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May 18, 2011

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Hearing Officer's Decision

Name of Case: Personnel Security Hearing

Date of Filing: February 10, 2011

Case Number: TSO-1006

This Decision concerns the eligibility of XXXXXXXXXXXX (the individual) to hold an access authorization (also called a security clearance) 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.²

I. BACKGROUND

The individual works for a Department of Energy (DOE) contractor and holds a DOE access authorization, now in suspension. He provided inconsistent information on four separate occasions to the Local Security Office (LSO) concerning his diagnosis and treatment for mental health issues: in his responses to two Questionnaires for National Security Positions (QNSPs) in 2003 and 2009, during a background investigation interview conducted by the Federal Bureau of Investigation (FBI) in 2006, and during a Personnel Security Interview (PSI) in 2010. The LSO could not resolve these discrepancies to its satisfaction, so it referred the individual to a DOE consultant psychiatrist for an agency-sponsored evaluation. The DOE psychiatrist prepared a written report (Report) setting forth the results of that evaluation and sent it to the LSO. Exhibit 4. Based on this Report and the rest of the individual's personnel security file, the LSO determined that derogatory information existed that cast into doubt the individual's eligibility for access authorization. The LSO informed the individual

¹ Access authorization is defined 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.

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>.

of this determination in a Notification Letter that set forth the DOE's security concerns and the reasons for those concerns. Exhibit 1. 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 OHA, and I was appointed the Hearing Officer. The DOE introduced nine exhibits into the record of this proceeding and presented the testimony of the DOE psychiatrist. The individual introduced four exhibits and presented the testimony of four witnesses in addition to his own testimony.

II. DEROGATORY INFORMATION AND THE ASSOCIATED SECURITY CONCERNS

A. Failure to Provide Accurate Information

The information that the LSO obtained from and about the individual raised two distinct types of security concerns. The first category of concerns relate to the individual's failure to disclose accurate information to the LSO regarding his mental health. In his responses to a QNSP in September 2003, the individual stated that he had not consulted with a health care provider about a mental health condition in the past seven years. Exhibit 7 at Section 21. During an FBI investigation in February 2004, he stated that he had not consulted a mental health professional about a mental health condition in the past five years. Exhibit 6 at 5-6. At an interview with a personnel security specialist on September 14, 2010, however, the individual admitted that he had been seeing a mental health counselor since 2000 or 2001. He further admitted that he did not provide that information because he thought it would affect his security clearance, and that he should have been honest. Exhibit 9 (Transcript of Personnel Security Interview (PSI)) at 158-60.

In December 2009, the individual completed an electronic version of a second QNSP, as part of a routine reinvestigation of his eligibility to continue to hold a security clearance. Exhibit 8. On that form, he indicated that he had, within the past seven years, "consulted with a health care professional regarding an emotional or mental health condition or . . . [been] hospitalized for such a condition." *Id.* at Section 21. Asked on the form to "indicate who conducted the treatment or counseling," the individual provided the required information about his treating psychiatrist. He did not, however, provide information about a mental health counselor he had been seeing for several years or about a 2006 hospitalization. *Id.*³ At his 2010 PSI, he explained that he had been hospitalized for a bad reaction to medications being used to treat his Bipolar Disorder. Exhibit 9 at 38-39, 92. He further admitted that he did not report his hospitalization to the LSO immediately upon returning to work, because he was "probably just ashamed to report it." *Id.* at 189.

The LSO's final concern regarding the individual's failure to provide information involved a February 2010 arrest for Reckless Driving. Although he discussed the matter at his PSI seven months later, he had not reported it in a timely manner to the LSO at the time of the arrest. *Id.* at 183-184.

³ The Notification Letter states that the individual omitted his therapist's name because he thought providing it would affect his security clearance. Exhibit 1 at I.B. That is factually incorrect. I have reviewed the PSI, and the context in which he expressed his concern for his security clearance regarded his withholding of information on his 2003 QNSP, as discussed in the paragraph above.

