* 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.

July 12, 2005

DECISION AND ORDER
OFFICE OF HEARINGS AND APPEALS

Hearing Officer Decision

Name of Case: Personnel Security Hearing

Date of Filing: October 28, 2004

Case Number: TSO-0156

This Decision concerns the eligibility of XXXXXXXXXXXXXX (hereinafter referred to as "the individual") to hold an access authorization 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." [1] A local DOE Security Office (LSO) suspended the individual's access authorization pursuant to the provisions of Part 710. In this Decision I will consider whether, on the basis of the testimony and other evidence in the record of this proceeding, the individual's access authorization should be restored. 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 not be restored.

I. Background

On August 7, 2002, the police arrested the individual while he was out of town on official business and charged him with false imprisonment in connection with an incident involving a woman that occurred on the same day. At the time of the individual's arrest, there was an outstanding arrest warrant for the individual in another state, a fact that led the police to hold the individual in jail for one week.

After the LSO learned of the August 2002 arrest, it conducted a Personnel Security Interview (PSI) with the individual to examine the circumstances surrounding the false imprisonment arrest and to learn the underlying bases for the outstanding arrest warrant for the individual. The LSO learned during the PSI that the outstanding arrest warrant in question related to an August 2001 charge for burglary, robbery and trespass. In addition to the individual's 2001 and 2002 involvement with the criminal justice system, the individual had two other arrests, one in 1994 for domestic violence and one in 1989 for menacing with a deadly weapon. After the PSI, the LSO referred the individual to a board-certified psychiatrist (DOE consultant-psychiatrist) for a forensic psychiatric evaluation. The DOE consultant-psychiatrist examined the individual in February 2003, and memorialized his findings in a report (Psychiatric Report or Exhibit 3). In the

[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.

Psychiatric Report, the DOE consultant-psychiatrist opined that the individual suffers from an illness or mental condition, *i.e.*, Impulse Control Disorder Not Otherwise Specified, of a nature which causes or may cause a significant defect in his judgment and reliability. The DOE consultant-psychiatrist also found that the individual does not present evidence of adequate rehabilitation or reformation from his Impulse Control Disorder.

In June 2004, the LSO initiated formal administrative review proceedings. The LSO first informed the individual that his access authorization had been suspended pending the resolution of certain derogatory information that created substantial doubt regarding his continued eligibility to hold a security clearance. In a Notification Letter that it sent to the individual, the LSO described this derogatory information and explained how that information fell within the purview of two potentially disqualifying criteria. The relevant criteria are set forth in the security regulations at 10 C.F.R. § 710.8, subsections (h) and (l) (Criteria H and L respectively).[2]

Upon his receipt of the Notification Letter, the individual filed a lengthy response to the allegations contained in the Notification Letter and exercised his right under the Part 710 regulations by requesting an administrative review hearing. The LSO forwarded the individual's hearing request to the Director of the Office of Hearings and Appeals (OHA) and the OHA Director appointed me the Hearing Officer for this matter on November 2, 2004. Subsequently, I convened a hearing within the regulatory time frame specified by the Part 710 regulations.

At the hearing, six witnesses testified. The LSO called two witnesses and the individual presented his own testimony and that of three witnesses. In addition to the testimonial evidence, the LSO submitted 17 exhibits [3] into the record; the individual tendered 20 exhibits, including two audiocassette tapes. I permitted the individual to file his closing statement in writing after 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

[2] Criterion H relates to 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 and reliability." 10 C.F.R. § 710.8(h). Criterion L relates to information that a person has "engaged in any unusual conduct or is subject to any circumstances which tend to show that the individual is not honest, reliable, or trustworthy; or which furnishes reason to believe that the individual may be subject to pressure, coercion, exploitation, or duress which may cause the individual to act contrary to the best interests of national security. Such conduct or circumstances include, but are not limited to, criminal behavior, a pattern of financial irresponsibility, conflicting allegiances, or violation of any commitment or promise upon which DOE previously relied to favorably resolve an issue of access authorization eligibility." 10 C.F.R. § 710.8 (l).

