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**United States Department of Energy  
Office of Hearings and Appeals**

In the Matter of: Personnel Security Hearing	)	
	)	
Filing Date: November 22, 2022	)	Case No.: PSH-23-0028
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Issued: February 13, 2023

**Administrative Judge Decision**

Brenda B. Balzon, Administrative Judge:

This Decision concerns the eligibility of XXXXXXXXXXXX (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."<sup>1</sup> 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**

A DOE contractor employs the Individual in a position that requires him to hold a security clearance. In November 2021, the Individual reported to the Local Security Office (LSO) that he was arrested for operating a vehicle under the influence of alcohol or drugs (OVI) on November 6, 2021. Exhibit (Ex.) 6.<sup>2</sup> The LSO subsequently issued the Individual a Letter of Interrogatory (LOI) concerning the circumstances of his arrest and his alcohol use. Ex. 7. The LSO also requested that the Individual be evaluated by a DOE consulting psychiatrist (DOE Psychiatrist), who, after conducting a clinical interview with the Individual, issued a report of his findings. Ex. 12. After receiving the DOE Psychiatrist's report, the LSO began the present administrative review proceeding by issuing a Notification Letter to the Individual, informing him that his security clearance had been suspended and that he was entitled to a hearing before an Administrative Judge

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<sup>1</sup> 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.

<sup>2</sup> Numerous exhibits offered by DOE contain documents with printed page numbers that are inconsistent with the pagination of the exhibits. This Decision cites to pages in the order in which they appear in exhibits without regard for their internal pagination.

in order to resolve the substantial doubt regarding his eligibility to hold a security clearance. *See* 10 C.F.R. § 710.21. In a Summary of Security Concerns (SSC) attached to the letter, the LSO explained that it possessed derogatory information about the Individual that raised security concerns under Guideline E (Personal Conduct), Guideline G (Alcohol Consumption), and Guideline J (Criminal Conduct) 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. 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 review hearing. The LSO submitted eighteen numbered exhibits (Ex. 1–18) into the record, and presented the testimony of the DOE Psychiatrist at the hearing. The Individual submitted ten exhibits (Ex. A–H, Ex. J, and Ex. K) into the record, and presented the testimony of three witnesses, including his own testimony. *See* Transcript of Hearing, Case No. PSH-23-0028 (hereinafter cited as “Tr.”).

## **II. Notification letter and Associated Security Concerns**

The LSO cited Guideline G (Alcohol Consumption) of the Adjudicative Guidelines as the first basis for its concerns regarding the Individual’s eligibility for access authorization. Ex. 2 at 1. “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. In citing Guideline G, the LSO relied upon the DOE Psychiatrist’s July 2022 conclusion that the Individual’s Phosphatidylethanol (PEth) test results of 458 ng/mL indicate that he had “heavy alcohol use within the prior month and has binge consumed alcohol to the point of impaired judgment.” Ex. 2 at 1. The LSO further cited that the PEth test results were in contrast with the Individual’s claim that he had consumed one to two glasses of wine on 11 occasions in the month before testing, and that he consumes alcohol multiple times per week consisting of one to two drinks per occasion. *Id.* The LSO also cited the DOE Psychiatrist’s unfavorable prognosis for the Individual, as well as the DOE Psychiatrist’s treatment and abstinence recommendations. *Id.* The LSO also relied upon the Individual’s December 2021 LOI responses concerning his frequency of alcohol consumption. *Id.* at 2. Additionally, the LSO cited the Individual’s November 9, 2021, Personnel Security Information Report (IR) in which he reported his November 6, 2021, OVI arrest. *Id.* The LSO further cited that in the Individual’s February 2019, Questionnaire for National Security Positions (QNSP), he reported his arrest, charge, and sentence for driving while under the influence (DWUI) in April 1998. *Id.* The above allegations justify the LSO’s invocation of Guideline G.

