

On December 19, 2019, the LSO issued the Individual a letter in which it indicated that it possessed reliable information that created substantial doubt regarding the Individual's eligibility to hold a security clearance. Ex. 2. In the summary of security concerns (SSC) attached to the letter, the LSO explained that the derogatory information raised security concerns under Guideline G (Alcohol Consumption) and Guideline J (Criminal Conduct) of the Adjudicative Guidelines. Ex. 3.

The Individual exercised his right to request an administrative review hearing pursuant to 10 C.F.R. Part 710. Ex. 1. The Director of the Office of Hearings and Appeals (OHA) appointed me as the Administrative Judge in this matter, and I subsequently conducted an administrative hearing. The LSO submitted fifteen exhibits (Ex. 1–15) into the record. The Individual submitted three exhibits (Ex. A–C). The Individual and his wife testified on his behalf, and the LSO offered the testimony of the DOE Psychologist.

II. THE NOTIFICATION LETTER AND THE ASSOCIATED SECURITY CONCERNS

The LSO cited Guideline G (Alcohol Consumption) of the Adjudicative Guidelines as the first basis for denying the Individual a security clearance. Ex. 3 at 1–2.

Excessive alcohol consumption often leads to the exercise of questionable judgement or the failure to control impulses, and can raise questions about an individual's reliability and trustworthiness. Adjudicative Guidelines at ¶ 21. The SSC listed as relevant facts: the DOE Psychologist's opinion that the Individual consumed alcohol habitually to the point of impaired judgment; the Individual's DUI arrests in 1993, 1996, and 2012; the Individual's arrest for Domestic Violence in which he allegedly had a physical altercation with his wife after drinking; and, the Individual's admission to consuming three to five beers per sitting on five or six days each week. *Id.*² The Individual's alcohol-related incidents away from work and the LSO's allegation that the Individual habitually consumed alcohol to the point of impaired judgment justify the LSO's invocation of Guideline G. Adjudicative Guidelines at ¶ 22(a), (c).

The LSO cited Guideline J (Criminal Conduct) of the Adjudicative Guidelines as the other basis for denying the Individual a security clearance. Ex. 3 at 2–4.

Criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. Adjudicative Guidelines at ¶ 30. By its very nature, it calls into question a person's ability or willingness to comply with laws, rules, and regulations. *Id.* The SSC listed as relevant facts: the Individual was arrested for DUI on three occasions, most recently in 2012; the Individual was arrested and charged with Assault/Domestic Violence in 2003; and, the Individual was arrested and charged with possession of marijuana in 1996. Ex. 4 at 3–4. The Individual's criminal record justifies the LSO's invocation of Guideline J. Adjudicative Guidelines at ¶ 31(a)–(b).

III. REGULATORY STANDARDS

² The SSC erroneously indicated that the Individual's second arrest for DUI was in 1993. During the hearing, the DOE counsel identified the error and the Individual confirmed that he was arrested for DUI in 1996. Tr. at 19.

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 completed an e-QIP on March 7, 2018. Ex. 7 at 43. The Individual disclosed that he was arrested and charged with DUI in 2012 after he was pulled over for speeding and his breath alcohol content (BrAC) was tested at .109% and .094%. *Id.* at 31–32. The Individual pleaded guilty to the DUI charge and completed probation in 2013. *Id.* at 32. The Individual disclosed that he was previously arrested and charged with DUI in 1993 and 1996. *Id.* at 33–34. The Individual reported that he completed court-ordered outpatient counseling for alcohol use after his 1996 DUI. *Id.* at 38. In addition, the Individual disclosed that he was arrested for Domestic Violence in 2003 after his parents summoned law enforcement due to a domestic disturbance between the Individual and his wife after the Individual consumed alcohol. *Id.* at 35–36.

In July 2018, the Individual met with an Office of Personnel Management (OPM) investigator for an interview under oath concerning his arrest record. Ex. 8 at 1. During the interview, the Individual described how he was arrested for DUI in 2012 after he gave a family member a ride shortly after consuming alcohol. *Id.* The Individual asserted that he had consumed three beers, and did not feel impaired. *Id.* The Individual also described how his 2003 arrest for Domestic Violence stemmed from an argument with his wife and parents about his drinking after he consumed five or six beers in his parents' home. *Id.* at 3. The Individual denied physically assaulting his wife during the domestic dispute, and asserted that his parents reported that he had grabbed his spouse's hand because law enforcement would not remove him from their home unless they alleged that he had committed physical violence. *Id.*

The Individual reported to the OPM investigator that he typically consumed three to five beers per sitting on five or six days each week. *Id.* at 4. The Individual claimed that “alcohol ha[d] no effects

on [him],” and that he became intoxicated after drinking twelve or more beers once or twice per year. *Id.* The Individual reported that he no longer drove when under the influence of alcohol. *Id.*

