

the affidavit of arrest, which included information that the Individual had consumed alcohol prior to his arrest. Ex. 6 at 5.

The local security office (LSO) issued the Individual a letter of interrogatory (LOI) concerning his alcohol use and alleged criminal conduct. Ex. 8. In his response, the Individual provided information on prior alleged alcohol-related infractions, including multiple arrests for driving under the influence (DUI) of alcohol, felony assault, and domestic violence. *Id.* at 7–13. He was also asked to meet with a DOE-consultant psychiatrist (DOE Psychiatrist) for an evaluation. Ex. 9. The DOE Psychiatrist subsequently issued a report of the evaluation (Report) in which he opined that the Individual met sufficient diagnostic criteria for a diagnosis of Alcohol Use Disorder (AUD), Mild, in early remission, under the *Diagnostic and Statistical Manual of Mental Disorders – Fifth Edition (DSM-5)*, and that the Individual binge consumed alcohol to the point of impaired judgment. *Id.* at 10–11.

The LSO issued the Individual a letter notifying him that it possessed reliable information that created substantial doubt regarding his eligibility for access authorization. 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) 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 (OHA) appointed me as the Administrative Judge in this matter, and I subsequently conducted an administrative hearing. The LSO submitted twelve exhibits (Ex. 1–12). The Individual submitted forty-five exhibits (Ex. A-1–I).³ The Individual presented six witnesses and testified on his own behalf. Hearing Transcript (Tr.) at 3-4. The LSO called one witness to testify. *Id.* at 4.

II. THE NOTIFICATION LETTER AND THE ASSOCIATED SECURITY CONCERNS

The LSO cited Guideline G (Alcohol Consumption) as the basis for its doubt concerning the Individual’s eligibility for access authorization. Ex. 1 at 1–2. “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 Psychiatrist’s determination that the Individual met sufficient diagnostic criteria for a diagnosis of AUD, Mild, under the *DSM-5*; the Individual’s alleged binge consumption of alcohol to the point of impaired judgment; and the Individual’s history of alcohol-related incidents and arrests. Ex. 1 at 1–2. The LSO’s assertions in the SSC justify its invocation of Guideline G. Adjudicative Guidelines at ¶ 22(a), (c)–(d).

³ The Individual marked related exhibits with a letter followed by sequential numbers. For example, results of certain alcohol tests submitted by the Individual are marked as exhibits B-1 through B-19 and performance evaluations the Individual received from the DOE contractor are marked as exhibits D-1 through D-5. Thus, the Individual’s exhibit markings do not correspond to the total number of exhibits he submitted.

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) (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

In February 2002, the Individual was arrested and charged with DUI. Ex. 8 at 6. The charge was dismissed. *Id.* In May 2004, the Individual was arrested and charged with Domestic Violence, Telephone Abuse, and False Imprisonment following a domestic dispute that occurred after he consumed six beers. *Id.* at 7; *see also* Tr. at 138–39 (indicating that the Individual and his female partner had an argument, that he was consuming alcohol at the time, that he seized her phone, and that the situation then "turned into a bigger thing"); Ex. 2 at 4 (admitting that he consumed a six-pack of beer prior to his arrest). He pleaded guilty to Domestic Violence and completed probation and alcohol counseling classes pursuant to a court order. Ex. 8 at 7; Ex. 12 at 56. The remaining charges were dismissed. Ex. 8 at 7.

In November 2005, the Individual was arrested and charged with Felony Assault and Disorderly Conduct following a bar fight. Ex. 12 at 76; *see also* Tr. at 140–41 (indicating that he believed that he had acted in self-defense when he struck a man to the ground who "was harassing [him and had] went up from behind [] and scratched [the Individual] . . . under [his] eye"). The charges were dismissed. *Id.* The Individual had consumed four beers prior to this arrest. Ex. 2 at 3.