[3] Exhibit 17 is a transcript of the two audiocassette tapes (labeled as Exhibits T-1 and T-2) that the individual submitted into the record.

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).

The individual must come forward at the hearing with evidence to convince the DOE that restoring 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 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 eligibility in favor of the national security. *Id.*

III. The Notification Letter and the Security Concerns at Issue

As previously noted, the LSO cites two potentially disqualifying criteria as bases for suspending the individual's security clearance, *i.e.*, Criteria H and L. The security concerns associated with these two criteria are explained in the Adjudicative Guidelines for Determining Eligibility for Access to Classified Matter and can be found in Appendix B to Subpart A of 10 C.F.R. Part 710. In brief, mental illnesses such as the one at issue here are security concerns because they may indicate a defect in judgment, reliability, or stability. *See* 10 C.F.R. Part 710, Appendix B to Subpart A, Guideline I. In addition, a history or pattern of criminal activity like that at issue here may create a doubt from a security standpoint about a person's judgment, reliability and trustworthiness. *Id.*, Guideline J.

With regard to Criterion H, the charge contained in the Notification Letter is based on the findings contained in the Psychiatric Report. As for Criterion L, the DOE relies on the individual's four arrests. Those arrests include the following: an arrest in 2002 for false imprisonment and outstanding arrest warrants; an arrest for an incident that occurred in 2001 stemming from charges of burglary, robbery and trespass; an arrest in 1994 for domestic violence and assault, and an arrest in 1989 for assault and menacing with a deadly weapon.

IV. Findings of Fact and Analysis

The individual contests almost all the facts relating to the four arrests at issue and disagrees with the DOE consultant-psychiatrist's diagnosis that he suffers from Impulse Control Disorder Not Otherwise Specified. I will first address the charges under Criterion L as they are relevant to my subsequent examination of security concerns associated with Criterion H.

A. Criterion L

1. 2002 Arrest

The police responded to a call on August 7, 2002 for "criminal sexual penetration." Ex. 13. The alleged victim told police that the individual "had approached her, grabbed her, slammed her up against a wall, grabbed her breasts and groped her vagina." *Id.* According to the police report, the individual ran when the victim screamed. *Id.* Almost immediately, the individual was apprehended by security guards in the area who held him until the police arrived on the scene. *Id.*

The individual's version[4] of events is as follows. Around 10:00 p.m. or 11:00 p.m. on the night in question, the individual had just left a strip club (Transcript of Hearing (Tr.) at 66) when he observed a man and woman arguing on the other side of the street. Ex. 6 at 10, Ex. 13. According to the individual, the man walked away from the woman and the woman started crying. Response to Notification Letter at 2. The individual claims that he approached the woman to warn her about the danger of walking in the area by herself. Ex. 6 at 11-12, Response to Notification Letter at 2. The individual contends that as he approached the woman, he tripped and inadvertently grabbed the woman's chest. Exs. 12, 13; Response to Notification Letter at 2, Ex. 6 at 12. The individual denies pushing the woman against the wall or groping her vagina. Ex. 6 at 26. He explained that he was shocked when the woman screamed so he ran away. *Id.* at 29-31. He acknowledges being apprehended by security guards who held him until the police arrived. The individual contends that the woman made her story "juicy" to gain the sympathy and attention of the man who had left her. *Id.* at 23, 28. The individual maintains that he is a law abiding citizen who happened to be in the wrong place at the wrong time. *Id.* at 14, 36. He believes that he was "overcharged" by police in connection with the incident because the "police are a little overbearing in the way they prosecute things." *Id.* at 36-37.

