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July 1, 2011

DECISION AND ORDER

OFFICE OF HEARINGS AND APPEALS

Hearing Officer's Decision

Name of Case: Personnel Security Hearing

Date of Filing: February 15, 2011

Case Number: TSO-1007

This Decision concerns the continued eligibility of XXXXXXXXXXXXXXXX (hereinafter referred to as "the individual") to hold an 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." As set forth below, it is my decision, based on the evidence and testimony presented in this proceeding, that the individual's access authorization should not be restored.

I. Background

The individual is employed by a Department of Energy (DOE) contractor and has held a security clearance at the request of her employer since 1991. In November 2009, the individual was apprehended after shoplifting at a local store and the local police department gave her a citation for shoplifting. She reported the incident to the local security office (LSO) and the LSO conducted a personnel security interview (PSI) with the individual in December 2009. The individual stated that she did not intentionally steal any items and that she would not repeat her actions. The LSO concluded that the security concern was mitigated because the incident occurred under unusual circumstances. However, in September 2010, the local police department again cited the individual for shoplifting. She reported the incident to the LSO and the LSO conducted a PSI with the individual in October 2010. The individual explained that her actions were a result of depression and anxiety. The PSI did not resolve the security concerns and the individual agreed to be evaluated by a DOE consultant-psychiatrist.

In November 2010, a DOE consultant-psychiatrist (DOE psychiatrist) interviewed the individual and concluded that the individual met the criteria for Major Depression, Recurrent and Kleptomania, as set forth in the Diagnostic and Statistical Manual of Mental Disorders, 4th Edition, Text Revised (DSM-IV-TR), and that she suffered from an illness or mental condition which causes or may cause a significant defect in her judgment or reliability. The LSO suspended her access authorization and then informed the individual how to proceed to resolve the derogatory information that had created a doubt regarding her eligibility for access authorization. Notification Letter (December 2010). The Notification Letter stated that the derogatory information regarding the individual falls within the purview of 10 C.F.R. § 710.8 (h) and (l) (Criteria H and L).¹ As for Criterion H, the Notification Letter referred specifically to: (1) the diagnoses of the DOE psychiatrist; (2) the individual's admission that the September 2010 citation was likely a result of her feelings of depression; and (3) her citation for shoplifting in November 2009. As regards Criterion L, DOE noted that the two citations were a result of criminal conduct. The Notification Letter also based this security concern on the individual's second citation for shoplifting that occurred only one year after she told the LSO that she would not engage in criminal activities in the future. According to the LSO, this tends to show that she is not reliable or trustworthy.

In a letter to DOE Personnel Security, the individual exercised her right under Part 710 to request a hearing in this matter. 10 C.F.R. § 710.21(b). The Director of OHA appointed me as Hearing Officer in this case. After conferring with the individual and the appointed DOE counsel, 10 C.F.R. § 710.24, I set a hearing date. At the hearing the individual, who was represented by counsel, testified on her own behalf and also called five witnesses. DOE counsel called the DOE psychiatrist as a witness. The transcript taken at the hearing shall be hereinafter cited as "Tr." Various documents that were submitted by the parties during this proceeding constitute exhibits to the hearing transcript and shall be cited as "Ex." DOE exhibits are numbered, and the individual's exhibits are lettered.

II. Analysis

The applicable regulations state that "[t]he decision as to access authorization is a comprehensive, common-sense judgment, made after consideration of all relevant information, favorable or unfavorable, as to whether the granting of access authorization would not endanger the common defense and security and would be clearly consistent with the national interest." 10 C.F.R. § 710.7(a). Although it is impossible to predict with absolute certainty an individual's future behavior, as the Hearing Officer I am directed to make a predictive assessment. There is a strong presumption against the granting or restoring of a security clearance. See *Department of Navy v. Egan*, 484 U.S. 518, 531 (1988) ("clearly consistent with the national interest" standard for the granting of security

¹ Criterion H concerns information in the possession of the agency that the individual 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). DOE invokes Criterion L when it is in possession of information that indicates that the individual has engaged in unusual conduct or is subject to circumstances which tend to show that she is not honest, reliable, or trustworthy or which furnish reason to believe that she may be subject to pressure, coercion, exploitation, or duress which may cause her to act contrary to the best interests of the national security. 10 C.F.R. § 710.8 (l).

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).