In June 2009, the Individual was arrested and charged with Driving While Intoxicated. Ex. 8 at 8; Ex. 12 at 49. The Individual pleaded guilty to a lesser charge of Driving While Ability Impaired. Ex. 8 at 8. As a result of this plea, the Individual's driver's license was revoked for approximately one year, he was sentenced to nine months of probation, and he was ordered to attend additional alcohol-related counseling. Ex. 9 at 4; Ex. 12 at 74. Following his 2009 arrest, the Individual

abstained from alcohol for “a little over three years” before resuming alcohol consumption. Tr. at 127.

On September 11, 2021, a police officer responded to a call from a woman who stated that her boyfriend, the Individual, had hit her, took her phone, and left on his motorcycle. Ex. 6 at 4; *but see* Tr. at 146–47 (reflecting the Individual’s testimony at the hearing that he had not struck his girlfriend, that she fell trying to evade him because “[s]he thought [he] was going to grab her, and he wasn’t,” and that she later said that the police had embellished her report). The report prepared by the responding officer also indicated that the Individual’s girlfriend said that “he is irate when he is under the influence of alcohol.” *Id.* at 5. When police officers arrived at the Individual’s home, they found him asleep and smelling of alcohol with liquor bottles around him. *Id.* Eventually, the Individual was arrested and charged with Assault Against a Household Member; Battery Against a Household Member; Cruelty to Animals; Resisting, Evading, Obstructing an Officer; and Assault Upon a Peace Officer. Ex. 7 at 4, 9.

On September 14, 2021, the Individual notified the LSO of his arrest and related charges. Ex. 7 at 4, 9. The Individual provided the LSO with a copy of the affidavit of arrest on October 6, 2021. Ex. 6.

In January 2022, the LSO issued the Individual the LOI. Ex. 8. In addition to providing further details about his past criminal charges, the Individual indicated in his response to the LOI that he did not feel he had a problem with alcohol, nor did he believe he needed any alcohol-related counseling or treatment. *Id.* at 17–18. The Individual also expressed his intention to drink in the future on “special occasions.” *Id.* at 19.

On March 3, 2022, The Individual met with the DOE Psychiatrist for a clinical interview. Ex. 9 at 3. The Individual reported to the DOE Psychiatrist that he had last consumed alcohol on February 10, 2022, three weeks prior to the clinical interview, when he claimed that he drank two beers. *Id.* at 7. Immediately following the clinical interview, the Individual provided a sample for a phosphatidylethanol (PEth) test. *Id.* at 9. The results of the PEth test were positive at a level of 77 ng/mL. *Id.* The DOE Psychiatrist opined that it was improbable that the Individual’s self-reported alcohol consumption could have produced a positive PEth test, and that the Individual had likely “significantly under-reported his actual drinking habits in the month before the PEth test.” *Id.*

In his Report, the DOE Psychiatrist concluded that the Individual met sufficient diagnostic criteria for a diagnosis of AUD, Mild, in Early Remission under the *DSM-5*.⁴ *Id.* at 10. He also opined that the Individual binge consumed alcohol to the point of impaired judgment. *Id.* at 11. In order for the Individual to show adequate evidence of rehabilitation or reformation, the DOE Psychiatrist recommended that he participate in treatment of “moderate intensity,” such as participating in

⁴ Specifically, the DOE Psychiatrist determined that the Individual met the following diagnostic criteria for AUD: (2) persistent desire or unsuccessful efforts to cut down or control alcohol use; (6) continued alcohol use despite having persistent or recurrent social or interpersonal problems caused or exacerbated by the effects of alcohol; and (8) recurrent alcohol use in situations in which it is physically hazardous. Ex. 9 at 10. The DOE Psychiatrist determined that the Individual met these diagnostic criteria based on the positive PEth test, which showed that he was consuming alcohol despite his stated desire not to do so, his alcohol-related arrests involving violence which demonstrated social or interpersonal problems influenced by alcohol, and his arrests for DUI which showed that he used alcohol in physically hazardous situations. *Id.*

Alcoholics Anonymous (AA) meetings under the guidance of a sponsor at least weekly or undergoing alcohol abuse counseling for one year, and abstain from alcohol consumption for the duration of his treatment. *Id.* at 12.

