



eligibility to hold a security clearance. In an attachment to the Notification Letter, the LSO explained that the derogatory information fell within the purview of two potentially disqualifying criteria set forth in the security regulations at 10 C.F.R. § 710.8, subsections (k) and (l) (hereinafter referred to as Criteria K and L).<sup>2</sup>

Upon his receipt of the Notification Letter, the individual exercised his right under the Part 710 regulations by requesting an administrative review hearing. The Director of the Office of Hearings and Appeals (OHA) appointed me the Administrative Judge in the case and I subsequently conducted an administrative hearing in the matter. At the hearing, the LSO presented no witnesses; the individual presented his own testimony and that of two long-time friends and work colleagues. The LSO submitted four numbered exhibits into the record; the individual tendered three exhibits, which have been labelled A through C.

## **II. Regulatory Standard**

### **A. Individual's Burden**

A DOE administrative review proceeding under Part 710 is not a criminal matter, where the government has the burden of proving the defendant guilty beyond a reasonable doubt. Rather, the standard in this proceeding places the burden on the individual because it is designed to protect national security interests. This is not an easy burden for the individual to sustain. 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 (9<sup>th</sup> Cir. 1990), *cert. denied*, 499 U.S. 905 (1991) (strong presumption against the issuance of a security clearance).

The individual must come forward with evidence to convince the DOE that restoring his 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 or her 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). Thus, an individual is afforded the utmost latitude in the presentation of evidence to mitigate the security concerns at issue.

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<sup>2</sup> Criterion K concerns information that a person has “[t]rafficked in, sold, transferred, possessed, used or experimented with a drug or other substance listed in the Schedule of Controlled Substances established pursuant to section 202 of the Controlled Substances Act of 1970 (such as marijuana, cocaine . . . ) except as prescribed or administered by a physician licensed to dispense drugs in the practice of medicine, or otherwise authorized by Federal law.” 10 C.F.R. § 710.8(k). Criterion L relates to information that a person has “[e]ngaged in any unusual conduct or is subject to any circumstances which tend to show that the individual is not honest, reliable, or trustworthy; or which furnishes reason to believe that the individual may be subject to pressure, coercion, exploitation, or duress which may cause the individual to act contrary to the best interests of the national security. . . .” 10 C.F.R. § 710.8(l).

## **B. Basis for the Administrative Judge's Decision**

In personnel security cases arising under Part 710, it is my role 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). I am instructed by the regulations to resolve any doubt as to a person's access authorization eligibility in favor of the national security. *Id.*

## **III. The Notification Letter and the Security Concerns at Issue**

As previously noted, the LSO cites two criteria as the bases for suspending the individual's security clearance, Criteria K and L. The Criterion K concerns arise from the following facts. The individual was arrested in October 2013 and charged with the possession of cocaine and drug paraphernalia. During a subsequent Personnel Security Interview (PSI) conducted by the LSO, the individual admitted that he had placed a small amount of cocaine and three cut-off straws used to inhale cocaine in his car, in anticipation of meeting with life-long friends whom he sees once a year. At their last two reunions, in October 2011 and 2012, they had used cocaine together and intended to do so again. He also admitted that he had reimbursed one of his friends for the cost of the cocaine purchased in 2012. The individual's purchase, possession, and use of cocaine raises a security concern under Criterion K, because use of an illegal drug may impair judgment and because all such activities with respect to an illegal drug raises questions about a person's ability or willingness to comply with laws, rules and regulations. *See* Guideline H of the *Revised Adjudicative Guidelines for Determining Eligibility for Access to Classified Information*, issued on December 29, 2005, by the Assistant to the President for National Security Affairs, The White House (Adjudicative Guidelines).<sup>3</sup>

