2017 and January 2018, the Individual consumed alcohol occasionally, including on one hunting trip and on the weekend before his evaluation by the DOE Psychologist. *Id.* at 70. He received the DOE Psychologist's report in late November or early December 2017, but did not abstain from alcohol until his security clearance was suspended in January 2018. *Id.* at 120. He did not start going to AA until March and testified that he began attending those meetings to mitigate the LSO's concerns. *Id.* at 71–72.

Although his girlfriend and family still consume alcohol, they are supportive of the Individual's sobriety and he turns to them, and the friend who testified on his behalf, for support in maintaining his sobriety. *Id.* at 73–74, 84, 91. The individual testified that after one month of abstaining from alcohol, he no longer had the urge to consume alcohol. *Id.* at 74. The individual stated that, although he is not certain what it means to him to be an alcoholic, he intends to continue going to AA until he is "100% at peace with [him]self." *Id.* at 76. The Individual testified that he considers his friend who testified on his behalf to be his sponsor and that he does not intend to get a sponsor from inside the AA program. *Id.* at 91. However, many of the people he works with daily are in his AA group and he talks to them often. *Id.* at 77.

The Individual testified that his dishonesty during the DOE Psychologist's evaluation stemmed from his fear of losing his job. *Id.* at 60. He admits that it was a mistake and that it was hard to admit that he had a problem. *Id.* at 60, 76. He does not believe that his trustworthiness, reliability, or judgment are questionable. However, when asked about his choice to repeatedly consume alcohol in violation of the terms of his probation, the Individual described that choice as "bad judgment." *Id.* at 82, 89.

The DOE Psychologist testified that the Individual is not yet rehabilitated or reformed, but has a fair to good prognosis and is at medium risk for relapse. *Id.* at 116–17, 122. He believes that the Individual has made a good initial effort to overcome his alcohol use disorder. *Id.* at 122. However, he stated that, at the time of the hearing, the Individual had only abstained from alcohol for five months and most patients are not considered rehabilitated until they have abstained for at least one year. *Id.* at 166–17. The DOE Psychologist testified that AA does not seem to be a good fit for the Individual and that the program is not right for everyone. *Id.* at 112–13. He noted that, when asked, the Individual could not identify the first of AA's 12 steps.² *Id.* at 113. He also noted that the Individual's friend is not a sponsor because he is not a recovering alcoholic. *Id.* at 113. The DOE Psychologist recommended that the Individual find a different treatment program that more closely meets his needs. *Id.* at 114. He also expressed approval of the Individual's ongoing treatment plan. *Id.* at 114–16. The DOE Psychologist believed that the Individual's trustworthiness, reliability, and judgment were still at issue, especially considering that he knowingly violated the terms of his probation by consuming alcohol. *Id.* at 118–19.

V. ANALYSIS

² However, the Individual described the content of the first step when asked what steps he had worked through. Tr. at 94.

The issue before me is whether the Individual, as he stands at the time of his hearing, presents an unacceptable risk to national security and the common defense. I must consider all of the evidence, both favorable and unfavorable, in a common sense manner. Because of the strong presumption against restoring security clearances, I must deny restoration if I am not convinced that the LSO's security concerns have been mitigated such that restoring the Individual's clearance is not an unacceptable risk to national security.

A. Guideline E

Guideline E provides that the following conditions, in relevant part, may mitigate Personal Conduct security concerns: (1) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts; (2) 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; and (3) 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. Adjudicative Guidelines at ¶ 17(a), (c), (d).

The Individual only admitted to his lack of candor after his PEth test revealed the truth. *Id.* at ¶ 17(a). He has sought treatment for the subject of his lie, but has not demonstrated that the treatment has focused on personal honesty and integrity so much as it focuses on abstinence from alcohol. *Id.* at ¶ 17(d). While the Individual's personal PEth tests are a good start in rebuilding his credibility, I am not convinced that he would be more honest in a similar situation in the future. The Individual said that he lied because he was afraid that he would lose his job. He did not offer testimony on what he would do the next time he is faced with a choice where telling the truth may lead to potential negative consequences. Fear of his actions' consequences can lead the Individual to lie, and the Individual, like all people, will face such a choice in the future. *Id.* at ¶ 17(a). Because he has not demonstrated how he will behave differently in the future, I am not convinced that the Individual is unlikely to repeat his behavior in the future, nor am I convinced that his lack of candor does not cast doubt on his reliability, trustworthiness, or good judgment.

