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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: February 14, 2022)	Case No.: PSH-22-0056
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_____)	

Issued: April 25, 2022

Administrative Judge Decision

Phillip Harmonick, Administrative Judge:

This Decision concerns the eligibility of XXXXX XXXXX (the Individual) to hold an access authorization under the United States Department of Energy's (DOE) regulations, set forth at 10 C.F.R. Part 710, "Procedures for Determining Eligibility for Access to Classified Matter and 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 that requires her to hold a security clearance. On May 30, 2021, the Individual was arrested for Driving Under the Influence (DUI). Exhibit (Ex.) 4 at 1. The local security office (LSO) issued the Individual a letter of interrogatory (LOI) concerning her alcohol use. Ex. 7. In her response to the LOI, the Individual indicated that she needed to consume "7-9 12-ounce beers or hard seltzers" to become intoxicated and that she consumed alcohol to the point of intoxication about one to two times monthly. Ex. 8 at 2.

A DOE-contracted psychologist (DOE Psychologist) conducted a clinical interview of the Individual on September 7, 2021. Ex. 11 at 2.² At the request of the DOE Psychologist, the Individual provided blood and urine samples for laboratory testing. *Id.* at 7. A Medical Doctor

¹ The regulations define access authorization as "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). This Decision will refer to such authorization as access authorization or security clearance.

² The internal pagination of numerous exhibits offered by the LSO does not correspond to the number of pages included in the exhibit. For example, the second page of Exhibit 11 is marked as page 1 due to an unnumbered first page. This Decision cites to pages in the order in which they appear in exhibits without regard for their internal pagination.

(MD) who interpreted the results of the laboratory tests indicated that the results were “congruent with heavy alcohol consumption.” Ex. 12. On September 15, 2021, the DOE Psychologist issued a Psychological Assessment (Report) in which she determined that the Individual met the diagnostic criteria for Alcohol Use Disorder (AUD), Moderate, under the *Diagnostic and Statistical Manual of Mental Disorders – Fifth Edition (DSM-5)*. Ex. 11 at 8–9.

The LSO issued the Individual a letter notifying her that her security clearance had been suspended and that it possessed reliable information that created substantial doubt regarding her eligibility to hold a security clearance. Ex. 1. In a 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. 2.

The Individual exercised her right to request an administrative review hearing pursuant to 10 C.F.R. Part 710. Ex. 3. 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 fourteen exhibits (Ex. 1–14). The Individual submitted ten exhibits (Ex. A–J). The Individual testified on her own behalf and offered the testimony of two character witnesses. Hearing Transcript (Tr.) at 17, 88, 110. The LSO offered the testimony of the DOE Psychologist. *Id.* at 124.

II. THE NOTIFICATION LETTER AND THE ASSOCIATED SECURITY CONCERNS

The LSO cited Guideline G (Alcohol Consumption) as the first basis for its determination that the Individual was ineligible for access authorization. Ex. 2 at 1–3. “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.” Adjudicative Guidelines at ¶ 21. The SSC cited: the DOE Psychologist’s determination that the Individual met the diagnostic criteria for AUD, Moderate, under the *DSM-5*; the MD’s opinion that the laboratory test results provided evidence that the Individual engaged in heavy alcohol consumption; the Individual’s arrest for DUI; and the Individual’s admission to consuming alcohol to intoxication at least monthly in her response to the LOI. Ex. 2 at 1–3. The LSO’s assertions that the Individual was arrested for DUI, habitually or binge consumed alcohol to the point of impaired judgment, and was diagnosed with AUD by the DOE Psychologist, justify the LSO’s invocation of Guideline G. Adjudicative Guidelines at ¶ 22(a), (c)–(d).

The LSO cited Guideline J (Criminal Conduct) as the other basis for its determination that the Individual was ineligible for access authorization. Ex. 2 at 3. “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.” Adjudicative Guidelines at ¶ 30. The SSC cited the Individual’s arrest for DUI. Ex. 2 at 3. The LSO’s allegation that the Individual was arrested for DUI justifies its 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 Dep't 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).

An 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). An 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 has received positive performance evaluations from the DOE contractor and completed numerous professional trainings and certification programs since 2015. Ex. B; Ex. H. The Individual frequently engages in charitable activities, and has received significant recognition from her community for her positive contributions. Ex. C; Ex. E. The Individual's friends and professional colleagues perceive her to be a reliable and trustworthy person possessing sound judgment. Ex. D; Tr. at 97–98, 113–17.

