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December 8, 2009

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Hearing Officer's Decision

Name of Case: Personnel Security Hearing

Date of Filing: July 2, 2009

Case Number: TSO-0781

This Decision concerns the eligibility of XXXXXXXXXXXXX (hereinafter referred to as "the individual") to hold an access authorization 1/ under the Department of Energy's (DOE) regulations set forth at 10 C.F.R. Part 710, Subpart A, entitled, "General Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material." As discussed below, after carefully considering the record before me in light of the relevant regulations, I have determined that the individual's access authorization should be granted.

I. Background

The individual is an applicant for a DOE access authorization. In November 2007, as part of a background investigation, the Local Security Office (LSO) conducted a Personnel Security Interview (PSI) of the individual to address mental health issues, alcohol use and the illegal use of prescription drugs. In addition to the PSI, the LSO requested the individual's medical records and recommended a psychiatric evaluation of the individual in October 2008 by a DOE consultant psychiatrist (DOE psychiatrist). The DOE psychiatrist reported that the individual has been diagnosed with Bipolar Disorder and presents a clear history of opiate abuse and alcohol abuse. The DOE psychiatrist added that the individual's mental illness causes or may cause a significant defect in his judgment and reliability and that the individual has not yet demonstrated adequate evidence of rehabilitation or reformation.

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(a).

In June 2009, the LSO sent a letter (Notification Letter) advising the individual that it possessed reliable information that created a substantial doubt regarding his eligibility to hold an access authorization. In an attachment to the Notification Letter, the LSO explained that the derogatory information fell within the purview of four potentially disqualifying criteria set forth in the security regulations at 10 C.F.R. § 710.8, subsections (h) (j) (k) and (l) (hereinafter referred to as Criteria H, J, K and L respectively). 2/

Upon receipt of the Notification Letter, the individual filed a request for a hearing. The LSO transmitted the individual's hearing request to the Office of Hearings and Appeals (OHA), and the OHA Director appointed me as the Hearing Officer in this case. At the hearing that I convened, the DOE Counsel called one witness, the DOE psychiatrist. The individual presented the testimony of four witnesses - his supervisor, two co-workers and his sister. He also testified on his own behalf. The DOE and the individual submitted a number of written exhibits prior to and during the hearing.

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 denial"); *Dorfmont v. Brown*, 913 F.2d 1399, 1403 (9th Cir. 1990), *cert. denied,* 499 U.S. 905 (1991) (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 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 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

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2/ Criterion H relates to information that a person 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). Criterion J relates to information that a person has "[b]een, or is, a user of alcohol habitually to excess, or has been diagnosed by a psychiatrist or a licensed clinical psychologist as alcohol dependent or as suffering from alcohol abuse." 10 C.F.R. § 710.8(j). 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, amphetamines, barbiturates, narcotics, ets.) except as prescribed or administered by a physician licensed to dispense drugs in the practice of medicine, or as otherwise authorized by Federal law." 10 C.F.R. § 710.8(k). Finally, Criterion L relates in relevant part to information that a person has "[e]ngaged in 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).

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.

B. Basis for the Hearing Officer's Decision

In personnel security cases arising under Part 710, it is my role as the Hearing Officer 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 in favor of the national security. *Id.*

III. The Notification Letter and the Security Concerns at Issue

As stated above, the LSO cites four criteria as bases for denying the individual's security clearance, Criteria H, J, K and L. To support Criterion H, the LSO relies on the DOE psychiatrist's report that the individual has been diagnosed with Bipolar Disorder and presents a clear history of opiate abuse and alcohol abuse. In addition, the DOE psychiatrist indicated that with respect to the individual's Bipolar Disorder, he has been inconsistent with both treatment and maintenance of his medical regimen. *See* Statement of Charges at 2. To support Criterion J in this case, the LSO relies on the following information: (1) during a November 2007 PSI, the individual admitted to substance and alcohol abuse treatment in 2001 and 2002, and stated that he continued to consume alcohol after treatment; (2) the individual was diagnosed with a history of alcohol abuse, which remains the basis for poor judgment and lack of reliability, and further the DOE psychiatrist opined that, at present, without a history of complete abstinence from alcohol, the individual is likely to relapse; (3) the individual admitted to periods in his life in which he participated in binge drinking and experienced concurrent blackouts. The LSO's Criterion K concerns are predicated on the individual's abuse of Hydrocodone, a prescription drug. The LSO further alleges that the individual has a lengthy history of prescription Hydrocodone use for migraines and states that there are records of two suicide attempts which possibly were related to an overdose of Hydrocodone. Finally, to support its reliance on Criterion L in this case, the LSO alleges that the individual admitted to the illegal use of a prescription drug (Hydrocodone) while at work, as recently as 2006.

