*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	)
		)
Filing Date:	January 20, 2015	)
		) Case No.: PSH-14-0109
		)

Issued : May 11, 2015

Administrative Judge Decision

Wade M. Boswell, Administrative Judge:

This Decision concerns the eligibility of XXXX (hereinafter referred to as "the individual") to hold an access authorization[1] under the Department of Energy's (DOE) regulations set forth at 10 C.F.R. Part 710, Subpart A, entitled, "General Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material." As fully discussed below, after carefully considering the record before me in light of the relevant regulations and Adjudicative Guidelines, I have determined that the individual's access authorization should not be restored.

I. Background

The individual is employed by a DOE contractor in a position that requires him to hold DOE access authorization. As a holder of access authorization, the individual is subject to reinvestigation every five years to verify his continued eligibility for access authorization and, in conjunction with such a periodic reinvestigation, the individual completed and certified a Questionnaire for National Security Positions (QNSP) in July 2013. *See* Exhibit 9. His QNSP was forwarded to the U.S. Office of Personnel Management (OPM) for investigation. During the OPM investigation, sources reported that the individual was under investigation for theft from a sports venue (Sports Venue) at which

[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.

the individual had worked part-time for a number of years. *See* Exhibit 11. In November 2013, OPM investigators interviewed the individual regarding this information and the individual confirmed that (1) he had taken money from the Sports Venue on several occasions, but did not recall the exact amounts taken, and (2) he had been contacted in February 2013 by the local police department about its investigation of the matter. *Id.* at 66 – 68.

OPM forwarded this information, as part of its investigation report, to the Local Security Office (LSO). Following receipt of this information, the LSO conducted a personnel security interview (PSI) with the individual on January 30, 2014. During the PSI, the individual confirmed his statements to the OPM investigators. *See* Exhibit 10. On March 24, 2014, the LSO advised the individual in a letter (Notification Letter) that it possessed reliable information that created substantial doubt regarding his eligibility to hold a security clearance. In an attachment to the Notification Letter, the LSO explained that the derogatory information fell within the purview of one potentially disqualifying criterion set forth in the security regulations at 10 C.F.R. § 710.8, subsection (l) (hereinafter referred to as Criterion L).[2]

Upon his receipt of the Notification Letter, the individual exercised his right under the Part 710 regulations by requesting an administrative review hearing. *See* Exhibit 2. The Director of the Office of Hearings and Appeals (OHA) appointed me the Administrative Judge in the case, which was designated by OHA as Case No. PSH-14-0049. Subsequently, the individual was criminally charged with two misdemeanors and one felony for the conduct cited in the Notification Letter. In July 2014, OHA administratively dismissed the case pending disposition of the felony charge and closed OHA Case No. PSH-14-0049. In October 2014, the individual pled guilty to the felony count pursuant to a plea agreement and was sentenced to three years of probation and ordered to make restitution. *See* Exhibit 3.

On January 16, 2015, the LSO revised the summary of security concerns with respect to the individual to reflect this additional information; all of the derogatory information set forth in the revised summary of security concerns continued to be within the purview of Criterion L. On January 20, 2015, the LSO forwarded the revised summary of security concerns to OHA, together with the individual's original request for an administrative review hearing. On that date, OHA accepted the individual's request for a hearing as OHA Case No. PSH-14-0109. Subsequently, I conducted an administrative hearing in the matter. At the hearing, the LSO presented no witnesses; the individual presented the testimony of three witnesses, including that of himself. The LSO introduced 12 numbered exhibits into the record; the individual tendered six lettered exhibits (Exhibits A – F). The exhibits will be cited in this Decision as "Ex." followed by the appropriate numeric or alphabetic designation. The hearing transcript in the case will be cited as "Tr." followed by the relevant page number. All documents relevant to this administrative review

[2] See Section III below.

proceeding were entered or re-entered by the parties into the record of OHA Case No. PSH-14-0109.[3]

II. Regulatory Standard

A. Individual's Burden

A DOE administrative review proceeding under Part 710 is not a criminal matter, where the government has the burden of proving the defendant guilty beyond a reasonable doubt. Rather, the standard in this proceeding places the burden on the individual because it is designed to protect national security interests. This is not an easy burden for the individual to sustain. The regulatory standard implies that there is a presumption against granting or restoring a security clearance. *See Department of Navy v. Egan*, 484 U.S. 518, 531 (1988) ("clearly consistent with the national interest" standard for granting security clearances indicates "that security determinations should err, if they must, on the side of denials"); *Dorfmont v. Brown*, 913 F.2d 1399, 1403 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991) (strong presumption against the issuance of a security clearance).

