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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: December 1, 2022) Case No.: PSH-23-0031
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Issued: May 8, 2023

Administrative Judge Decision

Kristin L. Martin, Administrative Judge:

This Decision concerns the eligibility of XXXXXXXXXXXX (“the Individual”) for access authorization under the Department of Energy’s (DOE) regulations set forth at 10 C.F.R. Part 710, entitled, “Procedures for Determining Eligibility for Access to Classified Matter and Special Nuclear Material.”¹ For the reasons set forth below, I conclude that the Individual’s security clearance should not be restored.

I. BACKGROUND

The Individual is employed by a DOE Contractor in a position which requires that he hold a security clearance. The Individual self-reported being arrested and charged with Aggravated Driving Under the Influence of Intoxicating Liquor or Drugs. An investigation into the Individual’s background uncovered derogatory information regarding the Individual’s alcohol consumption. He was referred to a DOE-consultant psychologist (Psychologist) who evaluated him and issued a report which concluded that the Individual was a binge drinker and contained recommendations for recovery. Exhibit 9 (hereinafter cited as “Ex.”). The Local Security Office (LSO) began the present administrative review proceeding by issuing a Notification Letter to the Individual informing him that he was entitled to a hearing before an Administrative Judge in order to resolve the substantial doubt regarding his eligibility to continue holding a security clearance. *See* 10 C.F.R. § 710.21.

The Individual requested a hearing, and the LSO forwarded the Individual’s request to the Office of Hearings and Appeals (OHA). The Director of OHA appointed me as the Administrative Judge in this matter. At the hearing I convened pursuant to 10 C.F.R. § 710.25(d), (e) and (g), the Individual testified on his own behalf, and the LSO presented the testimony of the Psychologist

¹ Under the regulations, “[a]ccess authorization’ means 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). Such authorization will also be referred to in this Decision as a security clearance.

who had evaluated the Individual. *See* Transcript of Hearing (hereinafter cited as “Tr.”). The LSO submitted 12 exhibits, marked as Exhibits 1 through 12. The Individual did not submit any exhibits.

II. THE NOTIFICATION LETTER AND THE ASSOCIATED SECURITY CONCERNS

As indicated above, the Notification Letter informed the Individual that information in the possession of the DOE created a substantial doubt concerning his eligibility for a security clearance. That information pertains to Guideline G of the *National Security Adjudicative Guidelines for Determining Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position*, effective June 8, 2017 (Adjudicative Guidelines). These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in the adjudicative process. 10 C.F.R. § 710.7.

Guideline G states that 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. Conditions that could raise a security concern include:

- (a) Alcohol-related incidents away from work, such as driving while under the influence, fighting, child or spouse abuse, disturbing the peace, or other incidents of concern, regardless of the frequency of the individual’s alcohol use or whether the individual has been diagnosed with alcohol use disorder;
- (b) Alcohol-related incidents at work, such as reporting for work or duty in an intoxicated or impaired condition, drinking on the job, or jeopardizing the welfare and safety of others, regardless of whether the individual is diagnosed with alcohol use disorder;
- (c) Habitual or binge consumption of alcohol to the point of impaired judgment, regardless of whether the individual is diagnosed with alcohol use disorder;
- (d) Diagnosis by a duly qualified medical or mental health professional (*e.g.*, physician, clinical psychologist, psychiatrist, or licensed clinical social worker) of alcohol use disorder;
- (e) The failure to follow treatment advice once diagnosed;
- (f) Alcohol consumption, which is not in accordance with treatment recommendations, after a diagnosis of alcohol use disorder; and
- (g) Failure to follow any court order regarding alcohol education, evaluation, treatment, or abstinence.

Id. at ¶ 22.

The LSO alleges that:

1. In March 2022, the Individual was arrested and charged with Aggravated Driving Under the Influence of Intoxicating Liquor or Drugs (hereafter referred to as “DWI” for consistency with related charges) after consuming six beers and at least four shots of vodka and falling asleep in the driver’s seat of his vehicle;
2. In March 2008, the Individual was arrested and charged with Aggravated Driving While Intoxicated (DWI);
3. In December 2003, the Individual was arrested and charged with Aggravated DWI;
4. In August 2001, the Individual was charged with DWI after admitting that he had consumed eight beers before driving and subsequently passing out at the wheel of his vehicle;
5. In February 2001, the Individual was arrested and charged with Aggravated DWI and Open Container; and
6. In August 2022, the Psychologist concluded that the Individual binge drank and that his five DWI charges were evidence that the Individual’s judgment was impaired when he was intoxicated.