At the hearing, the Individual asserted that he had honestly reported his alcohol consumption to the DOE Psychiatrist and noted that the positive PEth test occurred at a time when he was inhaling alcohol fumes on a daily basis in the workplace. Tr. at 117–25. The Individual took a polygraph test to support his claim that he had not consumed any alcohol between February 12, 2022, and his meeting with the DOE Psychiatrist. Ex. C. While the test produced a valid result, which the examiner opined was evidence that the Individual had answered truthfully, I assigned the results of the polygraph test minimal evidentiary weight because the Individual did not submit any qualifications of the polygraph tester into the record and because of the well-known limitations of polygraph testing.⁵

The Individual also testified that, at the time of the positive PEth test, he was exposed to isopropyl alcohol fumes in the course of his work in an enclosed space on a daily basis. Tr. at 120–24; *see also* Tr. at 19–20, 67–71 (providing confirmation from managerial personnel with personal knowledge of the Individual’s work that he was exposed to alcohol fumes on a daily basis for up to 10 hours per day); Ex. E-1, E-2 (reflecting the label of a jar of isopropyl alcohol used in the Individual’s workplace). He presented four articles concerning the effects of alcohol vapor inhalation, including two indicating that inhalation of alcohol vapors can cause positive Ethylglucuronide (EtG) tests. Ex. G-1, G-2, G-3, G-4. The DOE Psychiatrist disagreed with the Individual’s conclusion, explaining that it was his opinion that the inhalation of isopropyl alcohol could not produce a positive PEth test because isopropyl alcohol does not contain any ethanol and therefore could not produce the PEth biomarker which is solely created by ethanol. Tr. at 166–70. When asked about the Individual’s exhibits claiming that inhalation or absorption of alcohol could affect EtG testing, the DOE Psychiatrist stated:

the key thing is, you’re talking about sources of ethanol affecting the EtG, the ethanol glycosylate molecule, and not prop[anol]. Secondly, EtG is not a test I’ve used. I did, in my lab, a PEth test. Actually, EtG can be thrown off more by passive exposure of other sources of ethanol, but again, that’s kind of an academic point ‘cause we’re not talking about ethanol and nor are they claiming, that I’m aware, that he got any odd exposures to ethanol that caused his PEth to go up.

⁵ Polygraph test results are of questionable probative value. *See United States v. Scheffer*, 523 U.S. 303, 312 (1998) (“[T]here is simply no way to know in a particular case whether a polygraph examiner’s conclusion is accurate, because certain doubts and uncertainties plague even the best polygraph exams.”). Additionally, OHA has assigned limited or no weight to the results of polygraph tests in many prior cases. *See, e.g. Personnel Security Hearing*, OHA Case No. PSH-18-0025 at 4 (2018) (“I have assigned [the polygraph test] minimal evidentiary weight due to the well-documented limitations of polygraph testing.”); *see also Personnel Security Hearing*, OHA Case No. PSH-12-0144 at 8 (2012) (“I assign no probative value to the testimony of the polygraph technician or the results of his polygraph examination [.]”); *Personnel Security Hearing*, OHA Case No. TSO-1023 (2011) at 4, note 7 (explaining that due to “reliability issues associated with polygraph examinations I did not consider this evidence in my deliberations”). Decisions issued by OHA are available on the OHA website located at <http://www.energy.gov/OHA>.

Tr. at 169-70.⁶

The Individual testified that he had not consumed any alcohol since March 2022, when he consumed alcohol two days in a row after receiving the DOE Psychiatrist's Report because he "was bummed out" at the DOE Psychiatrist's conclusions. *Id.* at 118. The Individual underwent PEth tests in June, July, August, and September. Ex. A-1-A-4. Each of these tests was negative for traces of alcohol consumption. *Id.* Starting on July 25, 2022, the Individual provided urine samples for EtG testing every two to five days until October 6, 2022. Ex. B-1-B-24. All of these samples came back negative for traces of alcohol consumption. *Id.*

The Individual provided records showing that he has regularly attended AA meetings since August 24, 2022. Ex. I. He testified that these meetings helped him to come to the realization that he has some problems with alcohol, and that he intends to continue attending AA meetings in order to work on these problems. Tr. at 129-30. However, he does not have an AA sponsor, and, although he testified to having worked the twelve steps of the AA program, he was unable to name the AA steps he claimed to have completed. *Id.* at 151-52.

