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**United States Department of Energy
Office of Hearings and Appeals**

In the Matter of: Personnel Security Hearing)
Filing Date: April 13, 2016)
Case No.: PSH-16-0026)

Issued : July 13, 2016

Administrative Judge Decision

Wade M. Boswell, Administrative Judge:

This Decision concerns the eligibility of XXXXXXXXXXXX (hereinafter referred to as “the individual”) to hold an access authorization¹ 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 fully discussed below, after carefully considering the record before me in light of the relevant regulations and Adjudicative Guidelines, I have determined that the individual should not be granted access authorization.

I. Background

The individual is an applicant for DOE access authorization in conjunction with his employment by a DOE contractor. As part of his application process, the individual completed a Questionnaire for National Security Positions (QNSP) in January 2015 and his application was forwarded to the U.S. Office of Personnel Management (OPM) for a security investigation. The OPM investigation revealed matters which the individual had not disclosed on his QNSP, notwithstanding the requirement to do so. *See* Exhibit 12. These matters included numerous criminal citations, charges or arrests, some of which involved alcohol or controlled substances and some were felonies. Following receipt of this information, the Local Security Office (LSO) conducted a personnel security interview (PSI) with the individual in October 2015. *See*

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). Such authorization will be referred to variously in this Decision as access authorization or security clearance.

Exhibit 11. Since the PSI did not resolve concerns which arose during the security investigation with respect to the individual's use of alcohol, the individual was referred to a DOE consulting psychologist (the DOE psychologist) who conducted an evaluation of the individual in January 2016. *See* Exhibit 6. Although the DOE psychologist did not note any current alcohol concerns for the individual, he concluded that the individual suffers from an Antisocial Personality Disorder "that would affect his judgment and reliability." *Id.* at 18-20.

Since neither the PSI nor the DOE psychologist's evaluation resolved the security concerns, the LSO advised the individual in a letter (Notification Letter) dated March 14, 2016, that it possessed reliable information that created substantial doubt regarding his 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 (h) and (l) (hereinafter referred to as Criterion H and Criterion L, respectively).² *See* Exhibit 1.

Upon his receipt of the Notification Letter, the individual exercised his right under the Part 710 regulations by requesting an administrative review hearing. *See* Exhibit 2. The Director of the Office of Hearings and Appeals (OHA) appointed me the Administrative Judge in the case and, subsequently, I conducted an administrative hearing in the matter. At the hearing, the LSO introduced 12 numbered exhibits into the record and presented the testimony of one witness, the DOE psychologist. The individual introduced six lettered exhibits (Exhibits A – F) into the record and presented the testimony of eight witnesses, including that of himself. The exhibits will be cited in this Decision as "Ex." followed by the appropriate numeric or alphabetic designation. The hearing transcript in the case will be cited as "Tr." followed by the relevant page number.³

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 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991) (strong presumption against the issuance of a security clearance).

² See Section III below.

³ OHA decisions are available on the OHA website at www.energy.gov/oha/office-hearings-and-appeals. A decision may be accessed by entering the case number in the search engine at www.energy.gov/oha/security-cases.

An individual must come forward with evidence to convince the DOE that granting or restoring his or her 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.

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 cited two criteria as the bases for suspending the individual’s security clearance, Criterion H and Criterion L. Criterion H concerns information that a person has “an 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). It is well established that “certain emotional, mental, and personality conditions can impair judgment, reliability, or 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 (Adjudicative Guidelines). Conduct influenced by such psychological conditions can raise questions about an individual’s ability to protect classified information. With respect to Criterion H, the LSO relied on the January 2016 report of the DOE psychologist in which he opined that the individual met the criteria set forth in the *Diagnostic Statistical Manual of the American Psychiatric Association, 5th Edition (DSM-5)*, for Antisocial Personality Disorder. Additionally, the DOE psychologist concluded that the individual’s Antisocial Personality Disorder is an illness which causes, or may cause, a significant defect in the individual’s judgment or reliability. Ex. 1 at 1; Ex. 6 at 18-20.