The LSO also cited Guideline E (Personal Conduct) as a basis for its concerns regarding the Individual’s eligibility for access authorization. “Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an Individual’s reliability, trustworthiness, and ability to protect classified or sensitive information. Of special interest is any failure to cooperate or provide truthful and candid answers during national security investigative or adjudicative processes.” Adjudicative Guidelines at ¶ 15. Regarding Guideline E, the LSO alleged that the DOE Psychiatrist opined in his July 2022 report that the Individual’s PEth test results indicated heavy alcohol use within the prior month, which contrasted with the Individual’s reported alcohol use during the psychiatric exam, and the DOE Psychiatrist concluded that the Individual’s discrepant self-report of recent alcohol use was an

indication of his lack of ability or willingness to be candid regarding his alcohol use. Ex. 2 at 4. This information adequately justifies the LSO's invocation of Guideline E.

The LSO also cited Guideline J (Criminal Conduct) as a basis for its concerns regarding the Individual's eligibility for access authorization. "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. With respect to Guideline J, the LSO cited the Individual's November 2021 arrest for OVI. Ex. 2 at 3. The LSO also cited the Individual's 1998 arrest, charge, and sentence for DWUI. *Id.* The above criminal arrests justify the LSO's invocation of Guideline J.

### **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 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) (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 personnel security hearings. Even appropriate hearsay evidence may be admitted. *Id.* at § 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**

On November 6, 2021, the Individual was arrested and charged with OVI, which he timely reported to the LSO. Ex. 6. The LSO issued the Individual an LOI, which he submitted on December 10, 2021. Ex. 7; Ex. 8. In his LOI response he reported that in the 24 hours prior to his arrest, he consumed two light beers around noon, and drank one martini and two glasses of wine during dinner. Ex. 8 at 1. He reported that he chose to drive home because he did not feel impaired, however, he was involved in a car accident. *Id.* at 1-2. He admitted that he failed the field sobriety test, so the law enforcement officer took him to the local police station where he performed a breathalyzer test, however, the breathalyzer test result showed "invalid test." *Id.* He stated that despite the fact that he complied with instructions to wait 20 minutes before repeating the test, his second test showed the same "invalid test" result, which led the police to mark the test as "did not comply." *Id.*

The Individual also provided details about his use of alcoholic beverages. *Id.* at 3. He estimated that he drank alcohol to the point of intoxication a few times a year. *Id.* He further stated that he drank alcohol socially without the intent to get intoxicated. *Id.* The Individual reported that if he consumed four or five alcoholic drinks over several hours, he would consider himself intoxicated. *Id.*

In July 2022, the Individual underwent a psychiatric evaluation including a clinical interview (CI) with the DOE Psychiatrist. Ex. 12. During the CI, the Individual denied signs and symptoms of alcohol use disorder. *Id.* at 6. He reported to the DOE Psychiatrist that within the prior month he had consumed alcohol on eleven occasions, each in the quantity of one or two glasses of wine at dinner. *Id.* at 6. As part of the evaluation, the Individual underwent a PEth test. *Id.* at 8. The PEth test reflected a level of 458 ng/mL. Ex. 12 at 8-9; Ex. 13. The DOE Psychiatrist interpreted the Individual's PEth result and concluded that it indicated a heavy level of alcohol consumption within the prior month.<sup>3</sup> Ex. 12 at 8-9; Ex. 13; *see* Ex. 18 at 5. In his report (Report), the DOE Psychiatrist opined that the Individual's PEth test result contrasted with the Individual's reported alcohol use during the CI, and he concluded that based upon the PEth test result the Individual has binged or habitually consumed alcohol to the point of impaired judgment. Ex. 12 at 9. The DOE Psychiatrist further opined that the Individual's "discrepant self-report of recent alcohol use is an indication of his lack of ability or willingness to be candid at least with regard to his alcohol use." *Id.*