The individual's failure to provide accurate, timely information regarding personal events that might have a bearing on his access authorization raises national security concerns under paragraphs (f) 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. Criterion F concerns arise when the LSO learns that the individual "[d]eliberately misrepresented, falsified, or omitted significant information from a . . . [QNSP], a personnel security interview, written or oral statements made in response to official inquiry on a matter that is relevant to a determination regarding" access authorization. 10 C.F.R. § 710.8(f). As support for invoking this criterion, the Notification Letter cites the individual's denial of mental health-related treatment or hospitalization on his 2003 QNSP and in his 2004 FBI investigation, and his failure to disclose the name of his treating counselor and the fact of his 2006 hospitalization on his 2009 QNSP. Under Criterion L, concerns arise when derogatory information indicates that the individual 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." 10 C.F.R. § 710.8(l). The Notification Letter cites the individual's failure to report his 2006 hospitalization and his 2010 arrest as derogatory information that supports the invocation of Criterion L.

This derogatory information adequately justifies the DOE's invocation of Criteria F and L, and raises significant security concerns. 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 information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process. *See Revised Adjudicative Guidelines for Determining Eligibility for Access to Classified Information*, The White House (December 19, 2005) (Adjudicative Guidelines), at Guideline E.

B. Bipolar Disorder

The second category of concerns the LSO has raised relate to the individual's diagnosis of Bipolar Disorder. The DOE psychiatrist evaluated the individual on November 23, 2010, and completed his Report on November 28, 2010. In that Report, the DOE psychiatrist diagnosed the individual with Bipolar I Disorder. Exhibit 4 at 12. He described the disorder as being in full remission, because the individual had experienced no significant symptoms of the disease for nearly five years. *Id.* at 13. Nevertheless, because the individual recalled few details of his most severe manic episode, was initially resistant to both the diagnosis and prescribed medication, failed to report the episode, and required a week of hospitalization, the DOE psychiatrist concluded that, as of the date of the evaluation, the individual had an illness or mental condition that may cause a significant defect in judgment or reliability. *Id.*

This diagnosis raises a national security concern under paragraph (h) of the criteria for eligibility for access to classified matter or special nuclear material set forth at 10 C.F.R. § 710. Criterion H concerns arise when an individual has "[a]n illness or mental condition of a nature which, in the opinion of a psychiatrist or licensed clinical psychologist, causes or may cause a significant defect in judgment or reliability." 10 C.F.R. § 710.8(h). The DOE psychiatrist's opinion clearly supports the invocation of Criterion H in this case, and raises significant security concerns. Certain emotional, mental and personality conditions can impair judgment, reliability and trustworthiness. An opinion by a duly qualified mental health professional that an individual has a condition that may impair

judgment clearly raises a security concern in this regard. *See Revised Adjudicative Guidelines for Determining Eligibility for Access to Classified Information*, The White House (December 19, 2005) (Adjudicative Guidelines), at Guideline I.

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 and unfavorable, that has a bearing on the question of whether granting or restoring the individual’s 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 (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

The individual and his wife began seeing the mental health counselor in 2001, to address developmental problems in their oldest child. Tr. at 84 (testimony of mental health counselor). In July 2003, the individual met with the mental health counselor for the first time regarding himself, but the counseling was focused on family matters. *Id.* at 87. Late in 2004, at the counselor’s recommendation, the individual met with a psychiatrist, who diagnosed him with depression. *Id.* Early in 2005, he was re-diagnosed with Bipolar Disorder. *Id.* at 88. Once diagnosed, he continued to see the same mental health counselor for therapy, in conjunction with medication treatment. First treated with anti-depressants, he started taking lithium to treat his Bipolar Disorder in February 2006, with limited benefit. After trying several combinations of medications, by May 2006, he was extremely irritable, sensitive, and withdrawn. *Id.* at 149-50 (testimony of ex-wife). The wife, with the support of the mental health counselor, convinced the individual to enter the hospital. *Id.* at 90. During his five-day hospitalization, the individual was taken off the various medications he had been prescribed, and placed on Depakote to control his Bipolar Disorder. *Id.* at 153-54. Since then, the individual’s medication regimen has been overseen by the same psychiatrist, who states that he has been compliant in taking his medications as prescribed, and that he has been stable and free of symptoms. Exhibit B.

