

*The original of this document contains information which is subject to withholding from disclosure under 5 U.S. C. § 552. Such material has been deleted from this copy and replaced with XXXXXX's.

United States Department of Energy
Office of Hearings and Appeals

In the Matter of Personnel Security Hearing)

)

Filing Date: February 27, 2013)

Case No.: PSH-13-0023

)

)

Issued: September 30, 2013

Decision and Order

Robert B. Palmer, Hearing Officer:

This Decision concerns the eligibility of XXXXXXXXXXXX (hereinafter referred to as “the individual”) for access authorization under the regulations set forth at 10 C.F.R. Part 710, entitled "Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material.”¹ For the reasons set forth below, I conclude that the individual’s security clearance should not be restored at this time.²

I. BACKGROUND

The individual is employed by the Department of Energy (DOE), and was granted a security clearance in connection with that employment. On August 7, 2012, while at work, the individual became agitated and began experiencing an inability to concentrate, nausea, dizziness, a shortness of breath, and a headache. The individual claims that his anxiety and agitation were caused by a hostile work environment created by a pattern of discriminatory behavior exhibited towards him by his supervisor. He was transported to an on-site medical facility, where, after conducting an evaluation, personnel at the facility decided that the individual should be

¹ An access authorization is an administrative determination that an individual is eligible for access to classified matter or special nuclear material. 10 C.F.R. § 710.5. Such authorization will also be referred to in this Decision as a security clearance.

² Decisions issued by the Office of Hearings and Appeals (OHA) are available on the OHA website located at <http://www.oha.doe.gov>. The text of a cited decision may be accessed by entering the case number of the decision in the search engine located at <http://www.oha.doe.gov/search.htm>.

transferred to a local hospital. At the hospital, the individual was diagnosed with anxiety and received a referral for group counseling. Because this information raised security concerns, the local security office (LSO) summoned the individual for an interview with a personnel security specialist on August 23, 2012. At the individual's request, a second interview was held four days later. Because these Personnel Security Interviews (PSIs) did not resolve the LSO's concerns, the individual was referred to a local psychiatrist (hereinafter referred to as "the DOE psychiatrist") for an agency-sponsored evaluation. The DOE psychiatrist prepared a report based on that evaluation and submitted the report to the LSO. After reviewing this report and the other information in the individual's personnel security file, the LSO determined that derogatory information existed that cast into doubt the individual's eligibility for access authorization. It informed the individual of this determination in a letter that set forth the DOE's security concerns and the reasons for those concerns. I will hereinafter refer to this letter as the Notification Letter. The Notification Letter also informed the individual that he was entitled to a hearing before a Hearing Officer in order to resolve the substantial doubt concerning his eligibility for access authorization.

The individual requested a hearing on this matter. The LSO forwarded this request to the Office of Hearings and Appeals, and I was appointed the Hearing Officer. The hearing was convened in June 2013, and eight witnesses testified. Six witnesses, including the DOE psychiatrist, testified on behalf of the DOE, and the individual and his wife testified on behalf of the individual. Because the individual's expert witness was unavailable to testify at that time due to a serious illness, the hearing was reconvened in August 2013. During this second session, the individual and his psychiatrist (hereinafter referred to as "the evaluating psychiatrist") testified, as did the DOE psychiatrist. The DOE introduced 31 exhibits into the record of this proceeding, and the individual introduced 17 exhibits.

II. THE NOTIFICATION LETTER AND THE DOE'S SECURITY CONCERNS

As indicated above, the Notification Letter included a statement of derogatory information that created a substantial doubt as to the individual's eligibility to hold a clearance. This information pertains to paragraphs (h) and (l) of the criteria for eligibility for access to classified matter or special nuclear material set forth at 10 C.F.R. § 710.8.

Under criterion (h), information is derogatory if it indicates that an individual has an illness or mental condition which, in the opinion of a psychiatrist causes, or may cause, a significant defect in the individual's judgment or reliability. 10 C.F.R. § 710.8(h). As support for this criterion, the Letter cites the diagnosis of the DOE psychiatrist that the individual suffers from Generalized Anxiety Disorder, Persistent Disorder of Initiating or Maintaining Sleep, and Major Depressive Disorder, Recurrent, Severe, with Psychotic Features, and that these conditions "can cause problems with judgment and/or reliability." The Letter also cites the diagnosis of a licensed psychologist that the individual suffers from Adjustment Disorder with Anxiety and Situational Panic Attacks.

