

The Individual requested an administrative review hearing pursuant to 10 C.F.R. Part 710. Ex. 1. The Director of the Office of Hearings and Appeals appointed me as the Administrative Judge in this matter, and I subsequently convened a hearing pursuant to 10 C.F.R. § 710.25(d), (e) and (g). Prior to the hearing, the LSO submitted 21 numbered exhibits (Ex. 1-21) and the Individual submitted 56 lettered exhibits (Ex. A-DDD). During the hearing, the Individual presented the testimony of four witnesses, including himself, while the LSO presented the testimony of two witnesses, including the DOE Psychologist. *See* Transcript of Hearing, Case No. PSH-18-0079 (hereinafter cited as “Tr.”). After the hearing, the Individual submitted seven additional exhibits (Ex. EEE-KKK) and the LSO submitted three additional exhibits (Ex. 22-24).

II. THE NOTIFICATION LETTER AND THE ASSOCIATED SECURITY CONCERNS

As indicated above, the Notification Letter informed the Individual that DOE possessed reliable information that created a substantial doubt concerning his eligibility for a security clearance. In the Notification Letter, the LSO cited Guideline G as the basis for suspending the Individual’s security clearance. Ex. 3. “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.

In invoking Guideline G, the LSO cited, among other things, the DOE Psychologist’s diagnosis of the Individual with an Alcohol Use Disorder, mild, under the *Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition* (DSM-5). Ex. 3. Additionally, the LSO cited the Individual’s November 2016 arrest for DUI and other alcohol-related incidents discussed during the Individual’s October 2017 PSI. *Id.* The Individual’s DUI and the DOE Psychologist’s diagnosis of the Individual with an alcohol use disorder, justifies the LSO’s invocation of Guideline G security concerns. Adjudicative Guidelines at ¶ 22(a) and (d).

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 began consuming alcohol at approximately 19 years old while in college. Ex. 6 at 28. In 2006, while on his college campus, the Individual received a citation for underage consumption, which was later expunged from his record. *Id.* at 26-27. The Individual indicated that he mostly drank for the social aspect, but acknowledged that he enjoyed the taste of beer, specifically India pale ales (IPA), and saw having a beer as a weekend treat. *Id.* at 38-39. During the PSI, the Individual stated that five years prior, he would consume alcohol approximately three times a week, mainly on the weekends, drinking about four beers a day. *Id.* at 28-29. About three years ago, when the Individual met his current wife, his alcohol consumption decreased to the point that he drank approximately four beers on Saturdays, typically while watching football or while at the pool. *Id.* at 30-31.

In November 2016, the Individual and his wife went to dinner around 7:00 p.m., where they both consumed alcohol. *Id.* at 5. There is some discrepancy in the record concerning the Individual's alcohol consumption that night. During the October 2017 PSI, the Individual stated that he only had one glass of wine at dinner. *Id.* at 7. During the April 2018 Psychological Evaluation, the Individual reported that he consumed two pint (16 ounces) glasses of IPA during dinner. Ex. 4 at 4. After dinner, the Individual and his wife went to a bar to meet friends and then to see a band. Ex. 6 at 6-7. The Individual stated during the PSI that he had approximately four 16-ounce beers while waiting for the band to play. *Id.* at 8. However, during the Psychological Evaluation, the Individual stated that he had two pint glasses of beer at the bar, then four more pint glasses of beer while watching the band play. Ex. 4 at 4.

Around midnight, the Individual's cousin insisted on driving the Individual and his wife home since she had not drunk that night. Ex. 6 at 10. At home, the Individual and his wife worried that, because his car was parked at an apartment complex, it would likely be towed. *Id.* Approximately 20 minutes after being home, the Individual's wife drove him to the apartment complex to pick up his car, and the Individual drove home alone. *Id.* at 11.

