

Notification Letter, the LSO explained that the derogatory information raised security concerns under Guideline G (Alcohol Consumption) of the Adjudicative Guidelines. Ex. 1.

The Individual exercised his right to request an administrative review hearing pursuant to 10 C.F.R. Part 710. Ex. 2. The Director of the Office of Hearings and Appeals appointed me as the Administrative Judge in this matter, and I subsequently conducted an administrative hearing. The LSO submitted fifteen numbered exhibits (Ex. 1–15) into the record, and presented the testimony of the DOE Psychologist at the hearing. The Individual submitted thirteen exhibits (Ex. A–M) into the record. In addition to his own testimony, the Individual presented the testimony of five witnesses at the hearing.

II. The Notification Letter and the Associated Security Concerns

As previously mentioned, the Notification Letter included a statement of derogatory information that raised concerns about the Individual’s eligibility for access authorization. The information in the letter specifically cites Guideline G of the Adjudicative Guidelines which relates to security risks arising from alcohol consumption. 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.

In citing Guideline G, the LSO relied upon the fact that the DOE Psychologist determined in his April 2019 report that the Individual “habitually or binge consumes alcohol to the point of impaired judgement without adequate evidence of rehabilitation.” Ex. 1 at 1. In addition, the LSO relied upon: (1) the DOE Psychologist’s report that the Individual drinks “approximately seven to eight drinks of beers and shots over several hour period each night of the weekend[,]” and thus had exercised bad judgement during these episodes; (2) the October 2018 arrest and charge of a DWI and Unlawful Possession of a Firearm; (3) the fact that the Individual “assured the DOE he would not drink and drive in the future during his personal subject interview” in 2015; and (4) the fact that the Individual was arrested and charged with DWI in September 2015. *Id.*

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

In August 2015, the Individual was charged with a DWI misdemeanor after he consumed approximately six beers, twelve ounces each, in five hours. Ex. 11 at 4; Ex. 14 at 12. The DWI in this matter was later dismissed, but he was found guilty of reckless driving. Ex. 11 at 5; Tr. at 35. After the Individual's first DWI, he made a decision to abstain from the consumption of alcohol. Tr. at 11. However, the Individual resumed consuming alcohol about sixteen months after this arrest, as he did not believe he had a problem at the time. *Id.* at 36–37. The Individual testified that since going through two Intensive Outpatient Programs (IOPs) and getting involved with Alcoholics Anonymous (AA), “I learned that . . . the problem with addiction to alcohol is egocentric or ego based. So a \$500 fine and waiting a few extra months and staying sober for 16 months on my own almost grew that ego that I could control it and there was not a problem.” *Id.* at 39.

In October 2018, the Individual was charged with DWI and Unlawful Possession of a Firearm after consuming approximately four beers, twelve ounces each, and three shots of liquor. Ex. 11 at 5. The firearm in question was not located on the Individual's person, but rather, located in the back seat of his vehicle. Ex. 9 at 3. In the LOI, the Individual indicated that he has not consumed alcohol since this event, and he indicated that he was not aware that he was intoxicated the night of his arrest in October 2018. Ex. 11 at 5. The Individual also indicated that he has been attending “alcohol classes and meetings since October 2018.” *Id.* The record reflects the fact that the Individual took a DWI awareness class in January 2019. Ex. 12 at 6. The Individual declared that he last consumed alcohol on October 6, 2018. Tr. at 40.

The Individual first began receiving counseling with his therapist in October 2015. *Id.* at 34. He did not attend an intensive outpatient program (IOP) after the first DWI charge in 2015. *Id.* at 36. However, after his arrest in October 2018, the Individual attended an IOP, which he completed in December 2018. Ex. 11 at 5; Ex. A at 1. The Individual also saw a doctor affiliated with his employer and continued to see this doctor until late 2019, when he took leave to attend a second IOP. Tr. at 11–15. He has continued to attend therapy sessions approximately once a month with his therapist and has been voluntarily engaging his primary care physician to perform Phosphatidylethanol (PEth) tests. Ex. 11 at 5–6. Further, when the Individual was approximately a year sober, he joined a Continuing Recovery (CR) program. Tr. at 20.