Criterion (l) defines as derogatory information indicating that the individual has engaged in unusual conduct or is subject to circumstances which tend to show that he is not honest, reliable or trustworthy; or which furnishes reason to believe that he may be subject to pressure, coercion,

exploitation or duress which may cause him to act contrary to the best interests of national security. As support for this criterion, the Letter cites statements that the individual made during his August 23, 2012, PSI (August 23 PSI) that he was calm and in control of his ability to communicate during his visit to the site medical facility on August 7, and statements made by medical personnel indicating that the individual was shouting and making very loud defamatory comments about his supervisor and “Anglos.” The Letter also cites the individual’s statement during his August 23 PSI that he could recall the events of August 7 clearly, and his statement during his August 27, 2012, PSI that he could not remember whether he or his wife had said on August 7 that if his supervisor had been at the site medical facility, “I probably would have slapped her or decked her.”

These circumstances adequately justify the DOE’s invocation of criteria (h) and (l), and raise significant security concerns. As an initial matter, the individual has been diagnosed, by a duly qualified mental health professional retained by the U.S. Government, with a mental condition that could cause a significant defect in his judgment or reliability. Moreover, conduct involving questionable judgment, lack of candor, or dishonesty can also raise questions about an individual’s reliability, trustworthiness and ability to protect classified information. *See Revised Adjudicative Guidelines for Determining Eligibility for Access to Classified Information, The White House (December 19, 2005), Guidelines I and E.*

III. REGULATORY STANDARDS

The criteria for determining eligibility for security clearances set forth at 10 C.F.R. Part 710 dictate that in these proceedings, a Hearing Officer must undertake a careful review of all of the relevant facts and circumstances, and make a “common-sense judgment . . . after consideration of all relevant information.” 10 C.F.R. § 710.7(a). I must therefore consider all information, favorable or unfavorable, that has a bearing on the question of whether granting or restoring a security clearance would compromise national security concerns. Specifically, the regulations compel me to consider the nature, extent, and seriousness of the individual’s conduct; the circumstances surrounding the conduct; the frequency and recency of the conduct; the age and maturity of the individual at the time of the conduct; the absence or presence of rehabilitation or reformation and other pertinent behavioral changes; the likelihood of continuation or recurrence of the conduct; and any other relevant and material factors. 10 C.F.R. § 710.7(c).

A DOE administrative proceeding under 10 C.F.R. Part 710 is “for the purpose of affording the individual an opportunity of supporting his eligibility for access authorization.” 10 C.F.R. § 710.21(b)(6). Once the DOE has made a showing of derogatory information raising security concerns, the burden is on the individual to produce evidence sufficient 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). *See Personnel Security Hearing*, Case No. VSO-0013, 24 DOE ¶ 82,752 at 85,511 (1995) (*affirmed* by OSA, 1996), and cases cited therein. The regulations further instruct me to resolve any doubts concerning the individual’s eligibility for access authorization in favor of the national security. 10 C.F.R. § 710.7(a).

IV. FINDINGS OF FACT AND ANALYSIS

After reviewing the record in this matter in its entirety, I find that the individual has adequately addressed the DOE's security concerns regarding criterion (h). However, because I harbor serious doubts about the individual's honesty, trustworthiness and candor, I find that substantial doubts as to the individual's eligibility for a security clearance remain under criterion (l). My reasons for these conclusions are set forth below.

A. Criterion (h)

As indicated above, the DOE's invocation of criterion (h) is based primarily on the DOE psychiatrist's diagnosis that the individual suffers from Generalized Anxiety Disorder, Persistent Disorder of Initiating or Maintaining Sleep, and Major Depressive Disorder, Recurrent, Severe, with Psychotic Features. During the initial session of the hearing in June, the DOE psychiatrist testified about his diagnosis. He based his diagnosis of Generalized Anxiety Disorder on findings that the individual suffered "agitation, anxiety and excessive worry and he said the stress level is unbearable." June hearing transcript (Tr.) at 87. He further concluded that these symptoms were affecting the individual's physical and emotional health, his marriage and his relations with his son. *Id.* Regarding the Sleep Disorder and Depressive Disorder diagnoses, the DOE psychiatrist said that anxiety over a period of time can lead to depression and problems with sleep. He noted that the individual was getting "three or four" hours of sleep and was having problems with energy, motivation and interest. *Id.* These factors, when coupled with what the DOE psychiatrist found to be a history of depression, led to the Sleep Disorder and Depressive Disorder diagnoses. Tr. at 88. The DOE psychiatrist also found that the individual's beliefs that he was being discriminated against at work because of his ethnicity and was being "picked on" by a lot of people, that his supervisor was using police tactics against him, and that he might have to associate with bank robbers and child molesters if he was to take part in group therapy, were examples of paranoia. Tr. at 88, 90. This accounted for the "Psychotic Features" portion of his diagnosis. The DOE psychiatrist concluded that because of the high probability of a future depressive episode, the individual needed to be under the ongoing care of a psychiatrist and needed to be on medication. Tr. at 91. Because the individual did not meet these requirements as of the date of the hearing, the DOE psychiatrist continued to have serious concerns about the individual's judgment and reliability. Tr. at 96.

