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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: July 16, 2018)	Case No.: PSH-18-0055
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Issued: October 11, 2018

Administrative Judge Decision

Janet R.H. Fishman, Administrative Judge:

This Decision concerns the eligibility of XXXXXXXXXXXX (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 granted.

I. BACKGROUND

The Individual is employed by a DOE contractor in a position that requires him to hold a DOE security clearance. In January 2017, pursuant to a request by his employer that he be given an access authorization, the Individual submitted an electronic questionnaire for investigations (e-QIP). In August, 2017, while the investigation into the Individual’s eligibility for access authorization was ongoing, the Individual completed a personnel security information report disclosing that he had been arrested and charged Driving Under the Influence (DUI) earlier that month. DOE Ex. 7. The local security office conducted a Personnel Security Interview (PSI) of the Individual on January 19, 2018. DOE Ex. 13 at i. Because the PSI did not resolve the security concerns raised by the Individual’s DUI arrest, the LSO requested that the Individual undergo a forensic psychological evaluation by a DOE psychologist (DOE Psychologist), who examined the Individual on February 28, 2018 (Psychological Evaluation). DOE Ex. 3 at 1.

¹The 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.

After the PSI and Psychological Evaluation, substantial security concerns about the Individual remained unresolved. Accordingly, the LSO informed the Individual, in a Notification Letter dated June 4, 2018 (Notification Letter), that it possessed reliable information that created substantial doubt regarding the Individual's 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" and "Guideline J, Criminal Conduct." DOE Ex. 1.

The Individual requested an administrative review hearing pursuant to 10 C.F.R. Part 710. DOE Ex. 2. 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 concerning the matter. At the hearing, the LSO introduced twelve numbered exhibits (DOE Ex. 1–12) into the record and presented the testimony of the DOE Psychologist. The Individual introduced four lettered exhibits (Ind. Ex. A–D) into the record and presented the testimony of four witnesses, including himself. I received a transcript of the proceedings (Tr.) on October 3, 2018.

II. THE NOTIFICATION LETTER AND THE ASSOCIATED SECURITY CONCERNS

As indicated above, the Notification Letter informed the Individual that information in the possession of DOE created a substantial doubt concerning his eligibility for a security clearance. That information pertains to Guidelines G and J of the Adjudicative Guidelines.

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. Guideline G at ¶ 21. The Notification Letter asserted that: the Individual was arrested and charged with DUI in 2008, 2011, and 2017; the Individual was arrested and charged with Minor in Possession (MIP) in 2005; and the DOE Psychologist concluded that the Individual met the criteria for a diagnosis of Alcohol Use Disorder, moderate, without adequate evidence of rehabilitation or reformation, under the *Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition (DSM-5)*. The Individual's alcohol-related incidents away from work and the DOE Psychologist's conclusion that the Individual meets the diagnostic criteria for Alcohol Use Disorder under the *DSM-5* justify the LSO's invocation of Guideline G. *Id.* at ¶ 22(a), (d).

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. Guideline J at ¶ 30. With respect to Guideline J, the Notification Letter listed the Individual's three arrests for DUI and his arrest MIP. The Individual's history of criminal conduct justifies the LSO's invocation of Guideline J. *Id.* at ¶ 31(a), (c).

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 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).

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.

IV. FINDINGS OF FACT

The Individual does not contest the LSO's assertions in the Notification Letter. Tr. at 52. The Individual's first alcohol-related arrest was in 2005, when the Individual participated in a diversion program after being arrested for MIP. *Id.* at 45. The Individual reported that he began to drink to intoxication on a regular basis when he was eighteen (18) years old. *Id.* at 62. According to the Individual, he drank to intoxication nearly every weekend when he was attending college. *Id.* at 65–68. After college, the Individual reported that he continued to drink to intoxication on a regular basis, and that he frequently consumed ten (10) beers over four (4) hours on weekends up to his 2017 arrest for DUI. *Id.* at 73–78.

Prior to his 2017 DUI, the Individual pleaded guilty to DUI in 2008 and 2011. The Individual was placed in a diversion program after the 2008 incident which required him to perform community service and pay a fine. *Id.* at 42. After the 2011 DUI, an interlock device was installed on the Individual's vehicle for a period of two (2) years. *Id.* at 38.