I have thoroughly considered the record of this proceeding, including the submissions of the parties, the evidence presented and the testimony of the witnesses at the hearing convened in this matter. 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): 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 of the individual at the time of the conduct; the voluntariness of the 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 continuance or recurrence; and other relevant and material factors. After due deliberation, I find that the individual’s access authorization should not be restored because I cannot conclude that such a restoration would not endanger the common defense and security and would be clearly consistent with the national interest. 10 C.F.R. § 710.27(a). The specific findings that I make in support of this determination are discussed below.

A. Findings of Fact

In 1991, the individual, a college student working summers for a DOE contractor, was granted a clearance as a condition of her employment. Ex. 6 at 2. That year, she had a depressive episode as a result of a death in her family and took a semester off from her studies, but she did not seek counseling or take any antidepressants. Ex. 8 (Report) at 2. In 1997, she experienced her second depressive episode after the death of another relative, and her manager referred her to the Employee Assistance Program (EAP) after she used all of her sick leave for depression-related absences. In 1999, she married. Report at 7. She had a third depressive episode after the birth of her first child in 2000, and suffered from postpartum depression. She did not use an antidepressant because she was breastfeeding. She experienced her fourth significant depressive episode beginning in January 2009 after the birth of her third child. This unexpected pregnancy caused great changes in her busy life as a working mother. She suffered from insomnia, reduced memory, tearfulness, irritability, and a lack of energy. She withdrew from friends and family and suffered from low self-esteem. Her family noticed that she always looked sad. Her managers recommended mental health treatment because she cried often. Report at 4.

On November 8, 2009, the individual went to a local store with her three children, the youngest riding in a stroller. As she selected items in the store, she placed them on top of the stroller. She put a flash drive on top of the stroller also, but when it began sliding down into the stroller, she put it in her purse. She paid for the items on top of the stroller at the checkout, but the USB drive set off the alarm when she left the store. When a clerk stopped her, she panicked, pulled the drive from her purse, and threw it on a table of clearance items. Report at 4. A cashier saw this and called the manager, who accused her of trying to steal the item. The police gave her a citation for Shoplifting and Abandonment or Cruelty to Children. She had to sign an order stating that she would never

enter that store again. In December 2009, the individual discussed the incident with the LSO at a PSI, but no further action was taken because the concerns were mitigated. She stated in the PSI that she was not guilty of shoplifting and did not do anything wrong. Ex. 20 (PSI 2009) at 36, 45. The individual went to court in January 2010, and the charges were dismissed. Report at 4; Tr. at 155.

The individual had been experiencing difficulties at work due to her inability to travel frequently, which resulted in assignments she considered less desirable. *Id.* at 43. She was often tearful at work and frequently sought counsel and support from her second level manager. However, she had recently heard that this manager would soon be transferred, and she was upset about the impending move. Ex. 19 at 42-44.

On September 23, 2010, the individual stopped at a store to buy a few items including gifts for her mother's birthday. Ex. 9-12. She was waiting for a call from her office to tell her whether or not she was required to report to work that morning. The individual selected some eye drops from the shelf for her mother, along with a few items of clothing and some Band-Aids. According to the individual, her mother preferred a certain type of eye drop bottle that released larger drops. She removed the eye drops from their boxes and put the bottles in her purse, but left the packaging in her cart under the clothing items. Ex. 19 at 18. She also put the Band-Aid box in her purse. While still shopping she was notified that she should immediately report to work, and she went to the checkout counter. The cashier told her that the machine did not accept debit cards at that time, and when the cashier swiped the individual's credit card, that was not accepted either. She asked the cashier to let her retrieve her ATM card from her car so that she could pay with cash. Ex. 19 at 8, 16.

When she exited the store, the alarm went off, and a guard asked her to go to his office. The guard asked her to empty her purse, and discovered the eye drops and Band-Aids in her purse. The purse contained six bottles of eye drops, two large and four small, and various other items. She told the guard that she did not intend to steal the items, and as proof stated that the denture adhesive was still in its packaging in the cart. Ex. 19 at 9. She asked to pay and to speak to the manager. Ex. 19 at 7-12. She told the manager that she had forgotten that the items were in her purse because she was in a hurry to get to work and planned to return to the store with her ATM card. She also told the manager that she was not hiding the items because the purse was open. Despite her pleas to pay for the items, the manager called the police and a policeman gave her a citation. Tr. at 16; Ex. 9-12.