Around 1:30 a.m., a police officer pulled the Individual over. *Id.* at 12. During the PSI, the Individual admitted that when asked by the police officer whether he had anything to drink that night, he said "no," stating that he was "just trying to get home." *Id.* at 13. After failing a field sobriety test, the Individual was arrested for DUI, financial responsibility (for not having a copy of his insurance card readily available), and open container (for having an open beer container in his car). *Id.* at 17. During the PSI, the Individual stated that he did not know the results of the breathalyzer test from that night, but the record shows that his blood-alcohol content (BAC) was 0.207g/210L, more than two times the legal limit. Ex. 13. Three days after his arrest, the Individual informed his employer. Ex. 9. Although the Individual reported abstaining from alcohol for three months after his arrest, at the time of the October 2017 PSI, the Individual had resumed consuming alcohol. Ex. 4 at 3; Ex. 6 at 32.

In April 2018, the DOE Psychologist evaluated the Individual, diagnosing him with Alcohol Use Disorder, mild, and also concluded that he was “a user of alcohol habitually to excess.” Ex. 4 at 7. During the Psychological Evaluation, the Individual admitted that the night of his DUI arrest, he had in fact consumed approximately eight alcoholic beverages in about 4.5 hours. *Id.* at 4-5. At the time of the Psychological Evaluation, the Individual was still consuming alcohol, evidenced by the positive Phosphatidylethanol (PEth) test he took that day. Ex. 5; *see also* Ex. 4 at 5. The DOE Psychologist recommended that the Individual abstain from alcohol for 12 months, that he submit to frequent and random Ethyl Glucuronide (EtG) tests and at least two PEth tests over a 12 month period, and that he participate at least once weekly in Alcoholics Anonymous (AA) or another self-help group. Ex. 4 at 7. The DOE Psychologist specifically states in her report that alcohol breath tests are not recommended due to the Individual’s “tendency to not be fully candid about his use of alcohol” and the fact that these tests cannot detect drinking beyond a few hours. *Id.*

Prior to the hearing, the Individual submitted, as part of the record, 14 videos, showing him taking at-home breathalyzer tests between December 10, 2018, and January 4, 2019. Ex. I. He additionally submitted three negative EtG tests from December 14, 2018, December 27, 2018, and January 2, 2019. Ex. L. During a January 3, 2019, pre-hearing conference call, DOE counsel proposed that the Individual submit to another PEth test to corroborate the self-administered breathalyzer tests the Individual submitted as exhibits. On January 9, 2019, the Individual took the PEth test, which came back positive, detecting alcohol at a level of 128 ng/mL. (The detection limit that corresponds to a positive result is 20 ng/mL.)² Ex. 18.

During the hearing, the Individual’s substance abuse counselor testified that she started working with the Individual in January 2019. Tr. at 20. Currently, the counselor and the Individual meet weekly and plan to continue for another three months then reevaluate the frequency of their sessions. Tr. at 25. The counselor testified that she agreed with the DOE Psychologist’s diagnosis of the Individual with Alcohol Use Disorder, mild; however, the counselor believes that the Individual is in early remission since he indicated that he has been sober since May 2018. Tr. at 23; *see also* Ex. BBB at 2.

The counselor testified about confronting the Individual with his positive January 2019 PEth test, stating that he struggled with the results because he did not understand how the test could be positive. Tr. at 39. She stated that the Individual told her that he believed the test may have detected NyQuil he took due to a cold in December 2018. Tr. at 36-37. The counselor suggested that, because the Individual did not attend an intensive outpatient program, he was not aware of everyday products that may contain alcohol. Tr. at 41. The counselor testified that she does not consider this positive PEth test as an indication of a relapse. Tr. at 40-41. She further testified that she believes the Individual has no future intention to consume alcohol and gave him a positive prognosis with minimal chance of relapse. Tr. at 43, 48.

The Individual’s wife testified that before the November 2017 DUI, she had no concerns regarding the Individual’s alcohol consumption. Tr. at 73. She testified that the Individual started cutting down his alcohol intake after the DUI, and then cut back even more after the October 2017 PSI and the April 2018 Psychological Evaluation. Tr. at 75, 85. She testified that she has not seen the

² “A PEth at this level is consistent with significant consumption of alcohol. This could be regular consumption of 2 to 4 drinks a day or intermittent binge consumption of greater amounts of alcohol in the time period preceding the test.” Ex. 19.

