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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: January 7, 2022)	Case No.: PSH-22-0041
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Issued: April 1, 2022

Administrative Judge Decision

Janet R. H. Fishman, Administrative Judge:

This Decision concerns the eligibility of XXXXX XXXXX (hereinafter referred to as “the Individual”) to hold an access authorization under the Department of Energy’s (DOE) regulations set forth at 10 C.F.R. Part 710, Subpart A, entitled “General Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material.”¹ As discussed below, after carefully considering the record before me in light of the relevant regulations and the *National Security Adjudicative Guidelines for Determining Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position* (June 8, 2017) (Adjudicative Guidelines), I conclude that the Individual’s access authorization should not be restored.

I. Background

The Individual is employed by a DOE contractor in a position which requires that he hold a security clearance. Based on information gleaned from an October 2020 Enhanced Subject Interview (ESI) and the Individual’s responses to a December 2020 Letter of Interrogatory (LOI), the LSO requested that the Individual undergo a psychological evaluation. This evaluation was conducted by a DOE-consultant psychologist (DOE Psychologist) in May 2021. After receiving the DOE Psychologist’s report, the LSO began the present administrative review proceeding by issuing a Notification Letter to the Individual, informing him that his security clearance was suspended and that he was entitled to a hearing before an Administrative Judge to resolve substantial doubt regarding his eligibility to hold a security clearance. *See* 10 C.F.R. § 710.21.

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 Administrative Judge in this matter. At the hearing I convened pursuant to 10 C.F.R. § 710.25(d), (e), and (g), the Individual

¹ Access to authorization is defined as “an administrative determination that an individual is eligible for access to classified mater or is eligible for access to, or control over, special nuclear material.” 10 C.F.R. § 710.5(a). Such authorization will be referred to variously in this Decision as access authorization or security clearance

testified on his own behalf, presented the testimony of eight witnesses, and submitted three exhibits, marked as Exs. A through C. *See* Transcript of Hearing, Case No. PSH-22-0041 (cited as “Tr.”) The DOE Counsel presented the testimony of one witness and submitted nine exhibits marked as Exs. 1 through 9.

II. The Notification Letter and Associated Security Concerns

Guideline G

Guideline G (Alcohol Consumption) provides that an individual’s “[e]xcessive 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. Among those conditions set forth in the Adjudicative Guidelines that could raise a disqualifying security concern 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 “habitual or binge consumption of alcohol to the point of impaired judgment, regardless of whether the individual is diagnosed with alcohol use disorder.” Adjudicative Guidelines at ¶ 22(a), (c). With respect to Guideline G, the LSO alleged that 1) in May 2021, a DOE Psychologist concluded the Individual habitually or binge consumed alcohol to the point that would impair judgment, and 2) the Individual has a history of habitual or binge consumption of alcohol to the point of impairment, as evidenced by his responses to the LOI, a 2009 encounter with law enforcement after consuming alcohol, and a 2006 citation for underage drinking. Ex. 2 at 1-3. Given this, I find that the LSO had sufficient justification to invoke Guideline G in the present case.

Guideline J

Under Guideline J (Criminal Conduct), “[c]riminal activity creates doubt about a person’s judgement, reliability, and trustworthiness. By its very nature, it calls into questions a person’s ability or willingness to comply with laws, rules, and regulations.” Adjudicative Guidelines at ¶ 30. Among those conditions set forth in the Adjudicative Guidelines that could raise a disqualifying security concern is “evidence (including, but not limited to, a credible allegation, an admission, and matters of official record) of criminal conduct, regardless of whether the individual was formally charged, prosecuted, or convicted.” Adjudicative Guidelines at ¶ 31(b). With respect to Guideline J, the LSO alleged that the Individual has engaged in criminal conduct including 1) a 2009 encounter with law enforcement where the Individual was tested and found to be above the legal alcohol limit, and 2) a 2006 citation for underage drinking. Ex. 2 at 3. Therefore, I find that the LSO had sufficient justification to invoke Guideline J in the present case.

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 the relevant evidence, favorable or 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 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 and Hearing Testimony

In the LOI, the Individual disclosed that he had two alcohol-related encounters with law enforcement. Ex. 5 at 1, 2-3. Specifically, in 2006, he was charged with underage drinking. *Id.* at 1. In 2009, the Individual fell asleep on a bench after consuming alcohol at a concert and subsequently was administered an alcohol breath test by local police. *Id.* at 2-3. The Individual failed the test, but he was not arrested. *Id.* at 3. At the time he completed the LOI, the Individual stated that he was consuming alcohol one to three times a week, usually consuming between one to three 12-ounce beers or one to two 5-ounce glasses of wine at a time. Ex. 5 at 1. He also admitted that he consumed enough alcohol to register above the legal limit of .08 percent two to three times per month. Ex. 5 at 2.