After carefully reviewing the documentary evidence relating to the 2002 arrest and reflecting upon the individual's testimony and demeanor at the hearing, I determined that the individual's version of events is not credible. In reaching this conclusion, I considered that during the PSI the individual could not explain what caused him to allegedly "trip" into the woman in question. I also considered that the individual's responses to the Personnel Security Specialist's questions about the incident were evasive. At the hearing,

[4] The individual's version of events is gleaned from the following sources: his statements to police, his statements to the Personnel Security Specialist during the 2002 PSI, his interview with the DOE consultant-psychiatrist in 2003, his written response to the Notification Letter, and his hearing testimony.

the individual dismissed the import of the Personnel Security Specialist's questioning during the 2002 PSI by stating that she was "intentionally trying to be stubborn and not listen to the things" that he was trying to say. From my reading of the transcript, however, the Personnel Security Specialist did listen to the individual's version of what happened but pressed him on details that seemed incredulous. I also found it unbelievable that the woman would scream after being groped by a stranger only to "suit her own purposes" as the individual contends. It is similarly unbelievable that the individual ran away because he was "shocked" by the woman's screaming. A more logical inference is that the individual was trying to flee from the scene. In addition, none of the individual's arguments convince me that I should not rely on the police records in the record which were contemporaneously produced in the ordinary course of police business.

Mitigation Arguments relating to the 2002 Arrest

The Personnel Security Specialist testified at the hearing that she examined multiple court records to ascertain the status of the charge connected to the August 7, 2002 arrest. Tr. at 20. Unable to glean information from the court records, the Personnel Security Specialist next contacted the local District Attorney (D.A.). *Id.* at 22. The D.A. advised the Personnel Security Specialist that he had dropped the false imprisonment charge against the individual because he did not extradite the individual in a timely manner to face the charges associated with the outstanding warrant. *Id.*

The issue before me is whether the D.A.'s failure to prosecute the individual for the August 2002 incident negates the security concerns associated with that incident. I find that it does not. Even though there was no adjudication on the false imprisonment charge, the circumstances surrounding the incident are most unusual. The individual's inappropriate touching of a stranger on a street and his attempt to flee the scene of the incident are matters that, in my opinion, raise questions about the individual's judgment and reliability that remain unresolved. Accordingly, I find that the D.A.'s decision not to prosecute the case does not mitigate the underlying concerns associated with the individual's behavior.

2. 2001 Arrest Warrant

On August 29, 2001, the individual decided to visit his fiancée at her out-of-state residence. Response to Notification Letter at 3. Upon his arrival, the individual knocked at the door. Ex. A at 7. When the fiancée opened the door, she asked the individual to stay outside where she would talk to him. *Id.* at 14. Instead, the individual shoved the door in toward his fiancée and pushed her backwards. [5] *Id.* at 8. The fiancée repeatedly asked the individual to leave but he refused. *Id.* When the individual encountered another male guest upstairs in his fiancee's dwelling, he called his fiancée "a bunch of names"

[5] In his response to the Notification Letter, the individual claims that he used the key to his fiancee's home to let himself into the dwelling. Response to Notification Letter at 3. In her sworn testimony at a preliminary hearing in January 2003, however, the fiancée testified that the individual did not use his key but rather forced his way into the dwelling. Ex. A at 13. Since the judge in the case found probable cause to bind the individual over based on, among other things, the fact that the individual shoved the door in towards the fiancée and pushed her out of the way to enter the dwelling, I do not believe the individual's unsworn statement that he used a key on the night in question to enter the subject dwelling.

and disclosed some personal information about her. *Id.* The individual located the engagement ring that he had given the fiancée and took it without her permission [6] along with a ceramic jewelry box. *Id.* at 9. The individual threw the ceramic box against the tile floor causing the box to break. *Id.* at 10. The fiancée called the police and the individual fled. *Id.* at 19. According to the fiancée, that same night the individual called her on her cell phone and left threatening messages. *Id.* The police charged the individual with Second Degree Burglary, Robbery and Trespass to a Dwelling. Ex. 10. Some time later, harassment and domestic violence charges were added to the complaint. At a preliminary hearing in January 2003, a judge found probable cause existed to bind the individual over for the crimes of second-degree burglary, harassment, and robbery. Ex. A. In May 2003, the individual pled guilty to harassment, criminal mischief and domestic violence. Ex. 11, Ex. F. In exchange of the guilty plea, the charges of second-degree burglary, robbery and criminal trespass were dismissed. *Id.* The individual was ordered to pay restitution to his fiancée, serve one year probation, and attend domestic violence therapy. Ex. F. The individual complied with all terms of his sentence. Exs. F and G.