Ex. 1 at 1–2. Accordingly, the LSO’s security concerns under Guideline G are justified.

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 entire process is a conscientious scrutiny of a number of variables known as the “whole person concept.” Adjudicative Guidelines at ¶ 2(a). The protection of the national security is the paramount consideration. 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 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.

The discussion below reflects my application of these factors to the testimony and exhibits presented by both sides in this case.

IV. HEARING TESTIMONY

On the night of his March 2022 DWI, the Individual was at a friend's house drinking hard alcohol, which he did not usually drink, and after deciding to drive, fell asleep in the driver's seat of his car and was woken up by a police officer. Tr. at 9. The officer administered a field sobriety test, which the Individual did not pass. *Id.* The Individual was arrested but was soon released from jail. *Id.* He testified that he did not receive any paperwork when he was released but later admitted that the release papers had been left for him in his truck. *Id.* at 9, 64. The Individual testified that he had not attended counseling or sobriety support groups since his release because he was a single father and was busy with his children and their activities. *Id.* at 10. He felt he did not need such treatment activities because he did not consume alcohol during the work week or while working. *Id.* He testified that he would drink "a couple [alcoholic beverages] on the weekends" and had been doing well with that in recent months. *Id.*

The Individual testified that his February 2001 DWI occurred when officers at a sobriety checkpoint found a bottle of alcohol under his seat. Tr. at 13–14. He testified that the bottle belonged to one of the friends he was driving home but he had been blamed for it. *Id.* at 14. He testified that that charge had been dismissed. *Id.*

The Individual testified next that his August 2001 DWI occurred when he fell asleep in his vehicle's driver's seat at a gas station. *Id.* at 15. He testified that he had been at his cousin's wedding and consumed "six or more drinks and . . . some tequila." *Id.* at 15–16. He further testified that he remembered being at the wedding and waking up in jail but did not recall driving home. *Id.* at 15. The Individual paid fines for the DWI and was able to retrieve his vehicle, which had been seized. *Id.* at 16.

The Individual testified that his December 2003 DWI occurred when he stopped at a checkpoint after leaving a nightclub. Tr. at 16–17. He testified that he was immediately arrested and asserted, "I don't think I took a breath test, 'cause they just threw—they just threw me in—they just locked me up right away." *Id.* at 17. However, in a February 2020 routine investigation interview the Individual stated that he was asked to take a breath test, refused to do so, and was then arrested for DWI. Ex. 12 at 94. Additionally, in March 2020, when interviewed again in conjunction with his security clearance investigation, the Individual told the interviewer that he had refused to take a breath test; he confirmed this detail in his June 2022 response to a Letter of Interrogatory issued to him by the LSO. Ex. 6 at 2; Ex. 8 at 6. At the hearing, the Individual testified that he had consumed "a few Coronas and a few shots." Tr. at 17.

The Individual testified that he was arrested for DWI in March 2008 after leaving a family celebration. Tr. at 24. He testified that he had consumed two beers but failed a breath test after being pulled over for swerving. *Id.* He served three months in jail. *Id.* Prior to the hearing, in response to the Letter of Interrogatory issued by LSO, the Individual had indicated that he had refused to take a breath test during this incident. Ex. 8 at 11.

The Individual testified that he was charged with aggravated battery on a household member in January 2006. Tr. at 18. He testified that police said he had choked his then-girlfriend with the cord from window blinds. *Id.* He further testified that his then-girlfriend had choked herself. *Id.* at 19. He was placed on probation and one of the terms was to avoid being around the victim. *Id.* at 19–20.

The Individual testified that he was charged with misdemeanor battery in February 2006 and served jail time for violating the terms of his probation. Tr. at 20, 23. The Individual testified that he and the then-girlfriend were in his vehicle and an argument started. *Id.* at 23. He testified that the then-girlfriend pulled his chain necklace off and threw it out the window. *Id.* He continued, stating “so I pulled over to go pick it up and she ran out screaming that I was hitting her. . . . So I just waited and I told [the officer] my story, . . . and they believed her, of course, but I got arrested for that, I think for—and it was a probation violation for that.” *Id.* The Individual did not explain why he was in a vehicle with the then-girlfriend contrary to the terms of his probation.