The Individual testified that he last consumed alcohol six weeks prior to the hearing. Tr. at 16, 19. He also testified that he has not participated in Alcoholics Anonymous (AA), as he believes he has the tools and support of his family in his life and has not had a problem regulating his alcohol consumption. *Id.* at 17-18. The Individual testified that he has not undergone any Phosphatidylethanol (PEth) testing, other than the test conducted with the psychological evaluation. *Id.* at 26. In his response to the LOI, the Individual indicated that he consumes alcohol one to three times per week, yet his medical records reflect that he reported he was consuming alcohol three to five times per week. Ex. 6 at 1; Ex. B at 2. When questioned at the hearing about the disparity between what he reported to the LSO versus what he reported to his primary care physician, the Individual indicated that he consumed alcohol on average one to three times per week. *Id.* at 21.

The Individual’s character witnesses, including his wife, sister, sister-in-law, high school friend, college friend, and two work colleagues, all testified that the Individual was trustworthy and would not violate the national security. Tr. at 31, 41, 46, 49, 58, 68, 70, 76-77, 84. In addition, they all stated that they had never seen the Individual have issues with alcohol. *Id.* at 32, 40, 48, 54, 79, 86. The Individual’s sister claimed that if she had ever seen him have a problem with alcohol, she

would have spoken to him about it. *Id.* at 32.² One of the Individual's co-workers, who is also a friend, stated that they get together socially once a month, and he has never seen anything regarding the Individual's alcohol consumption that would give him concern. *Id.* at 79.

The Individual's primary care physician (Physician) testified that she has been treating him for two years. Tr. at 91. She said that when she first began treating him, they discussed the Individual's alcohol consumption because he was overweight, his blood pressure was high, his AST was a little high, and he had an elevated liver function. *Id.* at 93; Ex. B at 23-27. The Physician indicated that at their second appointment, it was apparent that he had reduced his alcohol consumption. *Id.* at 96. In the Individual's medical file, she noted that he reported "drinking less alcohol." Ex. B at 15. However, the Physician stated that she had no experience with PEth tests. *Id.* at 98.

During his May 2021 psychological evaluation with the DOE Psychologist, the Individual reported "drinking to the point of intoxication once or twice per month, usually in the context of . . . special events or backyard gatherings." Ex. 7 at 5. Also, during the evaluation, the Individual stated that his alcohol consumption for the previous five years was one to three days per week. *Id.* He asserted that his heaviest alcohol consumption had been approximately two weeks prior to the evaluation when he attended a wedding, admitting to consuming eight beers and one glass of wine over the course of a multi-hour wedding. *Id.* The DOE Psychologist concluded that the amount of alcohol the Individual reported having consumed at the wedding would equal a Blood Alcohol Content of .154 percent.

After the evaluation, the Individual underwent two laboratory tests, including the PEth test and an Ethyl Glucuronide (EtG) urine test. The test results were evaluated by a consulting psychiatrist, who concluded that although the EtG test was negative, the PEth test was positive and showed heavy alcohol consumption. *Id.* at 6. The DOE Psychologist concluded that, while the Individual does not have an Alcohol Use Disorder, he does habitually, or binge, consumes alcohol to the point that would impair judgment. *Id.* at 9. In his report, he recommended that, to show rehabilitation or reformation, the Individual complete six months of abstinence, verified by frequent PEth testing. *Id.* He also endorsed participation in Alcoholics Anonymous (AA) three times per week for a period of six months, including obtaining a sponsor and working through the twelve steps. *Id.* The DOE Psychologist also suggested participation in an intensive outpatient treatment program. *Id.* At the hearing, the DOE Psychologist confirmed his diagnosis and treatment recommendations. Tr. at 150.

² The Individual's sister stated that, although they do not live in the same city, she has been spending more time with the Individual because they are both teleworking, so she would occasionally work remotely for a week from where he lives. Tr. at 30.

V. Analysis

Guideline G

The Adjudicative Guidelines provide that an Individual can 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;

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

The Individual has not recognized his maladaptive alcohol use. Although he had remained abstinent for six weeks prior to the hearing, I cannot conclude that the Individual has mitigated the Guideline G concerns stated in the Notification Letter. In his May 2021 report, the DOE Psychologist provided very specific recommendations that the Individual did not endeavor to complete. As the Individual testified, he has not participated in AA nor has he undergone any PEth testing. The DOE Psychologist could not conclude that the Individual had sufficiently shown that he was reformed or rehabilitated. Considering his failure to thoroughly implement the DOE Psychologist's recommendations, the Individual has failed to completely resolve the Guideline G concerns.

Guideline J

The Adjudicative Guidelines provide that an Individual can 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;

* * *

- 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).

Both charges raised by the LSO occurred over 12 years prior to the date of the hearing. These charges occurred while the Individual was in college. Given this and the lack of other criminal

incidents, I find that sufficient time has elapsed since the latest criminal behavior so as not to cast doubt on his reliability, good judgement, or trustworthiness. Accordingly, the Individual has resolved the Guideline J security concerns.

VII. Conclusion

For the reasons set forth above, I conclude that the LSO properly invoked Guidelines G and J of the Adjudicative Guidelines. After considering all the evidence, both 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 raised by Guideline G as set forth in the Summary of Security Concerns. 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. Either party may seek review of this Decision by an Appeal Panel under the procedures set forth at 10 C.F.R. § 710.28.

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