An individual must come forward with evidence to convince the DOE that granting or restoring his or her access authorization "will not endanger the common defense and security and will be clearly consistent with the national interest." 10 C.F.R. § 710.27(d). The individual is afforded a full opportunity to present evidence supporting his or her eligibility for an access authorization. The Part 710 regulations are drafted so as to permit the introduction of a very broad range of evidence at personnel security hearings. Even appropriate hearsay evidence may be admitted. 10 C.F.R. § 710.26(h). Thus, an individual is afforded the utmost latitude in the presentation of evidence to mitigate the security concerns at issue.

B. Basis for the Administrative Judge's Decision

In personnel security cases arising under Part 710, it is my role as the Administrative Judge to issue a Decision that reflects my comprehensive, common-sense judgment, made after consideration of all the relevant evidence, favorable and unfavorable, as to whether the granting or continuation of a person's access authorization will not endanger the common defense and security and is clearly consistent with the national interest. 10 C.F.R. § 710.7(a). I am instructed by the regulations to resolve any doubt as to a person's access authorization eligibility in favor of the national security. *Id.*

III. The Notification Letter and the Security Concerns at Issue

As previously noted, the LSO cited one criterion as the basis for suspending the individual's security clearance, Criterion L. Criterion L concerns information that an individual has engaged in conduct "which tends to show that the individual is not honest, reliable, or trustworthy, or which furnishes reason to believe that that individual may be

[3] OHA decisions are available on the OHA website at www.oha.doe.gov. A decision may be accessed by entering the case number in the search engine at www.oha.gov/search.htm.

subject to pressure, coercion, exploitation, or duress which may cause the individual to act contrary to the best interests of the national security." 10 C.F.R. § 710.8(l). In support of the Criterion L security concern, the LSO alleges, *inter alia*, that: (1) in September 2013, a local prosecutor issued a criminal complaint charging the individual with two counts of theft/stealing less than $500 and one count of theft of theft/stealing of more than $500, but less than $25,000; (2) the individual was arrested for stealing while employed at the Sports Venue following a one-year investigation; (3) during the PSI, the individual acknowledged stealing between $200 and $500 while working at the Sports Venue to "get back" at management of the Sports Venue for certain managerial decisions that the individual had found objectionable; (4) during the PSI, the individual acknowledged that he stole $10 to $20 from the Sports Venue on one or two occasions to buy refreshments; and (5) in October 2014, the individual pled guilty to a felony (theft/stealing of more than $500 but less than $25,000) and was sentenced to three years of probation and ordered in make restitution of $1035 to the Sports Venue. Ex. 1 at 1 – 2. Criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. By its very nature, it calls into question a person's ability or willingness to comply with laws, rules and regulations, including those with respect to the protection of classified information. S*ee* Guideline J of the *Revised Adjudicative Guidelines for Determining Eligibility for Access to Classified Information*, issued on December 29, 2005, by the Assistant to the President for National Security Affairs, The White House (Adjudicative Guidelines).

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

IV. Findings of Fact

The individual testified that the factual matters set forth in the Notification Letter are correct. Tr. at 87 – 92. In reaching the findings of fact set forth below, I have carefully considered that acknowledgment by the individual, as well as the totality of the individual's testimony and the record as a whole.

The individual has been employed by a DOE contractor for approximately 30 years. Ex. 11 at 16. Additionally, between 1998 and 2012, the individual worked part-time (outside of the DOE complex) collecting parking fees at a local Sports Venue. *Id.* at 17. The Sports Venue hired the individual for a position covered by a union contract and, subsequently, promoted him to a supervisory position, which was not covered by a union contract. Tr. at 9. In the supervisory position, the individual both collected parking fees and supervised union employees collecting parking fees.