Criterion L concerns information that an individual has engaged in conduct “which tends to show that the individual is not honest, reliable, or trustworthy....” 10 C.F.R. § 710.8(l). Conduct reflecting questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations raises questions about an “individual’s reliability, trustworthiness and ability to protect classified information.” Adjudicative Guidelines at Guidelines E and F. With respect to Criterion L, the LSO alleges, *inter alia*, that the individual: (1) omitted from his QNSP required information in 13 instances; (2) reported different levels

of marijuana use during 1978-1982 in his PSI than he reported in the psychological evaluation; and (3) engaged in a pattern of criminal conduct, comprised of 18 arrests, citations or charges between 1979 and 2013. Ex. 1 at 1-3.

In light of the information available to the LSO, the LSO properly invoked Criterion H and Criterion L.

IV. Findings of Fact and 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)⁴ and the Adjudicative Guidelines. After due deliberation, I have determined that the individual should not be granted access authorization. I cannot find that granting the individual a 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.

As a preliminary matter, I note that the individual testified at the hearing that the facts cited by the LSO in the Notification Letter and by the DOE psychologist in his written evaluation were accurate. Tr. at 141-142, 206.

A. Administrative Judge Evaluation of the Evidence and Findings of Fact: Criterion H Security Concerns

Following the PSI, the individual was referred to a DOE psychologist for a psychological evaluation due to concerns with respect to his alcohol use, including concerns arising from the individual's arrest for driving under the influence of alcohol (DUI) in 2013. The DOE psychologist's evaluation of the individual in January 2015 consisted of reviewing the individual's personnel security file, conducting a clinical interview, and administering a series of psychological tests. Ex. 6 at 2; Tr. at 215-217. Based upon the evaluation, the DOE psychologist concluded that the individual had abused alcohol in the past (citing the individual's DUIs), but had evidenced adequate rehabilitation or reformation of his alcohol abuse. Ex. 6 at 18-19. Although the DOE psychologist found no evidence of a current alcohol disorder which caused, or could cause, a significant defect in the individual's judgment or reliability, the DOE psychologist opined that the individual met the *DSM-5* criteria for Antisocial Personality Disorder and that that was an illness or mental condition which causes, or may cause, a significant defect in the individual's judgment or reliability. *Id.* at 15-20. The

⁴ 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.

DOE psychologist prepared a written report following his evaluation of the individual and this written report forms the basis for the Criterion H security concerns set forth in the Notification Letter. Ex. 1 at 1. *See* Ex. 6.

As a result of my review of the DOE psychologist's written report, I had significant concerns about the evaluation and I communicated those concerns prior to the hearing. At the hearing, both DOE counsel and I examined the DOE psychologist on those concerns; however, his testimony did not alleviate my concerns. Tr. 220-235.

As an initial matter, the *DSM-5* states that "the essential feature of antisocial personality disorder is a pervasive pattern of disregard for, and violation of, the rights of others that begins in childhood or early adolescence and continues into adulthood." *DSM-5* at 659. Consistent with this defining characteristic, the diagnostic criteria for Antisocial Personality Disorder set forth in the *DSM-5* require that "[t]here is evidence of conduct disorder with onset *before age 15 years*." *Id.* at 659 (emphasis added). However, the DOE psychiatrist's written analysis in support of his diagnosis (labelled "Evidence that supports an illness or condition that may cause a defect in reliability or judgment" under the "Discussion" heading of his written report) cites no behavior of the individual that occurred prior to the individual turning 15 years old. The earliest "criminal" or "antisocial" conduct noted in either the Notification Letter or the written psychological evaluation occurred when the individual was cited for racing his vehicle and "peeling out" at a stoplight when he was approximately 19 years old. Ex. 6 at 15-17. At the hearing, the DOE psychologist testified that during the clinical interview he focused on the individual's adult history and that "[p]robably because the interview went on so long talking about all these other things that I might have overlooked [the criteria with respect to onset prior to age 15.]" Tr. at 224, 230.

