* 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	)	
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Filing Date: June 27, 2012	)	Case No.: PSH-12-0079
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Issued: October 12, 2012

Hearing Officer Decision

Steven J. Goering, Hearing Officer:

This Decision concerns the eligibility of XXXXXXXX (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 DOE should grant the individual access authorization.[2]

I. BACKGROUND

The individual is an employee of a DOE contractor and is an applicant for an access authorization. After a background investigation conducted by the Office of Personnel Management (OPM) revealed information of concern to the DOE, a Local Security Office (LSO) summoned the individual for an interview (PSI) with a personnel security specialist on August 31, 2011. Exhibit 3 (DOE Case Evaluation); Exhibit 5 (PSI Transcript). After the PSI, the LSO referred the individual to a local psychiatrist (hereinafter referred to as "the DOE psychiatrist") for an agency-sponsored evaluation. The DOE psychiatrist prepared a written report, setting forth the results of that evaluation, and sent it to the LSO. Exhibit 4 (Report of Psychiatric Examination). 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. Exhibit 3 (DOE Case Evaluation). The LSO informed the individual of this determination in a letter that set forth the DOE's security concerns and the reasons

[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 be referred to in this Decision as access authorization or 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.

for those concerns. Letter from LSO to Individual (June 6, 2012) (Notification Letter); Exhibit 1 (Summary of Security Concerns). 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 an access authorization.

The individual requested a hearing in this matter. The LSO forwarded this request to OHA, and I was appointed the Hearing Officer. The DOE introduced six exhibits into the record of this proceeding. The individual introduced twelve exhibits, and presented the testimony of seven witnesses, in addition to his own testimony.

II. DEROGATORY INFORMATION AND THE ASSOCIATED SECURITY CONCERNS

The Notification Letter cited derogatory information within the purview of two potentially disqualifying criteria set forth in the security regulations at 10 C.F.R. § 710.8, subsections (h) and (k) (hereinafter referred to as Criteria H and K, respectively). Exhibit 1 at 2-4.[3] The Notification Letter also cited Section 1072 of the National Defense Authorization Act for Fiscal Year 2008, otherwise known as the Bond Amendment. *Id.* at 2.

To support Criterion H, the LSO cited the report of the DOE psychiatrist, in which he concluded that the individual met criteria found in the Diagnostic and Statistical Manual of Mental Disorders IV-TR (DSM-IV-TR) for Opiate Dependence and Learning Disorder Not Otherwise Specified, and that both of these conditions cause, or may cause, a significant defect in judgment and reliability. *Id.* at 2-4 (citing Exhibit 4 at 7-10). Under Criterion K, the LSO cited admissions by the individual that he used heroin from 1996 to 1998, when he entered a methadone program, from which he subsequently relapsed three times, the last relapse occurring in 2004. *Id.* at 3 (citing Exhibit 4 at 1-8; Exhibit 5 at 12-18, 27-28, 44-48). The LSO further alleged, under Criterion K, that the individual admitted that he entered an additional treatment program and was diagnosed with Opioid Dependence in May 2010. *Id.* (citing Exhibit 4 at 4; Exhibit 5 at 34, 35).

Under the Bond Amendment, the LSO cited the report of the DOE psychiatrist, specifically his conclusion that the individual met that DSM-IV-TR criteria for Opiate Dependence. *Id.* at 2 (citing Exhibit 4 at 1, 7-10). The Bond Amendment provides that "the head of a Federal agency may not grant or renew a security clearance for a covered person who is an unlawful user of a controlled substance or an addict (as defined in section 802(1) of title 21)." 50 U.S.C. § 435c(b) (2009). Section 802(1) of title 21 defines "addict" as "any individual who habitually uses any narcotic drug so as to endanger the public morals, health, safety, or welfare, or who is so far addicted to the use of narcotic drugs as to have lost the power of self-control with reference to his addiction." 21 U.S.C. § 802 (2010).

Although the individual responded to the Notification Letter with a "general denial" of the allegations set forth therein, Exhibit 2, I find that, with two exceptions,[4] each of these allegations is valid and well

[3] Criterion H defines as derogatory information indicating that an individual has an "illness or mental condition of a nature which, in the opinion of a psychiatrist or licensed clinical psychiatrist, causes or may cause, a significant defect in judgment or reliability." 10 C.F.R. § 710.8(h). Under Criterion K, information is derogatory if it indicates that an individual 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, etc.) 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).

[4] First, as noted above, the Notification Letter alleges that the individual admitted in his PSI that he was

supported by the record in this case. 10 C.F.R. § 710.27(c) (requiring Hearing Officer to "make specific findings based upon the record as to the validity of each of the allegations contained in the notification letter").