Mitigation Arguments relating to the 2001 Arrest

The individual maintains that he was innocent of the charges connected with the 2001 Arrest Warrant even though he accepted the plea agreement. Response to Notification Letter at 4. He claims that his first counsel in the case was incompetent and his second counsel was rude and disinterested in the case. *Id.* at 3. He also maintains that the D.A. "piled on charges to prevent the defense from pleading too low." *Id.* at 2. In addition, he claims that the "cops threw in the domestic violence charge because the parties are associated." *Id.* Moreover, the individual attributes some of the problems on the evening in question to his fiancée, a woman whom he maintains suffers from Multiple Personality Disorder. *Id.* at 3. He claims that he gave the engagement ring to Personality "A," one of the personalities allegedly residing in his fiancée. *Id.* According to the individual, it was Personality "J," the hostile, wild, sexually irresponsible personality allegedly residing in his fiancée that emerged on the evening of August 2001. *Id.* The individual submitted audiocassette tapes of conversations between his fiancée and him in an attempt to show that it was his fiancée, not he, who was prone to outbursts. He described his fiancée as a "vindictive, crazy ex-girlfriend." Ex. 6 at 66. In addition, the individual requests that I disregard the incident because his fiancee lied to police and the judge in connection with this incident. [7] Finally, the individual questions the domestic violence charge since he maintains that after the incident in question he and his fiancée were intimate on at least one occasion.

The individual has not convinced me that there was no merit to the charges associated with the 2001 Arrest Warrant. The judge in the criminal case found probable cause to

[6] The individual claims that the charges of burglary, robbery and trespass were dismissed because the fiancée admitted, among other things, at the preliminary hearing that she had voluntarily given the engagement ring back to the individual. Response to Notification Letter at 2. The transcript of the preliminary hearing in question contradicts the individual's statements in this regard. When asked at the preliminary hearing whether the individual took the ring without the fiancee's consent, the fiancee responded affirmatively. Ex. A at 9.

[7] The individual states that "he feels sorry for this unfortunate and tragic individual even after her false charges and bearing false witness against me in a court of law. . . ." *Id.* at 4.

bind the individual over on the charges at issue. The individual was free to reject the plea agreement but chose not to do so. With regard to the individual's arguments regarding ineffective assistance of counsel, I find that there is no evidence in the record to support this argument. Regarding the individual's contention that his fiancée suffers from a Multiple Personality Disorder, I find that such a fact, even if true, does not excuse the individual's behavior on the night in question. Furthermore, the individual did not convince me that his fiancée lied about the events that occurred in August 2001. In fact, the individual placed his own credibility in issue when he erroneously stated that his fiancée had testified at the preliminary hearing that she had voluntarily given the engagement ring back to him. The documentary evidence in this case undermines the individual's contention in this regard. In the end, I find that the individual has not mitigated the import of the criminal charges associated with the August 2001 incident.

3. 1994 Domestic Violence Arrest

According to court records, the individual was charged on December 9, 1994 with unlawfully entering and remaining in his fiancee's dwelling, causing her bodily harm by choking her, and assaulting her by pulling her hair, banging her head on the interior of his truck and putting his elbow in her eye. Ex. 16 at 34. The court record reflects that the individual entered a guilty plea to assault in February 1995 and received a deferred sentence of one year. *Id.* at 35. He was also ordered to serve 100 hours of community service, complete domestic violence classes, and pay court costs. *Id.*

Mitigation Arguments relating to the 1994 Arrest

The individual contends that his ex-fiancée hit and kicked him first during the incident in question. Ex. 6 at 59. According to the individual, his fiancee slapped him in his face, hit and kicked the windshield, windows and console of his vehicle. Respond to Notification Letter at 7. The individual contends that in response to his fiancee's actions, he "merely, yet with determination, held her down against the vehicle seat with [his] hands on her shoulders." *Id.* The individual contends that during an earlier background investigation of him, his fiancée admitted that she was at fault with regard to the 1994 domestic violence matter and that the individual was merely trying to protect himself. *Id.* During the 2002 PSI, the individual claims that he only pled guilty to the charge to save his fiancée the embarrassment of his bringing up her Multiple Personality Disorder. Ex. 6 at 60. At the hearing, the individual claimed that his fiancée had relatives who were members of the police department so they gave her special treatment when she claimed that she was assaulted. Tr. at 81. He emphasized that it was his fiancée, not him, who was the violent one in the relationship. *Id.* at 82.