B. Guideline G

Guideline G provides that security concerns arising from alcohol consumption can be mitigated when: (1) the individual's alcohol use was so infrequent or so long ago that it is unlikely to recur and does not cast doubt on his current reliability, trustworthiness, or judgment; (2) the individual acknowledges his pattern of alcohol abuse, provides evidence of actions taken to overcome this problem, and has demonstrated a clear and established pattern of modified consumption or abstinence; (3) the individual has no history of relapse and is making satisfactory progress in treatment or counseling; or (4) the individual has successfully completed a treatment program and has established a pattern of modified consumption or abstinence. Guideline G at ¶ 23(a)–(d).

The Individual has shown significant progress in abstaining from alcohol, and his efforts are to be commended. However, these efforts do not fully mitigate the LSO's security concerns. The Individual's alcohol use was both frequent and recent, and the DOE Psychologist predicted a medium chance of relapse. *Id.* at ¶ 23(a). The Individual did acknowledge that his alcohol use has been problematic, and he has been making satisfactory progress in treatment, but he has not been

abstinent long enough to show an established pattern. *Id.* at ¶ 23(b)–(d). Furthermore, the timing of the Individual’s decision to abstain from alcohol undermines the credibility of his statements that he intends to abstain from alcohol permanently. He received notice that he had Alcohol Use Disorder, Mild, in late November or early December 2017, but chose to continue consuming alcohol—illegally in violation of the terms of his probation—until he lost his security clearance. That timing casts doubt on the sincerity of his efforts to recover, presenting them instead as efforts to meet a list of known mitigation techniques. At this time, I am not convinced that the Individual will abstain from risky alcohol consumption.

C. Guideline J

Mitigating factors for Guideline J include, in relevant part, (1) the passage of so much time since the criminal activity that further criminal behavior is unlikely, and (2) evidence of successful rehabilitation. Adjudicative Guidelines at ¶ 32(a), (d).

Though the Individual cites his June 2017 arrest as an isolated incident, his subsequent behavior indicates continued disregard for the law. He violated the terms of his probation knowingly and repeatedly by consuming alcohol between June 2017 and January 2018. The Individual has not been arrested since his criminal conduct one year ago, but has admitted to further criminal conduct and testified that such conduct was due to his bad judgment. His actions run contrary to testimony that he followed all rules, though very little of that testimony was even relevant to laws and rules outside of the workplace.

Furthermore, the Individual has demonstrated a pattern of disregard for the law that spans nearly a decade. While his June 2017 incident may have been an outlier in the type of criminal behavior involved, there is nothing unique about the Individual being caught breaking the law. The Individual stated that he has not been in serious trouble since college, however, the Guidelines do not explicitly consider the seriousness of an offense -- or lack thereof -- as a mitigating factor. Though the Individual considers his most recent incident “isolated,” the fact is that he has never gone more than a few years without reoffending.

The Individual intentionally violated the terms of his probation, knowing that he would be sentenced for criminal battery if he was caught. He also has a long history of violating the law. I am not convinced that further criminal behavior is unlikely, nor am I convinced that the Individual is successfully rehabilitated.

VI. CONCLUSION

Upon consideration of the entire record in this case, I find that there was evidence that raised concerns regarding the individual’s eligibility for a security clearance under Guidelines E, G, and J of the Part 710 regulations. I further find that the individual has not succeeded in fully resolving those concerns. Therefore, I cannot conclude that restoring DOE access authorization to the individual “will not endanger the common defense and security and is clearly consistent with the national interest.” 10 C.F.R. § 710.7(a). Accordingly, I find that the DOE should not restore access authorization to the individual at this time.

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

Kimberly Jenkins-Chapman
Administrative Judge
Office of Hearings and Appeals