The Individual reported during the PSI that he consumed approximately five (5) to six (6) twenty-four ounce (24 oz.) beers at a bar over four (4) hours on the night of his 2017 arrest for DUI. DOE Ex. 11 at 16–18. The Individual did not perceive that he was impaired when he left the bar, and stated during the PSI that he believed it was safe for him to operate a vehicle. *Id.* at 16, 25. According to the Individual, this was more beer than he had planned on consuming on that occasion. *Id.* at 10–11. As the Individual was driving home from the bar, a police officer pulled him over for speeding and requested that the Individual take an on-site breath alcohol test. *Id.* at 12. Based on his prior DUI experience, the Individual refused to take the on-site breath alcohol test in favor of being transported to the police station for an in-station test. *Id.* The in-station test at the police station measured the Individual's breath alcohol content at .093, and the Individual

was booked for DUI. *Id.* at 21. In December, 2017, the Individual pleaded guilty to DUI, the conditions of which included a monetary fine, temporary suspension of his driver's license followed by the installation of an interlock device in his vehicle for three (3) years, one (1) year of probation with random alcohol screenings, and court-ordered drug and alcohol counseling. *Id.* at 26–27, 29, 135–36.²

The Individual reported during the PSI that he had last consumed alcohol in early September, 2017. *Id.* at 97. The Individual indicated that his future intentions with respect to alcohol were to drink in moderation on special occasions. *Id.* at 30.

During the Psychological Evaluation, the DOE Psychologist interviewed the Individual, administered a Shipley-2 IQ test and a Personality Assessment Inventory test of the Individual, and directed the Individual to a nearby laboratory for a Phosphatidylethanol (PEth) alcohol test and a hepatic panel blood test to measure the Individual's liver health. DOE Ex. 8 at 3. The Individual indicated during the clinical interview that he did not believe that alcohol was a problem for him or that his four (4) alcohol-related arrests represented a pattern of excessive drinking. *Id.* at 6. Rather, the Individual expressed his belief that he could accurately calculate his level of intoxication, and noted that he passed field sobriety tests or was measured at a breath alcohol level below .08 by law enforcement approximately "three or four times per year" after being pulled over while driving under the influence of alcohol. *Id.* at 7. The Individual also described his participation in court-ordered drug and alcohol counseling. According to the Individual, the treatment was not helpful, in part because he deemed the other participants to have "severe substance addiction problems" which he did not believe himself to have, and he discontinued the group counseling before completing the program. *Id.* at 6.

Based on the results of the Psychological Evaluation, and the information the DOE Psychologist read in the Individual's investigative file, the DOE Psychologist determined that the Individual met the diagnostic criteria for Alcohol Use Disorder, moderate, under the *DSM-5*. *Id.* at 12. The DOE Psychologist noted that his diagnosis relied primarily on the Individual's long-standing pattern of maladaptive alcohol use demonstrated by his DUIs, his willingness to frequently drink and drive despite the hazards, his belief that he could calculate his level of intoxication while under the influence of alcohol and efforts to use those calculations to stay just under the legal limit when driving, and his high alcohol tolerance. *Id.* The DOE Psychologist recommended that the Individual demonstrate his rehabilitation or reformation by: (a) abstaining from alcohol for the duration of his probation for the 2017 DUI; (b) participating in three (3) Alcoholics Anonymous (AA) meetings per week for two (2) years; (c) completing the drug and alcohol counseling program that he discontinued, or a comparable one; (d) participating in his employer's EAP program; and (e) submitting to random blood alcohol tests for twelve (12) months after the end of his probation in December, 2018. *Id.* at 13.

During the Hearing, the Individual testified that he had abstained from alcohol since Labor Day, 2017, when he consumed one (1) beer so as not to sour the mood at a social function. Tr. at 66–67. The Individual offered into evidence a summary of the random drug and alcohol tests he took as a condition of his probation from December, 2017, to September, 2018, all of which were

² During the Hearing, the Individual disclosed that his probation also prohibited him from patronizing "drinking establishments." Tr. at 32.

negative for drugs and alcohol. Ind. Ex. C. The Individual testified that he attended six (6) AA meetings, and offered into evidence a document signed by two (2) individuals to establish his attendance at the last two (2) AA meetings he attended. *Id.* at 68; Ind. Ex. D. The Individual testified that he did not find the stories he heard from other AA participants, who he characterized as having “been drunk [] 24/7 for years,” relatable or helpful to him in his efforts to abstain from alcohol. Tr. at 74. According to the Individual, after the sixth AA session he “realized that [he] was actually blowing off [his] friends to go hang out with people that [he] didn’t relate to and actually disliked,” and therefore determined not to return to AA. *Id.* at 76. The Individual indicated that AA’s religious tenets were incompatible with his personal beliefs, and that he would not participate in a program that required participants to claim powerlessness and submission to a higher power. *Id.* at 101–04, 115. The Individual considered online programs, but elected not to pursue them. *Id.* at 104–05. The Individual also testified that he intended to pursue one-on-one counseling, but was seeking a therapist with whom he would get along. *Id.* at 77.