The Individual testified that over the years he had a back-and-forth relationship with the then-girlfriend, particularly because they had a child together. Tr. at 20–21. He testified, “I never touched her. The only time I would touch her is just to push her off of me, ‘cause she was the one that was violent toward me.” *Id.* at 21. He further testified that they often argued, and he would leave, but every time he left, the then-girlfriend would call the police and have him arrested. *Id.* at 20.

The Individual did not have a record of criminal charges between 2008 and 2022 and testified that he was staying “on task” because he had been awarded full custody of his children and needed to be a stable provider. Tr. at 29. During this time, the Individual was in a relationship, but when that relationship ended, he “went back . . . to the party scene.” *Id.* He testified that he made a mistake, referring to his most recent DWI, by adding liquor to his alcohol consumption that one time. *Id.* He testified that he typically limited his alcohol consumption to “a couple beers on the weekends,” by which he meant a 12-pack over the course of the weekend, every other weekend. *Id.* at 30, 33.

The Individual testified that, on the night of his March 2022 DWI, he had gone to a friend’s house expecting to go out to eat and have some drinks but ended up staying at his friend’s house. Tr. at 31. They purchased a 12-pack of beer and another friend arrived later with a bottle of vodka. *Id.* at 31, 34. The Individual testified that he had “some shots of vodka.” *Id.* at 34. He testified that he had talked to his friend about staying at his friend’s house that night and that he did not remember how he ended up in his vehicle. *Id.* He recalled being awakened by police around 6:30 or 7:00 a.m.; his vehicle was still parked outside his friend’s house. *Id.* at 35. He testified that the police said they had been called by someone who was concerned that he had died. *Id.* The Individual testified that he failed a field sobriety test because he “still felt drunk” and was tired. *Id.* at 36. He testified that no blood or breath test was administered. *Id.*

The Individual had hired an attorney to defend him against the March 2022 DWI charge. Tr. at 37. He testified that he had not had any court appearances. *Id.* He further testified that his attorney had told him that the court had never heard of his case and that there was no record of his arrest ever happening. *Id.* However, he later testified that his attorney had entered an

appearance for a hearing and the case was dismissed because the arresting officer did not appear. *Id.* at 65.

The Individual testified that he had not consumed alcohol between March and June 2022. Tr. at 40. He testified that he recalled meeting with the Psychologist and reviewing the Psychologist's report. *Id.* at 42. The Psychologist's report listed recommendations for the Individual which would help him demonstrate reformation or rehabilitation:

1. The Individual should abstain from alcohol for nine months;
2. The Individual should undergo a PEth test (a blood test that can show whether alcohol has been consumed in the preceding four weeks) every other month;
3. The Individual should participate in an Intensive Outpatient Program (IOP) that meets at least nine hours per week for 12 to 16 weeks;
4. The Individual should engage in counseling focusing on his impulsivity and should undergo testing for Attention Deficit Disorder;
5. The Individual should participate in Alcoholics Anonymous (AA) or a similar in-person group at least three times per week for at least 12 months.

Ex. 9 at 10.

The Individual testified that he had not abstained for nine months because he could control his consumption. Tr. at 43. He further testified that he did not plan to abstain in the future. *Id.* The Individual testified that, as of the hearing date, he typically consumed a beer with dinner on occasion or a few drinks with his brothers and did not consume more than two or three beers. *Id.* at 43, 47. He described having a problem with alcohol as drinking every day, not showing up to work, and not fulfilling household responsibilities. *Id.* The Individual had not tried to get a PEth test, beyond the one ordered by the Psychologist at his evaluation,² because he believed he could not afford them; however, he had not attempted to find out how much the tests cost. *Id.* at 44. The Individual testified that he had not attended an IOP because he had to take care of his children, including taking them to school and sports practices, and because he did not need to attend one. *Id.* at 44–45. He had no plans to attend an IOP in the future. *Id.* at 45. He testified that he had not pursued AA because he did not have time, and he did not plan to attend in the future because he did not need the program and he believed the program did not work. *Id.* at 45–46.

