

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. 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-20-0054 (hereinafter cited as "Tr."). The DOE counsel submitted 18 exhibits, marked as Exhibits 1 through 18 (hereinafter cited as "Ex."). The Individual submitted five exhibits, marked as Exs. A through E.

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 raised security concerns under Guidelines G and J 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).

Under Guideline G (Alcohol Consumption), the LSO cites the Psychiatrist's determinations that the Individual is a "binge consumer of alcohol" and meets the diagnostic criteria for Alcohol Use Disorder, Moderate, under the *DSM-5*. Ex. 2 at 1.³ The Individual's AUD, Moderate diagnosis and two DWI arrests adequately justify the LSO's invocation of Guideline G. 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, under Guideline G, are "alcohol-related incidents away from work, such as driving while under the influence, . . . regardless of the frequency of the individual's alcohol use or whether the individual has been diagnosed with alcohol use disorder," and "diagnosis by a duly qualified medical or mental health professional (e.g. . . psychiatrist . . .) of alcohol use disorder" · "Guideline G at §§ 22(a) and (d).

Under Guideline J (Criminal Conduct), the LSO cites the Individual's May 25, 2017, and October 12, 2018, DWI arrests. "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. The Individual's history of two DWI arrests adequately justifies the LSO's invocation of Guideline J.

III. REGULATORY STANDARDS

A DOE administrative review process under Part 710 requires me, as Administrative Judge, to issue a Decision that reflects my comprehensive, common-sense judgement, 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*

³ The DOE Counsel amended the Summary of Security Concerns to move two paragraphs that were erroneously listed under Guideline J to their correct subsections under Guideline G.

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 personal 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 has a history of two DWIs: on May 25, 2017 and October 12, 2018. Ex. 5 at 2; Ex. 12 at 1.

Psychological Evaluation

The Psychiatrist interviewed the Individual on August 23, 2019, and issued a report of his findings on September 3, 2019,⁴ in which he found that the Individual meets the criteria set forth in the DSM-5 for AUD, Moderate.⁵ Ex. 4 at 9. Accordingly, the Psychiatrist recommended that the Individual abstain from alcohol for one year, attend an intensive outpatient program (IOP), attend an ongoing aftercare program for a minimum of 12 months, and attend Alcoholics Anonymous (AA) (or another mutual help organization) for a minimum of one year, in order to achieve reformation or rehabilitation.⁶ Ex. A at 10.

Individual’s Exhibits

The Individual was evaluated by a psychologist (the Psychologist) of his choosing on June 8, 2020, and June 10, 2020. Ex. A at 1. The Psychologist issued a report of her findings on June 14, 2020. Ex. A at 1. In this report, the Psychologist opines that the Individual does not meet the DSM-5 diagnostic criteria for AUD. Ex. A at 4. Nevertheless, she acknowledges that the Individual has a problem with consuming alcohol to excess on a weekly basis. Ex. A at 5. While she disagreed with some of the Psychiatrist’s treatment recommendations, she agreed that the Individual “requires outpatient treatment with a relapse prevention program.” Ex. A at 6.

The Hearing

⁴ The Psychiatrist’s evaluation of the Individual included a Phosphatidylethanol (PEth) test, which detects alcohol use during the previous 28 day period. Ex. 4 at 7. The PEth test was positive. Ex. 18.

⁵ The Psychiatrist further concluded that the Individual’s PEth test results indicate that the Individual had significantly underreported his alcohol consumption. Ex. 4 at 9.

⁶ He further recommended additional laboratory testing to confirm and support the Individual’s sobriety. Ex. A at 10.

The Individual's Testimony

The Individual testified that on the night of his October 12, 2018, DWI arrest, his BAC was .10. Tr. at 17. He also testified that he had a previous arrest for a DWI on May 25, 2017. Tr. at 15. The Individual, however, denied that he has a problem with alcohol. Tr. at 22. He further asserted: "I don't meet the criteria for an alcohol disorder according to the DSM-5." Tr. at 30. In support of this assertion, he contended that "[from] the words of [the Psychologist] on my behalf, alcohol has never affected my job, or my home life, or my social life whatsoever, except for the DWI charges and [the DOE Psychiatrist's] report." Tr. at 30. However, when asked whether he agrees with his Psychologist's assessment that he drinks to excess on Friday nights, he admitted that he occasionally drinks to excess and understands that it can impair his judgment. Tr. at 32. The Individual further testified that has not sought any additional counseling (other than the evaluation with the Psychologist), and he has never been to an AA meeting. Tr. at 23.

The Psychiatrist's Testimony

The Psychiatrist testified that the Individual meets the criteria for a diagnosis of AUD, Moderate, noting that the Individual met four of the 11 DSM-5 criteria for AUD,⁷ as explained in his report. Tr. at 41-43. The Psychiatrist further testified that there is no evidence of rehabilitation or reformation because the Individual fails to acknowledge his alcohol problem. Tr. at 51-52. The Psychiatrist testified that, in order to make a finding that there is adequate evidence of rehabilitation or reformation, the Individual should achieve one year of sobriety, engage in supportive treatment such as an IOP, and participate in AA. Tr. at 52-53.