The individual informed DOE of the citation and in October 2010, the LSO conducted a PSI. She told the LSO that she planned to plead not guilty because she did not have any intent to steal and wanted to pay for the items. Ex. 19 (2010 PSI) at 23, 30. She also revealed how she was easily distracted (e.g., she drove past her children's school and did not remember to stop and pick them up, she went to a room to retrieve an object but forgot what she wanted when she arrived). *Id.* at 36. The individual described feeling isolated, sad, irritable, and stressed out. *Id.* at 39-40. Even though her infant was no longer breastfeeding, her sleep had not improved. *Id.* at 39-40, 54. She had not told her mother and sisters about the citations. *Id.* at 50-52. She agreed to a psychiatric evaluation and in

November 2010, a DOE psychiatrist conducted an evaluation and diagnosed the individual with Major Depression, Recurrent and Kleptomania.² Report at 10.

B. The Notification Letter and the Security Concerns at Issue

To support Criterion H, the LSO relies on the DOE psychiatrist's report that the individual suffered from Major Depression, Recurrent and Kleptomania. Report at 10. The DOE psychiatrist further opined that these conditions cause or may cause a significant defect in her judgment or reliability. The LSO also relied on information that the individual was cited for Shoplifting under \$100 in September 2010, and for Shoplifting under \$250 and Abandonment or Cruelty to Children in November 2009. Exs. 9-17. A mental condition such as depression or Kleptomania can impair a person's judgment, reliability and trustworthiness, all of which can raise questions about an individual's ability to protect classified information. See Guideline I, Psychological Conditions, *Revised Adjudicative Guidelines for Determining Eligibility for Access to Classified Information*, Assistant to the President for National Security Affairs (December 29, 2005) (Guidelines) ¶ 28(a)-(b).

To support the allegations under Criterion L, the LSO relies on the following information: (1) the individual displayed criminal conduct when she was cited for shoplifting in September 2010 and November 2009; and (2) the individual's conduct tends to show that she is not reliable or trustworthy because she indicated in a December 2009 PSI that she would not be involved in any future criminal activity, but she was cited a second time for shoplifting in September 2010. These events create doubt about her judgment, reliability, and trustworthiness. The criminal activity also calls into question her ability or willingness to comply with laws, rules and regulations. See Guideline J, Criminal Conduct, ¶ 30. Thus, the LSO's concern is valid and I find that the LSO properly invoked this criterion.

C. Hearing Testimony

1. Character Witnesses

The individual's husband, two friends and second level manager testified that the individual was an honest hard-working person. Tr. at 23-108. They were all aware of her citations for shoplifting, and consider those actions out of character for the individual. They all described the high levels of stress in her life as a result of her demanding job, conflicts with colleagues, chronic pain from injured knees, and sleep deprivation from caring for an infant. They agreed that the individual was often distracted by the demands of her family and her career. However, all of the witnesses were familiar with the individual's treatment regimen

²The DSM-IV-TR lists five diagnostic criteria for Kleptomania: (A) recurrent failure to resist impulses to steal objects that are not needed for personal use or for their monetary value; (B) increasing sense of tension immediately before committing the theft; (C) pleasure, gratification, or relief at the time of committing the theft; (D) the stealing is not committed to express anger or vengeance and is not in response to a delusion or a hallucination; and (E) the stealing is not better accounted for by Conduct Disorder, a Manic Episode, or Antisocial Personality Disorder. DSM-IV-TR at 667-669.

and remarked that the individual in recent months has seemed happier and less distracted.

2. The Individual's Expert Witness

The individual called as an expert witness a psychologist who conducted six hours of structured and unstructured interviews with the individual and also administered a battery of psychological tests: the Minnesota Multiphasic Personality Inventory (MMPI), Rorschach, Sentence Completion, and Human Figure Drawing Tests. Tr. at 160-168. The witness read the report of the DOE psychiatrist, and agreed with the diagnosis of Major Depression, Recurrent, but disagreed with the diagnosis of Kleptomania. *Id.* at 164-170. The psychologist concluded that depression was a factor in the individual's behavior. However, he disagreed with the diagnosis of Kleptomania for the following reasons: (1) the individual had a low score on psychopathic deviance; (2) she did not display any obsessive tendencies; (3) she had low scores in impulsivity; (4) she did not steal anything of value; (5) she did not experience any tension build up prior to the theft; and (6) her thefts appeared spontaneous and not planned like most committed by those who suffer from Kleptomania. Tr. at 164-171. He opined that the situational factors that accompanied her depression--the physical strain of breastfeeding, sleep deprivation, and chronic knee pain--all combined to cause her depression and lower her attention span, concentration, and capacity to integrate information. *Id.* at 169-170.

He noted that in the past the individual was able to ease the depression caused by the death of a family member with only few therapy sessions. Tr. at 186. *See also* Ex. 6 at 2. Her support system has improved over the years because her family is now alert to her needs. The psychologist concluded that her current treatment program is effective, and her depression is in remission with a low probability of recurrence. Tr. at 178.