The DOE Psychiatrist also concluded that based on the Individual's reported alcohol use, he could not be diagnosed as having an alcohol use disorder (AUD) according to the *Diagnostic and Statistical Manual of Mental Disorders – Fifth Edition (DSM-5)*. *Id.* In order for the Individual to show adequate evidence of rehabilitation or reformation, the DOE Psychiatrist recommended that the Individual participate in alcohol treatment with a period of recovery. *Id.* He stated that the Individual's prognosis is unfavorable until he is willing to be truthful about his alcohol use, enter an alcohol treatment program, and maintain abstinence from alcohol use for one year with documented sobriety. *Id.*

At the hearing, the Individual's Deputy General Manager ("Manager") testified that he has known the Individual for approximately 19 years, and during the majority of that time he has had regular contact with him. Transcript (Tr.) at 22-23, 25-26. He stated that since May 2022, he has had contact with the Individual multiple times per week, and although he is not the Individual's direct supervisor, he closely observes his work performance. *Id.* at 24-25. The Manager testified that the Individual told him about the security concerns involving his driving under the influence (DUI) charge.<sup>4</sup> *Id.* at 32-33. He further testified that he has never observed the Individual exhibiting signs that he was under the influence of alcohol while at work, nor has he had any complaints regarding

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<sup>3</sup> The DOE submitted an article on the PEth test written by a physician and a psychologist, and the article includes guidelines for interpretation of PEth results: William Ulwelling & Kim Smith, *The PEth Blood Test in the Security Environment: What it is; Why it is Important; and Interpretative Guidelines*, 63 J. FORENSIC SCI., 1634, 1638. Ex. 18 at 5. That article states that a PEth value greater than 200 ng/mL indicates "heavy consumption." *Id.*

<sup>4</sup> Although court records reflect that the Individual was found guilty of the charge of Operating a Vehicle Under the Influence of Alcohol (OVI), some witnesses in the hearing referred to the charge specifically as a "DUI" charge. Ex. 10; Tr. at 32-33; 53, 130. Therefore, this decision uses the terms "OVI" and "DUI" interchangeably.

the Individual's work performance. *Id.* at 26, 37. He stated that he has only socialized with the Individual on two occasions outside the workplace, and while alcohol was served at both events, there was nothing that caused him concern regarding the Individual's alcohol consumption. *Id.* at 27-28, 30. The manager asserted that he finds the Individual to be very reliable, and he has no concerns about the Individual's truthfulness or judgment. *Id.* at 26, 31-32, 34-35, 38-39; Ex. C.

The Individual's former supervisor ("Supervisor"), testified that she worked with the Individual for 14 years, and she directly supervised him beginning in 2015 for seven years. *Id.* at 44, 46. She stated that during the time she supervised him she usually interacted with him multiple times per week. *Id.* at 48. The Supervisor stated that she has never observed any indications that the Individual might have a problem with alcohol, including at work-related events where alcohol was served, or at dinners together on business trips. *Id.* at 49-52, 58-59. The Supervisor further asserted that she never has had any reason to question the Individual's truthfulness or candor. *Id.* at 48-50.

The Supervisor testified she was aware of the Individual's November 2021 DUI arrest. She stated that the Individual told her that he felt like he was "perfectly fine" to drive and did not think his alcohol level was above the legal limit. *Id.* at 54-55. However, she testified that the Individual told her that he failed the field sobriety test because the police officer was shining his flashlight in the Individual's eyes, and the Individual was extremely upset and shocked since he had just been involved in an accident and had a burn on his hand from the air bag which had deployed. *Id.* at 54. She further stated that the Individual told her he had asked for a breathalyzer test, but they could not get the breathalyzer machine to work properly so the Individual was charged with an OVI. *Id.* at 54-55.

The Individual admitted to the SSC allegations regarding his 1998 DWUI arrest and charge. *Id.* at 75-76. He testified that his sentence included suspension of his license for either three or six months (he couldn't remember which), payment of fines, and attendance at a driver education class. *Id.* at 76.