The evaluating psychiatrist testified when the hearing was reconvened in August 2013. She said that based on her evaluation of the individual and her review of a number of the exhibits submitted in this proceeding, including the DOE psychiatrist's report, she diagnosed the individual with situational anxiety. August 2013 transcript (Tr. 2) at 13. She further stated that the incident in question appeared to be a panic attack, triggered by an interaction with his supervisor during which he perceived that his supervisor had screamed at him because of the way that he had handled a work-related situation. Because the individual did not give her any history of a significant mental illness and told her that, although he had been regularly evaluated by a psychiatrist during his time in the military, no problems had been diagnosed, she concluded that the anxiety was "situational," *i.e.*, related to what had transpired between the individual and his supervisor. Tr. 2 at 13, 17. She found no evidence of any mental illness during her evaluation, Tr. 2 at 15, and no sign of any condition that would impair his judgment or reliability. Tr. 2 at 16. As for the DOE psychiatrist's recommendation that the individual remain under the care of a

psychiatrist, the evaluating psychiatrist testified that, although she could not see the individual on a continuing basis because of her illness, it was her understanding that the individual had been seeing a therapist, and that that therapist was available to the individual on an “as needed” basis. Tr. 2 at 23.

After hearing the evaluating psychiatrist’s testimony, the DOE psychiatrist was recalled. He reiterated his previous testimony that the individual suffers from a recurrent “depressive anxious illness,” and that he needed “to be monitored by somebody taking responsibility for that illness.” Because he believed that the individual was not being sufficiently monitored by a mental health professional, the DOE psychiatrist continued to conclude that the individual was not demonstrating adequate evidence of rehabilitation from his Depressive Disorder. The DOE psychiatrist indicated that the willingness of the individual’s therapist to see him on an “as needed” basis was not sufficient to allay the DOE psychiatrist’s concerns about a recurrence of the individual’s Depressive Disorder. Tr. 2 at 98-99, 105. However, he also testified that if it could be demonstrated that the individual was being monitored by a psychiatrist on a regular basis, that would be sufficient to allay the DOE psychiatrist’s concerns regarding the individual’s mental and emotional condition. Tr. 2 at 143.

Because of this testimony and because of counsel for the individual’s assertion that the individual was being monitored on an ongoing basis by a psychiatrist (hereinafter referred to as “the treating psychiatrist,”) I permitted the submission of a report from the treating psychiatrist, and a response to that report from the DOE psychiatrist. In his report, the treating psychiatrist stated that he had performed an evaluation of the individual, including an extensive interview and an examination of his medical history, and concluded that he did not suffer from any diagnosable emotional or mental illness or defect. Ind. Ex. 16 at 1. He further stated that he was familiar with much of the record of this proceeding, including the DOE psychiatrist’s report and his testimony at the June hearing, and that in response to the DOE psychiatrist’s concerns, he had scheduled quarterly appointments to monitor the individual’s mental and emotional state, and would continue to do so “indefinitely.” *Id.*

In his response to this report, the DOE psychiatrist stated that because the individual was being monitored and because both the evaluating psychiatrist and the treating psychiatrist said that the individual was doing well, “he should not have problems with judgment or reliability due to depression and anxiety.” DOE Ex. 30 at 1. However, the DOE psychiatrist did have concerns about the individual’s honesty and candor, saying that he was not “honest and forthcoming” during his interview with the individual, and that a patient’s honesty is essential in treatment and diagnosis. *Id.*