I find that the information set forth above constitutes derogatory information that raises questions about the individual's mental health under Criterion H and his alcohol use under Criterion J. The security concerns associated with Criteria H and J are as follows. First, a mental condition such as Alcohol Abuse can impair a person's judgment, reliability and trustworthiness. *See* Guideline I 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. Second, the excessive consumption of alcohol itself is a security concern because that behavior can lead to the exercise of questionable judgment and the failure to control impulses, which in turn can raise questions about a person's reliability and trustworthiness. *See id.* at Guideline G.

The derogatory information presented in this case also raises national security concerns under Criterion K. There are significant security concerns associated with past or current illegal drug usage. First, engaging in criminal conduct can raise questions about a person's ability or willingness to comply with laws, rules and regulations. *See id.* at Guideline H. Second, illegal drugs can impair a person's judgment which, in turn, can raise questions about the person's reliability and trustworthiness. *Id.* In addition, the information set forth above also raises questions about the individual's judgment and reliability under Criterion L.

IV. Findings of Fact

The relevant facts in this case are uncontested. The individual is an applicant for a DOE access authorization. As stated above, in November 2007, as part of a background investigation, the LSO conducted a PSI of the individual to address mental health issues, alcohol use and opiate abuse. During this interview, the individual admitted that he had undergone substance abuse and alcohol abuse treatment in 2001 and 2002. DOE Exh. 6 at 24-25. He also admitted that he continued to consume alcohol after his treatment. The individual admitted, during his PSI, that he had a past history of abusing a prescription drug, specifically Hydrocodone. He further admitted that he was taking Hydrocodone to treat migraine headaches. During the course of the interview, the individual admitted to using Hydrocodone illegally as recently as July 2006, within 12 months of signing his Questionnaire for National Security Positions. *Id.* at 29-30. Finally, the individual admitted to taking Hydrocodone while at work in 2006. *Id.* at 34-35.

When the 2007 PSI did not resolve the individual's mental health, alcohol and opiate abuse issues, the LSO referred the individual to a DOE psychiatrist in October 2008 for a forensic evaluation. After examining the individual, the DOE psychiatrist concluded that the individual has been diagnosed with Bipolar Disorder, and further that the individual presents a clear history of opiate abuse and alcohol abuse. In his report, the DOE psychiatrist stated that the individual's history "is to become externally focused, and without some level of scrutiny and accountability stop taking his medication, make poor relational choices and become problematic in his personal life." DOE Exhibit 7 at 5. He stated that in order for the individual to be considered reliable, he would need to demonstrate compliance with his psychiatric treatment and would need to be abstinent from non-prescription drugs and alcohol. The DOE psychiatrist further opined that it is unlikely, even with compliance with regular psychiatric care, that the individual could safely and reliably drink alcohol in any context. *Id.* He concluded that at the present time, without a history of active compliance with treatment of the individual's Bipolar Disorder, he is likely to return to a "chaotic lifestyle and become vulnerable to poor judgment and reliability." *Id.*

V. Analysis

I have thoroughly considered the record in 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). 3/ After due deliberation, I have determined that the individual's access authorization should be granted. I find that granting 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. The Diagnosis of Bipolar Disorder and History of Opiate Abuse and Alcohol Abuse-Criteria H, J, and K