Individual consume alcohol since May 5, 2018. Tr. at 74-75. After the Individual's security clearance was suspended in October 2018, the Individual's wife testified that he began devising a game plan to tackle his issues with alcohol. Tr. at 99. She stated that she accompanies the Individual to weekly open AA meetings and often watches SMART recovery online meetings with him at home. Tr. at 100-105. The Individual's wife also testified that she witnessed and recorded the Individual's self-administered breathalyzer tests. Tr. at 107-108.

The Individual's wife stated that since he stopped drinking in May 2018, the Individual has been able to navigate several stressful life situations without returning to alcohol. Tr. at 91-92. When asked about the Individual's positive PEth test from January 2019, the Individual's wife stated that the Individual was "bummed" because he had not had any alcohol. Tr. at 109. She stated that around Christmas both of them were sick with a severe cold and both took NyQuil, not realizing it contained alcohol. Tr. at 109-111. The Individual's wife testified that the Individual's family supports his abstinence and that she and the Individual understand that his sobriety is something that they will have to continue to work on maintaining. Tr. at 112, 116.

The Individual does not dispute the security concerns cited in the Notification Letter. Tr. at 171-177. The Individual testified that his last drink was May 5, 2018. Tr. at 130. The Individual stated that at the suggestion of his mother-in-law, he began meeting with an intern counselor on an informal basis in May 2018. Tr. at 144, 147-148. He also stated that he started the SMART recovery online program, although at the time he was not printing the attendance verification pages. Tr. at 139-140. The Individual testified that he began attending AA around August 2018, now attending approximately three meetings a week. Tr. at 157, 214-215. He testified that his future intention with alcohol was complete abstinence. Tr. at 177.

The Individual admitted that at previous stages of this process, he has downplayed his alcohol consumption. Tr. at 193. He testified that the Psychological Evaluation had a significant impact on him because he was still in denial at that point. Tr. at 140-141. He stated that although the DOE's Psychologist's report specifically stated alcohol breath tests were not good evidence of abstinence, he mostly took the tests to hold himself accountable. Tr. at 220-222. He testified that before the January 2019 PEth test, he had some concerns because of the NyQuil he had recently taken. Tr. at 130. He stated that he had been sick for approximately five days (around December 28-31, 2018) and took the prescribed dosage of NyQuil during this period to treat his cold, not realizing that the cold medicine contained alcohol. Tr. at 135, 190, 219.

Before the hearing, the Individual submitted a letter from his company's physician stating that the physician did not have any concerns regarding the Individual's psychological wellbeing or concerns for substance abuse during the annual physicals he has performed on the Individual since 2008 as part of the company's fitness for duty program. Ex. B. The LSO called the physician as a witness during the hearing. The physician testified that at the time he wrote this letter, he did not know about the Individual's DUI or that the Individual was on medication for depression because it had not been reported in the underlying documents the physician reviewed. Tr. at 237-239.

The Individual's Psychologist testified that he also agrees with the Alcohol Abuse Disorder, mild diagnosis, but that he believes the Individual is in early remission due to his self-reported ten months of sobriety. Tr. at 267, 274. He testified that although it took the Individual some time to realize he had a problem with alcohol, he now acknowledges it. Tr. at 268. The Individual's

Psychologist stated that he believes the positive PEth test is just one piece of information to consider, but that he believes the Individual was truthful about not consuming alcohol. Tr. at 270, 284. The Individual's Psychologist gave the Individual a positive prognosis stating that the Individual has been making good, continuous progress. Tr. at 276.

The DOE Psychologist testified last, stating that she does not feel comfortable saying the Individual is in remission because there is not adequate evidence of sobriety. Tr. at 311. She testified that biomarkers are used to corroborate alcohol consumption because of the tendency of alcoholics to minimize their alcohol use. Tr. at 310, 312. The DOE Psychologist testified that even if the January 2019 PEth test was a false positive, she would not change her prognosis because the Individual would still not have 12 months of sobriety with active recovery. Tr. at 313-314. Reviewing the submissions from the Individual, the DOE Psychologist testified that she believed the Individual had only been engaged in formal recovery since November or December 2018. Tr. at 314-315.