The record in this matter indicates that, since the DOE psychiatrist’s diagnosis, two psychiatrists and one psychologist have evaluated the individual. None of these three diagnosed the individual as suffering from any type of depression, which was the portion of the DOE psychiatrist’s diagnosis that caused him to doubt the individual’s judgment and reliability, and one, the treating psychiatrist, found that he did not suffer from any diagnosable condition.³ Furthermore, after

³ The psychologist saw the individual on two occasions shortly after the August 7, 2012, incident, diagnosed the individual as suffering from Adjustment Disorder with Anxiety and Situational Panic Attacks, and counseled the individual on coping mechanisms to manage what

reading the treating psychiatrist's report, the DOE psychiatrist indicated that he no longer had concerns about defects in the individual's judgment or reliability due to depression or anxiety. Although, as discussed below, I share the DOE psychiatrist's concerns about the individual's honesty and candor, I cannot ignore the favorable expert testimony and opinion in this matter. I find that the individual has adequately addressed the DOE's concerns under criterion (h).

B. Criterion (l)

I reach a different conclusion, however, with regard to criterion (l). As set forth above, the DOE's invocation of this criterion was based on perceived inconsistencies between his August 23 PSI and statements made by medical personnel who witnessed his behavior on the morning that he was transported to the site medical facility and then later, to a local hospital, and inconsistencies between his August 23 and August 27, 2012, PSIs.

After reviewing the two PSIs, I find that, while the record supports the existence of the inconsistencies outlined in the Notification Letter, the individual was more honest about his emotional state while at the site medical facility during the second PSI than during the first. Whereas during the first interview, the individual said that he was calm and in control, during the second, the individual admitted that he was "clearly upset" and "distraught." DOE Ex. 3 at 5, 6. While these admissions are of some limited mitigating value,⁴ they fall far short of convincing me that there are no legitimate security concerns regarding the individual's honesty and reliability.

As an initial matter, the individual's shifting contentions regarding the statement about "decking" his boss leave me with substantial doubts as to the veracity of any of the individual's claims about the matter. During his August 23 PSI, the individual said that he was in control of his ability to communicate on the morning of August 7th, and that he remembered everything that he said. DOE Ex. 4 at 19, 22. Despite being asked repeatedly if there was anything else that he recalled about his statements on that morning, and despite being warned about the possible consequences of making false, incomplete or misleading statements, the individual made no mention of the comment about "decking" his boss. After that interview, the individual executed a release that allowed the DOE to obtain his medical records. Four days later, the individual revealed that on August 7th, a comment was made at the local hospital that if his boss was present, "I probably would have slapped her, or decked her," but the individual could not remember if he or his wife said it. DOE Ex. 3 at 5. However, during his June 5, 2013, testimony at the hearing, the individual said that he was 99 percent certain that his wife had made the comment in question. Tr. at 245. His wife also testified that she made the statement. Tr. at 265. Nevertheless, I have substantial doubts about the veracity of this testimony. As indicated above,

he termed "work-related stress." Ind. Ex. 8. I note, however, that as discussed in Section IV.B of this Decision, the individual was not completely honest and forthcoming with the evaluating psychiatrist regarding his psychiatric history. It is also not evident from the record whether the individual was candid with the psychologist in this regard, or what sources of information, other than the individual, he relied on in reaching his diagnosis.

⁴ See *Adjudicative Guideline E*, ¶ 17(a): "the individual made prompt, good faith efforts to correct the omission, concealment, or falsification before being confronted with the facts."

the DOE obtained the individual's medical records, including those generated during the individual's visit to the local hospital emergency room on the morning of August 7th. Under the heading "Initial Assessment" and the sub-heading "Additional Findings," are handwritten notes that read "trouble sleeping & reg. headaches since Nov. [unintelligible] anxiety today denies si/hists would 'deck boss' if able." DOE Ex. 5 at 7. Although the records do not specify who made the statement, the fact that the statement was memorialized in the midst of information about the individual that was obtained from the individual during the process of evaluating his emotional, mental and physical condition strongly suggests that it was he who made the statement in question.

Moreover, the record in this matter demonstrates that the individual has engaged in a pattern of providing false, incomplete, or misleading information to the DOE, and even to his evaluating psychiatrist. First, during an OPM background investigation in 2009, the individual told a federal investigator that there had not been any infidelity during any of his previous three failed marriages by either himself or his wives. DOE Ex. 19 at 25. However, he told the DOE psychiatrist that during his first marriage, his wife had an affair, and during his second, both he and his wife had affairs. DOE Ex. 2.