To support its allegations regarding Criterion L, the LSO reports the individual's admission that he had consumed three glasses of wine before driving home the night of the October 2013 arrest, and summarizes the arresting officer's description of the individual at the time of the arrest, including his failure of portions of a field sobriety test and a breathalyzer test that indicated a blood alcohol content (BAC) of .11. The LSO also relied on the individual's admissions that he did not feel impaired at the time of the arrest, that his consumption of alcohol that evening was not unusual, and that he had consumed alcohol before each of the two times he used cocaine. These facts, taken together with his involvement with cocaine, are circumstances that the LSO found to tend to show that the individual is not honest, reliable, or trustworthy, and thus raised security concerns under Criterion L. Excessive use of alcohol often leads to the exercise of questionable judgment or the failure to control impulses, and raises questions about an individual's reliability and trustworthiness. Adjudicative Guidelines at Guideline G.

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<sup>3</sup> The Notification Letter also cites the individual's admission that he used marijuana during college, roughly 40 years ago. As there is no evidence that the individual has used marijuana, or any other illegal drug, between his college years and 2011, I find that the LSO's concern regarding marijuana use has been mitigated by the passage of time. *See* Adjudicative Guidelines, Guideline H at ¶ 26(a).

Criminal conduct—in this case, using illegal drugs and driving after drinking, with a BAC in excess of the limit established by state law—creates doubt about a person’s judgment, reliability, and trustworthiness, and calls into question a person’s ability or willingness to comply with laws, rules, and regulations. Adjudicative Guidelines at Guideline J. Finally, the LSO determined that all of the above activity constituted conduct “involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations,” which “can raise questions about an individual’s reliability, trustworthiness, and ability to protect classified information.” Adjudicative Guidelines at Guideline E.

#### **IV. Findings of Fact**

The individual attends his college alumni reunions nearly every year. Exhibit (Ex.) 1 (Transcript of January 28, 2014, Personnel Security Interview) at 38. At these reunions, he spends most of his time with a small group of friends, whom he sees only once a year, and they golf together. Transcript of Hearing (Tr.) at 37, 46, 61. He and his wife separated in June 2011, and he was worried about the upcoming divorce and its effect on his children. *Id.* at 36. At the 2011 reunion, roughly four months after his separation, one of his friends, whom he knew to have used drugs, offered cocaine to the others after a round of golf during which, the individual estimates, they each drank four or five beers. *Id.* at 37-38, 61. The others, including the individual, accepted the offer and the individual inhaled two lines of cocaine. *Id.* at 38.

The individual did not use any cocaine again until his 2012 reunion, when he did so under virtually identical circumstances. *Id.* at 39. However, since the same friend had purchased and brought the cocaine, as he had the previous year, the individual repaid him the cost of the cocaine he had brought with him in 2012. *Id.* After the group shared the cocaine in 2012, some had not been used, and the individual brought the remainder home with him, to keep it until the next reunion in 2013. *Id.* at 40. He did not use the cocaine he brought home, but rather stored it in a dresser drawer and did not remove it until his friend called him about a week before the 2013 reunion to remind him to bring it with him. *Id.* at 32-33, 41. Following that conversation, he put the cocaine in his car, along with three small straws they had used to snort the cocaine. *Id.* at 32, 42.

The cocaine remained in his car as he went about his daily routines, including driving onto the DOE site where he worked. *Id.* On October 8, 2013, he drove to meet a friend for dinner, during which he drank three glasses of wine over a period of about three hours. *Id.* at 31, 52. He testified that he had felt the effect of the alcohol, but did not believe his ability to drive was impaired. *Id.* at 53. While driving himself home after the dinner, he entered a construction zone near his exit, became confused as to where he should be driving, and was stopped by the local police. *Id.* at 31. One police officer performed a field sobriety test on the individual, portions of which he failed. *Id.* at 31; Ex. 3. A breathalyzer test indicated he had a BAC of .11, above the legal limit according to local state law. Tr. at 55. While the individual was being tested, another police officer moved the individual’s car to a safer location. *Id.* at 31. As he was getting out of the car, the second officer noticed a small bag that contained the cocaine and three straws the individual had placed there. *Id.* at 31-32.