The Individual testified that he had last been intoxicated the weekend before the hearing and confirmed that he understood intoxication to mean being “very drunk.” Tr. at 48. He added that when he was intoxicated, he felt dizzy, slurred his words, and fell down; he also testified that he needed to consume about eight beers to become intoxicated. *Id.* at 48–49. He later amended his testimony to say that over the previous weekend he “wasn't drunk, drunk. I had a couple beers,

² The Individual's PEth test, ordered by the Psychologist and administered on August 2, 2022, had a positive result for alcohol consumption in the preceding four weeks. Ex. 9 at 27–28.

and that's it." *Id.* at 56. The Individual testified about his expectations for his future alcohol consumption:

Q: You mentioned that you became intoxicated this past weekend. How often do you imagine that you will become intoxicated in the future, like how many times per month, for example?

A: I don't—I can't tell you that. I don't know. I don't know my future.

Id. at 48–49.

The Individual testified that he did not drive after drinking unless he had an opportunity to sober up first. Tr. at 50–51. If he was at a family barbecue, he might drive if he had consumed one or two beers at most, then eaten food, and waited an hour or two before driving. *Id.* He further testified that if he had his children with him he would get a designated driver if he had any alcohol at all. *Id.* at 51.

The Individual provided conflicting testimony about his possession of alcohol:

Q: Do you currently keep alcohol in your home?

A: Not currently, but like I said, I'll have—I'll have a few beers in the fridge for when my brothers show up. But like I said, I don't drink.

Tr. at 51. He then clarified that he had alcohol in his home at that moment and that he did keep alcohol in his home. *Id.* at 52.

The Individual testified that he had abstained from alcohol for “a few months” after his March 2022 DWI. Tr. at 58–59. He testified that when he met with the Psychologist on August 2, 2022, he understood that the substance abuse evaluation was related to his ability to continue holding a security clearance and, therefore, his employment. *Id.* at 60; Ex. 9 at 2. He further testified that he understood the same about the Psychologist's report when he received it. *Id.* He testified that he predicted he would lose his job if he did not maintain a security clearance. *Id.* When asked why, given the risk to his employment, he had resumed alcohol consumption in contravention of the Psychologist's recommendation of abstinence, the Individual responded:

I don't know. I just like, I guess I like to have a couple beers. I guess that didn't really like come into—you know, it didn't kick into reality that I do need to stop, but I have—I have—I guess I have an issue with it, but I don't have an issue to the point that I need counseling or need AA. I don't need that, those things, but if I do—if I did want to stop drinking, I could stop drinking.

Id. at 62–63.

The Psychologist testified that, in his assessment, the Individual defined “a couple beers” as up to six beers in one evening. Tr. at 68–69. Based on that definition, the Psychologist testified that the Individual's reported alcohol consumption during his initial evaluation—four to six beers once or

twice a month and, when he could, six beers on Friday nights and six beers on Saturday nights—was consistent with the results of the Individual’s PEth test. *Id.* at 72; Ex. 9 at 7–8.

The Psychologist testified that his psychological testing showed the Individual is somewhat impulsive and tends to make bad decisions when he acts before thinking. Tr. at 73. He testified that alcohol is a dis-inhibitor that could make the Individual’s decision-making worse. *Id.* He acknowledged that an IOP would have been difficult for the Individual given his parenting obligations but reiterated that the Individual needed to examine his alcohol use in a group setting like the IOP and AA (or a comparable program). *Id.* at 64–75. He also acknowledged the financial costs of PEth testing and testified that he had recommended tests every other month, instead of monthly, for this reason. *Id.* at 74.

The Psychologist testified that the Individual’s history of driving while impaired or intoxicated beyond the legal limit indicates that he has a tendency toward drinking and driving, even if he was not becoming intoxicated frequently during the time periods in which he was arrested. Tr. at 76. The Psychologist expressed concern about how the Individual’s impulsiveness affected this tendency. *Id.* at 77. He believed that the Individual had decreased his alcohol consumption since his most recent DWI charge in response to the administrative review process. *Id.* at 78. However, he also believed that the Individual’s insistence that he did not have an alcohol problem could mean that the Individual would resume drinking at higher levels after the administrative review process ended. *Id.*

The Psychologist gave the Individual a below average prognosis for not drinking to intoxication in the future and a very low prognosis for abstaining from alcohol in the future; he opined that the Individual was not rehabilitated or reformed from his binge drinking. Tr. at 79–80. He further opined that the Individual demonstrated poor judgment by deciding to stay in a relationship for so long with the previous girlfriend who allegedly attacked him and filed fraudulent police reports against him. *Id.* He believed that the Individual’s general lack of introspection or consideration of the consequences of his actions indicated that his behavior was careless and action-oriented; as a dis-inhibitor, alcohol exacerbated that behavior, leaving the Individual with less control over his life. *Id.* at 80–81.