Although my major concern with the DOE psychologist's evaluation is the lack of psychological data from the individual's early life, I was additionally confused by the "Conclusion" in his written report, which references various *DSM-5* criteria which the psychologist opined the individual met. *See* Ex. 6 at 18-19. The references in the written report do not appear to correspond with the diagnostic criteria as set forth in the *DSM-5*.⁵ When I

⁵ The *DSM-5* sets forth the diagnostic criteria for Antisocial Personality Disorder as follows:

- A. A pervasive pattern of disregard for and violation of the rights of others, occurring since the age 15 years, as indicated by three (or more) of the following:
 1. Failure to conform to social norms with respect to lawful behaviors, as indicated by repeatedly performing acts that are grounds for arrest.
 2. Deceitfulness, as indicated by repeated lying, use of aliases, or conning others for personal profit or pleasure.
 3. Impulsivity or failure to plan ahead.
 4. Irritability and aggressiveness, as indicated by repeated physical fights or assaults.
 5. Reckless disregard for safety of self or others.
 6. Consistent irresponsibility, as indicated by repeated failure to sustain consistent work behavior or honor financial obligations.
 7. Lack of remorse, as indicated by being indifferent to or rationalizing having hurt, mistreated, or stolen from another.
- B. The individual is at least age 18 years.
- C. There is evidence of conduct disorder with onset before age 15 years.

questioned the DOE psychologist at the hearing about these inconsistencies between the *DSM-5* references in his written report and the text of the *DSM-5*, he acknowledged that there were discrepancies between what he wrote in his written evaluation and the *DSM-5* diagnostic criteria for Antisocial Personality Disorder, but that he did not have an answer for the discrepancies.⁶ Tr. at 234.

Even if I were to agree that the individual committed all of the antisocial acts noted in the Notification Letter which the DOE psychologist accepted as evidencing criminal behavior,⁷ I cannot align the DOE psychologist's analysis with the diagnostic criteria for Antisocial Personality Disorder set forth in the *DSM-5*. While Administrative Judges customarily accord deference to mental health professionals with respect to security concerns under Criterion H, the Part 710 regulations require that my decision reflect my comprehensive, common-sense judgment after consideration of all factors. *See* 10 C.F.R. § 710.7(a). This regulatory guideline requires that I not ignore the apparent discrepancies between the *DSM-5*, on the one hand, and the DOE psychologist's written report and testimony, on the other. *Cf. Personnel Security Hearing*, Case No. PSH-13-0101 (2014). Based on the foregoing, I cannot find that the psychological evaluation as set forth in the DOE psychologist's written report and as presented at the hearing supports a Criterion H security concern with respect to Antisocial Personality Disorder. *See* Adjudicative Guidelines at Guideline I, ¶29(e).

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- D. The occurrence of antisocial behavior is not exclusively during the course of schizophrenia or bipolar disorder.

DSM-5 at 659.

For example, the DOE psychologist's written report states "[The individual] denied substance abuse is a problem, so his history of antisocial behavior cannot be blamed solely on substance abuse, which would negative [*sic*] an antisocial personality disorder (criteria E met)." Ex. 6 at 18. However, the *DSM-5* diagnostic criteria for Antisocial Personality Disorder, as set forth above, stops at Criterion D and does not discuss the absence of substance abuse as a criterion. (However, the *DSM-5* criteria for General Personalities Disorder has a comparable criteria as its Criterion F: that the pattern of behavior at issue cannot be "attributable to the physiological efforts of a substance (e.g., a drug abuse, a medication) or a medical condition." *DSM-5* at 647.)

Another example is that the DOE psychologist's written report states: "[The individual's] antisocial behavior cannot be justified on the basis of social/cultural factors. In other words, he was not raised in an environment or culture that supports domestic violence, driving while intoxicated, etc. Therefore criteria D is met." Ex. 6 at 18. However, Criterion D for the diagnosis of Antisocial Personality Disorder in the *DSM-5*, as set forth above, states that the behavior at issue "is not exclusively during the course of schizophrenia or bipolar disorder" and no other criterion in the *DSM-5* for Antisocial Personality Disorder specifically references social/cultural factors.