I further find that the valid allegations in the Notification Letter adequately justify the DOE's invocation of the Bond Amendment and Criteria H and K, and raise significant security concerns. First, regarding the Bond Amendment, I note that, aside from diagnosing the individual as Opiate Dependent, the DOE psychiatrist opined in his report that the treatment the individual had received to that point was only "minimally effective," and therefore recommended more intensive treatment. Exhibit 4 at 10. Based on this opinion, it is reasonable to conclude that, at the time of the psychiatrist's report, the individual was an "addict" under the definition referenced in the Bond Amendment, in that he had not yet regained the "power of self-control with reference to his addiction."

Addiction to a narcotic drug, of concern under the Bond Amendment, and any use of illegal drugs such as heroin, at issue here under Criterion K, can raise questions about an individual's reliability and trustworthiness, both because drugs can impair judgment and because their use raises questions about a person's ability or willingness to comply with laws, rules, and regulations. *See Revised Adjudicative Guidelines for Determining Eligibility for Access to Classified Information* (*Adjudicative Guidelines*), The White House (December 19, 2005) at Guideline H. Further, certain emotional, mental, and personality conditions can impair judgment, reliability, or trustworthiness, in this case both Opiate Dependence and Learning Disorder Not Otherwise Specified being of concern under Criterion H. *Id.* 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 the individual 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

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diagnosed with Opioid Dependence by a treatment facility in May 2010. Exhibit 1 at 3 (citing Exhibit 5 at 34, 35). However, I find no such admission in the PSI.

Second, under Criterion H, the Notification Letter references the diagnosis of Learning Disability Not Otherwise Specified reached by the DOE Psychiatrist, and then states that the individual "admitted he cannot be financially responsible because of his limitations associated with reading and writing impairments and admits it is unreasonable for him to resolve his debt on his own." Exhibit 1 at 4. The Notification Letter cited a portion of the PSI transcript containing a statement by the individual that he does not know how to "spell" or "write stuff down" in response to a question as to why he had not contacted a bankruptcy attorney or a consumer credit counseling service. Exhibit 5 at 83. In a response to question later in the interview, not in the context of a discussion of his reading and writing difficulties, the individual answered "No" when asked whether he thought it was reasonable for him to pay off his debts on his own. *Id.* at 84. Because of the tenuous connection between these two statements in the PSI transcript, I find that the Notification Letter, at best, mischaracterizes the relationship between the individual's learning disability and his ability to pay off his debts. Aside from the accuracy of the allegation, its inclusion in the Notification Letter, particularly under Criterion H, is puzzling. First, I note that the LSO found, *after the PSI*, that any concerns related to the individual's finances had been mitigated. Exhibit 3 at 2. Further, these statements by the individual in the PSI were not cited in the report of the DOE psychiatrist, whose diagnosis formed the basis of the concern cited under Criterion H.

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). 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. ANALYSIS

A. The Concerns Stemming from the Individual's Use of Illegal Drugs Have Been Resolved

Prior to the hearing in this matter, the individual submitted two letters from the clinic from which he has received treatment since May 2010. In one letter, a medical doctor at the clinic states that, since beginning treatment, the individual has been "followed with a medical provider at least once a month. He is also followed by a counselor." Exhibit A. The doctor states that "he has had urine drug screens every 2-3 months" and "not once tested positive for illicit drugs." *Id.* The doctor concludes that she considers the individual's opiate dependence to be "well-controlled." The second letter, from the counselor at the clinic, states that the individual has been "successful in compliance with the Suboxone Program and has not experienced any ill side effects." Exhibit B.[5]

The counselor, a licensed clinical social worker and behavioral health therapist, testified at the hearing by telephone. Hearing Transcript (Tr.) at 87-97. She described the individual's participation in the clinic's program as "excellent." *Id.* at 87, 88. Regarding counseling, she testified that she and the doctor decide what treatment is appropriate. *Id.* at 89. She stated that "there are some people who we insist on coming much more frequently for counseling because of their risk. If the risk is very low, then, of course, the physician is monitoring and it would be once a month." *Id.* at 90. She opined that the risk of the individual relapsing into the use of heroin, is "very low" and that his prognosis is "excellent, ..." *Id.* at 91, 93.