V. ANALYSIS

Guideline G Concerns

The Adjudicative Guidelines provide that 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,

⁷ Under the DSM-5, only two of these conditions need to be met in order to meet the criteria for AUD.

(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). None of these mitigating conditions under Guideline G are applicable in this case.

The Individual disputes the Psychiatrist’s opinion that he meets the DSM-5 criteria for AUD, Moderate. In support of this assertion, he has submitted the Psychologist’s report, which sets forth her conclusion that the Individual was not properly diagnosed with AUD under the DSM-5.⁸ After reviewing the Psychologist’s report, the testimony of the Psychiatrist, and the Psychiatrist’s report, I find that the Psychiatrist’s opinion that the Individual meets the DSM-5 criteria for AUD, Moderate, is persuasive. In order to meet the DSM-5 criteria for AUD, an individual must satisfy at least two of the 11 criteria for AUD set forth in the DSM-5. The Psychiatrist identified four of these criteria that the Individual has met, noting that the Individual:

admits to drinking larger amounts alcohol than he intends when arrested twice for DWI (criteria 1); his alcohol use has caused problems occupationally (criteria 5); repeated driving while intoxicated (criteria 8). Although more commonly observed in regular heavy users of alcohol, tolerance to the effects of alcohol has been reported in binge drinkers. Considering [the Individual's] report that when he achieves a blood alcohol content 0.10g/21 0L, he reports that he experiences no adverse physical effects from this, tolerance to the effects of his regular alcohol exposure is presumed (criteria 10).

Ex. 4 at 9.

In her report, the Psychologist contends that the Psychiatrist erred in concluding that the Individual met Criteria 1, since the Individual reported to her that his alcohol consumption had not changed during the past 15 years. Ex. A at 4. In reaching this conclusion, The Psychologist ignored the Individual’s admission to the Psychiatrist that he had consumed more alcohol than he intended prior to both of his DWI arrests. The Psychologist further contends that the Psychiatrist erred in concluding that the Individual met Criteria 5, since the Individual reported to her that his drinking had not affected his personal relationships, employment, and capacity for social relationships. Ex. At 4. In reaching this conclusion, the Psychologist ignored the obvious threat to his occupational status (in the form of the present proceeding) that has resulted from the Individual’s two DWIs. The Psychologist also contends that the Psychiatrist erred in concluding that the Individual met Criteria 10, claiming that the Psychiatrist’s conclusion that the Individual has developed a tolerance to alcohol was erroneous since the Individual’s BAC at the time of his second DWI was “only” .10 percent, which used to be the “legal limit” in the state in which he was arrested.⁹ Ex. A at 4. I am not persuaded by this contention. The Psychologist agreed with the Psychiatrist’s conclusion that the Individual met Criteria 8. Ex. A at 4.

⁸ Nevertheless, the Psychologist acknowledges that the Individual has a problem with consuming alcohol to excess on a weekly basis. Ex. A at 5.

⁹ For the past 17 years, a BAC of .8 percent has been considered to be presumptive evidence of intoxication in the state in which the Individual resides.

The Individual has not established that the mitigation conditions described in Guideline G §32(a) are present. Since the Individual does not accept that he has a problem with alcohol, he has not complied with any of the Psychiatrist's treatment recommendations and has continued to consume alcohol. The Individual's continued alcohol use and failure to take any meaningful actions to address his AUD, casts doubt upon his current reliability, trustworthiness, and judgement.

Nor has the Individual established that the mitigation conditions described in Guideline G at § 23(b) are present. The Individual fails to acknowledge that his pattern of alcohol use is maladaptive, and has not provided evidence of meaningful actions taken to overcome this problem. The Individual has not demonstrated a clear and established pattern of abstinence in accordance with the Psychiatrist's treatment recommendations

The mitigating conditions set forth at Guideline G § 23(c) and § 23(d) are clearly inapplicable because the Individual is not currently in treatment and has not successfully completed any treatment program.

Because the Individual has not satisfied any of the mitigating conditions under Guideline G, I find that the security concerns raised under Guideline G in the Statement of Charges have not been resolved.

Guideline J Concerns

The Adjudicative Guidelines provide that 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; and
- (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).

The Individual's criminal activity concerns are inextricably linked to his alcohol use concerns. Until the Individual is rehabilitated or reformed from his AUD, there is a high risk that he will consume alcohol and drive. Therefore, the Individual has not met the mitigating condition set forth at § 32(a). The mitigating conditions set forth at §32(b) and §32(c) are clearly inapplicable, because the Individual does not contest the charges of either of his arrests for DWI and has not produced any evidence indicating that he was pressured or coerced into driving while intoxicated.

Finally, the Individual does not meet the mitigating factors set forth at §32(d) because he has not presented any evidence of successful rehabilitation or reformation, and there has not been a significant passage of time without recurrence of an alcohol related arrest. Realizing that Individual's maladaptive alcohol use has resulted in criminal activity on at least two occasions, I cannot be certain that the Individual will refrain from further criminal activity, unless he is rehabilitated or reformed from his AUD. Accordingly, at this time, the Individual has not mitigated the security concerns 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 not mitigated the security concerns raised under Guideline G or Guideline 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