On January 23, 2019, the Individual met with the DOE Psychologist for a clinical interview. Ex. 10 at 2. The Individual recounted the circumstances of his alcohol-related arrests to the DOE Psychologist consistently with the accounts that he had provided to the OPM investigator, including his claim that he had consumed three beers before driving prior to his 2012 arrest for DUI. *Id.* at 3–4. According to the DOE Psychologist, the Individual’s account understated his drinking and the Individual likely consumed seven beers before driving. *Id.* at 4. The Individual reported to the DOE Psychologist that he usually consumed four beers over ninety minutes after work Monday through Thursday and six beers over three to four hours on Fridays and Saturdays. *Id.* After the DOE Psychologist expressed concern to the Individual that he was consuming alcohol excessively, the Individual recanted his prior account and claimed that he had overstated his drinking on Fridays and Saturdays. *Id.* The Individual explained that he consumed alcohol in part to relieve stress associated with his job. *Id.*

The DOE Psychologist recommended that the Individual undergo two laboratory tests to objectively assess the extent of his alcohol consumption: an ethyl glucuronide (EtG) test and a Phosphatidylethanol (PEth) test. According to the physician who provided the laboratory reports to the DOE Psychologist, the Individual’s EtG test was positive for metabolites of ethyl alcohol which indicated that the Individual had consumed alcohol within three to four days prior to the test. *Id.* at 8. The physician indicated that the PEth test was positive for the PEth biomarker at a level of 353 ng/mL, which he explained was strong evidence that the Individual consumed alcohol on a regular, heavy basis, or engaged in binge drinking, within several weeks of the date of the test. *Id.* According to the physician, one research study indicated that PEth levels equivalent to the Individual’s were consistent with consuming 3.5 alcoholic drinks on a daily basis. *Id.*

After considering the security investigative record, the clinical interview, and the results of the laboratory testing, the DOE Psychologist issued his Report in which he opined that the Individual habitually consumed alcohol to the point of impaired judgment. *Id.* at 7. Based on the Individual’s original account of his alcohol consumption during the clinical interview, the DOE Psychologist estimated that the Individual’s blood alcohol content (BAC) reached .06g/210L four days per week and .07 g/210L two days per week. *Id.* at 6. According to the DOE Psychologist, decision making is impaired when BAC reaches .05g/210L. *Id.* The DOE Psychologist also cited two governmental organizations that defined heavy or excessive alcohol consumption as more than fourteen drinks each week. *Id.* Based on the frequency of the Individual’s drinking to a level at which his decision making was likely impaired, and the Individual’s weekly alcohol consumption in excess of recommended levels, the DOE Psychologist concluded that the Individual habitually consumed alcohol to the point of impaired judgment. *Id.* The DOE Psychologist recommended that the Individual demonstrate rehabilitation or reformation by abstaining from alcohol for at least nine months, undergoing at least two PEth tests to substantiate his abstinence from alcohol, and consulting with a counselor on a weekly basis to help him relieve stress without recourse to alcohol. *Id.* at 7.

V. HEARING TESTIMONY

During the hearing, the Individual recounted his criminal history and acknowledged the accuracy of each of the allegations set forth in the SSC. Tr. at 16–24, 54. The Individual asserted that he had not committed Domestic Violence against his wife in 2003 and that his parents called the police after he argued with them about politics and his consumption of alcohol. *Id.* at 21–22.³ The Individual testified that he attended Alcoholics Anonymous (AA) meetings for approximately two and one-half months and abstained from alcohol for approximately one year after his 2012 arrest for DUI. *Id.* at 23–24; *see also* Ex. B at 2 (reflecting the Individual’s attendance at eight AA meetings from February 12, 2013, to April 30, 2013). The Individual acknowledged that he had resumed problematic drinking in the past even after successfully abstaining from alcohol, but opined that this time was different because he realized that his “job was on the line every day” and that abstaining from alcohol was “a life decision [] at this point.” Tr. at 31.

The Individual stated that he had realized after meeting with the DOE Psychologist that “if [he] was serious about [his] job, that [he] would abstain from drinking alcohol immediately.” Tr. at 25–26. The Individual reported that he began abstaining from alcohol immediately after the clinical interview with the DOE Psychologist. *Id.* at 26. The Individual also underwent several PEth tests to document his abstinence from alcohol. *Id.*; *see also* Ex. A (showing that the Individual tested positive (30 ng/ml) for the PEth biomarker on a February 2019 test, and negative for the PEth biomarker in March 2019, May 2019, June 2019, July 2019, December 2019, and January 2020). Although the Individual’s February 22, 2019, PEth test was positive for traces of the PEth biomarker, the Individual denied having consumed alcohol after his meeting with the DOE Psychologist in January 2019. Tr. at 36–37.