1. The Individual's Testimony

The individual did not dispute that he suffers from Bipolar Disorder under the criteria set forth in the Diagnostic and Statistical Manual of Mental Disorders, 4th edition, Text Revised (DSM-IV-TR) or that he has a history of Opiate Abuse and Alcohol Abuse. At the hearing, the individual described his past drinking pattern as frequently drinking with friends followed by intoxication. Transcript of Hearing (Tr.) at 54. He testified that he drank in response to various stressors in his life including the terminal illnesses of his parents, divorce, a break-up with a fiancee, and other problematic relationships. *Id.* at 55. The individual stated he has been working on "turning his life around" since 2006 and that he stopped drinking alcohol in February 2007. *Id.* at 56-57. He further testified that he has not abused Hydrocodone since 2001, after undergoing substance abuse and alcohol abuse treatment. *Id.* According to the individual, his lifestyle change was due to a "spiritual rebirth" that did not occur overnight, but rather over a period of time. *Id.* at 58. He testified that he does not struggle with abstinence from alcohol and has no need, desire or craving to drink. *Id.* at 60. The individual admitted to abusing alcohol in the past, but testified that he never felt he was addicted to alcohol. *Id.* at 63. The individual described himself as happy and content now, and states that he is no longer co-dependent on others. *Id.* at 61. He reiterated that the past stressors of the death of his parents and problematic relationships no longer exist and that he is feeling emotionally stable now. *Id.* at 62. The individual stated that he has several support mechanisms, including his family and doctors, to remove or reduce stress in his life. *Id.* at 63. He is also living alone now and no longer associates with old friends who drink. *Id.* at 62. With respect to his past opiate abuse, the individual testified that he recently requested that his doctors no longer prescribe narcotics for his migraine pain or for any other use. *Id.* at 65. He testified that he has undergone three significant surgeries since 2004, has been prescribed pain medication and has not abused it. *Id.* The individual further testified that the last time he used prescribed Hydrocodone was in January or February of this year for the treatment of migraines and stated that he never uses narcotics more than prescribed. *Id.* at 81. However, the individual stated that in the future he intends to use Tylenol and non-pain medications, such as vascular constrictors, to manage his migraines. *Id.* at 82.

3/ 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.

The individual further testified about his Bipolar Disorder, stating that he has not suffered a bipolar episode since 2001, when he was hospitalized and treated. *Id.* at 73. He testified that he meets with his physician every three months and has been compliant with taking his medication. *Id.* at 70. The individual explained that he was inconsistent in the past with taking his medication because the medication was often debilitating. *Id.* at 69.

During the hearing, the individual also offered the testimony of four witnesses-his supervisor, two co-workers/friends and his sister. All of these witnesses testified that the individual is an honest, reliable and responsible person. *Id.* at 14, 18, 19, 24. The individual's supervisor testified that he has never observed the individual in an impaired condition and described the individual as a conscientious, good employee. *Id.* at 12-13. Both co-workers, one of when is the individual's landlord, testified that they have never observed the individual consuming alcohol or noted any problems with the individual's behavior or lifestyle. *Id.* at 19, 26. The individual's sister corroborated the individual's testimony that he had a strained family life with significant stressors including the passing of their parents and the individual's divorce in 2002. *Id.* at 36. She testified that since the individual's divorce, a significant amount of stress has been removed and the individual's mood is better. *Id.* at 37. The sister further testified that the individual has become more attentive to family and has undergone a "spiritual growth" since 2006. *Id.* Although she did not have much knowledge of the individual's substance and alcohol abuse prior to 2006, the sister testified that the individual now appears to be very stable, noting that his emotional state is much better. *Id.* at 39. She testified that the family serves as a good support system for the individual. *Id.* at 41.