3. The Individual

The individual admitted that she was cited for shoplifting on two occasions, but testified that she does not believe that she had a problem with stealing. Tr. at 139-140. She explained that she should not have gone into the store in the 2010 incident because of all of the pressures on her that day. Instead, she described her actions as careless, and maintained that she did not have any intent to steal. *Id.* at 141-144. During that period in her life, she was not able to admit to herself that she was depressed, but rather believed that she could get better on her own without the help of any professional or medication. *Id.* at 158. However, she began taking an antidepressant in January 2011, meets her therapist twice a month and sees the EAP counselor once a month to update him on her progress with the therapist. *Id.* at 154. Her life now is much improved—she previously had been waking up three to four times a night, but now sleeps through the night and is not sluggish during the day. *Id.* at 125. She testified that medication has “made a world of difference,” and that she considers her therapist “a godsend.” *Id.* at 125.3 She feels happy, has reconnected

³The individual's therapist submitted a letter into evidence. Ex. A. The therapist stated that she does not believe that the individual has Kleptomania, and she finds the individual to be an honest person. She agrees with the diagnosis of Major Depression, Recurrent, and has focused her sessions on that area. She has observed “a marked improvement in [the individual's] affect and function.” *Id.* They began sessions in November 2010 and have met 13 times for therapy. Since

with friends, and is no longer breastfeeding. *Id.* at 126. After the surgery she can now play sports with her children and exercise regularly. The criminal charges in both cases were dismissed. *Id.* at 131-132, 155. She intends to continue with antidepressants, therapy, and exercise. *Id.* at 130.

4. DOE Psychiatrist

The DOE psychiatrist was present during the entire hearing and testified at the end after observing all of the witnesses. Tr. at 188-237. At the time of his evaluation in November 2010, he diagnosed the individual with Major Depression, Recurrent and Kleptomania. However, at the hearing, he agreed with the individual's expert and her therapist that the individual's depression was in remission after a successful treatment regimen of antidepressants, exercise, and therapy. *Id.* at 213.

The DOE psychiatrist further opined at the hearing that the individual still suffered from Kleptomania. *Id.* He considered the two shoplifting incidents to be typical of Kleptomania episodes and questionable as "honest mistakes" as described by the individual. He believes that she had the intent to take the items and not pay for them. *Id.* at 216. Even though he considered her to be more honest than the average person, he believes that she still suffers from Kleptomania. *Id.* at 220-221. First, Kleptomania is impulsive, not planned like a common theft, and her actions appeared impulsive. *Id.* at 198. He testified that her actions in both incidents could not be considered an honest mistake –it is possible that she removed the items from the boxes thinking that the sensor was in the packaging. *Id.* at 199. The psychiatrist found it odd that a person with a security clearance who had a previous shoplifting citation would put an item in her purse. *Id.* He testified that such an action would make the average person uncomfortable, and a clearance holder should feel even more discomfort. Second, she took things that she didn't plan to take and did not need, a key criterion for Kleptomania in the DSM-IV-TR. She said that her mother did not like the small bottles of eye drops, but she had small bottles in her purse when the guard searched her. *Id.* at 201.

The psychiatrist found no evidence of tension before or pleasure after the theft (i.e. additional diagnostic criteria for Kleptomania), but he still made a diagnosis of Kleptomania. Because the individual did not admit any problem, he concluded that it would be unlikely that she would have admitted the tension or relief elements of a Kleptomania episode. *Id.* at 202-203. Nonetheless, he concluded that she still suffered from Kleptomania and her prognosis was guarded because she did not admit that she had actually stolen anything. *Id.* at 207. According to the psychiatrist, the individual would have to admit a problem in order to resolve the problem and then follow a recommended treatment plan to show rehabilitation. *Id.* at 225-230.

January they have met every two weeks, and will re-evaluate that schedule in six months. *Id.* She believes the antidepressant has worked well for the individual. *Id.*

D. Mitigation of Security Concerns

After a review of the record, I conclude, for the following reasons, that the individual has not fully mitigated the security concerns related to Criteria H and L.

1. Criterion H

I find that the individual has mitigated the security concerns relating to her depression. At the time of the hearing, the DOE psychiatrist, the individual's therapist, and her expert witness all agreed that her depression was in remission after a successful treatment regimen. The individual provided testimony and evidence that has demonstrated ongoing and consistent compliance with the treatment plan designed by her therapist. Guideline I, ¶ 29 (a). She is currently receiving counseling and has a favorable prognosis by her therapist. Further, the DOE psychiatrist has opined that her depression is in remission and has a low probability of recurrence, and there is no indication of a current problem. *Id.* at ¶29 (c). Therefore, I conclude that the individual has mitigated the Criterion H concerns regarding the diagnosis of depression.