The Individual acknowledged that he did not pursue the counseling recommended by the DOE Psychologist, and expressed that by the time that he received the Report he had already abstained from alcohol for some time and therefore concluded that he did not need counseling to manage stress. *Id.* at 28–29. The Individual denied that he had an alcohol problem, and said that he had never routinely consumed alcohol to the point of intoxication, but indicated that abstaining was better for his health. *Id.* at 32–33.

The Individual’s wife testified that she had not observed the Individual consume alcohol since the night before he met with the DOE Psychologist in January 2019. *Id.* at 70. The Individual’s wife expressed that she had never believed that the Individual had a drinking problem during their twenty-seven years of marriage, the Individual had almost always consumed alcohol in the home, and he had never demonstrated adverse changes to his demeanor or behavior after drinking. 57–58, 64. She also indicated that the Individual had numerous constructive hobbies, including cooking, hunting and fishing, and weightlifting, to which he devoted his time, and that he did not need to drink to occupy his time. *Id.* at 65–66. The Individual’s wife reported that, besides using his hobbies as an outlet, the Individual talked to her when he was experiencing stress and she did not believe that stress would cause him to return to drinking. *Id.* at 68–69. The Individual’s wife also testified that the Individual had not committed the Domestic Violence offence for which he was arrested, and supported the Individual’s version of events in which his parents asserted that

³ I note that this testimony conflicts with the accounts the Individual provided on the e-QIP and to the OPM investigator in which he admitted that he was arguing with his wife but denied that he committed the alleged Domestic Violence. Ex. 7 at 31; 8 at 3.

he had committed the offense in order to have the Individual removed from their property by police. *Id.* at 60–61.

The DOE Psychologist testified last, after observing the testimony offered by the other witnesses. The DOE Psychologist expressed that he believed that the Individual had either continued drinking after the clinical interview in January 2019, contrary to the Individual’s testimony, or that the Individual had consumed alcohol much more heavily than he had reported prior to the clinical interview on the basis that the February 22, 2019, PEth test should not have been positive if the Individual had accurately reported his drinking. *Id.* at 33–34, 86. However, despite this discrepancy, the DOE Psychologist opined that the Individual’s other PEth test results strongly supported his claims of abstinence. *Id.* at 89–90.

The DOE Psychologist expressed concern that the Individual had not followed his recommendation to pursue counseling, and asserted that the Individual was at greater risk of relapse for having failed to do so, but nevertheless opined that the Individual had demonstrated rehabilitation. *Id.* at 92–95. The DOE Psychologist indicated that he was “around 75, 80 percent” confident in his opinion that the Individual would not relapse into problematic drinking within the next two years. *Id.* at 96–97.

VI. ANALYSIS

A. Guideline G

The Individual’s alcohol-related incidents away from work and the LSO’s allegation that the Individual habitually consumed alcohol to the point of impaired judgment raise security concerns under Guideline G of the Adjudicative Guidelines. Adjudicative Guidelines at ¶ 22(a), (c). The Individual did not contest any of the facts set forth in the SSC or the DOE Psychologist’s Report. Tr. at 27, 54. However, the Individual asserted that he had abstained from consuming alcohol for over one year and intended to continue to do so in the future. *Id.* at 26, 49. An individual may mitigate security concerns under Guideline G if:

- (a) so much time has passed, or the behavior was so infrequent, or it happened under such unusual circumstances that it is unlikely to recur or does not cast doubt on the individual’s current reliability, trustworthiness, or judgment;
- (b) the individual acknowledges his or her pattern of maladaptive alcohol use, provides evidence of actions taken to overcome this problem, and has demonstrated a clear and established pattern of modified consumption or abstinence in accordance with treatment recommendations;
- (c) the individual is participating in counseling or a treatment program, has no previous history of treatment and relapse, and is making satisfactory progress in a treatment program; 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(a)–(d).

I find that the Individual has not satisfied the first mitigating condition under Guideline G because he has not sufficiently established how he will avoid relapsing into problematic alcohol-related behavior, as he did after one year of abstinence following his 2012 DUI, and due to my uncertainty as to the current period of the Individual's abstinence from alcohol. Although the Individual and his wife testified credibly that the Individual has abstained from alcohol since January 2019, the Individual's alcohol testing record leaves too many doubts as to the duration of the Individual's abstinence. The Individual's positive PEth test result in February 2019 casts doubt on the Individual's claim to have abstained from alcohol since January 2019.