2. The DOE Psychiatrist's Testimony and Report

The DOE psychiatrist stated in his Psychiatric Report that the individual has been diagnosed with Bipolar Disorder and presents a clear history of opiate abuse and alcohol abuse. He further opined that without a history of active compliance in treatment of the individual's Bipolar Disorder, he is likely to return to a chaotic lifestyle and become vulnerable to poor judgment and reliability. After listening to the testimony of all the witnesses in the case, the DOE psychiatrist testified that the individual has addressed his concerns and he no longer possesses the risk factors that he exhibited in October 2008 during the psychiatric evaluation Specifically, the DOE psychiatrist testified that in 2008, he believed the individual needed to change his lifestyle and patterns and seek medical support. *Id.* at 85. He explained that the individual's prescription drug, alcohol abuse and past problematic relational choices are directly related to the individual's neglect of his Bipolar Disorder. *Id.* He further explained that with respect to the individual's prescription drug abuse, he did not have the same level of concern as with someone who had a primary narcotics dependence that was unrelated to another diagnosis. *Id.* at 86. He reiterated that the individual's past alcohol abuse and substance abuse are not primary. According to the DOE psychiatrist, the individual is now taking the need to care for himself seriously and is doing what is appropriate with his doctors. *Id.* at 86. Specifically, he testified that the individual's behavior is quite different from the past three years in that the individual is now consistent in complying with his treatment for Bipolar Disorder. *Id.* at 89.

The DOE psychiatrist testified that he is no longer concerned about issues of credibility or trustworthiness and added that the individual now has a sense of accountability. *Id.* at 87. He further testified that the individual's diagnosis of Bipolar Disorder is lifelong and without mood stabilizers the individual is vulnerable. *Id.* at 91. However, he opined that the individual is receiving sufficient and appropriate treatment, and therefore there are currently no risk factors for the individual. *Id.* He reiterated that the individual's primary issue is his compliance with his Bipolar Disorder medication. The DOE psychiatrist also stated that the individual has given him no reason to doubt his sincerity in maintaining his compliance with his medication. Finally, the DOE psychiatrist concluded that there is sufficient evidence of rehabilitation from alcohol abuse and that the individual has a good prognosis for the future. *Id.* at 102,103.

3. Hearing Officer's Evaluation of the Evidence

In the administrative process, Hearing Officers accord deference to the expert opinions of psychiatrists and other mental health professionals regarding rehabilitation and reformation. *See Personnel Security Hearing*, Case No. TSO-0728 (2009). In this case, I accorded substantial weight to the opinion of the DOE psychiatrist who testified at the hearing that the individual is complying with the treatment of his primary diagnosis of Bipolar Disorder and that he is rehabilitated from both alcohol and substance abuse. Moreover, from a common-sense perspective, the following factors weigh in the individual's favor. First, the individual convincingly testified that his drinking was in response to various past stressors in his life. Likewise, the individual convincingly testified that he last used Hydrocodone in January 2009 to treat his migraines and that he uses narcotics only as prescribed. I am persuaded by the individual's testimony that in the future he will use Tylenol and non-pain medications to manage his migraines. Second, I am convinced that the individual's current support network will help him cope with any stressors that might otherwise serve as triggers to alcohol or substance abuse. Moreover, I am persuaded by the individual's testimony that he has changed his lifestyle, is more stable now and is no longer co-dependent on others. Third, I am persuaded by the individual's testimony, and that of his witnesses, that the individual exercises good judgment and reliability and will remain compliant with his medication for Bipolar Disorder. In sum, I find that the individual has provided adequate evidence to mitigate the Criteria H, J and K concerns at issue.

With respect to the Criterion L security concerns which relate to the individual's admission during his PSI that he took Hydrocodone at work, I believe these concerns are inextricably intertwined with the judgment and reliability concerns found in Criteria H, J and K. After considering the "whole person," I am convinced that the DOE can rely on the individual's ability to make sound judgment calls regarding the safeguarding of classified information. *See* Adjudicative Guidelines at (2)a. I therefore find that the individual has sufficiently mitigated the LSO's concerns under 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 Criteria H, J, K and 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 find that the individual has brought forth convincing evidence to mitigate the security concerns associated with Criteria H, J, K and L. I therefore find that granting the individual's access authorization would not endanger the common defense and security and would be consistent with the national interest. Accordingly, I find that the individual's access authorization should be granted. The parties may seek review of this Decision by an Appeal Panel under the regulations set forth at 10 C.F.R. § 710.28.

Kimberly Jenkins-Chapman
Hearing Officer
Office of Hearings and Appeals

Date: December 8, 2009