In 2011, management changed at the Sports Venue. *Id.* at 10. The new management implemented changes that the individual believed, in certain instances, violated the union contract and changes that adversely affected him. *Id.* Specifically, the individual found objectionable that his spouse was no longer allowed to work with him at the Sports Venue and that he and his subordinates no longer had the same access to watch events at the Sports Venue. *Id.* at 107. Additionally, in 2012, he was informed that the jobs of those collecting parking fees (i.e., his job and those of his subordinates) would be

outsourced to a contractor upon the expiration of the union contract that covered his subordinates. *Id.* at 12 – 13.

During the Fall 2012, the individual stole money from the parking receipts at the Sports Venue on at least four occasions, in an amount aggregating at least $1,035.[4] *Id.* at 11 – 12, 26 – 27; Ex. 3 at 2. The individual stole the money because he was angry with the Sports Venue for its management decisions. Ex. 10 at 10 – 13, 98 – 99, 106 – 107; Ex. D-2 at 1. The thefts fell into two categories. First, the individual took parking receipts and placed them in either his sock or pocket and, subsequently after returning from the men's room, returned a portion of the cash he had taken while retaining the balance. Ex. 10 at 11 – 13. During the PSI, the individual acknowledged such thefts on two occasions. *Id.* at 11. Second, the individual took smaller amounts of cash to reimburse himself for refreshments that he provided to his subordinates. Tr. at 98 – 100; Ex. 10 at 11. The Sports Venue did not authorize such expenses or reimbursements. Tr. at 106. During the PSI, the individual acknowledged taking cash from the Sports Venue on two occasions for such unauthorized reimbursements. Ex. 10 at 27.

In February 2013, local police informed the individual that the Sports Venue had installed video cameras on which the individual was observed stealing cash during the Fall 2012 and that the police were investigating the thefts. *Id.* at 13 – 15.

In September 2013, the local prosecutor issued a criminal complaint charging the individual with two counts of theft/stealing less than $500 and one count of theft/stealing of more than $500 and less than $25,000. Ex. 12 at 1 – 2. In February 2014, the individual was arrested and charged with three counts of theft from the Sports Venue. Tr. at 75; Ex. 8 at 1. While the September 2013 criminal complaint and the final charging document both contained three counts of theft, the details of those counts had been modified. The final charging document accused the individual of: (1) felony theft/stealing of $500 or more (but less than $25,000) on October 28, 2012; (2) misdemeanor theft/stealing of less than $500 on November 25, 2012; and (3) misdemeanor theft/stealing of less than $500 on December 2, 2012. *See* Memorandum of Telephone Conference from Wade Boswell, OHA, to File, dated March 25, 2015 (Pre-Hearing Memorandum), at A-4; Ex. 3 at 1 – 3.

In October 2014, the individual was found guilty of felony theft occurring on October 28, 2012, following his pleading guilty to such offense. *Id.* at 1. Pursuant to a plea agreement,

[4] As discussed below, the record contains various descriptions of the number of thefts committed by the individual and the aggregate amount stolen by the individual. In making this finding, I rely on the individual's statements during the PSI that he stole money in retaliation for management decisions during "the last [event] or two [he] worked" (Ex. 10 at 11), which he distinguished from cash he stole prior to these last two events to reimburse himself for employee refreshments "once or twice" (*Id.* at 27). In light of the individual's general lack of candor and his practice of minimizing his behavior, I have concluded that in each instance in which he acknowledged behavior as occurring one or two times that the behavior occurred at least twice. During the PSI, the individual acknowledged stealing an aggregate of $400-$500 in "retaliatory thefts" (*Id.* at 12 – 13) and no more than $10-$20 for "reimbursement thefts" on one or two occasions (*Id.* at 27); however, the court ordered the individual to make restitution to the Sports Venue in the amount of $1035 (Ex. 3 at 2) and, therefore, I conclude that the restitution amount is the minimum amount that the individual stole from the Sports Venue.

the misdemeanor charges against the individual were dismissed. Although the misdemeanor charges were dismissed, the individual acknowledges that he stole money from the Sports Venue on both November 25, 2012, and December 2, 2012. Tr. at 12 – 13.

In October 2014, the court ordered the individual to pay $1035 in restitution to the Sports Venue, in addition to other fees. Ex. 3 at 2. Sentencing on the felony conviction was suspended and the individual was placed on probation for three years. *Id.* at 1.

