

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 one of his brothers; the LSO produced no witnesses. In addition to the testimonial evidence, the LSO submitted five numbered exhibits into the record and the individual submitted five exhibits as well, which I labeled as Exhibits A through E. 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).

Once the DOE has demonstrated a national security concern, 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.

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

² Criterion L 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).

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 that he had not filed state or federal tax returns for his 2012, 2013 and 2014 personal and business income. 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 financially supported several members of his immediate family at various times over the last decade, including his grandmother and mother until their respective deaths, some of his younger siblings until they reached financial independence, and currently his son. To this end, he has supplemented the income he earns at his position at the DOE facility by running a construction company in his spare time and, starting in 2010, helping one of his brothers run a farm. Ex. 5 (Transcript of August 19, 2015, PSI) at 45-46, 56, 58; Tr. at 17, 22-23, 81-82.

For 11 years, until 2012, the individual relied on the services of a local certified public accountant (CPA) to organize, calculate, and file his taxes for him. Tr. at 30. The CPA had advised the individual to account for his businesses in his personal income tax return rather than treating the businesses as discrete entities for tax purposes. In January 2013, when the individual brought his documents to the CPA for preparation of his 2012 tax returns, the CPA told him that he could not file his tax returns at that time but assured him that he would take care of his taxes soon. *Id.* at 31. The individual repeatedly asked when his taxes would be filed, and he received the same reassurance. Later in the year, the CPA informed the individual that he was no longer practicing as a CPA. *Id.* at 32, 55. At that point, the individual attempted, unsuccessfully, to file for an extension of time to file his returns. *Id.* at 55. He approached another tax preparer, who stated that, without an understanding of the original CPA's handling of the individual's businesses, they could not file his tax returns for him. *Id.* at 56-57. He also spoke with another CPA, who declined to take on the task. *Id.* at 44. Faced with those rejections and busy with his DOE facility position and two businesses, he took no additional immediate steps to get his tax returns filed. *Id.* at 45.

By the time he met with the Office of Personnel Management investigator in June 2015, the individual had engaged the services of a tax preparation service that had promised to prepare his tax returns for 2012, 2013, and 2014. Ex. 5 at 101. During that interview, he stated that his delinquent tax returns would be filed within 30 days. *Id.* at 106. At the August 2015 PSI, he stated that he would get his tax returns filed by the end of that month. *Id.* at 121. The tax service, however, then advised him not to file any returns until it worked out his business-related expenses; as a result, he did not file his taxes by the end of the month. Tr. at 79. After paying that company nearly \$1000, he learned that it had taken no steps to file his taxes and was unlikely to follow through. *Id.* at 75-76. Using an online tool from his bank, the individual attempted to separate his personal income and expenses from the income and expenses of each of his businesses for each of the years in controversy. Ex. 5 at 107.

In October 2015, the individual entered into a contract with a second tax preparation service to help him resolve his tax filing issues. Tr. at 58. This company committed to filing the individual's outstanding federal tax returns. It has worked with the individual to segregate his personal income and expenses from his business income and expenses, and has received a deadline from the Internal Revenue Service for filing both personal and business tax returns. *Id.* at 46, 48, 50, 64. Because the company has demanded a great deal of information from the individual and has been responsive to his requests and demands, he is optimistic that it will deliver the services for which he contracted. *Id.* at 59. In addition, the individual has now engaged the services of a new CPA, on the basis of a strong recommendation, who will represent him, once the tax preparation service has completed filing the outstanding federal returns, by filing the corresponding state tax returns for 2012, 2013, and 2014 as well as filing all future tax returns for the individual and his businesses. *Id.* at 51-52, 61-62.

At the PSI in August 2015, the individual 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. 5 at 103, 123. At the hearing, he testified that he has routinely had his employer withhold significant amounts to cover his income tax liability, and generally received a refund through 2011. Tr. at 36-37, 56; Ex. E. He believes that he will also be eligible for refunds from his delinquent tax return, once they have been filed, less any penalties and interest. As a result of the PSI, he now understands that his failure to file was in violation of the law. Tr. at 60.

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 restored. I 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.

The individual made a conscious decision not to file federal income tax returns for a period of about two years. This decision demonstrates poor judgment. I find, however, a number of factors in this case that mitigate the security concerns that would generally accompany such a

display of poor judgment. First of all, the individual always filed and paid his taxes, employing the services of a CPA, until the CPA stopped practicing. For several months of that period, the CPA led the individual to believe that he was only temporarily unable to assist him. Once it became evident that the CPA could no longer help him, the individual attempted to secure assistance from other tax preparers. While the individual admitted to some procrastination on his part, he did reach out to at least two tax preparation services and two CPAs before he ultimately succeeded, in October 2015, in engaging a service that is committed to filing all of the delinquent Federal tax returns. In addition, he has now secured a well-recommended CPA who will take care of his delinquent state tax returns as well as his future responsibilities as a taxpayer. Finally, he is now aware that failing to file tax returns is a violation of a law and not simply a choice that renders him subject to potential penalties and interest charges.

I find also that the individual's poor judgment, as displayed in his failure to file his tax returns for 2012, 2013, and 2014, was limited to this matter and is not in evidence in other aspects of his life. Both he and his brother testified that he is not only a responsible, trusted worker, but also, as the eldest son of a large family, a person who has taken upon himself the welfare of four generations. *Id.* at 17, 34-36, 80; Ex. C. Through his hard work, which has included employment in addition to his full-time position at the DOE facility, he has been able to provide for their needs as well as his own, and faces no financial hardship at this time.

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 restoring 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 restored.

William M. Schwartz
Administrative Judge
Office of Hearings and Appeals

Date: February 22, 2016