As described in detail at Section II.A. above, the individual provided incomplete and inconsistent information to the LSO regarding the diagnosis and treatment of his Bipolar Disorder on four occasions: in his responses to two Questionnaires for National Security Positions (QNSPs) in 2003 and 2009, during a background investigation interview conducted by the Federal Bureau of Investigation (FBI) in 2006, and during a Personnel Security Interview (PSI) in 2010. In addition, he failed to report his 2006 hospitalization and his 2010 arrest for Reckless Driving to the LSO in a timely manner, as is required of security clearance holders.

A. Criterion F: Deliberate Falsifications, Misrepresentations and Omissions

The evidence presented in this proceeding overwhelmingly convinces me that the individual is an unreliable historian. His ex-wife and his mental health counselor each testified that the individual is forgetful and, according to his ex-wife, had been unable to recall details throughout their marriage. Transcript of Hearing (Tr.) at 76 (testimony of ex-wife), 91-92, 97 (testimony of counselor). His treating psychiatrist wrote that the individual has a “difficult time talking about his emotions, or the correct sequence of events, . . . even during routine visits when he is fairly comfortable.” Exhibit D. In his Report, the DOE psychiatrist stated that the individual’s “self-report regarding his Bipolar Disorder symptoms has been unreliable in the past.” Exhibit 4 at 13. Whether intentional or unintentional, the individual’s faulty reporting of events makes it difficult to discern exactly what transpired. Moreover, his wife testified that the individual attempts to rectify situations in which he gives inaccurate information by inadvertently offering explanations that further confuse the listener. Tr. at 76 (“trying to own up to stuff that maybe he didn’t do”). This was the ex-wife’s explanation for the individual’s admission during the PSI that he had withheld information because he felt it would affect his security clearance. Even if his ex-wife is correct and the individual provided his explanations at the PSI with the best of intentions, I am not convinced that the individual can be relied on to provide accurate information.

The LSO set forth three factual bases in support of its charge that the individual deliberately misrepresented significant information in the security clearance process. The first relates to his statements on his 2003 QNSP and during a February 2004 FBI investigation that he had not, within five or seven years as specified, seen a health care professional about a mental health condition. At his 2010 PSI, however, he provided information inconsistent with those assertions, stating that he had been seeing a mental health counselor since 2000 and that he should have been honest. Because the individual did not see his mental health counselor *about a mental health condition* until late in 2004, I find that he did not misrepresent facts, deliberately or otherwise, in 2003 and 2004. A careful reading of the PSI transcript reveals that the individual explained to the interviewer that he had been seeing the counselor since 2000 or 2001, but had not yet been diagnosed with a mental health condition. Exhibit 9 at 157. Nevertheless, after he admitted that he had seen the same counselor as early as 2001, the interviewer asked why he had responded in the negative rather than the positive to the QNSP question regarding mental health treatment. *Id.* at 158. At that juncture, the individual responded with his incriminating statements, attempting to explain an error that he had not in fact made. *Id.* at 158, 160. I cannot find that the individual’s truthful responses support a factual basis for a concern about his honesty. Nevertheless, his incriminating statements, even if delivered with the best of intentions, underscore the difficulty inherent in relying on information he provides, as the LSO must do in determining his eligibility for security clearance.