V. ANALYSIS

A person who seeks access to classified information enters into a fiduciary relationship with the government predicated upon trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours. The government places a high degree of trust and confidence in individuals to whom it grants access authorization. Decisions include, by necessity, consideration of the possible risk that the applicant may deliberately or inadvertently fail to protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information.

The issue before me is whether the Individual, at the time of the hearing, presents an unacceptable risk to national security and the common defense. I must consider all the evidence, both favorable and unfavorable, in a commonsense manner. “Any doubt concerning personnel being considered for access for national security eligibility will be resolved in favor of the

national security.” Adjudicative Guidelines at ¶ 2(b). In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record. Because of the strong presumption against granting or restoring security clearances, I must deny access authorization if I am not convinced that the LSO’s security concerns have been mitigated such that restoring the Individual’s clearance is not an unacceptable risk to national security.

Guideline G concerns may be mitigated if:

- (a) So much time has passed, or the behavior was so infrequent, or it happened under such unusual circumstances that it is unlikely to recur or does not cast doubt on the individual’s current reliability, trustworthiness, or judgment;
- (b) The individual acknowledges his or her pattern of maladaptive alcohol use, provides evidence of actions taken to overcome this problem, and has demonstrated a clear and established pattern of modified consumption or abstinence in accordance with treatment recommendations;
- (c) The individual is participating in counseling or a treatment program, has no previous history of treatment and relapse, and is making satisfactory progress in a treatment program; or
- (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.

The facts in this case do not support any of the mitigating factors. The Individual’s pattern of DWI arrests spans 21 years and includes five distinct instances of DWI arrests, one which occurred about one year before the hearing, indicating that the behavior is recent and is not infrequent or unusual. The Individual does not acknowledge his troubling pattern of alcohol consumption and intoxication and has not participated in or completed a treatment or counseling program. He has abstained for a period of months, but has returned to alcohol consumption, indicating a history of relapse. The Individual continues to consume alcohol regularly and continues to consume alcohol to intoxication, despite the serious consequences he has faced and continues to face for those actions. The Individual’s decision to continue consuming alcohol at all, much less to intoxication, with the knowledge that doing so could result in termination of his security clearance, and potentially his job, indicates unreliability and poor judgement. The Individual’s characterizations of the current state of his legal situation, his receipt of charging documents from law enforcement, and his recent alcohol use shifted throughout the hearing and sometimes, when subject to questioning, changed to contradict his prior testimony. This lack of consistency in the Individual’s testimony makes it difficult to rely on his word. It also indicates that he may lack trustworthiness, as does his failure to call any witnesses or submit any exhibits to corroborate his testimony.

The Individual’s decision to continue consuming alcohol precludes me from finding that drinking and driving is a behavior that is unlikely to recur. He testified that he intends to refrain from drinking and driving in the future, but it is unlikely that he intended to drink and drive in the past,

indicating that an intent to refrain from that behavior has not stopped it from occurring in the past. It is clear that, at this time, if the Individual is continuing to consume alcohol, the risks posed by his binge drinking remain; the Psychologist's opinion that the Individual is not rehabilitated or reformed from binge drinking was, in large part, due to the fact that the Individual continues to consume alcohol. Because I must resolve any doubt in favor of the national security, I cannot find that the Individual has mitigated the Guideline G concerns.

VI. CONCLUSION

Upon consideration of the entire record in this case, I find that there was evidence that raised concerns regarding the Individual's eligibility for access authorization under Guideline G of the Adjudicative Guidelines. I further find that the Individual has not succeeded in fully resolving those concerns. Therefore, I cannot conclude that restoring DOE access authorization to the Individual "will not endanger the common defense and security and is clearly consistent with the national interest." 10 C.F.R. § 710.7(a). Accordingly, I find that the DOE should not restore access authorization to the Individual.

This Decision may be appealed in accordance with the procedures set forth at 10 C.F.R. § 710.28.

Kristin L. Martin
Administrative Judge
Office of Hearings and Appeals