At the hearing, management and supervisory personnel with personal knowledge of the Individual's conduct in the workplace testified that he is a trusted and reliable employee. *Id.* at 20-25, 55-60, 71-76. A counselor from the DOE contractor's Employee Assistance Program (EAP) also testified. *Id.* at 33-35. He explained that he and the Individual had met for eight counseling sessions between approximately October 2021 and February 2022 in which they discussed relationships and family dynamics, and that there was an opportunity for up to two more sessions through EAP if needed. *Id.* at 39-44, 46-47. A friend of the Individual and the Individual's son also testified as to the Individual's trustworthiness and reliability. *Id.* at 82, 85-87, 91-93, 97, 101, 109.

After observing the hearing, the DOE Psychiatrist testified that, although the Individual's AUD was in remission, he was too early in the recovery process to have established rehabilitation. *Id.* at 178-79, 207-08. While the DOE Psychiatrist indicated that the Individual's AA meeting attendance was positive for his recovery, he expressed concern that the Individual did not have an AA sponsor to help him realize the full benefits of the AA program. *Id.* at 185. He opined that the Individual's prognosis was "fair on a good, fair, poor [scale]," explaining that he did not think the Individual had shown that he had developed the skills necessary to deal with commonplace disappointments without resorting to alcohol, and he cited as evidence the Individual's consumption of alcohol in response to the disappointment of receiving the unfavorable information in the DOE Psychiatrist's Report. *Id.* at 180-81.

⁶ The Individual objected to the DOE Psychiatrist's testimony on the ground that the DOE Psychiatrist is not an expert in chemistry. Tr. at 188-89. In response, DOE counsel noted that while the DOE Psychiatrist is not an expert in chemistry, he is a medical doctor and as such is qualified to testify as to how chemicals affect the human body. *Id.* at 210. In addition to being a medical doctor, the DOE Psychiatrist has authored an academic article on the interpretation of PEth tests in the national security setting. Ex. 10 at 2. In light of the DOE Psychiatrist's medical training and scholarship specifically related to the interpretation of PEth tests, I am convinced that he is sufficiently expert in the interpretation of PEth tests to opine as to whether isopropyl alcohol could produce a positive PEth test.

V. ANALYSIS

Guideline G

The Individual's alcohol-related arrests and the DOE Psychiatrist's opinion that the Individual met sufficient diagnostic criteria under the *DSM-5* for a diagnosis of AUD justify the LSO's invocation of Guideline G.⁷ Adjudicative Guidelines at ¶ 22(a), (c). Conditions that could mitigate a security concern under Guideline G include:

- (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,
- (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.

Id. at ¶ 23(a)–(d).