The individual was charged with possession of a controlled dangerous substance and with possession with intent to use drug paraphernalia.<sup>4</sup> Ex. 3. Soon after his arrest, at the suggestion of his attorney, the individual voluntarily engaged in substance abuse counseling. Before entering the program, the counseling center assessed the individual as being “without any clinical syndrome involving substance abuse.” Ex. A. He completed a 12-week program of weekly, one-hour sessions shortly before his trial date. Tr. at 44-45, 47. The individual testified that the program focused more on alcohol than illegal drugs. *Id.* at 44. He stated that the counseling affected him not so much with respect to his use of cocaine, as he believes he does not have a drug problem, but rather concerning alcohol use, increasing his appreciation of the caution that should be used, particularly when driving after drinking. *Id.* at 48, 64.

The individual pled guilty to both charges, but was given a verdict of Probation Before Judgment, most likely, in the individual’s opinion, due to his lack of a prior arrest record. Tr. at 33. He received a sentence of 18 months of supervised probation, during which time he is subject to random drug and alcohol testing and must abstain from alcohol. *Id.* at 33; Ex. B. The results of all random testing, as of the date of the hearing, were all negative. Tr. at 34; Ex. A. The individual’s probation period will expire in August 2015. Ex. B.

## **V. Analysis**

I have thoroughly considered the record of this proceeding, including the submissions tendered in this case and the testimony of the witnesses presented at the hearing. In resolving the question of the individual’s eligibility for access authorization, I have been guided by the applicable factors prescribed in 10 C.F.R. § 710.7(c)<sup>5</sup> and the Adjudicative Guidelines. After due deliberation, I have determined that the individual’s access authorization should not be restored. I cannot find at this time that restoring the individual’s DOE security clearance will not endanger the common defense and security and is clearly consistent with the national interest. 10 C.F.R. § 710.27(a). The specific findings that I make in support of this decision are discussed below.

### **A. Criterion K: Cocaine Use**

At the hearing, the individual and his witnesses testified about his excellent work history, his lack of a criminal record, and the circumstances that led to his cocaine use and arrest. The individual attributes his first use of cocaine to peer pressure and the upsetting

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<sup>4</sup> He was not charged with any alcohol-related offense.

<sup>5</sup> Those factors include the following: the nature, extent, and seriousness of the conduct, the circumstances surrounding the conduct, to include knowledgeable participation, the frequency and recency of the conduct, the age and maturity at the time of the conduct, the voluntariness of his participation, the absence or presence of rehabilitation or reformation and other pertinent behavioral changes, the motivation for the conduct, the potential for pressure, coercion, exploitation, or duress, the likelihood of continuation or recurrence, and other relevant and material factors.

circumstances of his separation and impending divorce. Tr. at 45. He acknowledges using cocaine on two occasions, but testified that it will never happen again. *Id.* He has not used cocaine since his 2012 reunion.

In considering the evidence before me, I first looked to the Adjudicative Guidelines. As circumstances that may mitigate security concerns for illegal drug use, Guideline H at ¶ 26(a) lists the fact that “the behavior happened so long ago, was so infrequent, or happened under such circumstances that it is unlikely to recur or does not cast doubt on the individual’s current reliability, trustworthiness, or good judgment.” At the hearing, the individual pointed out that his most recent cocaine use was in the fall of 2012, that the sum of his use was two isolated instances, and his life has progressed beyond the stresses of his separation and divorce. *Id.* at 29-30. While I acknowledge that these facts weigh in the individual’s favor, I find them outweighed by other facts. The individual had placed the cocaine in his car with the intention of using it the following weekend at his 2013 reunion. He explained at the hearing that his arrest cast a somber shade on the annual gathering, which he did attend, and he and his buddies neither drank alcohol nor used illegal drugs. *Id.* at 43. His pattern of using cocaine was as well-defined as it was short-lived: once a year, with friends he saw only once a year. But for the arrest, I believe he would have used it again in October 2013. Moreover, while I may attribute his succumbing to using cocaine in 2011 to his family stresses, I cannot mitigate his use in 2012 (and likely in 2013 had he not been arrested) to the same stresses he was experiencing in 2011.