I am not convinced by the individual's testimony or the documentary evidence in the record that the individual is blameless with regard to the 1994 Domestic Violence arrest. As an initial matter, the individual pled guilty to the charge of domestic violence. His explanation that he only did so to shield his fiancée from the embarrassment of his claim that she suffered from Multiple Personality Disorder is simply not believable. I reviewed the fiancee's unsworn declaration in 1998 to the Office of Personnel Management investigator in which she claims to accept full responsibility for the 1994 incident. In my opinion, even if the fiancée accepted responsibility for starting the argument that led to

the incident in question, that does not excuse the individual's use of restraint on his fiancée.

4. 1989 Arrest for Menacing with a Deadly Weapon

The individual was arrested in 1989 and charged with menacing with a deadly weapon. According to the individual, he was in his vehicle when it crossed paths multiple times in a short period of time with a truck containing two male occupants. The individual claims that he felt threatened by the men so he took a 9 mm Lugar that he had in his vehicle and pressed it against the side of the vehicle's window so the two men could see that he had a gun.

Mitigation Arguments relating to the 1989 Arrest

The individual submitted newspaper articles from January 1990 about the trial and its subsequent dismissal for prosecutorial misconduct. Ex. R. The individual suggests that the disposition of the case mitigates the security concern associated with his conduct. The individual also contends that his brandishing of the weapon was merely self-defense. Tr. at 48. He concluded by stating that had he been the aggressor, he would have simply shot the two people in the other vehicle.

As an initial matter, the dismissal of a charge on technical grounds does not negate, from a security perspective, the seriousness of the underlying charges. The brandishing of a weapon, with the intent to scare others, is an assault. This behavior is troubling. With regard to the individual's self defense claim, I am unable to discern from the evidence before me whether there is any merit to the individual's argument. I am concerned, however, that the individual has skewed facts in order to present a version of events most favorable to him. For example, in his written closing argument the individual declares, "I won that case [1989 case] by rule of law." On the contrary, a judgment on the merits of the case was never rendered. This verified misstatement of facts by the individual causes me to question what other facts the individual has misrepresented in this case.

5. Other Factors Relating to Criterion L

a. Evaluation of Testimony Evidence

Two female co-workers testified on the individual's behalf at the hearing. Both had worked with the individual in a classified vault at his place of employment. Both testified that they never observed the individual mishandle classified information. Tr. at 98, 108. Both testified that he always behaved in a gentlemanly manner towards them. *Id.* at 100, 113. Both expressed surprise that he had been arrested four times in the last 16 years. *Id.* at 101, 121.

While it is a positive factor that the individual has discharged his classified responsibilities in a manner expected of him, that fact, alone, cannot mitigate the unresolved concerns connected with his past criminal conduct. In addition, simply because the individual has comported himself in a gentlemanly manner around his female colleagues does not mean that he comported himself this way with other women outside the workplace environment. The fact that neither of the two co-workers knew about the

individual's four arrests suggest that they do not know him other than in a professional context. Their cumulative testimony does not negate the gravity of the individual's four arrests.

The individual's neighbor also testified at the hearing. He related that he lived next to the individual's apartment for four years. *Id.* at 125. During that time, the neighbor claims to have overheard arguments between the individual and his fiancée. *Id.* at 129-131. The neighbor testified that he heard prolonged periods of yelling and screaming, things being thrown, and walls being hit. *Id.* at 130. Under cross examination, the neighbor admitted that he had no way of knowing who was throwing the objects that he heard crashing but he heard both male and female voices arguing. *Id.* at 130, 147. Finally, the neighbor also opined at the hearing that the individual was an honest, law abiding citizen. *Id.* at 150.