On May 30, 2021, the Individual and her husband attended a barbecue where she consumed four 12-ounce beers, eight 12-ounce alcoholic seltzers, and two shots of hard alcohol. Ex. 6 at 2; Ex. 8 at 1; Ex. 11 at 4. The Individual attempted to drive home from the barbecue and was arrested for DUI. Ex. 4 at 2–6; Ex. 5 at 2; Ex. 6 at 2.³ The Individual's breath alcohol content (BRAC) was measured at 0.196 and 0.183. Ex. 4 at 2, 7; Ex. 5 at 2.

Over the 10-year period prior to her arrest for DUI, the Individual consumed alcohol multiple times weekly and became intoxicated at least once per month. Ex. 8 at 2; *see also* Ex. 6 at 3 (estimating that she had become intoxicated twenty times in the 12-month period prior to her arrest for DUI and admitting that she had consumed as many as eighteen alcoholic drinks in one day during that period). According to the Individual, she needed to consume seven-to-nine 12-ounce beers or hard seltzers during this period to become intoxicated. Ex. 8 at 2.

³ The Individual does not dispute any of the information contained in Exhibit 4 (Arrest Report) or Exhibit 5 (Probable Cause Affidavit) concerning her arrest and DUI charge, except the statement of a witness to law enforcement that the witness observed her strike her husband, which she denies occurred. Tr. at 48–49.

On June 17, 2021, the Individual met with a Licensed Social Worker (LSW) for an assessment. Ex. A at 2; *see also* Ex. I at 1 (reflecting the training and credentials of the LSW). The Individual told the LSW that she had not consumed alcohol since her arrest for DUI. Ex. A at 4. The Individual reported being “about 90 percent ready to remain abstinent” from alcohol, and attributed her motivation to doing so to “legal problems” and to showing herself that she was capable of quitting alcohol use. *Id.* at 6. The LSW determined that the Individual met the diagnostic criteria for AUD, Mild, under the *DSM-5* and recommended that the Individual participate in an alcohol education course. *Id.* at 8; *see also* Tr. at 135–36 (reflecting testimony of the DOE Psychologist that the alcohol education course in question is the lowest level of intervention recommended by the American Society of Addiction Medicine).

The Individual met with the DOE Psychologist for a clinical interview on September 7, 2021. Ex. 11 at 2. During the clinical interview, the Individual represented that she had benefited from the alcohol education course recommended by the LSW, had consumed approximately ten alcoholic drinks since her arrest for DUI, and last consumed alcohol approximately two days prior to the clinical interview, when she drank one beer. *Id.* at 5.

At the request of the DOE Psychologist, the Individual provided blood and urine samples for laboratory Ethyl Glucuronide (EtG) and Phosphatidylethanol (PEth) tests. *Id.* at 7. An EtG test measures the presence of a metabolite of ethanol in a subject’s urine, and can detect chemical evidence of alcohol consumption up to four days after the subject last consumed alcohol. Ex. 14 at 2. A PEth test measures the presence of the PEth biomarker in a subject’s blood, and can detect chemical evidence of alcohol consumption up to four weeks after a subject last consumed alcohol. *Id.* at 2–3. The EtG test was negative, which the MD interpreted as “strong medical evidence that the [Individual] was abstinent from alcohol during the three days prior to the sample collection.” Ex. 11 at 27. The PEth test was positive at a level of 156 nanograms (ng) per milliliter (mL). *Id.* Based on the negative EtG test, and the half-life of the PEth molecule, the MD calculated that the Individual’s PEth level was approximately 234 ng/mL four days prior to the specimen collection. *Id.* The MD opined that the Individual’s estimated PEth level was “congruent with heavy alcohol consumption,” and noted that a study had found that a PEth level of 202 ng/mL was correlated with an average consumption of 4.3 alcoholic drinks per day. *Id.*

On September 15, 2021, the DOE Psychologist issued her Report in which she opined that the Individual met the diagnostic criteria for AUD, Moderate, under the *DSM-5*.⁴ *Id.* at 7–8. The DOE Psychologist recommended that the Individual demonstrate rehabilitation or reformation by participating in an intensive outpatient rehabilitation program (IOP) followed by aftercare for a total of twelve months of treatment, actively participating in Alcoholics Anonymous (AA) for twelve months, abstaining from alcohol for the duration of treatment, and documenting her abstinence from alcohol through at least six PEth tests over the 12-month treatment period. *Id.* at 8–9.

⁴ Specifically, the DOE Psychologist found that the Individual met five diagnostic criteria for AUD: (1) unsuccessful efforts to cut down or control alcohol use; (2) craving or strong desire or urge to use alcohol; (3) recurrent alcohol use resulting in a failure to fulfill major role obligations at work, school, or home; (4) alcohol use continued despite a persistent or recurrent physical problem that is likely to have been caused or exacerbated by alcohol (pre-diabetes); and, (5) tolerance. Ex. 11 at 7–8.