With regard to his responses on his 2009 QNSP, the individual failed to list his mental health counselor where the form asked for such information. The individual did not state at his 2010 PSI, as asserted in the Notification Letter, that he omitted that information because he feared it would affect his security clearance. Rather, he made that statement with regard to his responses on the 2003 QNSP, as discussed in the above paragraph. At the hearing, however, he offered an explanation for his omission. He testified that he did not list the counselor's name along with his psychiatrist's name, because he assumed that the LSO would contact the psychiatrist, who he knew had a comprehensive file on him, and the psychiatrist would provide all the relevant information, including his counselor's name. Tr. at 202. Regardless of the individual's intentions, I find that he deliberately omitted significant information from his QNSP.

As for his omission of his 2006 hospitalization from his 2009 QNSP, the individual offered three explanations for this omission at the hearing. He first argued that the language of the relevant question on the QNSP read "indicate *who* conducted the treatment . . .;" because "who" refers to a person and not an institution, he need not list the hospital. Tr. at 209. When the DOE counsel challenged his reasoning, the individual retreated from that position and posited his second rationale: that he was hospitalized for a drug reaction, which he considered a medical issue and not a mental health condition *per se*, and therefore was not obliged to report the hospitalization on the QNSP. *Id.* at 210-12. Finally, when I asked him why he did not list the hospitalization on the day he completed his QNSP, the individual stated that he did not recall the event. *Id.* at 214. Given the length and the very serious nature of the individual's hospitalization, I do not find it credible that he could have forgotten the entire event three years after its occurrence. The individual's attempts at the hearing to explain his omission on the 2009 QNSP, well intentioned though they may have been, mirror his behavior at the PSI. I believe, at both junctures, he was seeking to provide explanations that would resolve any concerns his audience had, whether accurate or not. His behavior demonstrates to me that he is incapable of reliably reconstructing events and their underlying causes. In the end, I find that the individual did not meet his burden of convincing me that he did not deliberately omit information about his 2006 hospitalization.

B. Criterion L: Reliability

The reservations I expressed in the Criterion F section above regarding the individual's unreliability as a source of information apply equally to this discussion of the LSO's concerns under Criterion L. The LSO set forth two factual bases in support of its charge that the individual has been subject to circumstances that tend to show that he is not reliable. The first is that he failed to report his 2006 hospitalization to the LSO. When questioned at his 2009 PSI about this failure, the individual stated that he was "probably just ashamed to report it." Exhibit 9 at 189. At the hearing, the individual testified that he probably was ashamed of being hospitalized, but that he "most likely did not know at the time I was required to report my hospitalization," because he believed he was recovering from a bad reaction to medication. Tr. at 244. Again, the individual is offering a choice of explanations rather than providing a reason for his actions. Although I am convinced that the individual now recognizes his duty to report in this specific circumstance, neither explanation he has offered mitigates the concern this failure to report raises, as neither demonstrates that the individual will not repeat this behavior in analogous situations in the future.

The second factual basis for the LSO's concern about the individual's reliability is his failure to report a February 2010 arrest for Reckless Driving to the LSO in a timely manner. The LSO first

learned about the arrest when he discussed the matter at his PSI seven months later. *Id.* at 183-184. At the hearing, the individual acknowledged that he was aware of the requirement to report this arrest. *Id.* at 249. He testified that both he and his wife reported the arrest to the FBI investigator with whom they met immediately before and after the arrest. *Id.* at 246. He assumed, however, that the FBI would report the arrest to the LSO. *Id.* Though his assumption may logically explain his actions, I cannot find that it mitigates a concern about his reliability, in this instance, to comply with reporting requirements of which he was aware.