The Individual represented that the PSI and DOE Psychologist’s report did not reflect that, from 2015 to 2017, he had not driven a vehicle after drinking more than two (2) beers except for the night of the 2017 DUI. Tr. at 52–54. The Individual asserted that he had abused alcohol and engaged in risky drinking and driving behavior in 2011, but had changed his behavior after the 2011 DUI. *Id.* at 57–60.

The Individual argued that the DOE Psychologist’s diagnosis was based on misunderstandings of fact that resulted from the Individual answering questions too narrowly. Tr. at 60–61. The Individual testified that he did not frequently attempt to calculate whether he was legally intoxicated before driving during the period following his 2011 DUI, and that when he did he merely counted how many beers he had consumed and compared that to the amount of time in which he consumed them, assuming that each beer added .02 to his alcohol level and each hour that passed subtracted .02 from his alcohol level. *Id.* at 61–64. The Individual testified that the DOE Psychologist misunderstood the circumstances under which he discontinued court-ordered counseling, and that the leader of the counseling group authorized him to complete three (3) one-on-one counseling sessions in lieu of the eleven (11) remaining group sessions ordered by the court. *Id.* at 70–71. The Individual also noted that the DOE Psychologist’s report mistakenly referred to his MIP as a DUI, and asserted that the MIP was not evidence of an alcohol use disorder because he was not driving or otherwise at risk of physical harm because of his underage drinking. *Id.* at 93. Finally, the Individual asserted that the DOE Psychologist’s conclusion that he had a high alcohol tolerance was not supported by a clinical definition of high alcohol tolerance or factual evidence. *Id.* at 99–100.

The Individual testified that he intended to consume alcohol in the future at social events, but did not intend to drink alcohol before driving in the future. *Id.* at 81–82. The Individual further testified that he would be willing to discontinue drinking altogether if necessary to mitigate the security concerns. *Id.* at 82–83.

The Individual offered the testimony of his father, who testified that the Individual had not consumed alcohol for over one (1) year prior to the hearing. *Id.* at 39. The Individual’s father testified that he believed that the Individual had matured since the 2017 DUI, and would exercise better judgement in the future. *Id.* at 43–44. The Individual also offered the testimony of a friend

who has known the Individual for seven (7) years, and who sees the Individual three (3) to four (4) times per month at social events, to establish that the Individual has not consumed alcohol since 2017. Tr. at 10–11, 15. The Individual offered the testimony of a second friend, who sees the Individual once or twice a month, who testified that he had not seen the Individual drink alcohol in approximately one (1) year. *Id.* at 22, 26–27.

The DOE Psychologist testified after observing the entirety of the hearing and all of the testimony offered therein. The DOE Psychologist clarified that his diagnosis was based on the Individual meeting the *DSM-5* diagnostic criteria for Alcohol Use Disorder, moderate, over a twelve-month period in the past, and not the twelve-month period immediately preceding the Psychological Evaluation. *Id.* at 123–24. In spite of the additional information the Individual provided during the hearing, the DOE Psychologist maintained that his diagnosis was unchanged. *Id.* at 132. The DOE Psychologist further opined that, although the Individual had started the process of rehabilitation and that he was at low risk of returning to alcohol on his current program, that the Individual was not rehabilitated because he had not actively participated in AA or a similar program and had not yet demonstrated sobriety outside of the controlled period of his probation. *Id.* at 133, 149. According to the DOE Psychologist, participating in AA or an AA-like program for at least one (1) year would provide the Individual with interactions that would reinforce the Individual’s abstinence from alcohol and support his efforts to avoid relapsing as he did after his prior DUIs. *Id.* at 147, 149.

V. ANALYSIS

A. Guideline G Considerations

The Individual disagrees with several aspects of the DOE Psychologist’s report, and argues that the DOE Psychologist’s diagnosis of Alcohol Use Disorder, moderate, was more severe than his symptoms and relevant history warranted. Moreover, the Individual asserts that he has changed his drinking habits significantly since the 2011 DUI, that the 2017 DUI was an aberration during a period when he was making responsible decisions concerning alcohol, and that his approximately thirteen (13) months of abstinence since the 2017 DUI has established that he can control his drinking. The DOE Psychologist testified that the information the Individual provided during the hearing did not change his diagnosis, and that the Individual was not yet rehabilitated because he had not demonstrated abstinence from alcohol outside of his closely-monitored period of probation and was not participating in AA or a similar program that would support him in his abstinence.

An individual may mitigate security concerns under Guideline G if “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 good judgement.” Guideline G at ¶ 23(a). In this case, the Individual’s alcohol-related arrests have been neither infrequent nor unusual. Moreover, only about thirteen (13) months have elapsed since the Individual’s 2017 DUI. In light of the fact that six (6) years elapsed between the Individual’s 2011 and 2017 DUIs, more time is needed before DOE can be satisfied that the Individual is not at risk of engaging in risky, alcohol-related behavior.