The Individual testified regarding his November 6, 2021, OVI arrest. He stated that he drank approximately one-and-a-half or two beers while eating lunch at his house. *Id.* at 82-83. He testified that approximately seven hours after he consumed the beers, his wife took him to dinner at a restaurant for his birthday, and during their meal he drank approximately two glasses of wine and a martini. *Id.* at 77-79, 86; Ex. E (Individual's restaurant receipt dated November 6, 2021). He asserted that some charts regarding alcohol consumption for certain body weights state that three alcoholic drinks within a certain time period is "well under the legal limit." *Id.* at 84; Ex. H (chart of approximate blood alcohol content in one hour by National Highway Traffic Safety Administration). Thus, he asserted that based on his body weight and over two hours of time he spent at the restaurant before driving, he did not feel intoxicated nor believed that he was "going to be a danger to anyone." *Id.* at 78; 84. He stated that during his drive home, he got into an accident and thought the other driver did not have his headlights on when he hit the other driver's car. *Id.* at 78. According to the police report, the Individual admitted to consuming alcohol prior to driving, was involved in a car "crash," had slurred speech, was unsteady on his feet, and failed the field sobriety test. *Id.* at 85-86, Ex. 5. The Individual did not dispute the facts in the police report, although he indicated he was not sure if he had slurred speech. *Id.* at 85-86. He testified that he was pretty sure he was going to fail the field sobriety test since his "mind was spinning" due to

being involved in an accident and because he got hit by the airbag that deployed. *Id.* at 78-79, 85. He further testified that at the police station he tried to comply with the breathalyzer test by providing multiple breathalyzer samples, but the breathalyzer machine did not give readings, and the police told him he was going to be charged with failure to comply with the test. *Id.* at 79. The police report stated that the Individual was provided with two “invalid sample[s]” and was arrested for OVI with refusal to submit to a breathalyzer test. Ex. 5.

The Individual testified that the arresting officers told the prosecutor he was complying with the breathalyzer test, but the breathalyzer was not working. The Individual submitted a letter from his criminal defense attorney that corroborated this account. *Id.* at 80-81; Ex. F. The Individual testified that he entered a plea of no contest and the judge found him guilty of a lesser alcohol-related offense. *Id.* at 88. In support of his testimony, he submitted an audio recording of his sentencing hearing which confirmed that the judge found him guilty of operating a vehicle under the influence, a misdemeanor.<sup>5</sup> Ex. D; Tr. at 233, 236; Ex. G; Ex. 10 (Court Disposition of Charges dated February 2, 2022). The Individual testified that his sentencing terms included a one-year license suspension with limited privileges, payment of fines, and attendance at a three-day driver intervention program (DIP). Tr. at 88-89; Ex. 10. He stated that during the DIP he was required to talk with a drug and alcohol counselor, who made a determination regarding whether he would need future counseling or a court referral for a rehabilitation program. *Id.* at 89. The Individual submitted written verification showing that he completed the DIP and was not referred for further assessment. Ex. A. He also testified that his sentence did not include a prohibition on alcohol use. Tr. at 90-91, 228-239; Ex. D.

The Individual stated that after receiving the DOE Psychiatrist’s report, he had serious discussions with his wife, his former supervisor, and his parents, and he asserted that he had never before had anyone in his life express concerns about his alcohol consumption. *Id.* at 99-100. He testified that he has never sought counseling for his alcohol use because he never felt that he needed counseling, nor has any person suggested that he needed it. *Id.* at 107. He stated that when he asked his wife if she wants him to stop consuming alcohol, she told him there is no reason to stop because it is not a problem. *Id.* at 128. The Individual testified that he also asked one of his brothers whether he believes the Individual has an alcohol problem or if he was worried when the Individual drove his nine-year-old nephew to restaurants for meals together. *Id.* at 121-22, 126-27. The Individual asserted that his brother did not believe that the Individual has an alcohol problem. *Id.* at 121-22, 126. The Individual stated that he and his brother regularly spend time together at each other’s houses doing social activities and on some of those occasions they have consumed alcohol together. *Id.* at 123-24. Upon questioning by the DOE Psychiatrist regarding whether doctors have told him if he has any significant health problems related to alcohol use such as with his liver, high blood pressure (HBP), or diabetes, he testified that no doctors have told him that he has any of those health problems except HBP, and no doctor has ever suggested that his HBP was related to his alcohol use. *Id.* at 112-15.

