

returns had to be filed by a certain date. On June 8, 2015, the LSO sent a letter (Notification Letter) to the individual advising him that it had reliable information that created a 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 to request an administrative review hearing, and I was appointed the Administrative Judge in the case. At the hearing, the individual presented his own testimony and that of four other witnesses; the LSO produced no witnesses. In addition to the testimonial evidence, the LSO submitted seven numbered exhibits into the record and the individual submitted seven exhibits as well, some with multiple subparts, identified as Exhibits A through F and Z. 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.

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).

The individual must come forward at the hearing with evidence to convince the DOE that granting or 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.

² Criterion H concerns information that a person has engaged in conduct “which tends to show that the individual is not honest, reliable, or trustworthy.” 10 C.F.R. § 710.8(l).

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 support for its security concerns under Criterion L, the LSO relies on the information that the individual provided in his responses on his e-QIP and during his PSI. Specifically, the Notification Letter states that the individual admitted he had not filed his federal tax returns for 2010, 2011, 2012, and 2013, even after discussing the matter with an Office of Personnel Management investigator in June 2014, and had made no effort to contact the Internal Revenue Service. Ex. 1.

I find that there is ample information in the Notification Letter to support the LSO's reliance on Criterion L. Failure to file annual income tax returns as required may be evidence of a failure or inability to live within one's means, satisfy debts, and meet financial obligations, which may indicate poor self-control, lack of judgment, or unwillingness to abide by rules and regulations. These traits in turn raise questions about a person's reliability, trustworthiness, and ability to protect classified information. *See 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) at Guideline F.

IV. Findings of Fact

The individual has been separated from his wife of 19 years since 2009. Tr. at 29, 55. He took responsibility for filing their tax returns through 2008. *Id.* at 35-36. In 2008 or 2009, the individual and his wife separated and the wife filed for divorce. However, shortly before the divorce was final, the couple reconciled. *Id.* at 37, 55. After six months together, they agreed to separate again, but the wife was unwilling to finalize the divorce. *Id.* at 37.

The individual was strongly in favor of divorce and devised a plan to convince his wife to go through with the divorce. He knew that his wife feared little, but did fear not paying taxes; she had divorced her previous husband because he would not pay taxes. *Id.* at 36. To encourage her to divorce him, the individual stopped filing tax returns in 2009, along with other behavior intended to convince her that divorce was the best option. *Id.* at 35-36. The record demonstrates that the individual did file his tax return for 2010, though he has no recollection of doing so. *Id.* at 72 (testimony of tax preparer). He did not file tax returns for 2011, 2012, or 2013 in a timely manner.

Even though an Office of Personnel Management investigator had discussed the individual's failure to file tax returns with him in June 2014, the individual testified that he did not realize the seriousness of his actions at that time. Tr. at 42; Ex. 3. At the PSI in February 2015, he indicated that he was not aware that failing to file tax returns was against the law; he was aware, however, that he would be subject to penalties and interest charges for late filing. Ex. 6 at 147-48. As a result of the PSI, he understood that his failure to file was in violation of the law. Tr. at 42. At the hearing, when asked why he did not file his tax returns immediately upon learning that his failure to file was unlawful, the individual responded that he was hoping that his plan might still give him the necessary leverage to convince his wife to agree to the divorce. *Id.* at 48. He further testified that he had been willing to lose his job and had even attempted to ruin his credit rating by not making mortgage payments, in order to obtain his wife's consent to the divorce. *Id.* at 39, 43, 49. He stated that his sole reasons for engaging in these actions had been to obtain the divorce, and he conceded that none of these plans had had the desired effect. *Id.* at 49.