Nor can I find mitigation under ¶ 20(b) of Guideline H, which contemplates “a demonstrated intent not to abuse any drugs in the future, such as (1) disassociation from drug-using associates and contacts; (2) changing or avoiding the environment where drugs are used; (3) an appropriate period of abstinence; (4) a signed statement of intent with automatic revocation of clearance for any violation.” Although he sees his friends only once a year, he has not renounced them, and remains in contact with at least one of them throughout the year. *Id.* at 42. He intends to continue to attend his annual reunions with his friends, returning to the same circumstances under which he used cocaine in the past, though he stated that he will leave their company should they ever use illegal drugs in his presence. *Id.* at 43-44.<sup>6</sup>

The individual testified that his intent is to never use illegal drugs again. He presented himself very credibly at the hearing, and I have no reason to doubt his intentions. I remain concerned, however, that he may find himself in the same environment that induced him to use cocaine in the past, and peer pressure, which he stated was a factor in the past, may yet affect his conviction to refrain from future cocaine use. I therefore am not convinced that he has sufficiently mitigated the LSO’s concerns under Criterion K.

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<sup>6</sup> The record contains no evidence regarding the remaining mitigating factors.

## B. Criterion L: Conduct Affecting Judgment

The LSO's concerns under this criterion fall into three categories of conduct, all of which demonstrate poor judgment: excessive alcohol use, criminal behavior, and a pattern of activities that comprises illegal drug use, excessive alcohol use, and criminal conduct. There is considerable overlap between these three concerns, and all arose from the same set of facts described above: the individual's use of cocaine on two occasions in 2011 and 2012, and his arrest in 2013.

Although the individual was arrested in 2013 for possession of cocaine and drug paraphernalia, the arresting officers determined that the individual had been driving his vehicle with a BAC of .11. At the hearing, the individual contended that the LSO's concern regarding excessive alcohol use should be mitigated for a number of reasons: he was not charged with an alcohol-related offense; he has no pattern of excessive alcohol use; the counseling center determined that he had no clinical syndrome involving substance abuse; and he has demonstrated behavioral changes in support of sobriety since his arrest. *Id.* at 50-51. Although he was not charged with Driving Under the Influence of Alcohol, I am nevertheless concerned that, at the time of his arrest, he was driving with a BAC of .11, significantly higher than the level of intoxication at which state law has defined as unsafe in a driver. Moreover, he testified that, though he felt the effect of the alcohol, he believed at the time that he was capable of driving. He also stated that it was not unusual for him to drink three glasses of wine over a period of three hours, as he had on that occasion. My experience in personnel security hearings where alcohol consumption is at issue has taught me that it would be extremely unusual for an adult of average size to achieve a BAC of .11 by consuming alcohol in the manner the individual stated. Instead, it leads me to believe that the individual may have unwittingly drunk considerably more than he recalled on the night of the arrest. It also leads me to question how often he might have gotten behind the wheel under the same circumstances: when he believed he had been drinking responsibly and had in fact consumed more than he realized.

Finally, in describing his counseling program as "eye-opening" regarding alcohol use, he testified that he was surprised at how much others in the program drank yet still thought they were "perfectly fine." *Id.* at 64. After hearing their stories, he was convinced that he had no problem with alcohol, though he stated he will be more cautious in the future about drinking and driving. *Id.* at 63-64. I am not as convinced as the individual. Although, as the individual pointed out, his BAC has been recorded at .11 only once in his adult life, *id.* at 73, he has admitted to driving after drinking on numerous occasions, provided he believed he was not too impaired to drive. *Id.* at 77. I am not convinced that this poor judgment occurred long ago (as it occurred in October 2013), infrequently, or under unusual circumstances in the past, nor that it will not resume when the individual's probation elapses. I also note additional circumstances in which the individual's alcohol consumption may have contributed to his exercise of poor judgment: the two instances when the individual decided to use cocaine occurred after the individual had consumed four to five beers. Furthermore, the individual does not acknowledge his issues with alcohol. After considering the above facts, I cannot find that the individual has mitigated

the LSO's concerns regarding his judgment arising from excessive alcohol use. *See* Adjudicative Guidelines, Guideline G at ¶ 23(a), (b).