The Individual testified that in order for him to believe that he has an alcohol problem, he would have to have problems connected to his alcohol use such as marital problems, family relationship

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<sup>5</sup> The hearing transcript also includes a transcript of Exhibit D, which is an audio recording of the Individual’s criminal sentencing hearing regarding his November 2021 charge for OVI. Tr. at 228-39; Ex. D.

problems, or problems with his job, but he asserted that he has none of those problems. *Id.* at 128-130. He acknowledged that a DUI arrest could be an indication of an alcohol problem, however, he indicated that he also sees his November 2021 DUI as an isolated incident because his two DUIs are approximately 24 years apart, and he asserted that he was a different, immature person at the time of his 1998 DUI arrest. *Id.* at 131. He admitted that between his 1998 DUI and his 2021 DUI he has had occasions where he drove after consuming alcohol, however, he asserted that he never drove when he thought he was intoxicated. *Id.* at 132-33.

The Individual maintained that he did not lie about his alcohol consumption to the DOE Psychiatrist, notwithstanding his July 2022 PEth test result. *Id.* at 100. He asserted that he obtained his own PEth test because the July 2022 PEth result “seems so outrageous” when compared to the amount of alcohol he knows that he consumes and the amount he reported to the DOE Psychiatrist. *Id.* at 144. The Individual submitted a copy of his November 22, 2022, PEth test, which was positive at 48 ng/mL. Ex. B. He stated that when he got his PEth test result he was satisfied because the result seemed more in the expected range based on the amount of alcohol he consumes. *Id.* at 147. However, he also stated he was frustrated because he does not understand how he could have got such a high PEth test result from the first test. *Id.* He did admit that in the last 30 days prior to the hearing date, he engaged in ten to 15 occasions of alcohol consumption. *Id.* at 150-51.

Regarding his future plans with alcohol, the Individual stated that he “does not really have a plan to change because [he] does not think there’s a problem.” *Id.* at 135. He clarified that the exception is that since his 2021 OVI arrest, if he is the driver when he goes out to dinner at restaurants, he drinks water and will not consume alcohol. *Id.* at 92, 134. He insisted that by keeping “his word” that he will not consume alcohol when he is going to drive, he will not get another DUI arrest. *Id.* at 133-34.

After observing the hearing, the DOE Psychiatrist testified that in his Report he did not diagnose the Individual with AUD under the *DSM-5* because the Individual denied having any of those symptoms that met the criteria for AUD. *Id.* at 160-61. He stated that the testimony of the Individual’s witnesses “back up or are consistent with [the Individual’s] claims that he does not have alcohol use disorder [AUD] in terms of impairment at work related to alcohol use.” *Id.* at 171. However, the DOE Psychiatrist stated that the disparity between the Individual’s self-report of his alcohol use as compared to the PEth test result caused him to question the Individual’s level of candor regarding the accuracy of his self-report. *Id.* at 162. The DOE Psychiatrist stated that the Individual told him he was consuming small amounts of alcohol three or four days a week. *Id.* However, his PEth test result of 458 ng/mL was an indication of very high consumption in the previous month. *Id.* at 161-62.