During the clinical interview with the DOE Psychologist, the Individual revised his estimate of his drinking practices after the DOE Psychologist warned him that he was consuming an unhealthy amount of alcohol, and the Individual likely underreported the amount of alcohol that he consumed on the date of his 2012 arrest for DUI. In light of this conduct, I cannot dismiss the possibility that the Individual is again minimizing his alcohol consumption. Moreover, even disregarding the positive February 2019 PEth test, there is a gap of over five months between the Individual's July 12, 2019, PEth test and his December 31, 2019, PEth test during which there is no objective evidence of his abstinence. While there is some evidence in the record that the Individual abstained from alcohol for some period of time between January 2019 and the date of the hearing, the duration of the Individual's absence is not sufficiently definite for me to find that "so much time has passed" that the Individual is unlikely to return to problematic drinking. *Id.* at ¶ 23(a).

The Individual's alcohol-related arrests are also not mitigated by the passage of time in this case. While approximately eight years have passed since the Individual's last arrest for DUI in 2012, the Individual has demonstrated a pattern of alcohol-related arrests separated by years without recurrence. In light of the Individual's prior behavior, no passage of time is sufficient to ensure that he will avoid ill-advised decisions after drinking until he resolves the circumstances that led him to drink excessively though abstinence, treatment, or both. As I am not convinced that the passage of time has resolved the security concerns arising from the Individual's habitual consumption of alcohol to the point of impaired judgment, I likewise find that the passage of time does not resolve the security concerns related to the Individual's arrests for DUI. *Id.*

The second mitigating condition is inapplicable to this case because the Individual does not acknowledge his maladaptive alcohol use, has not taken actions to resolve the problem, and has not clearly established a pattern of abstinence. Despite three arrests for DUI, an arrest stemming from a family dispute concerning his drinking, and the opinion of the DOE Psychologist that the Individual was engaged in problematic alcohol consumption, both the Individual and his wife denied that the Individual engaged in problematic alcohol consumption. Furthermore, the Individual did not clearly establish what actions he had taken that would make his current abstinence from alcohol more durable than his prior one-year abstinence from alcohol following his 2012 arrest for DUI. Although the Individual expressed his belief that he can maintain abstinence through his own willpower, the DOE Psychologist noted that the Individual's lack of counseling placed him at significantly greater risk of relapse than he would have been had he pursued the recommended counseling. In light of the Individual's lack of insight into the serious consequences that have resulted from his alcohol consumption, lack of tangible steps to resolve the problem, and the unclear duration of the Individual's abstinence discussed above, I find the

second mitigating condition inapplicable. *Id.* at ¶ 23(b). The third and fourth mitigating conditions are also inapplicable because the Individual did not pursue counseling or treatment. *Id.* at ¶ 23(c)–(d).

The Individual’s burden to show that granting him a security clearance “will not endanger the common defense and security and will be clearly consistent with the national interest” is an exceptionally heavy one. 10 C.F.R. § 710.27(d). While I found the Individual’s efforts laudable and his testimony credible, I harbor too many doubts to conclude that the Individual has carried this heavy burden. Thus, having determined that none of the mitigating conditions under Guideline G are applicable, I conclude that the Individual has not resolved the security concerns asserted by the LSO under Guideline G.

B. Guideline J

The Individual’s arrest record since 1993 raises security concerns under Guideline J. Adjudicative Guidelines at ¶ 31(a)–(b). An individual may mitigate security concerns under Guideline J if:

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

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

I find that the Individual’s marijuana-related arrest in 1996 is mitigated by the passage of time, but that his other arrests are not. Nearly twenty-five years have passed since the Individual’s marijuana-related arrest without the recurrence of drug-related misconduct, and thus I find that the misconduct is unlikely to recur. With respect to the alcohol-related arrests, OHA Administrative Judges have consistently measured whether “so much time has elapsed since the criminal behavior” under the first mitigating condition of Guideline J based on whether adequate time has passed for an individual to meet treatment recommendations concerning their alcohol consumption. *See, e.g., Personnel Security Hearing*, OHA Case No. PSH-13-0062 at 7 (2013) (finding that “once the Individual resolves the security concerns raised by his use of alcohol, the associated [Guideline J] concerns pertaining to his alcohol-related arrests will also be mitigated.”)⁴ As described above, the Individual has not pursued treatment or satisfactorily demonstrated a pattern of abstinence to resolve the security concerns related to his drinking. Furthermore, many years have elapsed between each of the Individual’s alcohol-related arrests

⁴ Decisions issued by OHA are available on the OHA website located at <http://www.energy.gov/OHA>.

only for the misconduct to recur. Thus, I conclude that the passage of time is inadequate to mitigate the security concerns asserted by the LSO under Guideline J. Adjudicative Guidelines at ¶ 32(a).⁵

VII. CONCLUSION

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

Richard A. Cronin, Jr.
Administrative Judge
Office of Hearings and Appeals

⁵ The remaining mitigating conditions are inapplicable as the Individual does not assert that he was pressured or coerced into committing the acts, does not dispute the facts as set forth in the SSC, and, as discussed above, has not established rehabilitation through the passage of time. Adjudicative Guidelines at ¶ 32(b)–(d).