I find that the neighbor's testimony only confirmed that the individual and his fiancée had a tumultuous relationship. While the individual presented the neighbor's testimony to show that his fiancée was the violent one in the relationship, the neighbor testified that he did not see what happened in the individual's apartment and often heard both a male and female voice yelling. Therefore, I find no basis to conclude that the fiancée was the violent partner in the relationship. Accordingly, I cannot conclude that the neighbor mitigated those criminal charges relating to the incidents in which the fiancée was involved, *i.e.*, the 2001 arrest and the 1994 domestic violence arrest.

b. Audiocassette Tapes

The individual submitted two audiocassette tapes into the record for several purposes. First, he wished to establish that his fiancée suffered from Multiple Personality Disorder, a condition that he alleges caused her, from time to time, to act in an aggressive, hostile manner towards him. Second, he wished to show his strained relationship between him and the attorney who represented him in connection with the 2001 arrest.

I have decided not to accord any weight to the tapes. As an initial matter, I find that the integrity of those tapes is questionable. It is clear from my listening to the tapes that portions of the tapes have been deleted and other portions edited. As the DOE Counsel pointed out at the hearing, it is unclear whether the individual edited or deleted portions of the tapes that were unfavorable to him.

In addition, the relevancy of the tapes is an issue. A large portion of the tapes allegedly recorded not only arguments between the individual and his finacee, but very personal conversations between the two, including a detailed description of a rape, a discussion of the pair's sex life, and issues relating to the fiancee's job as an exotic dancer. Other portions of the tapes portray the individual acting as though he were his financee's therapist. Still other parts of the tapes contain crude, condescending remarks made by the individual to his fiancée. At a minimum, the individual's decision to submit the tapes into evidence raises questions about his judgment, in my opinion. Nevertheless, to the extent that the individual believes that the tapes confirm his view that his fiancée suffers from a mental illness, I find that any mental illness that his fiancée suffers from is irrelevant to the individual's conduct. Overall, it is my determination that the tapes do nothing to mitigate any of the security concerns at issue here.

c. Other Factors

In considering the totality of evidence as required under 10 C.F.R. § 710.7 (c), I considered that the four arrests at issue appear to suggest a pattern of criminal activity. I also considered that the conduct at issue in each of the four incidents at issue is serious. While the individual implies that he was the victim in each of the four arrests, I am not inclined to believe him based on the facts developed in the record. Even though the individual's last arrest occurred in 2002, I will not discount it as remote in time. The fact that the 2002 arrest was the individual's fourth arrest outweighs the fact that almost three years have elapsed since the arrest. In addition, I considered that the individual apparently does not take responsibility for any of his actions. For example, with respect to the 2002 incident, the individual blames the woman whom he allegedly groped for embellishing her story and the police for "overcharging" him. As for the 2001 incident, the individual blames his first counsel for incompetence, his second counsel for being disinterested in the case, and his fiancée for lying to police and at the preliminary hearing about the incident. As for the 1994 arrest, the individual blames his fiancée for starting the altercation. With regard to the 1989 incident, he blames the two men in the truck for intimidating him which caused him to brandish a weapon. It is my assessment after carefully reviewing the record that the individual's version of events with regard to each of the four incidents is not reliable. In the end, the individual has not convinced me that the security concerns associated with the Criterion L charges are mitigated.

B. Criterion H

The DOE consultant-psychiatrist examined the individual in February 2003 and determined at that time that he individual suffers from Impulse Control Disorder Not Otherwise Specified. Ex. 3. The DOE consultant-psychiatrist based his diagnosis on the individual's documented history of failing to conform his behavior to the requirements of the law. In particular, the DOE consultant-psychiatrist pointed to the individual's four arrests discussed extensively in Section IV.A. above, and six motor vehicle violations[8] that he received over a six year period. At the hearing, the DOE consultant-psychiatrist explained that speeding tickets are not ordinarily "a big issue" to him but they are important in the context of evaluating impulsive behavior. Tr. at 155. The DOE consultant-psychiatrist found it significant that the individual's last speeding ticket occurred after the individual's license had been suspended for six months due to his accumulation of excessive points. The DOE consultant-psychiatrist concluded from the record before him that the individual's 10 arrests/citations between 1989 and 2002 demonstrate high risk, irresponsible, aggressive and anti-social behavior on the individual's part. The DOE consultant-psychiatrist also opined that the individual's defect in his judgment and reliability is significant. Moreover, the DOE consultant-psychiatrist opined that because impulse control disorders are "traits and not states," the individual needs a period of 10 years in which he has exhibited no significant defects in impulse control before the individual could demonstrate adequate evidence of rehabilitation or reformation.