In November 2019, the Individual entered another IOP, and at the time of the hearing, was expected to complete that program in early March 2020. *Id.* at 22–23, 27; Ex. F at 1–2. Despite the Individual's participation in the CR program, counseling, and AA, a PEth test that was administered on January 2, 2020 was positive; however, the Individual took an Ethyl Glucuronide (EtG) urine test on January 9, 2020, which was negative. Tr. at 24. All previous and subsequent PEth tests, including tests on November 22, 2019 and January 22, 2020, have also been negative. *Id.* at 18–19; Ex. D. Following the hearing, the Individual had a nail clipping EtG test performed

in early March 2020, which was also negative. Ex. J. According to articles provided by the Individual, the nail clipping EtG test will detect chronic and/or binge drinking. Ex. K; Ex. L; Ex. M. The Individual also attends AA meetings regularly. Tr. at 29; Ex. E; Ex. H. During the second IOP in 2018, he attended AA once a day. Tr. at 29; Ex. F.

In addition to his own testimony, the Individual presented the testimony of his therapist, his ex-wife, and three character witnesses, including his AA sponsor. The Individual's sponsor testified that he met the Individual at AA in 2019. Tr. at 47. To the sponsor, AA is a service organization, and he asks those he sponsors to stuff envelopes and run workshops in prisons, jails, and treatment organizations. *Id.* at 50–51. The Individual has been volunteering as requested by his sponsor. *Id.* at 51. He continued that he shared his contact information with the Individual because he presented as someone who wanted to participate in AA for a lifetime. *Id.* at 48. The sponsor and the Individual meet regularly, in the early morning hours, to work the steps. *Id.* at 48–49, 52. The sponsor uses the early morning hours as a measure to indicate the dedication of a person to AA, and the Individual has attended every meeting. *Id.* 49, 52. The sponsor is happy with the Individual's progress in the AA program. *Id.* at 58, 62. He declared that alcoholics are self-centered and he wants to help someone who is ready to self-sacrifice; he stated that the Individual is such a person. *Id.* at 59. He continued that the Individual told him about the positive PEth test immediately. *Id.* at 62. The sponsor found it difficult to believe that the Individual had consumed alcohol, "because if he drank, I probably wouldn't see him again for a while. That's just been my experience with alcoholics." *Id.* at 72. The sponsor considers the Individual one of his most successful "sponsees," of his 23 years in AA. *Id.* at 75.

Another witness testified that he had worked approximately 12 hours, four days a week with the Individual and has never had concerns over the Individual's judgement and reliability. *Id.* at 77. The witness has invited the Individual on outings where alcohol has been readily available for consumption, and not only did the Individual abstain from alcohol consumption, he also offered to drive other people home. *Id.* at 79–80. He also finds that the Individual has taken a positive attitude toward his treatment and classes. *Id.* at 80–81.

The Individual's third witness, who was hired at the same time as the Individual, stated that he never had reason to question the Individual's judgement at work. *Id.* at 87. He trusts the Individual enough to go to the Individual when he needs advice. *Id.* at 89. The witness testified that the Individual has been positive about the treatment process. *Id.* at 92.

The Individual's ex-wife testified that she speaks to the Individual on a daily basis and sees him multiple times a week. *Id.* at 97. During their New Year's Eve celebration, the Individual joined her and their family, played games, watched the television, and did not consume alcohol. *Id.* at 98. She testified that the Individual seems to spend most of his time "either at [his CR], with his counselor, or with his sponsor." *Id.* at 99. The Individual's ex-wife testified that she has not seen alcohol at his home and that the Individual is "done" with drinking, continuing:

And everything he has gone through, his therapy and the VA and all his programs, I think it's changed his behavior, his attitude. . . . He has a lot more patience. I think he's more self-aware now and is really working on -- working on himself, which is -- I think it's helped our -- I don't know that maybe we wouldn't have as good a relationship right now if he wasn't going through all his classes and changing himself.

Id. at 98–99, 101.

