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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: April 22, 2019) Case No.: PSH-19-0024
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Issued: July 12, 2019

Administrative Judge Decision

Steven L. Fine, Administrative Judge:

This Decision concerns the eligibility of XXXXXX (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, “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

On September 16, 2017, police arrested the Individual, a DOE Security Clearance holder, and charged him with Aggravated Driving While Intoxicated (ADWI). Ex. 7 at 13-17. The LSO conducted a Personnel Security Interview (PSI) of the Individual on November 30, 2017, during which the Individual admitted consuming six alcoholic beverages prior to this arrest. *Id.* The Individual also acknowledged that he had a history of three prior alcohol-related arrests. Ex. 7 at 13-17, 20-26. Because this derogatory information raised concerns about the Individual’s alcohol use and psychological state, the LSO asked the Individual to undergo a forensic evaluation by a DOE Psychiatrist (the Psychiatrist). The Psychiatrist interviewed the Individual on April 13, 2018, and issued a report on April 30, 2018, diagnosing the Individual with Alcohol Use Disorder, Mild (AUD). Ex. 4 at 15. The Psychiatrist subsequently amended his report after receiving laboratory testing results indicating that the Individual had recently engaged in heavy alcohol consumption, revising the Individual’s diagnosis from AUD Mild to AUD Moderate. Ex. 5 at 3. On the basis of the Individual’s four alcohol-related arrests and the Psychiatrist’s opinion, 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 on April 22, 2019. At the hearing I convened pursuant to 10 C.F.R. § 710.25(d), (e) and (g), I took testimony from the Individual and the Psychiatrist. *See* Transcript of Hearing, Case No. PSH-19-0024 (hereinafter cited as "Tr."). The LSO submitted 17 exhibits, marked as Exhibits 1 through 17 (hereinafter cited as "Ex."). The Individual did not submit any exhibits.

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 Guideline G 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). Specifically, the LSO alleges that the Individual has been diagnosed with AUD, Moderate, and has a history of four alcohol related arrests. This information adequately justifies the LSO's invocation of Guideline G and raises significant security concerns. The Adjudicative Guidelines state: "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. Among those conditions set forth in the Guidelines that could raise a disqualifying security concern are (1) "alcohol-related incidents away from work, such as driving while under the influence, fighting, . . . disturbing the peace, or other incidents of concern." (Guideline G at § 22(a)); and (2) "diagnosis by a duly qualified medical or mental health professional . . . of alcohol use disorder." (Guideline G at § 22(d)). These allegations adequately justify the LSO's invocation of Guideline G.

The LSO also alleges that the Individual's history of four arrests creates a substantial doubt concerning his eligibility for a security clearance under Guideline J (Criminal Conduct). Criminal activity creates doubt about a person's judgement, reliability, and trustworthiness. By its very nature, it calls into question a person's ability or willingness to comply with laws, rules, and regulations. Adjudicative Guidelines at ¶ 30. The Individual's history of four arrests justifies the LSO's invocation of Guideline J. Adjudicative Guidelines at ¶ 31(b).

III. REGULATORY STANDARDS

A DOE administrative review proceeding under Part 710 requires me, as the Administrative Judge, to issue a Decision that reflects my comprehensive, common-sense judgment, made after consideration of all of the relevant evidence, favorable and unfavorable, as to whether the granting or continuation of a person's access authorization will not endanger the common defense and security and is clearly consistent with the national interest. 10 C.F.R. § 710.7(a). The regulatory standard implies that there is a presumption against granting or restoring a security clearance. *See 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. 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 December 20, 2001, police charged the Individual with Minor in Consumption. Ex. 7 at 26. During the PSI, the Individual admitted that he had consumed alcohol prior to this incident. Ex. 7 at 26.

On August 31, 2002, police charged the Individual with Malicious Destruction of Property. Ex. 7 at 23-24. During the PSI, he admitted that he had consumed alcohol prior to this arrest. Ex. 7 at 23.

On March 22, 2015, police charged the Individual with Speeding and Driving While Intoxicated (DWI). Ex. 15 at 1.

On September 16, 2017, police arrested and charged the Individual with Aggregated Driving While Intoxicated (ADWI). Ex. 8 at 1. At the time of this arrest, the Individual’s Blood Alcohol Level (BAL) was measured at .18 percent. Ex. 7 at 17.

Because of the security concerns raised by these incidents, the Individual was evaluated by the Psychiatrist on April 13, 2018, at the LSO’s request.² Ex. 4 at 1. On April 29, 2018, the Psychiatrist issued a report in which he concluded that the Individual met the criteria for AUD, Mild, set forth in the *Diagnostic and Statistical Manual of the American Psychiatric Association, Fifth Edition (DSM-5)*. The Psychiatrist further opined that the Individual’s prognosis was not favorable and that he had not shown that he was rehabilitated or reformed from his AUD. Ex. 4 at 15. The Psychologist recommended that the Individual completely abstain from alcohol for a one-year period and begin outpatient treatment with an individual substance abuse counselor or treatment program. Ex. 4 at 15.