On September 16, 2021, pursuant to a plea agreement related to the charge of DUI resulting from her May 30, 2021, arrest, the Individual was sentenced to one year of unsupervised probation. Tr. at 37; Ex. J. The Individual complied with the terms of her probation by paying a fine, performing community service, and having an interlock device installed on her vehicle. Tr. at 37; Ex. J. The interlock device registered numerous failed tests based on the vehicle operator's positive BRAC in the two-week period after the interlock device was installed on the Individual's car.⁵ Ex. G at 1, 9–52. The interlock device has not registered a failed test based on the vehicle operator's positive BRAC since October 19, 2021. *Id.* at 2–7, 52.

The Individual met with the LSW for a second assessment on February 28, 2022. Ex. A at 9. The Individual reported to the LSW that she last consumed alcohol on January 8, 2022. *Id.* at 10. The LSW determined that the Individual met the diagnostic criteria for AUD, Mild, in early remission under the *DSM-5*. *Id.* She recommended that the Individual participate in outpatient treatment, including group counseling, individual counseling, and “random and frequent” alcohol testing. *Id.* at 17.

The Individual commenced a 16-week outpatient treatment program several days prior to the hearing. Tr. at 25–27, 60–61. The Individual testified that, as part of this treatment, she must undergo alcohol testing twice weekly. *Id.* at 27–28; *see also* Ex. F (reflecting that the Individual provided a sample for a blood alcohol test unrelated to her treatment program on March 3, 2022, the results of which were negative for traces of alcohol). The Individual has not undergone the PEth testing recommended by the DOE Psychologist, and attributed this to not knowing how to obtain such a test. Tr. 67–68. The Individual testified that she has abstained from alcohol since January 8, 2022, and is willing to pursue individual and group counseling on an ongoing basis if necessary to regain her security clearance. *Id.* at 21, 40–41.

At the hearing, the DOE Psychologist opined that the alcohol education class recommended by the LSW following the first assessment was insufficiently rigorous considering the severity of the Individual's AUD. *Id.* at 135–36. She likewise opined that, although the outpatient treatment program the Individual is attending is appropriate for a person with AUD, Mild, the IOP she recommended for the Individual was a more appropriate intervention for a person with AUD, Moderate, because an IOP involves more hours of treatment and covers a greater breadth of treatment topics. *Id.* at 142–46, 152. The DOE Psychologist indicated that the alcohol testing the Individual had recently undergone was not the PEth testing she had recommended, and that the Ethyl Alcohol test reflected in Exhibit F was the variety used to measure the presence of alcohol immediately following an alcohol-related incident, such as a DUI arrest. *Id.* at 141–42. The DOE Psychologist opined that the Individual had not demonstrated rehabilitation or reformation, and that she could not provide a favorable prognosis for the Individual's recovery. *Id.* at 143, 150.

⁵ The Individual testified that the interlock device erroneously measured alcohol on her breath in the first three weeks after it was installed due to mechanical failure which was resolved through recalibration by a technician. Tr. at 35–37.

V. ANALYSIS

A. Guideline G

The Individual's arrest for DUI, alleged habitual or binge consumption of alcohol to the point of impaired judgment, and diagnosis with AUD justify the LSO's invocation of Guideline G. Adjudicative Guidelines at ¶ 22(a), (c)–(d). 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; and,
- (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).

The Individual was arrested for DUI within one year prior to the hearing, and is still serving probation for that offense. Moreover, the results of the September 2021 laboratory testing provide strong evidence that the Individual engaged in heavy alcohol consumption approximately six months prior to the hearing. The recency of the Individual's problematic alcohol consumption leads me to conclude that her alcohol use continues to cast doubt on her reliability, trustworthiness, and judgment. Moreover, the Individual repeatedly admitted to having engaged in regular, heavy alcohol consumption for ten years prior to her arrest for DUI. Thus, her problematic alcohol consumption was neither infrequent nor occurred under unusual circumstances. For these reasons, I find that the first mitigating condition under Guideline G is inapplicable in this case. *Id.* at ¶ 23(a).