The individual paid the required restitution and fees as required by the court order. Ex. F at 2 – 4. As of the date of the hearing, the individual was in compliance with the terms of his probation. *Id.* at 1.

V. Analysis

I have thoroughly considered the record of this proceeding, including the submissions tendered in this case and the testimony of the witnesses presented at the hearing. In resolving the question of the individual's eligibility for access authorization, I have been guided by the applicable factors prescribed in 10 C.F.R. § 710.7(c)[5] and the Adjudicative Guidelines. After due deliberation, I have determined that the individual's access authorization should not be restored. I cannot find that restoring the individual's DOE security clearance will not endanger the common defense and security and is clearly consistent with the national interest. 10 C.F.R. § 710.27(a). The specific findings that I make in support of this decision are discussed below.

A. Mitigating Evidence

In mitigation of the Criterion L security concerns arising from his thefts from the Sports Venue and the related criminal proceedings, the individual argues that such behavior is inconsistent with his prior behavior and that it will not be repeated. Tr. at 8 – 16; Ex. A at 1. At the time that he stole cash from the Sports Venue, he felt shame and remorse and confessed to a priest at his church. Tr. at 14, 65, 72; Ex. 10 at 21. The priest advised the individual to make restitution and, thereafter, the individual paid the restaurant charges for a colleague's retirement celebration, pledged money to a hospital, and gave cash to a homeless man. *Id.* at 22 – 23. Referring to these three acts, the individual said, "I felt like that was the restitution amount…the father said to make restitution, I felt that covered it." *Id.* at 52.

Subsequently, the individual concluded that his theft of money from his then-employer was a side-effect of medical treatment that he received contemporaneously with his

[5] Those factors include the following: the nature, extent, and seriousness of the conduct, the circumstances surrounding the conduct, to include knowledgeable participation, the frequency and recency of the conduct, the age and maturity at the time of the conduct, the voluntariness of his participation, the absence or presence of rehabilitation or reformation and other pertinent behavioral changes, the motivation for the conduct, the potential for pressure, coercion, exploitation, or duress, the likelihood of continuation or recurrence, and other relevant and material factors.

thefts. During the two years prior to these events, the individual had been using a testosterone topical application on a daily basis. Tr. at 11. A few days prior to the first theft for which the individual was criminally charged, his doctor implanted testosterone pellets in his hip as a six-month substitute for the topical gel he had been using daily. *Id.*; Ex. B at 2 – 3. The individual's subsequent internet research indicated that possible psychological effects of steroid use include "increased aggressiveness and sexual appetite, sometimes resulting in abnormal sexual and criminal behavior…." *Id.* at 1; Tr. at 70. The individual testified that "…with my personality, I believe I had to have been influenced somewhat by [the testosterone implant], that made me conduct myself in the way I did with the [Sports Venue]." *Id.*

The individual does *not* attribute the testosterone implant for his theft of cash to reimburse himself for refreshments for his subordinates, which he testified that he justified (apparently as an equitable reimbursement) for having traditionally brought refreshments for his subordinates.[6] *Id.* at 71 – 72.

In further mitigation of the Criterion L security concerns, the individual argues that he had sought counseling through his employer's employee assistance program (EAP). *Id.* at 15. Through the EAP, the individual attended two counseling sessions and underwent psychological testing. Ex. D-1 at 2. Although the EAP counselor did not testify at the hearing, the individual presented an email from the counselor which stated that the counselor had "administered the Minnesota Multiphasic Personality Inventory to [the individual] and the results did not reveal any anti social [sic] tendencies or proclivities to be dishonest." Ex. D-2 at 1.

For these reasons, the individual argues that he has mitigated the security concerns noted by the LSO under Criterion L.

B. Administrative Judge Evaluation of Evidence

Security concerns arise under Criterion L when a person's conduct suggests that he or she is not honest, reliable or trustworthy or may be subject to pressure or coercion. *See* 10 C.F.R. § 710.8(l). With respect to the individual, the Notification Letter alleges that he engaged in criminal activity and was the subject of criminal justice proceedings as a result of such activity. While the individual acknowledges that he stole cash from his employer and pled guilty to a felony, it is not clear on how many occasions he stole from his employer or the total amount that he stole. The administrative record of this proceeding contains several possible answers.