The DOE Psychiatrist acknowledged that his conclusions regarding the Individual’s alcohol use are based primarily on his positive PEth test. *Id.* at 196. He testified that he does not question the validity of the PEth test result. *Id.* at 163. The DOE Psychiatrist provided examples of medical conditions that could potentially cause a falsely elevated PEth level, however, he stated that the Individual did not have a history of any of those medical conditions.<sup>6</sup> *Id.* at 163-64. He concluded,

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<sup>6</sup> The DOE Psychiatrist stated that “individuals who have alcoholic liver disease, cirrhosis, fibrosis, scarring...don’t metabolize alcohol in the same way[,] [s]o you might get a falsely elevated level.” Tr. at 163-64. He also stated that

“We don’t have an explanation from a medical standpoint as to why this this test would be falsely elevated, so [he] do[es] trust the result.” *Id.* at 164. The DOE Psychiatrist stated that he has experience with the particular laboratory that administered the PEth test and asserted he has no reason to question the reliability of the lab or the processes used in administering the PEth test. *Id.*

The Individual questioned the DOE Psychiatrist regarding the correlation coefficient of the PEth test cited in an article submitted by the DOE on interpretative guidelines of the PEth test.<sup>7</sup> Tr. at 182-89; Ex. 18 at 3; Ex. K. The DOE Psychiatrist stated that the correlation concerns the relationship between alcohol ingestion and the PEth result. Tr. at 175. In response to questioning, the DOE Psychiatrist acknowledged that the correlation coefficient is less than .9 however, he noted that “[t]here is a relationship.” *Id.* at 188. He explained:

It’s not an inverse relationship . . . or an absent relationship where it’s 0 or .2 or .3. This is .6, .7 positive correlation. So, I don’t think I’m willing to abandon the 458 PEth result because the correlation is not 97 here. That’s just the way this is. [W]e’re not doing nuclear engineering. I have to agree with that, yes. This is laboratory science. [E]ven in [the individual’s] case if you . . . took off 20 percent [off the 458 PEth result], you’d be at 350. It still would be very elevated. So I acknowledge that this is not a perfect interpretation, but we’re still talking about a very high level of alcohol use.

*Id.* at 188-89. The DOE Psychiatrist confirmed his conclusion that the Individual binge consumed alcohol, which for a male individual means that he consumes five or more alcoholic drinks per day.”<sup>8</sup> *Id.* at 165. He testified that although the PEth test does not specifically tell him when the Individual consumed alcohol or if he consumed alcohol in that manner, the PEth test research and literature indicates that “a result of 458 comports with that kind of heavy and binge use.” *Id.* at 165-66. The DOE Psychiatrist noted that the Individual submitted to another PEth test in November 2022, and that PEth result was one-tenth the PEth result from his July 2022 PEth test. *Id.* at 168. He concluded that the November 2022 PEth result reflects that the Individual’s alcohol consumption for the 30 days prior to the test was one tenth of his alcohol consumption that occurred in July 2022. *Id.* at 168-69; Ex. B. The DOE Psychiatrist stated that the Individual has admitted that he continues to consume alcohol several days a week in small quantities, which is also shown by his November 2022 PEth test result of 48 ng/mL. *Id.* at 169; Ex. B.

The DOE Psychiatrist stated that his recommendations to show adequate evidence of rehabilitation or reformation included that the Individual would first need to recognize the presence of an alcohol problem, and then pursue a resolution by entering a treatment program such as attendance at AA meetings and obtaining an alcohol sponsor or obtaining treatment from mental health and drug and alcohol professionals. Tr. at 167-68. He further recommended that the Individual would need to attempt to reduce or abstain from alcohol use as part of his recovery. *Id.* at 168. The DOE

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“[i]n other [i]ndividuals who have gastric bypass procedures for morbid obesity, they have a different anatomy in their stomachs and their alcohol absorption is abnormal. . . .” *Id.* at 164.

<sup>7</sup> The article states, “There is a significant correlation between PEth values and the number of drinks consumed for individuals with no liver disease. . . [t]he correlations are sizable ( $r= 0.57$  and  $r=0.69$ .)” Ex. 18 at 3.