As of the date of the hearing, the Individual claimed to have abstained from alcohol for less than three months and to have participated in outpatient treatment for one week. Even if the Individual's self-reported period of abstinence from alcohol was substantiated, which her single blood alcohol test is insufficient to accomplish, it would be too brief to show an established pattern of abstinence. The DOE Psychologist recommended that the Individual abstain from alcohol for twelve months and substantiate her abstinence through periodic PEth testing.⁶ As the Individual's claimed period

⁶ I found the DOE Psychologist's explanation of her diagnosis of the Individual with AUD, Moderate, persuasive. However, even if I was persuaded that the LSW's diagnosis of the Individual with AUD, Mild, was more appropriate than the DOE Psychologist's diagnosis, I would nevertheless find the Individual's period of abstinence insufficient to establish the applicability of the mitigating condition. The DOE Psychologist indicated that she would typically recommend six months of abstinence from alcohol for a person diagnosed with AUD, Mild, to demonstrate

of abstinence is far shorter, and not supported by robust alcohol testing, I find that the second mitigating condition under Guideline G is inapplicable. *Id.* at ¶ 23(b).

While the Individual has enrolled in an outpatient treatment program, she had only participated in one week of treatment as of the date of the hearing, and the DOE Psychologist testified that the program was not of sufficient intensity to satisfy her treatment recommendations. Additionally, the Individual has not provided evidence corroborating that she is actively participating in the program, complying with treatment recommendations, and making satisfactory progress. Thus, the Individual has not established the applicability of the third mitigating condition under Guideline G. *Id.* at ¶ 23(c). The final mitigating condition under Guideline G is not applicable because the Individual has only just begun treatment for AUD and did not assert that she had completed a treatment program as of the date of the hearing. *Id.* at ¶ 23(d).

While the Individual demonstrated that she is an effective employee and positive member of her community, she is still in the early stages of recovery from AUD. Given the Individual's admitted alcohol misuse over a period of many years, the brief period of abstinence from alcohol the Individual claimed as of the date of the hearing, and the DOE Psychologist's opinion that the Individual had not demonstrated rehabilitation or reformation and did not have a positive prognosis for recovery, I find that the Individual has not resolved the security concerns asserted by the LSO under Guideline G.

B. Guideline J

The Individual's arrest for DUI justifies the LSO's invocation of Guideline J. *Id.* at ¶ 31(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; 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.

Id. at ¶ 32(a)–(d).

rehabilitation or reformation; the Individual has abstained for a far shorter time period. Tr. at 154. Furthermore, the Individual has only undergone one blood alcohol test at a time of her choosing and did not begin the "random and frequent drug and alcohol testing" recommended by the LSW until she commenced the outpatient treatment program in the week prior to the hearing. *Supra* p. 5. Thus, the Individual would not have established a pattern of abstinence in accordance with treatment recommendations even if I credited the LSW's less severe diagnosis of AUD.

The Individual does not allege that she was coerced into committing the DUI or that she did not commit the offense. Accordingly, only the first and fourth mitigating conditions are potentially applicable in this case.

The Individual's arrest for DUI occurred less than one year prior to the hearing and she will continue to serve the probation to which she was sentenced in connection with the offense until September 2022. In light of the recency of the Individual's arrest, and the fact that she is still serving probation, I find that insufficient time has elapsed for me to conclude that the passage of time, in and of itself, mitigates the security concerns related to her conduct. Moreover, the frequency of the Individual's admitted intoxication and the recency of her claimed abstinence from alcohol indicates that she is too early into her recovery for me to conclude that she is unlikely to engage in alcohol-related criminal conduct in the future. For these reasons, I find the first mitigating condition under Guideline J inapplicable. *Id.* at ¶ 32(a).

The Individual demonstrated extensive charitable community involvement. She also established her completion of employment-related training and a positive employment record. However, most of the positive activities the Individual demonstrated occurred prior to her criminal conduct and therefore do not establish rehabilitation. Although the Individual testified that she has complied with the terms of her probation, she had only served about half of that sentence as of the date of the hearing. While the Individual has shown that she possesses many positive traits and has engaged in beneficial activities, she has not brought forth sufficient evidence of rehabilitation following her criminal conduct to establish the applicability of the fourth mitigating condition of Guideline J. *Id.* at ¶ 32(d).

As none of the mitigating conditions under Guideline J are fully satisfied in this case, and the Individual's recovery is not sufficiently established to conclude that she is not at risk of engaging in alcohol-related criminal conduct in the future, I find that the Individual has not resolved the security concerns asserted by the LSO under Guideline J.

VI. CONCLUSION

In the above analysis, I found that there was sufficient derogatory information in the possession of DOE to raise security concerns under Guidelines G and J of the Adjudicative Guidelines. After considering all 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 Summary of Security Concerns. Accordingly, I have determined that the Individual's access authorization should not be restored. This Decision may be appealed in accordance with the procedures set forth at 10 C.F.R. § 710.28.

Phillip Harmonick
Administrative Judge
Office of Hearings and Appeals