Having heard the testimony of the clinic's counselor, the DOE psychiatrist stated that he was impressed by her testimony and by the quality of the clinic's program. *Id.* at 118, 119. He noted that, when he wrote his report, he was unimpressed with a "once-a-month treatment program, that it didn't seem intensive enough to give him the skills he needed and the training he needed to give him a better prognosis." *Id.* After hearing the counselor's testimony, the DOE psychiatrist testified that

> [I]t seems that it isn't the case that it was a barebones, publicly funded treatment program that only allowed one a month, but it turns out that much more intensive treatment programs are given by her if they feel that it is needed.
>
> So he was evaluated by competent people and had the one-a-month program because that is what his well-trained counselors felt was appropriate.

[5] In his report, the DOE psychiatrist explained that Suboxone is a combination of buprenorphine, a long-lasting synthetic opiate, and naloxone, an opiate antagonist, and is commonly given in 30-day prescriptions that an addict can take as "one gelatin square sublingually each morning." Exhibit 4 at 3-4.

I would be comfortable with that now, knowing that he was evaluated.

Tr. at 119. Finally, the DOE psychiatrist testified that, "as of today, [the individual's] risk of relapse into illegal drug use is low." *Id.* at 126.

Considering the hearing testimony of both the counselor and the DOE psychiatrist, along with all other evidence in the record, I conclude that the risk that the individual will use illegal drugs in the future to be sufficiently low that the concerns raised related to the individual's use of illegal drugs, under both Criteria H and K, have been resolved.6

Further, I find that the individual is no longer an "addict" under the definition referenced in the Bond Amendment, *i.e.*, that he is not an " individual who habitually uses any narcotic drug so as to endanger the public morals, health, safety, or welfare, or who is so far addicted to the use of narcotic drugs as to have lost the power of self-control with reference to his addiction." 21 U.S.C. § 802 (2010).

In this regard, I note the DOE psychiatrist's testimony that the individual was, at the time of the hearing, habitually using a narcotic drug, Suboxone. Tr. at 121, 130. The DOE psychiatrist also expressed concerns about the individual "as far as his public health risk, in that he picked up the Hepatitis C virus when he was sharing needles, probably back in his heroin days," although the psychiatrist pointed out that this disease is not easily communicable. *Id.* at 121. Regardless of the seriousness of this risk, however, it seems clear that the risk does not stem from the narcotic drug that he is currently using, Suboxone. As such, I find that, while the individual does currently habitually use a narcotic drug, there is no evidence that he habitually uses this drug in a way that endangers the public moral, health, safety, or welfare.

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[6] In a recent case before this office, an OHA Hearing Officer addressed the risk of relapse of an individual who, at the time of the hearing, was receiving Suboxone therapy for treatment of an addiction to a prescription opiate, OxyContin. *Personnel Security Hearing*, Case No. PSH-11-0030 (2012). The psychiatrist who testified for the DOE in that case opined that, unless the individual could avoid relapse into OxyContin abuse for one year *after* he had completed his Suboxone therapy, she could not consider the individual's risk of relapse into the abuse of OxyContin to be low. *Id.* at 9. The psychiatrist cited studies showing that "Suboxone works well for prescription opiate users," but that "discontinuation of Suboxone use causes relapse rates to skyrocket. . . . ." *Id. at 8.* Considering this testimony, the Hearing Officer concluded that "it would appear that, from the point of view of the national security, the risk of relapse in this case will continue to be too high until the individual has successfully completed his Suboxone treatment and avoided the significant risk of relapse thereafter." *Id. at 9.*

The present case is distinguishable in at least two respects. First, in this case, both the DOE psychiatrist and the clinic's counselor agreed that the risk of relapse once Suboxone is discontinued is dependent on the length of time an individual has been on Suboxone, *i.e.*, the longer one is kept on Suboxone therapy, the lower the risk of relapse once the therapy is discontinued. Tr. at 95. Significantly, this time-dependent factor was *not* addressed by the DOE psychiatrist's testimony in the prior case. Moreover, unlike in the prior case, I have the benefit of the testimony of the individual's counselor that the individual should remain on Suboxone until the counselor, the medical doctor at the clinic, and the individual believe he is ready "to move off of it, and sometimes that happens in two years, sometimes three, sometimes longer. It depends." Tr. at 92; *id.* at 97 (testimony of counselor that she would "certainly" not recommend discontinuing Suboxone treatment unless she believed the risk of relapse was low). By contrast, in the prior case, the treatment provider did not testify, and so could provide no similar assurance that the individual in that case would remain on Suboxone therapy until it was appropriate to discontinue it.

In short, the evidence presented in the prior case was simply not sufficient to assure the Hearing Officer that the risk of relapse in that case was low enough to resolve the relevant concern. Here, the much different testimony before me, along with the credible testimony of the individual that he would not discontinue taking Suboxone against the advice of his doctor and counselor, *id.* at 110, convince me that this individual is at a low risk of relapse into use of illegal drugs.