The individual was also less than completely honest and forthcoming during his evaluation by the DOE psychiatrist. He informed the DOE psychiatrist that he had never received psychiatric treatment before, other than in the recent past, when he was prescribed Valium to deal with stress caused by his relationship with a previous supervisor. *Id.* However, the individual was found to be "moderately depressed," and was diagnosed by a military psychiatrist in 1991 as suffering from Adjustment Disorder With Depressed and Anxious Moods. He was prescribed Valium for this condition. DOE Ex. 20 at 8. The individual testified, unconvincingly, that he did not recall this treatment. Tr. at 251. Moreover, the intake assessment from the local hospital noted that the individual had a "history of Depression." DOE Ex. 5 at 14. The source of this information is unclear, if it did not come from the individual. The individual also told the DOE psychiatrist that his dosage of Valium was 2.5 milligrams. DOE Ex. 2. He stated during his August 23 PSI that he was taking 5 milligrams, DOE Ex. 4 at 15, and he testified in June that his dosage was either 2.5 or 5 milligrams. Tr. at 180. However, according to the medical records obtained from the local hospital, the individual was on a prescribed dosage of 10 milligrams of Valium.

Furthermore, the record indicates that the individual either omitted significant information, or provided false information to his own evaluating psychiatrist in at least two instances. First, despite being asked about any previous psychiatric problems, as was the case with the DOE psychiatrist, the individual failed to mention his 1991 diagnosis and treatment while he served in the armed forces. In fact, the individual told the evaluating psychiatrist that he was screened regularly by a psychiatrist during his military service because of his work with prisoners of war, and no problems were ever discovered. Ind. Ex 14 at 2.

Second, the individual gave the evaluating psychiatrist an explanation of the event that triggered his August 7th episode that is totally inconsistent with the explanation that he gave to the DOE and to at least one medical professional on the day of the incident in question. During his August 23 PSI, he told the DOE that his breakdown on August 7th was triggered by a string of e-mails from his supervisor that contained "very demeaning" language. DOE Ex. 4 at 7-8. In an e-mail

from one of the physicians at the site medical facility to the individual's supervisor, the physician reported that the individual said "there was a chain of negative e-mails sent by the mgr. today which when he read them, caused the intense nervous and unable to visibly focus (*sic*)." However, the individual did not discuss these e-mails with the evaluating psychiatrist, and instead told her that the events of August 7th were triggered by a telephone conversation during which the individual's supervisor allegedly yelled at him. Ind. Ex. 14 at 2; Tr. 2 at 33-34. The individual testified in August about this alleged telephone conversation. He said that his supervisor called him on August 7th "while she was driving in her car," and "started yelling at [him] about [his] time sheets." Tr. 2 at 89.

The record in this matter clearly indicates that a telephone conversation such as that described by the individual simply did not take place. First, in a signed affidavit dated August 30, 2013, the individual's supervisor stated that she did not receive a telephone call from the individual or place a call to him while driving to work on August 7, 2012, and that she did not, in fact, speak to him at all on that day. DOE Ex. 30 at 1. The supervisor's statements about not speaking to the individual on the telephone on the morning of August 7th are supported by telephone records which show that the supervisor did not make or receive any calls on her government cell phone on that day and that the individual did not make or receive any calls on his office phone that day. *Id.* at attachments 2, 4. The individual's office is in a restricted area where personal telephones are not allowed, and where the arrivals and departures of employees are electronically tracked. The DOE has submitted documentation indicating that the individual entered the restricted area at 6:28 a.m. on the morning of August 7th, and left it shortly after 10 a.m., when he was transported to the site medical facility. *Id.* at attachment 6. Given this history of providing false, incomplete, or misleading information to the DOE and to his evaluating psychiatrist, I find that the individual has not successfully addressed the DOE's security concerns under criterion (l) regarding his honesty and reliability.

V. CONCLUSION

For the reasons set forth above, I find that the individual has adequately addressed the DOE's security concerns regarding criterion (h), but that valid concerns remain regarding his honesty and reliability. He has therefore failed to mitigate the DOE's security concerns under criterion (l). Consequently, he has failed to convince me that restoring his access authorization would not endanger the common defense and would be clearly consistent with the national interest. Accordingly, I find that the DOE should not restore the individual's security clearance at this time. Review of this decision by an Appeal Panel is available under the procedures set forth at 10 C.F.R. § 710.28.

Robert B. Palmer
Hearing Officer
Office of Hearings and Appeals

Date: September 30, 2013