⁷ I find that the LSO's allegation in the SSC that the Individual binge consumed alcohol to the point of impaired judgment, which was based solely on the DOE Psychiatrist's opinion in his Report, is not sufficiently substantiated to constitute a security concern under Guideline G. *See* Ex. 1 at 1 (citing the DOE Psychiatrist's Report). At the hearing, the DOE Psychiatrist explained that he did not think the Individual was a habitual consumer of alcohol, but that the Individual's five alcohol-related arrests showed that the Individual binge consumed alcohol to the point of impaired judgment. Tr. at 181–84; *see also* Ex. 9 at 11 (indicating that the DOE Psychiatrist "would not consider 5 episodes in 20 years 'habitual,' and therefore would conclude that [the Individual] is a binge consumer of alcohol to the point of impaired judgment"). The DOE Psychiatrist indicated that he had defined binge consumption of alcohol as "having a blood alcohol of 0.08 or greater, and on an occasional, rather than regular, habitual basis." *Id.* at 182. He denied having considered how many times the Individual consumed alcohol to intoxication in the year prior to the clinical interview or in any other prior one-year period. *Id.* at 184. While the Adjudicative Guidelines do not define binge consumption of alcohol, OHA has generally accepted definitions of binge consumption of alcohol to the point of impaired judgment based on drinking a large volume of alcohol in a short period of time on a minimum number of occasions within a specified time period. *See, e.g., Personnel Security Hearing*, OHA Case No. PSH-18-0034 at 4, n. 5 (2018) (accepting a DOE-contracted Psychologist's definition of binge consumption of alcohol to the point of impaired judgment as "a pattern of drinking to levels of intoxication by drinking heavy amounts of alcohol in a short time period with the intention of becoming intoxicated or drinking to high levels of intoxication less than once a month, but at least several times a year, that results in impaired judgment"); *see also Personnel Security Hearing*, OHA Case No. PSH-17-0041 at 5, n. 5 (2017) (listing various definitions of problematic alcohol consumption, including the Substance Abuse and Mental Health Services Administration's definition of 'binge drinking' for men as "five or more drinks within two hours on at least one day in the past 30 days"). At a minimum, the LSO must employ a definition of binge drinking that alleges that the behavior occurred with sufficient frequency or severity to constitute a security concern. The DOE Psychiatrist's opinion, on which the LSO relied, does not do so because it effectively amounts to an allegation that the Individual has become intoxicated on multiple occasions over multiple decades of his adult life. Absent additional information as to the nature of the Individual's history of alcohol consumption, the LSO has not asserted sufficient facts to support the allegation that the Individual binge consumed alcohol to the point of impaired judgment.

While the Individual has provided strong evidence through alcohol testing that he has abstained from alcohol since at least June 2022, and has avoided alcohol-related incidents since his arrest in September 2021, I find that an insufficient period of time has elapsed for me to conclude that the Individual's problematic alcohol consumption does not cast doubt on his reliability, trustworthiness, and judgment. Notably, the Individual previously relapsed after abstaining from alcohol for three years following his 2009 arrest and alcohol-related counseling. The passage of only about seven months between the Individual's last self-reported alcohol consumption and the hearing, of which only a portion was supported by alcohol testing, is too little to establish that the Individual will not return to problematic alcohol consumption again. Moreover, the Individual has repeatedly shown poor judgment after consuming alcohol, and he has not attributed his pattern of alcohol misuse to unusual circumstances. Therefore, I find that the first mitigating condition under Guideline G is inapplicable. *Id.* at ¶ 23(a).

While the Individual has acknowledged his maladaptive alcohol use and taken steps to overcome his problems with alcohol, he has not established a pattern of modified consumption or abstinence from alcohol in accordance with treatment recommendations. *Id.* at ¶ 23(b). In his Report, the DOE Psychiatrist stated that he would consider the Individual rehabilitated after approximately one year of treatment, which he would date from the Individual's last drink. The record shows that the Individual began treatment approximately two months prior to the hearing and last consumed alcohol approximately seven months prior to the hearing. Therefore, as the Individual has not established a pattern of abstinence in compliance with treatment recommendations, I find that the second mitigating condition under Guideline G is inapplicable. *Id.*

The Individual relapsed multiple times following alcohol-related counseling after DUIs. Further, the Individual has not participated in AA under the guidance of a sponsor, as recommended by the DOE Psychiatrist, and did not present testimony from any witnesses knowledgeable about his participation in AA who could testify as to his progress therein. For these reasons, I find the third mitigating condition inapplicable. *Id.* at ¶ 23(c). The fourth mitigating condition is not applicable because it is undisputed that the Individual has not completed the treatment program recommended by the DOE Psychiatrist. *Id.* at ¶ 23(d).

In light of the Individual's history of alcohol related incidents, the relatively short duration of his abstinence, his failure to obtain an AA sponsor and lack of proven treatment progress, and the opinion of the DOE Psychiatrist that his prognosis for recovery from his AUD is only fair, I find that the Individual's reliability and trustworthiness remain compromised by his alcohol consumption. Accordingly, I find that the Individual has not resolved the security concerns asserted by the LSO under Guideline G.

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 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