In May 2015, the individual received a notice from the Internal Revenue Service (IRS), sent to an old address, that he owed taxes for his 2011 income. He paid the amount requested, which included interest and penalties, immediately. *Id.* at 39, 74; Exs. A, E-5, E-6.³ In August 2015, he received a second notice from the IRS, now sent to his corrected address, stating that he must file his 2009, 2012, and 2013 tax returns. Tr. at 38-39; Ex. B. In early September 2015, the individual sought help from a tax preparer, who prepared his 2009, 2012, 2013, and 2014 returns immediately. *Id.* at 64-65. The individual then wrote checks for the amounts due according to those returns and mailed all four returns to the IRS on September 4, 2015. *Id.* at 33-34, 44, 46; Exs. C, F. He stated that he now understands that he will owe interest and penalties on these returns, and will pay them when the IRS calculates them and informs him. *Id.* at 78-79.

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) and the Adjudicative Guidelines. After due deliberation, I have determined that the individual's access authorization should be granted. I find that granting 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.

The individual made a conscious, purposeful decision not to file federal income tax returns for a number of years. This decision demonstrates poor judgment. I find, however, a number of factors in this case that mitigate the usual security concerns that would generally accompany such a display of poor judgment. First of all, the individual always filed and paid his taxes until he was faced with his wife's refusal to finalize the

³ His tax preparer later confirmed that the IRS's calculations of his 2011 tax liability were correct. Exs. E-2, E-3, E-4.

divorce. He credibly testified that he always intended to file his returns, as he had consistently in the past; his plan, while ill-conceived, was to refrain from filing them until he achieved his goal of convincing his wife to agree to the divorce. He also consistently stated, at both the PSI and the hearing, that he had not realized that failing to file returns was illegal, but that he was willing to subject himself to penalties and other assessments to achieve his goal. Had he known his actions were unlawful, he would have filed and paid his taxes. Ex. 6 at 174. Once he realized that his plan to not file tax returns was not achieving its intended goal, the individual took steps to comport with his IRS requirements in full, including his liability for 2009 and 2014, years that were beyond the scope of the LSO's concerns. In addition, he testified to his commitment to pay all tax obligations in the future. Tr. at 52.

Second, the individual's poor judgment, as displayed in his unsuccessful plan, was limited to a specific goal and is not in evidence in other aspects of his life. His girlfriend testified that he is law-abiding, pays his bills on time, and meets all his financial obligations. *Id.* at 11, 18, 19. His long-time co-worker and sometime supervisor vouched for the individual's reliability and security consciousness on the job. *Id.* at 58-60. On the other hand, his girlfriend and his brother both testified that the individual becomes anxious and agitated when discussing his wife and the predicament in which she has placed him. *Id.* at 11, 83. His brother further testified that the individual had rejected his mother's advice regarding taxes, because "trying to get rid of her has clouded your judgment." *Id.* at 82.

The individual now acknowledges that his plans to not file tax returns and to ruin his credit rating were not successful. He testified at the hearing that these plans are "failed attempts and there is no need for me to pursue that avenue further." *Id.* at 43. He had no other plans of his own for obtaining the divorce, and no intention to reinstitute any of his earlier attempts. *Id.* at 49, 52. He has instead engaged a lawyer to assist him, through lawful means, in obtaining the divorce he seeks, and will abide by the lawyer's advice in these matters. *Id.* at 51-52.

The facts discussed above set this case apart from a typical case involving failure to file tax returns and offer a number of reasons for finding that the LSO's concerns are less serious than they appeared initially. Adjudicative Guidelines at Guideline F, ¶ 20(a) (behavior unlikely to recur), (c) (clear indications that the problem is being resolved or is under control), (d) (individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts [in this case, IRS liability]). After considering all the testimony and written evidence in the record, I am convinced that the individual has resolved the LSO's security concerns that arose from his failure to file income tax returns.

VI. Conclusion

In the above analysis, I have found that there was sufficient derogatory information in the possession of the DOE that raised 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 brought forth sufficient evidence to resolve the security concerns associated with this criterion. I therefore find

that granting the individual's access authorization will not endanger the common defense and is clearly consistent with the national interest. Accordingly, I have determined that the individual's access authorization should be granted.

William M. Schwartz
Administrative Judge
Office of Hearings and Appeals

Date: November 17, 2015