After the hearing, the Individual submitted, among other exhibits, the results of a hair EtG test from a sample collected on February 12, 2019. Ex. GGG. The hair EtG test was negative and purported to test approximately a three month time frame. Id. As part of its post-hearing submissions, the LSO responded to the Individual's submission of the hair EtG test asserting that a false negative hair EtG test is more likely than a false positive PEth test. Ex. 23.

V. ANALYSIS

I have thoroughly considered the record of this proceeding, including the submissions tendered in this case and the testimony of the witnesses presented at the hearing. In resolving the question of the Individual's eligibility for access authorization, I have been guided by the applicable factors prescribed in 10 C.F.R. § 710.7(c) and the Adjudicative Guidelines. After due deliberation, I have determined that the Individual's security clearance should not be restored. I cannot find that restoring the Individual's DOE security clearance will not endanger the common defense and security, and is clearly consistent with the national interest. 10 C.F.R. § 710.27(a).

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

During the hearing, both parties presented conflicting testimony about the negative January 2, 2019, EtG test, the positive January 9, 2019, PEth test, and what these results meant as it relates to the Individual's abstinence. To bolster his assertion that the positive January 9, 2019, PEth test was erroneous, after the hearing, the Individual submitted a negative February 12, 2019, hair EtG test. Both the Individual and his wife attributed the positive January 9, 2019, PEth test to their recent ingestion of NyQuil. Based on the Individual's own testimony about the timing and the amount of NyQuil consumed and his history of downplaying his alcohol consumption, I did not find the

Individual's testimony that the only alcohol he consumed was NyQuil to be credible. However, because I find that there is separate substantial evidence indicating that the Individual is not fully rehabilitated, I need not make a determination regarding the accuracy of the January 9, 2019, PEth test.

Although the Individual and his wife testified that his sobriety date was in May 2018, the evidence does not support this assertion. The Individual submitted 14 videos of home breathalyzer tests and three EtG test results, however, the earliest breathalyzer video occurred on December 10, 2018, and the earliest EtG test was December 14, 2018. Exs. I and L. I cannot find that the Individual has abstained from alcohol before December 2018 because nothing in the record corroborates this assertion besides the testimony of the Individual and his wife. Additionally, as evidence of his active recovery, the Individual submitted verification of SMART recovery online meetings and AA attendance sheets. Exs. J, K, O, P, and CCC. However, these submissions only date back to November 18, 2018, and December 12, 2018, respectively. Again, I cannot find based on the record, developed in this case, that the Individual was in active recovery prior to November 2018.

Even assuming *arguendo* that the January 9, 2019, PEth test was a false positive, the Individual still has not established a pattern of modified consumption or abstinence to mitigate the Guideline G security concerns. At most, he has demonstrated that he has been actively engaged in recovery since November 2018 and abstinent since December 2018, which is well short of the 12 months recommended by the DOE Psychologist. The Individual testified that before November 2018, he was not collecting evidence concerning his sobriety because he was doing it for himself, not for this hearing. While this may be true, because there is documented evidence, including the Individual's own testimony, that he has previously downplayed his alcohol consumption, I cannot find that the Individual has provided sufficient evidence based on the testimony of the Individual and his wife alone.

Additionally, there is no evidence that the Individual has completed any treatment program and, aside from informal counseling in May 2018, the Individual's substance abuse counseling just began in January 2019. Based on the foregoing information, I find that none of the mitigating factors applies to this case and that the Individual has not resolved the Guideline G security concerns.

VI. CONCLUSION

In the above analysis, I found that there was sufficient derogatory information in the possession of the DOE that raised security concerns under Guideline G of the Adjudicative Guidelines. After considering all of the relevant information, favorable and unfavorable, in a comprehensive, common-sense manner, including weighing all of the testimony and other evidence presented at the hearing, I find that the Individual has not brought forth sufficient evidence to resolve the security concerns set forth in the Notification Letter. Accordingly, I have determined that the Individual's access authorization should not be restored. Either party may seek review of this Decision by an Appeal Panel pursuant to 10 C.F.R. § 710.28.

Brooke A. DuBois
Administrative Judge
Office of Hearings and Appeals