However, I cannot find that the individual has mitigated the security concern regarding the diagnosis of Kleptomania. First, although the individual's expert testified at length that the individual does not have Kleptomania, I am more persuaded by the testimony of the DOE psychiatrist that the individual suffers from that disorder. Tr. at 166. The psychiatrist more credibly used the DSM-IV-TR criteria to justify his diagnosis. For example, the individual's expert stated that the absence of social deviance (i.e., the individual was not a common thief) proved that the individual was not suffering from Kleptomania. However, the DOE psychiatrist explained that the absence of any deviance is a characteristic of Kleptomania because that diagnosis excludes any deviance or antisocial disorder. *Id.* at 196. To diagnose Kleptomania, you must rule out antisocial personal disorder and deviance, and the psychologist's test did so. Also, the DOE psychiatrist emphasized that the individual stole things that she did not want, as stated in the Diagnostic Criteria for Kleptomania. *Id.* at 200-201; DSM-IV-TR at 669. See *Personnel Security Hearing*, Case No. TSO-0965 (2011) (key diagnostic criteria for Kleptomania is the recurrent theft of things that the individual does not need and had no reason to take).⁴ Even though the individual said that her mother preferred the larger bottles of eye drops, she was apprehended with four of the smaller bottles in her purse, along with the large ones. Tr. at 141-144.

Second, I agree with the DOE psychiatrist that the individual does not have a good prognosis without admitting that she suffers from Kleptomania. Although I find the individual to be a credible and sincere person, this disorder presents a security concern because a person who suffers from Kleptomania and has access to sensitive material may steal it. See *Personnel Security Hearing*, Case No. TSO-0956 (2010) (explaining the security concern related to Kleptomania). I agree with the DOE psychiatrist that if the individual cannot recognize a problem, she cannot resolve it. Tr. at 202-203; 207. She continued to say that her actions were not stealing. See, e.g. Ex. 19 at 12 (she told a

⁴ 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>.

policeman that she was not stealing because an unopened item was still in her cart, not in her purse.). The DOE psychiatrist also testified that she should have been more aware, as a clearance holder, of her actions in putting items in her purse or on a stroller while shopping. Therefore, I agree with the DOE psychiatrist that her Kleptomania is unacknowledged and untreated, and I am persuaded by the testimony of the DOE psychiatrist that there is an unacceptable likelihood of recurrence of her Kleptomania. Tr. at 213. Thus, I cannot find that the security concern related to the diagnosis of Kleptomania has been resolved.

2. Criterion L

I also find that the individual has not resolved the Criterion L concern at this time. To resolve a Criterion L concern arising from illegal conduct, an individual must show rehabilitation, including a passage of time without recurrence of the criminal activity. See *Personnel Security Hearing*, Case No. TSO-0956 (2010). The individual had two citations for shoplifting in the last two years, and it has been less than a year from the last shoplifting incident to the date of the hearing. See *Personnel Security Hearing*, Case No. TSO-0956 (2010); (Criterion L concern not resolved when most recent shoplifting arrest was within the past year); Guideline J, Criminal Conduct, ¶ 32(d). Further, the individual has not acknowledged the behavior that caused the security concern and does not admit that she did anything wrong. See Guideline E, ¶ 17 (d) (conduct involving questionable judgment may be mitigated if the individual acknowledges the behavior and then takes positive steps or obtains counseling to change that behavior). Therefore, I conclude that she has not mitigated the security concerns regarding Criterion L.

III. Conclusion

As explained in this Decision, I find that the LSO properly invoked 10 C.F.R. § 710.8 (h) and (l). After carefully reviewing the testimonial and documentary evidence in a common-sense manner, I find that the individual has partially mitigated the Criterion H concern, but has not presented any mitigating factors for the Criterion L concern. Thus, in view of the criteria and the record before me, I cannot find that restoring the individual's access authorization would not endanger the common defense and security and would be consistent with the national interest. Accordingly, I find that the individual's access authorization should not be restored at this time. Any party may seek review of this Decision by an Appeal Panel under the procedures set forth at 10 C.F.R. § 710.28.

Valerie Vance Adeyeye
Hearing Officer
Office of Hearings and Appeals

Date: July 1, 2011