Guideline J addresses security concerns that arise from an individual's engaging in criminal activity. Adjudicative Guidelines at Guideline J. The Notification Letter focuses on the individual's use of cocaine, arrest for possession of cocaine, and driving with a BAC higher than that permitted by state law. At the hearing, the individual disputed that his behavior regarding alcohol had any criminal implications because he was not charged with DUI, and therefore that his criminal activity was limited to two uses of cocaine and his October 2013 arrest. Tr. at 75-76, 78, 81. He also pointed out that his counseling sessions have taught him to be more vigilant about driving after consuming alcohol. *Id.* at 86. Although I agree that his counseling has benefited the individual in some respects, I cannot find that "there is evidence of successful rehabilitation" from his criminal activity, as set forth in Guideline J at ¶ 32(d). Sufficient time has not passed since the arrest to establish an enduring period without recurrence of criminal activity, particularly because probation has been in effect for much of that period. *Id.*; *id.* at ¶ 32(a) ("so much time has elapsed since the criminal behavior happened so long ago, or it happened under such circumstances that it is unlikely to recur and does not cast doubt on the individual's current reliability, trustworthiness, or good judgment.") Moreover, although he has escaped detection except on the one occasion in October 2013, the individual has frequently driven under similar conditions—when he has similar quantities of alcohol and believed he was not too disabled to be behind the wheel. While I believe that individual is sincere in his commitment to act more cautiously in the future, I cannot find that he has sufficiently mitigated the LSO's concerns about his criminal activity at this time.

Similarly, after reviewing the record in this proceeding, I am left with doubts concerning the individual's conduct evidencing questionable judgment. Guideline E addresses such conduct, but focuses on an individual's failure to provide truthful and candid information during the security clearance process. There is evidence of only one instance in which the individual deliberately withheld information from the LSO: in about 1980, he did not reveal that he had used marijuana in college. Tr. at 94. The individual testified that he had not been candid at the time out of fear that he would not get the position for which he was applying. *Id.* The record indicates that the individual has been forthright with the LSO ever since that time, up to and including the circumstances of his 2013 arrest. *Id.* at 110-13. Consequently, I find that the LSO's concerns about the individual's lack of candor and dishonesty are mitigated by the passage of time and his subsequent behavior. Guideline E at ¶ 17(c). I am left, however, with doubts about the questionable judgment the individual has employed in the circumstances described in the above paragraphs—using cocaine on two occasions while holding a security clearance, and driving after drinking excessively at least once and perhaps many times. Guideline E at ¶ 16(c). I therefore cannot find that the individual has mitigated the LSO's general concerns about his judgment.

Based on the foregoing, I find that the individual has not mitigated the security concerns associated with Criterion L.



## **VI. Conclusion**

In the above analysis, I have found that there was sufficient derogatory information in the possession of the DOE that raises serious security concerns under Criterion L. 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 have found that the individual has not brought forth sufficient evidence to mitigate the security concerns associated with Criteria K and L. I therefore do not find that restoring the individual's access authorization will not endanger the common defense and is clearly consistent with the national interest. Accordingly, I have determined that the individual's access authorization should not be restored. The parties may seek review of this Decision by an Appeal Panel under the regulations set forth at 10 C.F.R. § 710.28.

William M. Schwartz  
Administrative Judge  
Office of Hearings and Appeals

Date: July 22, 2014