<sup>8</sup> The DOE Psychiatrist testified that “binge alcohol consumption has a specific government-defined definition” that has been used for approximately 15 to 20 years. *Id.* at 165.



Psychiatrist explained that sobriety is a necessary but insufficient element of recovery. *Id.* at 194. He stated that recovery means that an individual adopts a lifestyle that is not only abstinence-based, but that the people and activities in that individual's life are no longer substance-based. *Id.* at 194.

The DOE Psychiatrist concluded that at the time of the hearing his prognosis for the Individual had not changed. *Id.* at 169. He explained that the Individual does not recognize the presence of an alcohol problem, and has never indicated that he needs to pursue alcohol treatment. *Id.* at 166-67. The DOE Psychiatrist opined that the Individual has shown "zero evidence" of rehabilitation or reformation. *Id.* at 169-70.

## **V. Analysis**

### **A. Guideline G**

Conditions that could mitigate security concerns 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; 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.

I have carefully considered the record of his proceeding, including the submissions tendered in this case and the testimony of the witnesses presented at the hearing. The Individual asserts that he is not a habitual or binge consumer of alcohol and that the July 2022 PEth test was inaccurate. I note that the Individual's witnesses asserted that they have never seen him consume alcohol in excess nor have they observed that he has any impairment at work related to alcohol use. I believe that the witnesses' testimony supports the DOE Psychiatrist's conclusion that the Individual does not meet the DSM-5 criteria for AUD. However, I also agree with the DOE Psychiatrist's determination that the Individual habitually or binge consumes alcohol to the point of impaired judgment. I base my conclusion on the evidence presented, including the July 2022 PEth result, the DOE Psychiatrist's expert testimony, and the article submitted by the DOE regarding the interpretative guidelines of PEth tests. The DOE Psychiatrist is an expert and is qualified to interpret PEth results. He provided rationale based on his knowledge, professional experience, and review of the research-based literature on PEth tests. By contrast, the Individual did not present any competing expert opinion to refute the opinions of the DOE Psychiatrist. Accordingly, on

balance, I find that the evidence supports the finding that the Individual habitually or binge consumes alcohol to the point of impaired judgment. I turn next to whether any of the mitigating factors apply.

The first mitigating factor set forth at ¶ 23(a) is not present. The Individual continues to engage in alcohol consumption and testified that he has no plans to modify his alcohol consumption patterns because he does not believe that he has an alcohol problem. His failure to address this issue and the fact that he continues to engage in maladaptive alcohol use without obtaining treatment for it precludes me from finding that the behavior is unlikely to recur.

The second mitigating factor does not apply because the Individual does not recognize the presence of an alcohol problem, so he has not acknowledged his pattern of maladaptive use. Moreover, he has not presented any evidence of actions taken to overcome this problem. Nor are the third or fourth mitigating conditions present, since the Individual has not enrolled in any treatment program for his alcohol use nor has he presented evidence that he is abstaining from alcohol use, both of which are part of the DOE Psychiatrist's treatment recommendations.

## **B. Guideline E**

Conditions that could mitigate security concerns under Guideline E include:

- (a) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts;
- (b) the refusal or failure to cooperate, omission, or concealment was caused or significantly contributed to by advice of legal counsel or of a person with professional responsibilities for advising or instructing the individual specifically concerning security processes. Upon being made aware of the requirement to cooperate or provide the information, the individual cooperated fully and truthfully;
- (c) the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment;
- (d) the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that contributed to untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur;
- (e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress;
- (f) the information was unsubstantiated or from a source of questionable reliability; and,
- (g) association with persons involved in criminal activities was unwitting, has ceased, or occurs under circumstances that do not cast doubt upon the individual's reliability, trustworthiness, judgment, or willingness to comply with rules and regulations.