On May 5, 2018, the Psychiatrist issued an addendum (the Addendum) to the Report. Ex. 5. In the Addendum, the Psychiatrist reported that he had received the results of the third PEth test, which

² During the Clinical Interview, the Individual claimed he had only consumed three alcoholic drinks since his ADWI arrest on September 16, 2017. Ex. 4 at 9. The Psychiatrist requested that the Individual take two laboratory tests, the gamma-glutamyl transpeptidase (GGT) and Phosphatidylethanol (PEth) tests, in order to assess his alcohol use. Ex. 4 at 11-12. GGT measures liver functioning for injury from alcohol and other causes of liver injury. Ex. 4 at 17. PEth is a direct test for alcohol; only alcohol can generate PEth in the blood. Ex. 4 at 12. The results of the GGT tests revealed damage to the Individual’s liver consistent with heavy alcohol consumption. Ex. 4 at 13. While the first two PEth tests administered to the Individual were invalidated by laboratory error, a third specimen provided by the Individual on April 26, 2018, indicated that the Individual had consumed alcohol in at least moderate amounts during the previous 28 days. Ex. 5 at 2.

indicated that the Individual had engaged in at least moderate alcohol consumption during the 28 days prior to April 26, 2018, when the specimen had been obtained from the Individual. Ex. 5 at 2. The Psychiatrist further noted that both the PEth and GGT test results indicated that the Individual had likely engaged in heavy alcohol consumption during the previous 30 days. This finding was inconsistent with the Individual's assertion that he had consumed only three alcoholic beverages since his September 16, 2017, ADWI arrest. See Ex. 4 at 9. After considering this additional information, the Psychiatrist amended his diagnosis of the Individual from AUD, Mild to AUD Moderate. Ex. 5 at 3. The Psychiatrist therefore modified his treatment recommendations, stating:

I recommend complete abstinence from alcohol for a minimum of 12 months from now, or until 5/19 at least. In addition, I would recommend [that the Individual] begin an Intensive Outpatient Program (IOP) treatment program so that he may receive assistance in achieving sobriety. Following the completion of an IOP program, I would recommend his participation in an ongoing aftercare program for a minimum of 12 months. As a known support for attaining sobriety, I would recommend [the Individual] participate in AA [Alcoholics Anonymous] or other mutual help organizations.

Ex. 5 at 3-4.

At the hearing, the Individual testified that he did not contest the factual accuracy of the information in the Notification Letter or the Report, but asserted that he has mitigated the security concerns raised by his AUD and history of four arrests. The Individual cited the passage of time since his first two arrests as evidence that the concerns arising from his criminal activity have been mitigated and further contended that his changed lifestyle since the recent birth of one of his children partially mitigated the security concerns under the Adjudicative Guidelines. Tr. at 14–15, 52–53. The Individual admitted that he had not abstained from alcohol or participated in an intensive outpatient treatment program as recommended by the DOE Psychiatrist. *Id.* at 47–50. However, pursuant to the plea agreement he entered into in connection with his ADWI, the Individual had an interlock device placed on his vehicle, underwent an alcohol assessment, and completed an impaired driver course. *Id.* at 44–45. The Individual also testified that he had participated in an alcohol intervention counseling program offered by the U.S. Department of Veterans Affairs (VA) in anticipation that he would be ordered to do so by the court adjudicating the ADWI. *Id.* at 18–20, 48. The six-week VA counseling program included weekly group sessions, three individual meetings with a psychologist, and random urinalysis tests which the Individual represented had all been negative for alcohol. *Id.* at 19, 50. The Individual testified that a VA psychologist had urged him not to consume alcohol, but had provided him with recommendations for safer drinking practices if he chose to continue to drink. *Id.* at 51.

The Individual admitted that he presently consumes alcohol, allegedly in moderation, and had consumed two beers on the Friday prior to the hearing. *Id.* at 47–48. The Individual admitted that he was not sure if it was safe for him to continue to drink alcohol, but testified that he intended to do so nevertheless in a manner consistent with the VA psychologist's recommendations for safer

drinking.³ *Id.* at 45–47. He testified that did not believe that he currently had a problem with alcohol. *Id.*

The Psychiatrist, after observing the Individual’s testimony, testified that his diagnosis of the Individual was unchanged and that the Individual was not in remission or rehabilitated.⁴ *Id.* at 76. When asked to provide his prognosis for the Individual, the Psychiatrist testified: “Until he ceases drinking I would not say he has a very good prognosis.” *Id.* at 80.

V. ANALYSIS

The Adjudicative Guidelines provide four conditions that can mitigate security concerns under Guideline G, none of which are applicable in this case. Adjudicative Guidelines at ¶ 23(a)–(d). The first mitigating condition applies when security concerns arising under Guideline G are unlikely to recur based on the passage of time, the infrequency of the behavior, or the unusual nature of the circumstances surrounding the conduct. *Id.* at ¶ 23(a). The Individual’s AUD is clearly in an active state, since the Individual admits that he continues to use alcohol, albeit in an allegedly moderated fashion. Since it is clear that the Individual’s efforts to address his AUD have not yet succeeded, I find that his problematic alcohol use is likely to recur. Accordingly, I find that the first mitigating condition under Guideline G is inapplicable.