C. Criterion H: Illness or Mental Disorder

As stated above, the DOE psychiatrist diagnosed the individual with Bipolar I Disorder. Exhibit 4 at 12. His mental health counselor testified at the hearing that she believed the individual suffered from a less severe form of Bipolar Disorder, Type II. *Id.* at 98. The individual's treating psychiatrist, who did not testify at the hearing, provided the individual with a letter that referred to his "Bipolar disorder" without more detail. Exhibit B. After the hearing, the treating psychiatrist provided a more detailed letter concerning his treatment under her care, in which she identified his mental condition as "Bipolar Affective Disorder Type I." Exhibit D. Because both psychiatrists who have evaluated the individual concur on the diagnosis, I find that he suffers from Bipolar I Disorder.

Despite the many medication adjustments in the early treatment of his disease, the individual has been symptom-free for nearly five years at the time of the hearing, and by all accounts complies with a medication regimen that has varied little during that period. *Id.* Although he was reluctant at first to accept the fact that he suffers from this disease, he accepted and embraced the diagnosis once he began to feel the relief the Depakote provided. Tr. at 75 (testimony of ex-wife). His counselor reports that he is grateful for the relief that Depakote provides and is willing to tolerate its side effects, which include slowed cognition and blurred memory. *Id.* at 104, 119; *id.* at 156 (testimony of individual). Consequently, she predicts that he will likely continue to take his medication as prescribed and continue to employ good judgment. *Id.* at 103-04. His mental health counselor and his treating psychiatrist form his support network. *Id.* at 237-38.

After hearing the testimony of all the other witnesses at the hearing, the DOE psychiatrist testified regarding his opinion of the individual's mental status in light of what he had heard and observed. He stated that the diagnosis he presented in his Report is still correct. He then pointed out testimony he had heard that indicated the individual's Bipolar Disorder was under control. He had observed no signs of stress or abnormality in the individual during the hearing, and believed that the individual is compliant with his prescribed medications. *Id.* at 261, 267. On the other hand, he expressed his opinion that Bipolar Disorder is a difficult disease; outbreaks tend to recur, and manic episodes lead to impulsive and talkative behavior, which may cause significant defects in judgment and reliability. *Id.* at 262. Moreover, the disease recurs with or without medication. *Id.* He stated that the general prognosis for the disease is a fair to good chance of relapse, and he predicts that the individual stands a fair to poor chance of handling a relapse well: he likely would not report it, based on his history and his observed reluctance to express himself freely to his treatment providers. *Id.* at 263, 278-79. The DOE psychiatrist also expressed concern that there is no way to determine whether the Depakote is working to prevent relapse or whether his five years of freedom from symptoms is because he is not yet due for an episode. *Id.* at 259, 264, 285.

I have concluded from the evidence in the record that the individual has accepted the diagnosis of Bipolar Disorder, and I am convinced that he prefers his life under medication to that without medication. Nevertheless, I must give substantial weight to the DOE psychiatrist's current opinion, based on all the information presented before and at the hearing. Although in some circumstances mental health professionals determine that Bipolar Disorder is so well controlled in an individual that it does not cause a significant defect in judgment or reliability, the DOE psychiatrist continues to believe that it does so in this case. I concur in his assessment. The individual's inability to report events reliably effectively hampers his own treatment by increasing the risk that his support network will not respond appropriately should a relapse occur. Having considered all the evidence in this proceeding, I conclude that the LSO's concerns about the individual's mental illness remain unresolved.

Because the individual has not successfully addressed the concerns that the LSO has raised with regard to his diagnosis, the compelling testimony of the DOE psychiatrist and my common sense judgment convince me that the individual's Bipolar I Disorder causes or may cause a significant defect in judgment or reliability at this time and that he has not sufficiently mitigated the security concerns associated with the issues before me.

V. CONCLUSION

For the reasons set forth above, I conclude that the individual has not sufficiently resolved the DOE's security concerns under Criteria F, H, and L, and therefore has not demonstrated 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 individual's security clearance should not be restored. The individual may seek review of this Decision by an Appeal Panel under the procedures set forth at 10 C.F.R. § 710.28.

William M. Schwartz
Hearing Officer
Office of Hearings and Appeals

Date: **May 18, 2011**