During the PSI, the individual acknowledged *two* occasions on which he stole cash from his employer (which he stated totaled $400 to $500) in retaliation for workplace changes

[6] At the hearing, after the individual testified as to the possible role of steroid use in his criminal behavior, I specifically asked him to clarify the statements that he had made in which he first described his thefts as having been motivated by anger towards the Sports Venue, then for reimbursement for refreshments for his subordinates at the Sports Venue, then as a result of steroid use. His response was, "No…. The money I took on the first two occasions, I justified in my mind because I've always bought sandwiches for my crew. Okay? That's the way I justified the stealing to me." Tr. at 71 – 72.

instituted by the Sports Venue. Ex. 10 at 11 – 13. He distinguished those occasions from earlier occasions where "*once or twice*" he took money from his employer to reimburse himself for refreshments that he provided to his subordinates (which he stated was $10 or $20 in each case). *Id.* at 27. Such reimbursements were not authorized by his employer. Tr. at 106.

However, at the hearing, the individual stated[7] that he stole cash from the Sports Venue on *two* occasions to reimburse himself for refreshments and that he stole cash triggered by his anger at the workplace changes on *one* occasion only. *Id.* at 12 – 13. Consistent with the PSI, the individual testified that the "reimbursement" thefts preceded the larger "retaliatory" theft(s). *Id.;* Ex. 10 at 27. The individual's statements at the hearing align with the *initial* criminal charges brought against him in that he stated the "reimbursement" thefts occurred on October 28, 2012, and November 25, 2012 (the dates specified in the initial criminal charges for the misdemeanor thefts), and the "retaliatory" theft occurred on December 2, 2012 (the date specified in the initial criminal charge for the felony theft). However, this testimony is inconsistent with the *final* criminal charges brought against the individual which charged him with felony theft on October 28, 2012, and misdemeanor theft on the two subsequent dates. *See* Pre-Hearing Memorandum at A-4. The individual pled guilty to committing felony theft on October 28, 2012, pursuant to a plea agreement which dismissed the misdemeanor charges. Ex. 3 at 1 – 2. By pleading guilty to felony theft on October 28, 2012, the individual admitted stealing an amount greater than $500 on that date and this admission cannot be reconciled with the individual's assertions at the hearing that on that date he took cash only in an amount necessary to reimburse himself for employee refreshments – an amount he described in the PSI as being $10 to $20.

The individual's testimony that he committed theft twice to reimburse employee refreshments followed by a single larger theft in retaliation of workplace changes is also undermined by information in the record that the individual was video-taped slipping cash into his sock on surveillance cameras that his employer installed after it suspected employee theft. Ex. 10 at 15. It seems improbable that "one or two" thefts limited to the cost of employee refreshments of $10 to $20 would have prompted the Sports Venue to undertake such measures.

Additionally, the court ordering the individual to make restitution to the Sports Venue in the amount of $1035 raises doubts about the accuracy of the individual's responses in the PSI in which he stated that the thefts totaled no more than $540. *See* Ex. 3 at 2; Ex. 10 at 12, 27.

Notwithstanding the factual uncertainties described above, two conclusions clearly result from the above summary. First, as a minimum, the individual has acknowledged committing one felony theft and two misdemeanor thefts; he was criminally charged with all three; and he pled guilty, pursuant to a plea agreement, to the most serious of the charges. The individual's felony conviction resulted, *inter alia*, in his being sentenced to

[7] These statements were made by the individual during his opening statement at the hearing, which preceded his testimony under oath.

probation for three years, of which he had only served approximately six months as of the date of the hearing. All of this conduct is disqualifying under Criterion L. *See* Administrative Guidelines at Guideline J, ¶31(a) (disqualification resulting from a single serious crime or multiple lesser crimes), ¶31(c) (disqualification resulting from allegations or admissions of criminal conduct, regardless of whether the person was convicted), and ¶31(d) (disqualification resulting from individual currently being on parole or probation). Second, the factual uncertainties that exist in the record[8] result from the individual having provided inconsistent information during the course of the security investigation and proceedings. These inconsistencies evidence the individual's unreliability and trustworthiness and are disqualifying under Criterion L. *See* 10 C.F.R. § 710.8(l); Administrative Guidelines at Guideline E, ¶16(d) (credible adverse information when combined with all available information supporting a whole-person assessment of untrustworthiness and unreliability).