The Individual's therapist indicated that when she first saw him in 2015, "[t]here was no indication, at least in testing or in what [she] could identify, that there was a problem with alcohol." *Id.* at 121. Accordingly, the Individual was given educational materials and asked to follow-up in three months. *Id.* at 121–22. After his October 2018 DWI, the Individual began seeing his therapist again and he immediately notified her when his PEth test result was positive in early January. *Id.* at 106–07. During the IOP, the Individual did well, was active, easily engaged, and supportive of others in the program. *Id.* at 107–08. The Individual had started the PEth tests at her recommendation. *Id.* at 108. Even if the Individual did consume alcohol, the therapist believes that lapses are a part of the recovery process. She does not feel that a lapse would erase the work he has done in the last approximate sixteen months, and believes the Individual should continue with his treatment and AA involvement. *Id.* at 113–17. She believes his prognosis is good. *Id.* at 112. The therapist confirmed that he meets every standard of rehabilitation or reformation that she recognizes. *Id.* She said that the Individual has been honest with her. *Id.* at 130–31.

The DOE Psychologist testified that he was very impressed when he met with the Individual. *Id.* at 136–37. The Individual had already undergone three PEth tests and had started counseling. *Id.* In his report, the DOE Psychologist stated that the Individual underwent two separate tests, the EtG urine test and the PEth test, as part of his assessment. Ex. 12 at 2. The DOE Psychologist indicated in his report that a consultant psychiatrist provided his opinion on the two tests, that the EtG urine test was negative and that the PEth test indicated he had not been consuming alcohol on a regular, heavy basis within the few weeks prior to the test. *Id.* at 6–7. The DOE Psychologist's report indicated that the Individual does not meet the criteria for Alcohol Use Disorder, but that he does binge consume alcohol after a period of abstaining from alcohol. *Id.* at 8. This pattern of behavior and the observation that the Individual engages in concerning behavior when he is intoxicated, led the DOE Psychologist to determine that the Individual's alcohol consumption raises concerns of questionable judgement. *Id.* At the time of the evaluation, the DOE Psychologist indicated that there was no adequate evidence of rehabilitation or reformation, because the Individual has engaged in a long period of abstaining from alcohol followed by an episode of binge consumption. *Id.* As a result, the DOE Psychologist recommended an IOP of a minimum of six weeks, participation in an AA program at least three times per week, and a full year of sobriety. *Id.* In addition, the DOE Psychologist recommended monitoring via PEth and EtG tests as well as individual counseling at least twice per month. *Id.* At the time of the hearing, the Individual was scheduled to complete an IOP as of early March 2020. Ex. F at 1. After receiving a copy of the DOE Psychologist's report, the Individual decided to attend another program at the VA. Tr. at 19–

20. As reported above, the Individual is attending AA, has a sponsor, and has enrolled in an IOP. *Id.* at 11–15, 20, 22–23, 29.

At the hearing, the DOE Psychologist testified that he evaluated the Individual in mid-April 2019. *Id.* at 133. He was impressed that the Individual had been so proactive about getting treatment. *Id.* at 136–37. He asserted that he expected to come to the hearing and say that the Individual was the “best example of reformation and rehabilitation . . . that he [had] seen at a hearing.” *Id.* at 137. He claimed that he was perplexed by the January 2, 2020, test results. *Id.* at 138. The DOE Psychologist explained that, to his knowledge, the January 2nd PEth test results would suggest the Individual was drinking fairly heavily and frequently. *Id.* at 136. He stated that, “But the mean rate, if you hit that 54, is up to seven or ten drinks per day over a several-week period. And I believe this particular test showed 535 . . . , which would suggest fairly heavy, fairly frequent drinking in most cases.” *Id.* at 136.

The DOE Psychologist was encouraged by the length of the Individual’s sobriety and asserted that more emphasis should be placed on the Individual’s continued treatment. *Id.* at 141. He concluded that he agreed with the Individual’s sponsor, who testified that, in his opinion, when someone starts consuming alcohol, they keep drinking or at least craving alcohol. *Id.* at 146–47. He opined that when there is a lapse or relapse it is followed by embarrassment and frustration, which results in trying to “fix it with more alcohol.” *Id.* at 147.