The remaining mitigating conditions under Guideline G apply when an individual modifies his alcohol consumption and pursues appropriate treatment in accordance with treatment recommendations. *Id.* at ¶ 23(b)–(d). While the Individual has attended an alcohol program at his local VA facility, by his own admission, the Individual continues to consume alcohol and has not pursued the Psychiatrist’s recommendation to participate in AA or a similar program. The Psychiatrist testified that the Individual has not demonstrated rehabilitation and that his prognosis is not good. The Individual has not presented any compelling evidence to the contrary, and I am convinced that his AUD is currently in an active state, since he continues to use alcohol. Moreover, I do not find the Individual’s testimony concerning his modified drinking habits to be credible, in

³ The Individual further admitted that he had underreported his drinking on the night before his arrest for ADWI during the PSI, and opined that he had consumed approximately four shots of whiskey and several beers between 6:00 p.m. and 3:00 a.m. when his BAC was tested. *Id.* at 34, 37–39. The Individual did not offer any update to the estimate he provided to the Psychiatrist of having consumed three drinks between his ADWI arrest and the date of the clinical interview. *Id.* at 39–41, 97–98.

⁴ The Psychiatrist further opined that the Individual was probably still underreporting his drinking, and that there was no reliable evidence that the Individual had moderated his drinking as he claimed. *Id.* at 76. The Psychiatrist challenged the Individual’s assertion that consuming approximately seven drinks over a period of nine hours could have produced a BAC of .18, and speculated that the Individual was either underreporting how many drinks he had consumed or became so impaired that he had experienced memory lapses. *Id.* at 71. Furthermore, the DOE Psychiatrist explained that it was not possible that three drinks could have produced the Individual’s elevated results on the PEth test and GGT test, and opined that the Individual was still minimizing his drinking. *Id.* at 60–70. The Psychiatrist further explained that, although drinking more than one admits is not a diagnostic criterion under the *DSM-V*, he had inferred that the Individual had developed a physiological tolerance for alcohol and was consuming more alcohol than he intended and therefore that the Individual met more of the diagnostic criteria for alcohol use disorder than he was willing to admit. *Id.* at 80–81. The Psychiatrist further testified that the test results showed that the Individual was engaging in habitual, rather than binge, consumption of alcohol. *Id.* at 77–78. The Psychiatrist further testified that any assertions of sobriety or moderated drinking on the part of the Individual would need to be corroborated through testing due to the Individual’s demonstrated inability to reliably self-report his drinking. *Id.* at 76.

light of the Individual's minimization of his drinking in the recent past. The Individual's unwillingness or inability to address his AUD raises significant and continuing concerns about his judgment, reliability, and trustworthiness. For these reasons, I find that the Individual has not satisfied any of the mitigating conditions under Guideline G.

There are also four conditions that can mitigate security concerns under Guideline J of the Adjudicative Guidelines. Two of these conditions, concerning persons pressured or coerced into committing criminal acts and persons who assert that they did not commit the alleged conduct, are clearly inapplicable in this case. *Id.* at ¶ 32(b)–(c). The remaining conditions apply when conduct is unlikely to recur based on the passage of time, the infrequency of the behavior, or the unusual nature of the circumstances surrounding the conduct, and when an individual demonstrates rehabilitation, such as through the passage of time without recurrence of criminal activity, restitution, compliance with the terms of parole or probation, job training or higher education, a good employment record, or constructive community involvement. *Id.* at ¶ 32(a), (d).

In the present case, the Individual has only recently completed the terms of his plea agreement for his second DWI in the past four years. In light of the recentness and repetition of the Individual's criminal conduct, and his failure to take the appropriate actions to treat the root cause of his criminal behavior, *i.e.* his alcohol problem, I am not convinced that the Individual's alcohol-related criminal conduct is unlikely to recur. Accordingly, I find that none of the mitigating conditions under Guideline J are applicable.

I have found that no mitigating conditions for the security concerns raised by the Individual's four alcohol-related arrests and AUD diagnosis are present in the instant case. Accordingly, I find that those security concerns as well as the doubts concerning the Individual's judgment, reliability and trustworthiness arising from his AUD diagnosis and four alcohol-related arrests have not been resolved.

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 not sufficiently mitigated the security concerns raised under Guidelines G and J. Accordingly, the Individual has not demonstrated that restoring his security clearance would not endanger the common defense and would be clearly consistent with the national interest. Therefore, the Individual's security clearance should not be restored. The parties may seek review of this Decision by an Appeal Panel under the procedures set forth at 10 C.F.R. § 710.28.

Steven L. Fine
Administrative Judge
Office of Hearings and Appeals