[8] The specific citations are the following: speeding in 1990, speeding in 1991, speeding in 1993, violation of a red light signal in 1993, speeding in 1994 and speeding in 1996. Ex. 3 at 11.

The DOE consultant-psychiatrist remained in the hearing room throughout the testimony of all the witnesses. After listening to all the testimony, the DOE consultant-psychiatrist testified that none of the new information presented at the hearing changed his professional opinion that the individual still suffers from an impulse control disorder. *Id.* at 164. Specifically, he testified that the audiocassette tapes submitted by the individual in this case are not relevant to any of the arrests at issue or to his diagnosis. *Id.* at 161. Second, he testified that he found the individual's version of the 2002 arrest to be incredulous. *Id.* at 162. Third, he testified that the individual's argument that he demonstrated good impulse control in 1989 when he did not shoot the people involved in the altercation is devoid of merit. *Id.* at 163. According to the DOE consultant-psychiatrist, the individual's action in brandishing a deadly weapon demonstrated just the opposite, namely, poor impulse control. *Id.*

Mitigation Arguments regarding Criterion H

The individual disagrees with the DOE consultant-psychiatrist's diagnosis and accuses the psychiatrist of relying on police reports that are false and misleading in arriving at his diagnosis in this case. Closing Statement at 6. The individual also accuses the psychiatrist of twisting things and not paying attention to the truth in this case. *Id.* at 5.

At the hearing, I asked the individual why he did not consult with a mental health professional to obtain another opinion in view of his belief that he does not suffer from an impulse control disorder. Tr. at 224. The individual responded that his brother-in-law, a physician, advised him that "maybe one in ten psychiatrists would believe [the individual's] story. *Id.* at 226. For this reason, the individual stated that he thought it would be a waste of his money to consult with a mental health professional. *Id.* at 225.

As an initial matter, I reviewed the record in this case and find there to be no basis for the individual's charge that the DOE consultant-psychiatrist "twisted" things or failed to pay attention to what the individual was communicating. Second, I find that the individual's lay opinion that he does not suffer from an impulse control disorder cannot outweigh the opinion of a board-certified psychiatrist who has practiced psychiatry for almost 40 years. It is my finding that the DOE consultant-psychiatrist presented compelling evidence to support his diagnosis of Impulse Control Disorder Not Otherwise Specified and his opinion that the individual requires a period of 10 years with no incidents of impulsive behavior before he can be considered reformed or rehabilitated. The individual, on the other hand, has failed to present any credible evidence that undermines that psychiatric diagnosis. He also has provided no evidence that would allow me to find him rehabilitated or reformed from his mental illness. He has not sought any treatment for his impulse control disorder. Not quite three years have elapsed since the individual's last arrest. As the DOE consultant-psychiatrist pointed out, since an impulse control disorder is a "trait and not a state" a substantial period of time needs to elapse before the individual can demonstrate that he is reformed or rehabilitated from his mental illness based on the passage of time alone. In this case, the individual falls far short of the recommended 10 year period of documented behavior required as evidence of rehabilitation or reformation. Based on all the foregoing, I must find that the individual has failed to mitigate the DOE's security concerns under Criterion H.

VI. Conclusion

After considering all the relevant information in this case, 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 mitigate the security concerns advanced by the LSO under either Criterion L or Criterion H. I therefore cannot find that restoring the individual's access authorization would not endanger the common defense and would be clearly consistent with the national interest. Accordingly, I have determined that the individual's access authorization should not be restored.

Ann S. Augustyn
Hearing Officer
Office of Hearings and Appeals

Date: July 12, 2005