⁶ The discrepancies noted cannot be explained by referenced to the *DSM-IV-TR*, which was superseded by the *DSM-5*, as both versions contain almost identical descriptions of the diagnostic criteria for Antisocial Personality Disorder. *See DSM-IV-TR* at 701-706 and *DSM-5* at 659-663. The *DSM-5* contains a section entitled, "Alternative *DSM-5* Model for Personality Disorders," which contains an alternative diagnostic paradigm and proposed diagnostic criteria for various personality disorders, including Antisocial Personality Disorder. *See DSM-5* at 761-781. While the analysis of the DOE psychologist incorporates certain of the language and analysis from the discussion set forth in the alternative diagnoses section, the DOE psychologist makes no reference to the alternative diagnoses model in his written report nor did he refer to it during his testimony at the hearing. I cannot assume a basis for a psychological diagnosis which the DOE psychologist did not articulate.

⁷ See discussion under the heading, *Pattern of Criminal Conduct*, *infra*.

**B. Administrative Judge Evaluation of Evidence and Findings of Fact:
Criterion L Security Concerns**

With respect to Criterion L, the LSO alleges that the individual inaccurately reported information during the access authorization application process and that the individual has engaged in a pattern of criminal activity. *See Ex. 1.*

Inaccurately Reporting. The individual does not dispute that he omitted required information from his QNSP. In mitigation of these omissions, the individual testified that he completed his QNSP on his manager's computer with the assistance of his manager. Tr. at 187, 191-192. Many of the omissions relate to information which is required to be reported on the QNSP without regard to when it occurred and the individual testified that he had been told by his manager that the questionnaire only required the reporting of information if it occurred within the last seven years; the manager's testimony at the hearing corroborated the individual's account. Ex. B; Tr. at 77-81, 199-202. The individual also testified that he was confused by certain questions which required reporting of criminal citations or charges even where those matters were subsequently dismissed or where there was no conviction. *Id.* at 194. However, the individual was not able to explain his failure to report certain required information which occurred within the seven years prior to his certification of his QNSP (e.g., a DUI charge in 2013 and a domestic battery charge in 2009). In response to several of these omissions, the individual simply testified that he did not know why he did not list them. *Id.* at 193-197, 203. The individual's manager apparently "clicked" several of the answers on the QNSP (as opposed to the individual) and the individual testified that he did not recall answering certain questions in the manner in which they were answered on the QNSP or even seeing certain of the questions prior to the LSO raising concerns about his QNSP. *Id.* at 188, 198, 204. While acknowledging that he had done "a very poor job" in completing the QNSP, he testified that he was ashamed and disappointed in himself. *Id.* at 207. He testified that through the administrative review process he had learned the importance of paying attention, reading slowly and doing everything himself, but that nothing on his QNSP was intended as dishonest. *Id.* at 205, 207.

While I found aspects of the individual's testimony credible (and, as noted above, portions of the individual's testimony were credibly corroborated by his manager), the individual's testimony shifted during the hearing with respect to his manager's participation in answering questions on the individual's QNSP. Specifically, the individual initially testified that he had "clicked" on all of the responses in his QNSP himself, but subsequently testified that both he and his manager had "clicked" on the responses and that he had initially lied in his testimony because he did not want to get his manager in trouble for having tried to help him.⁸ *Id.* at 189-

⁸ During the hearing, the following exchanged occurred between DOE Counsel and the individual:

Question: You clicked on every single one of these [answers on the QNSP]?
Answer: I did.
Question: And you're not – you're not lying under oath as this point in time?
Answer: No. No, sir.
Question: Okay. Have you told the Judge, Mr. Boswell, or myself [DOE Counsel] previously that somebody else clicked on the answers for these for you?