The individual's lack of trustworthiness and reliability are further evidenced in the record in two other specific instances. When the individual was first interviewed by OPM as part of its periodic security reinvestigation, the individual stated that he no longer worked for the Sports Venue but assumed that he was eligible to be rehired. Ex. 11 at 58. This answer is deceptive as the individual had been interviewed seven months earlier by the local police department and informed that the Sports Venue had video-tapes from surveillance cameras showing the individual stealing cash. *Cf.* Administrative Guidelines at Guideline E, ¶16(d).

Additionally, in response to my questions at the hearing, the individual testified that he was aware that one other person had been criminally charged for theft of parking receipts from the Sports Venue – his daughter who he supervised at the Sports Venue was charged for misdemeanor theft of parking receipts during the same period in which the individual had stolen cash from the parking receipts. The individual had observed[9] his daughter stealing the money and, notwithstanding his responsibility to the Sports Venue as the supervisor of the parking fee collectors, he did not speak to his daughter about her theft or report his observations to the Sports Venue. Tr. at 102 – 104. *Cf.* Administrative Guidelines at Guideline E, ¶16(d).

Under the Adjudicative Guidelines, disqualifying behavior may be mitigated based upon a significant lapse of time since the behavior occurred without the recurrence of criminal behavior, the behavior having occurred under unusual circumstance, or the individual having been successfully rehabilitated, including showing remorse or having made restitution. *See* Administrative Guidelines at Guideline J, ¶32(a), (d). As discussed below, the individual has failed to evidence sufficient, relevant mitigation.

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[8] In addition to the factual variations in the record which are summarized above, the individual provided a version with other variations to OPM during its investigation. *See* Ex. 11 at 66 – 67.

[9] The individual's testimony on this point was that "[he] had a high suspicion of [his daughter taking money from the parking receipts]" because "[he] thought [he] saw her put some money in a cigarette case." Tr. at 103.

In this case, the individual committed multiple thefts recently – all within two and one-half years of the hearing. The individual's conviction was less than six months prior to the hearing and his probation continues for another two and one-half years. The individual committed the criminal acts at the time that he was a mature adult, nearing retirement. As a result, a significantly greater period of time needs to elapse without the recurrence of criminal conduct by the individual. *See* 10 C.F.R. § 710.7(c) (considering factors of frequency and recency of conduct and age and maturity of the individual at the time of the conduct).

The individual argues that his criminal behavior occurred under unusual circumstances that are unlikely to recur, in that he was angry at the Sports Venue for its revised management practices and his anger was exacerbated by steroid medication that he was taking at the time. While the individual presented credible documentation that he received an implanted testosterone pellet during the period in which his behavior occurred, his arguments with respect to the effect of such implant on his behavior are supported solely by a comment on the website of the United States Anti-Doping Agency that anabolic agents (including testosterone) result in "increased aggressiveness and sexual appetite, sometimes resulting in abnormal sexual and criminal behavior…." Ex. B at 1. This is mere speculation by the individual and insufficient to support a determination 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).

Further, the individual acknowledges that his behavior was directed at the Sports Venue in retaliation for it having changed certain workplace policies that were detrimental to the individual. Tr. at 73 – 74, 107. He specifically identified: no longer being able to view events at the Sports Venue on days he worked; no longer being allowed to work with his wife; and a decision to outsource the jobs of him and his subordinates at the end of the expiring union contract. *Id.* Here the individual was motivated by self-interest; he committed acts based on his own sense of fairness, knowing such behavior violated established criminal laws. The individual allowed his own judgment and values to annul the behavior expected of members of the community.[10] The individual's willingness to violate laws in retaliation for workplace policies which he found personally detrimental evidences behavior that is inconsistent with access authorization. A holder of access authorization must comply with laws, rules and regulations in handling classified materials and resolve any concerns through established procedures. The individual's criminal conduct was fueled by anger and a personal sense of justice, which cannot be mitigated as an "unusual circumstance" arising as a speculative side-effect of his steroid medication. 10 C.F.R. § 710.27(c), (d).