V. Analysis

The issue before me is whether the Individual, at the time of the hearing, presents an unacceptable risk to national security and the common defense. I must consider all of the evidence, both favorable and unfavorable, in a common sense manner. “Any doubt concerning personnel being considered for access for national security eligibility will be resolved in favor of national security.” Adjudicative Guidelines ¶ 2(b). In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record. Because of the strong presumption against granting and restoring security clearances, I must deny the security clearance unless I am convinced that the LSO’s security concerns have been mitigated such that granting the Individual’s clearance is not an unacceptable risk to national security.

Habitual or binge consumption of alcohol to the point of impaired judgement, regardless of whether the individual is diagnosed with an alcohol use disorder, can render an individual ineligible for access authorization. Guideline G at ¶ 22(c). An Individual may be able to mitigate such security concerns the following ways:

- (1) 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; or
- (2) the individual acknowledges his or her pattern of maladaptive alcohol use, provides evidence of actions take to overcome this problem, and has demonstrated clear and

established pattern of modified consumption or abstinence in accordance with treatment recommendations; or

- (3) the individual is participating in counseling or treatment program, has no previous history of treatment and relapse, and is making satisfactory progress in a treatment program; or
- (4) 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).

The Individual has made laudable efforts to mitigate security concerns related to his alcohol consumption. There is no question that the Individual has acknowledged his pattern of maladaptive alcohol consumption, which took the form of binge drinking, and has taken action to overcome the problem by immediately enrolling himself in an IOP in October 2018 and engaging in ongoing treatment with his therapist. Tr. at 11, 16. He enrolled in a second continuing recovery program after meeting with the DOE psychologist, including taking leave from his employment to complete the program. *Id.* at 20. The Individual categorically stated that he has not consumed alcohol since October 2018. *Id.* at 40. The Individual voluntarily submitted to regular PEth tests, including the January 2, 2020, positive PEth test, and he became active early on in the AA program and maintains strong participation, as evidenced by his sponsor's testimony. The Individual has followed all of the treatment recommendations outlined in the DOE Psychologist's report to show adequate evidence of reformation or rehabilitation.

With respect to the Individual's January 2, 2020, positive PEth test, the DOE Psychologist testified that his understanding of the test would indicate "fairly heavy, fairly frequent drinking." *Id.* at 136. However, the Individual's PEth tests on November 22, 2019, and January 22, 2020, were both negative.²

I found the Individual to be credible in his testimony, especially regarding his alcohol use. Further, his sponsor was very impressive and strict in the conduct expected from those he sponsors. In my opinion, the sponsor would not continue to work with the Individual if he believed the Individual was continuing to consume alcohol. The Individual's therapist testified that the Individual has been honest with her regarding his alcohol consumption. The Individual testified that he notified his ex-wife, CR counselor, therapist and sponsor of the positive PEth test immediately after receiving the results. His witnesses confirmed his testimony. Both experts and the sponsor testified that the Individual is working hard at his abstinence and programs, including AA, aftercare, and the recovery program.

With the Individual's credible testimony regarding his alcohol consumption, supported by the November 22, 2019, and January 22, 2020, PEth tests, the (EtG) urine test of January 9, 2020, and

² When both experts were asked if the January 22, 2020 test, taken less than three weeks after the positive PEth test, should not have had some type of reading, neither could answer. Both experts are psychologists and don't have the medical expertise to answer the question about the test.

the testimony of his therapist and sponsor, I find there is insufficient evidence to establish that the Individual engaged in alcohol consumption as seemingly indicated by the January 2, 2020 PEth test. Further, as described above, the Individual has provided convincing evidence of his rehabilitation from his past alcohol misuse. Accordingly, I find the Individual has sufficiently mitigated Guideline G 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 and Guideline J 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 brought forth sufficient evidence to resolve the security concern associated with Guideline G. Accordingly, I have concluded that restoring DOE access authorization to the Individual “will not endanger the common defense and security and is clearly consistent with the national interest.” 10 C.F.R. § 710.7(a). Therefore, I find that the DOE should restore access authorization to the Individual at this time. The parties may seek review of this Decision by an Appeal Panel, under the regulation set forth at 10 C.F.R. § 710.28.

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