Adjudicative Guidelines at ¶ 17.

The Individual asserted that he did not lie to the DOE Psychiatrist during the CI about the amount of his alcohol consumption despite the fact that his July 2022 PEth test indicated he engaged in heavy alcohol consumption. He attempted to mitigate the Guideline E concerns by questioning the value of the correlation coefficient which concerns the relationship between alcohol ingestion and the PEth result. However, the Individual has not presented any evidence that would cause me to question the validity of his July 2022 PEth result. The DOE Psychiatrist presented a well-reasoned explanation as to why he finds the PEth result valid, and he showed that there is in fact a positive relationship between alcohol ingestion and the PEth result as evidenced by a sufficiently positive correlation. Moreover, as stated above, the DOE Psychiatrist's expertise qualifies him to interpret PEth results, whereas the Individual did not present any competing expert opinion to refute the opinions of the DOE Psychiatrist. Furthermore, while the Individual submitted an additional, much lower PEth test result from November 2022, he took that PEth test four months after the first PEth test. Therefore, I do not find that it invalidates the Individual's earlier July 2022 PEth test result. As such, I am compelled to conclude that the Individual misrepresented his alcohol consumption to the DOE Psychiatrist.

I find that the first mitigating factor does not apply because the Individual did not make efforts to correct his misstatement. He maintains that he made truthful statements about his alcohol consumption even after being confronted with results of his PEth test that indicate otherwise. The second mitigating factor is inapplicable because the Individual did not assert that he was advised by any person regarding what information to disclose to the DOE Psychiatrist about his alcohol consumption.

Regarding the third mitigating factor, I do not find that so much time has passed since the behavior occurred because the Individual's lack of candor concerning his alcohol use occurred in July 2022, and continued up to the date of the hearing,.

The fourth mitigating condition is inapplicable because the Individual has not identified any underlying factors that contributed to his lack of candor about his alcohol use and he has not pursued counseling. The fifth mitigating condition is inapplicable because the LSO did not allege that the Individual had engaged in conduct that placed him at special risk of exploitation, manipulation, or duress. The sixth mitigating condition does not apply because as discussed above, the Individual has not presented evidence that his July 2022 PEth test result was from a source of questionable reliability. The final mitigating condition is inapplicable because the LSO has not alleged that the Individual associates with persons involved in criminal activities.

### **C. Guideline J**

Conditions that could mitigate security concerns under Guideline J include:

- (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.

Regarding the first mitigating factor, in addressing the Individual's two DUI arrests and charges, I note that several years have passed since the Individual's 1998 DUI. I also note that while the Individual was charged in November 2021 with OVI Refusal, he was ultimately convicted of a lesser alcohol-related charge of OVI. However, the Individual's November 2021 arrest and charge occurred just a little over one year before the hearing. Moreover, since the Individual acknowledges that he continues to consume alcohol on a regular basis and he does not believe he has a problem nor has he sought treatment for his alcohol use, I cannot find that the Individual's alcohol consumption to a degree that necessitates the intervention of law enforcement 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.<sup>9</sup> Moreover, the Individual's criminal activity concerns are inextricably linked to his problematic alcohol consumption. "Accordingly, until this problem is adequately addressed, the root cause of his criminal activity remains unaddressed" and is therefore unresolved. *Personnel Security Decision*, OHA Case No. PSH-20-0068 at 11 (2020).

## **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 Guidelines G, E, and J of the Adjudicative Guidelines. After considering all of 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.

Brenda B. Balzon  
Administrative Judge  
Office of Hearings and Appeals

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<sup>9</sup> The second and third mitigating factors do not apply because the Individual has not asserted that he was pressured or coerced into committing the criminal behavior, and he admitted to both of the Guideline J allegations put forth by the LSO. I also find that the fourth mitigating factor is not present because the Individual has not put forth any evidence of successful rehabilitation from his problematic alcohol use, which is the primary cause of his criminal activity.