As for the second part of the definition, the DOE psychiatrist testified that "the fact that [the individual] is in a Suboxone program shows that he has obtained more self-control of his addiction rather than given up self-control." *Id.* at 122. I agree, and find that the individual is not so far addicted to the use of Suboxone as to have lost the power of self-control with reference to his addiction. As such, I find resolved any concern raised as to whether the individual is an addict under the definition reference in the Bond Amendment.

B. The Concerns Stemming from the Individual's Learning Disability Have Been Resolved

In his report, the DOE psychiatrist noted that the individual acknowledged being functionally illiterate and, after administering screening tests for reading and arithmetic, the psychiatrist rendered a diagnosis of Learning Disorder Not Otherwise Specified. Exhibit 4 at 1, 6, 7. In his hearing testimony, the DOE psychiatrist explained his report's conclusion that the individual's functional illiteracy "may cause a significant defect in judgment or reliability." *Id.* at 10. The DOE psychiatrist stated that he was concerned that the individual's "inability to read could be a problem in situations such as being able to understand security regulations and by benefitting from training and learning about security policies, ..." Tr. at 114-15.

However, the DOE psychiatrist listed a number of factors that now mitigate that concern. He noted that

> In my one-hour interview with him, I did not do formal testing, as I mentioned, intelligence testing, reading testing, other such formal testing.
>
> Subsequently, formal testing was done, and it did show that he does have a dyslexic disorder, but it showed a number of things that I thought were important.
>
> First of all, his intelligence turned out to be above average, which was something I was concerned about when I met with him, because his inability to read could be from dyslexia, but it could be from just a generalized poor intelligence, but subsequent testing showed that his intelligence, as I mentioned, is above average. His IQ is greater than 100. So that is a good sign as far as his ability to function in the workplace, to deal with whatever information he needs to get regarding security measures and how to understand them and how to get the information if he needs to get it.

Id. at 115.

The DOE psychiatrist also referenced prior hearing testimony, *id.* at 74, that all new employees at the DOE facility where the individual works receive a two-day training followed by a 50-question test, which the individual passed. *Id.* at 117. He stated that he had not been aware of this training and test, and that it represented "another screening that he has passed and again goes to the argument that his poor performance with me was partly because I stressed him out by doing these questions in the context of a stressful psychiatric evaluation." *Id.* The DOE psychiatrist testified that what he heard at the hearing "made me change my opinion that his ability to read would be at such a low level that it would affect his reliability; particularly his reliability with respect to being able to learn about and follow security regulations." *Id.* at 116.

There was also hearing testimony describing tutoring that the individual had received since May 2012. His tutor testified at the hearing, stating that the individual had done "[r]eally well," and that what impresses her most "is he is working two jobs, then he comes and sees us two and three times a week."

Id. at 58. She stated that, since beginning tutoring, the individual has significantly increased both his reading speed and vocabulary. *Id.* She described the individual as very conscientious about building security in the locations where she tutors him, including at the DOE facility where he works. *Id.* at 62, 65-66. The tutor testified that, if the individual came across a document that was labeled "Classified," he would be able to recognize that, and that, "if it doesn't say 'Classified' and it is not properly labeled, I think he, knowing him and seeing him at work, would err on the side of caution," and make sure it was handled properly. *Id.* at 63.

In general, I was very impressed that the individual reached out for assistance in coping with his learning disability and, more importantly, that he has faithfully stayed with that program, meeting two to three times a week, despite holding down two jobs. The individual testified, credibly in my opinion, that he is "going to still stick with the reading no matter what happens here. I am still going to do it." *Id.* at 113.

Even to the extent that the individual may in the future not comprehend certain written materials related to security requirements, I am convinced, based on his testimony and that of his supervisor, that he would ask for help to make sure he understands any relevant material he is given to read. *Id.* at 77, 113. In sum, given all the evidence in the record, including the revised opinion of the DOE psychiatrist based upon the testimony presented at the hearing, I find that any security concern raised by the individual's learning disability has been resolved.

V. CONCLUSION

For the reasons set forth above, I conclude that the individual has resolved the DOE's security concerns under the Bond Amendment and Criteria H and K. Therefore, the individual has demonstrated that granting him access authorization would not endanger the common defense and would be clearly consistent with the national interest. Accordingly, I find that the DOE should grant the individual a security clearance. Review of this decision by an Appeal Panel is available under the procedures set forth at 10 C.F.R. § 710.28.

Steven J. Goering
Hearing Officer
Office of Hearings and Appeals

Date: October 12, 2012