192, 212-213. This testimony, independent of all of the bases cited by LSO in the Notification Letter, is disqualifying under Criterion L. In matters of national security, it is imperative that one be honest in all interactions with the DOE, even when the truth may not be convenient to oneself or someone else. Regardless of the individual's motivation, his testimony in a DOE administrative review hearing knowingly included false information and, therefore, demonstrated a lack of honesty, trustworthiness and reliability. In light of the foregoing, I find that the individual has failed to resolve the security concerns arising under Criterion L from the omission of information during his access authorization application process.

Pattern of Criminal Conduct. The LSO alleged 18 instances in which the individual had been cited, charged or arrested for criminal conduct. Ex. 1 at 1-3. While the individual did not agree that he had engaged in criminal conduct in each of these instances, he did not dispute that he had interaction with law enforcement authorities with respect to each of these matters. Tr. at 141-142. The cited criminal conduct ranges from 1979 (traffic violation for "peeling out") to 2013 (DUI); they include three alcohol or substance related incidents, six domestic violence matters, two additional physical altercations, one petty larceny citation, and six traffic related matters. Ex. 1 at 1-3.

Individually, some of these matters could be mitigated through the individual having evidenced adequate rehabilitation or reformation of his alcohol abuse in the opinion of the DOE psychologist; others could be individually mitigated due to their remoteness in time making their recurrence unlikely. Additionally, the individual also offered very strong support for many of the domestic violence issues having not occurred. Tr. at 30- 40, 124-127, 154-169. However, most of the evidence offered by the individual was his own testimony and, while I was generally sympathetic to his presentation, I cannot ignore the lack of reliability of his

Answer: That was before I thought somebody was going to be in trouble. I'm not going to put somebody else in any trouble for helping me do something that we both overlooked or didn't answer properly.... It wasn't to mislead anybody or be dishonest or – it was a mistake....

Question: ...[W]hat I'm asking him is has he stated to me or [to the Administrative Judge] in the past, in preparation for this hearing, that somebody else actually clicked on the answers for – on this form.

Answer: [My manager] and I both did it.

Question: Okay. And so some of them, he clicked on the answers, some of them you did, is that what you're testifying today?

Answer: Yes, sir.

Question: Okay. And is that a truthful statement?

Answer: Yes, sir.

Question: Okay. And when I asked you that just a couple minutes ago, you said you filled it all out. Was that truthful?

Answer: No, sir.

Question: Okay. Any why were you not being truthful?

Answer: Because I don't want to get [my manager] in trouble for anything that he's just trying to help me do.

Question: Okay. So you were lying under oath in order to protect [your manager], is that accurate?

Answer: ... Yes.

Tr. at 190-192.

testimony which was discussed above. *See Id.* at 189-192, 212-213. Additionally, some of his corroborating witnesses (his mother, an aunt, and his third wife) seemed confused about events or lacked recollection of certain important facts, most likely a result of the remoteness in time of many of the matters being discussed. For these reasons, I find that the testimony presented is insufficient to remove the doubt created by the alleged criminal conduct with respect to the individual's honesty, trustworthiness and reliability.

Even though individual allegations of criminal conduct may be subject to mitigation as noted above, there remains a history of the individual ignoring legal norms for a period of nearly 35 years, beginning in 1979 and continuing until 2013. The length of the individual's involvement with law enforcement clearly supports the concern that he has an established pattern of criminal conduct and I cannot find that compliance with criminal laws for since 2013, a mere three years, is sufficient to evidence reformation of that pattern.

Based on the foregoing, I find that the individual has not sufficiently resolved the security concerns arising under Criterion L with respect to his pattern of criminal conduct.

V. Conclusion

In the above analysis, I have found the security concerns associated with Criterion H resolved. Notwithstanding the foregoing, other derogatory information in the possession of the DOE raises additional serious security concerns under Criterion L. Accordingly, 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 resolve the Criterion L security concerns. Accordingly, I have determined that the individual should not be granted access authorization. The parties may seek review of this Decision by an Appeal Panel under the regulations set forth at 10 C.F.R. § 710.28.

Wade M. Boswell
Administrative Judge
Office of Hearings and Appeals

Date: July 13, 2016