An individual may also mitigate security concerns under Guideline G if “the individual acknowledges his or her alcoholism or issues of alcohol abuse, provides evidence of actions taken to overcome this problem, and has established a pattern of abstinence [] or responsible use [].” *Id.* at ¶ 23(b). During the Psychological Evaluation and the hearing, the Individual sought to differentiate himself from persons he met in AA and group counseling who he deemed different from himself in terms of their relationship to alcohol. The Individual also repeatedly disclaimed the significance of his history of alcohol-related arrests, and asserted that they did not represent a pattern at all. Additionally, the Individual capriciously elected not to follow the DOE Psychologist’s recommendations concerning attendance of AA meetings or to seek alternatives when he found AA a poor fit. Although the Individual has established an admirable period of abstinence from alcohol, the DOE Psychologist expressed concern that the risk of the Individual lapsing will increase after the Individual completes his probation. I find this particularly important to determining the appropriate “pattern of abstinence” that the Individual must demonstrate to show that he is rehabilitated, particularly in light of the fact that the Individual relapsed after the 2011 DUI despite completing the terms of his probation. Given these facts, I cannot find that the Individual has demonstrated an adequate period of alcohol abstinence.

An individual may also mitigate security concerns under Guideline G if the individual is satisfactorily participating in counseling, or has completed counseling and complied with treatment recommendations from a duly qualified medical professional or a licensed clinical social worker. *Id.* at ¶ 23(c)–(d). The Individual has not yet selected a counselor, nor has he complied with all of the DOE Psychologist’s treatment recommendations. Although the Individual takes issue with the DOE Psychologist’s diagnosis and, consequentially, treatment recommendations, the Individual has not offered the testimony of his own expert. Therefore, I cannot conclude that the Individual has satisfied treatment recommendations.

For the abovementioned reasons, I conclude that the Individual has not satisfied any of the mitigating criteria set forth under Guideline G. Accordingly, I find that he has not resolved the security concerns asserted by the LSO under Guideline G.

B. Guideline J Considerations

The Individual does not dispute that he engaged in any of the criminal conduct asserted by the LSO in the Notification Letter. However, he argues that he has changed the drinking habits that caused him to engage in the criminal conduct, and that he therefore will not engage in criminal conduct in the future.

An Individual may mitigate security concerns under Guideline J if “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 judgement.” Guideline J at ¶ 32(a). As discussed above, the Individual has pleaded guilty to four (4) alcohol-related offenses, and six (6) years passed between the Individual’s 2011 and 2017 DUIs. The Individual has established a pattern of committing alcohol-related offenses, satisfying the conditions of the plea bargains he has struck with respect to the offenses, and then relapsing into alcohol-related criminal behavior years later. The thirteen (13) months that have passed since the Individual’s 2017 DUI is simply not enough time to determine that the Individual is unlikely

to commit alcohol-related crimes in the future in light of the Individual's prior criminal history and OHA's prior practice with respect to the application of this mitigating factor. *See, e.g., Personnel Security Hearing*, OHA Case No. PSH-17-0012 (2017) (finding that the passage of approximately one year since an individual's arrest for DUI was inadequate to mitigate security concerns under Guideline J in light of the individual's prior DUI and MIP).³

An individual may also mitigate security concerns under Guideline J if the person was pressured or coerced into committing the act, there is evidence that the person did not commit the offense, or the individual has demonstrated successful rehabilitation. Guideline J at ¶ 32(b)–(d). The Individual has not asserted that he was pressured into the alcohol-related criminal conduct, or that he did not commit the conduct. As noted above, the passage of time since the 2017 DUI is not enough to establish that the Individual is unlikely to commit further alcohol-related offenses in the future, and the Individual has not yet completed his probation for the 2017 DUI. Accordingly, I conclude that these mitigating criteria are inapplicable in this case.

For the reasons set forth above, I conclude that the Individual has not satisfied any of the mitigating criteria under Guideline J. Accordingly, I find that he has not resolved the security concerns asserted by the LSO under Guideline J.

VI. CONCLUSION

For the reasons set forth above, I conclude that the LSO properly invoked Guidelines G and J. After considering all of the evidence, both favorable and unfavorable, in a common sense manner, I find that the Individual has failed to mitigate the security concerns raised under Guidelines G and J. Accordingly, the Individual has not demonstrated that granting his security clearance would not endanger the common defense or would be clearly consistent with the national interest. Therefore, the Individual's security clearance should not be granted. Either party may seek review of this Decision by an Appeal Panel under the procedures set forth at 10 C.F.R. § 710.28.

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

³ Decisions issued by OHA are available on the OHA website located at <http://www.energy.gov/OHA>.