In further mitigation, the individual introduced into the record an email from his EAP counselor to support that his criminal behavior was an aberration. Even though the LSO raised no security concerns with respect to mental health, the LSO raised no objections to the email being entered into the record. The email states that the counselor administered

[10] The individual testified: "The logic I had in my head was I guess I thought I was like a Robin Hood and this would get back at them…." Tr. at 110.

psychological tests to the individual and the "results did not reveal any anti social [sic] tendencies or proclivities to be dishonest." (Ex. D-2 at 1). I have given the email *de minimis* weight as (1) it is a mere three sentences, with no pretensions of a psychological evaluation and no description or analysis of the test findings other than a summary sentence; (2) the individual did not present the counselor to testify to provide information to support his conclusion; and (3) the individual presented no information on the counselor's qualifications as an expert.

The individual also suggests that his EAP counseling demonstrates mitigation of the security concerns. However, the EAP counselor's email indicated that the individual's criminal behavior was based on "anger" (a conclusion consistent with the individual's own testimony), and the individual presents no evidence that this issue was addressed in his counseling. He had only two EAP counseling sessions (with a third for psychological testing) and he testified that the focus of the counseling was on the need for the individual to forgive himself for committing criminal acts before he could "move on." Tr. at 73. Such counseling fails to address concerns arising from behavior motivated by anger towards third parties, especially when such emotions fueled criminal conduct.

With respect to mitigation based upon successful rehabilitation, the Adjudicative Guidelines state that factors such as remorse and restitution may be considered. Administrative Guidelines at Guideline J, ¶32(d). While the individual has consistently expressed remorse, his regret seems to result from the consequences he has endured as a result of his behavior. True rehabilitation begins with acceptance of one's behavior and the consequences. Here, the individual continues to excuse his behavior and portray himself as a victim: his behavior was driven by changes made by the Sports Venue to workplace practices, some in violation of a provision of a union contract (Tr. at 10 – 11); his behavior was a result of prescribed medication *(Id.* at 11 – 12, 70 – 72, 87); the police needlessly embarrassed him by arresting him after he boarded a flight (ignoring that there was an outstanding warrant for his arrest and he was about to fly out of the country) (*Id.* at 15 – 16); and he received a more severe sentence than a first time offender should have due to the political influence of the Sports Venue *(Id.* at 76). There is no evidence that the individual has accepted responsibility of his behavior in a manner that evidences the commencement of rehabilitation.

Further, the individual's evidence of restitution also fails to support mitigation. The individual stated that following his thefts, he confessed to a priest who told him to perform restitution. Ex. 10 at 52; Tr. at 14. His restitution consisted of paying for a colleague's retirement dinner, making a charitable contribution, and giving cash to a homeless man. Such acts, however, failed to provide restitution to the party from whom he stole – the Sports Venue. Again, he attempts to shift responsibility from himself by arguing that he would have repaid the Sports Venue had they just approached him, but they failed to take the initiative. He also argues that he could not initiate restitution to the Sports Venue because he did not know who to contact. Ex. 11 at 67; Tr. at 14, 65, 109 – 110. This argument lacks credibility in light of the fact that he worked for the Sports Venue for 14 years, much of which time he was in a supervisory position. When the individual finally did make restitution to the Sports Venue, it was pursuant to a court

order. Court ordered restitution does not evidence rehabilitation, which is premised on genuine remorse and personal initiative to correct one's past misdeeds.

Based on the foregoing, I find that the individual has not mitigated the security concerns associated with Criterion L arising from his theft of cash from the Sports Venue and the resultant criminal proceedings.

V. Conclusion

In the above analysis, I have found that there was sufficient derogatory information in the possession of the DOE that raises serious security concerns under Criterion L. After considering all the relevant information, favorable and unfavorable, in a comprehensive common-sense manner, including weighing all the testimony and other evidence presented at the hearing, I have found that the individual has not brought forth sufficient evidence to mitigate the security concerns associated with Criterion L. Accordingly, I have determined that the individual's access authorization should not be restored. The parties may seek review of this Decision by an Appeal Panel under the regulations set forth at 10 C.F.R. § 710.28.

Wade M. Boswell
Administrative Judge
Office of Hearings and Appeals

Date: May 11, 2015