

*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: April 21, 2016)
)
)

Case No.: PSH-16-0034

Issued: August 4, 2016

Administrative Judge Decision

Neil Schuldenfrei, Administrative Judge:

This Decision concerns the eligibility of XXXXXXXXXXXX (hereinafter referred to as “the individual”) to hold an access authorization¹ 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 discussed below, after carefully considering the record before me, in light of the relevant regulations and the Revised Adjudicative Guidelines for Determining Eligibility for Access to Classified Information, The White House (December 19, 2005) (Adjudicative Guidelines), I have determined that the individual’s access authorization should not be restored.

I. Background

The individual works for a DOE contractor in a position that requires that she hold a DOE security clearance. In a Letter of Interrogatory (LOI) response dated February 3, 2016, the individual stated that she had filed her 2011 federal income tax return in July or August of 2015 (approximately three years after the legal deadline for filing), and that she had filed her 2010 federal income tax return at that same time (approximately four years after the legal deadline for filing).

On March 23, 2016, the LSO sent a letter (Notification Letter) to the individual advising her that it had reliable information that created a substantial doubt regarding her eligibility to hold a security clearance. In the attachment to the Notification Letter, the LSO explained that the derogatory information fell within the purview of potentially disqualifying criteria set forth in the

¹ Access authorization is defined as “an administrative determination that an individual is eligible for access to classified matter or is eligible for access to, or control over, special nuclear material.” 10 C.F.R. § 710.5(a). Such authorization will be referred to variously in this Decision as access authorization or security clearance.

security regulations at 10 C.F.R. § 710.8(l) (hereinafter referred to as Criterion L). Criterion L concerns information that a person has:

“...engaged in any unusual conduct or is subject to any circumstances which tend to show that the individual is not honest, reliable, or trustworthy; or which furnishes reason to believe that the individual may be subject to pressure, coercion, exploitation, or duress which may cause the individual to act contrary to the best interests of the national security. Such conduct or circumstances include, but are not limited to, criminal behavior....”

10 C.F.R. § 710.8(l).

Upon receipt of the Notification Letter, the individual exercised her 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 her own testimony and that of one other witness, and the LSO presented no witnesses. In addition to the testimonial evidence, the LSO submitted fourteen numbered exhibits into the record; the individual submitted no exhibits. 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 restoring 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 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). 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 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 cites:

- In her LOI response dated February 3, 2016, the individual stated that she filed her 2011 federal income taxes in July or August 2015, which was three years after the legal deadline of April 17, 2012. Furthermore, she did not file her 2011 federal taxes until after a personnel security interview (PSI) conducted on July 10, 2015; and
- In her LOI response dated February 3, 2016, the individual stated that she filed her 2010 federal income taxes in July or August 2015, which was four years after the legal deadline of April 17, 2012. Furthermore, she did not file her 2010 federal taxes until after a personnel security interview (PSI) conducted on July 10, 2015.

Notification Letter, attachment at 1.

IV. Findings of Fact

On October 16, 2014, the individual completed a Questionnaire for National Security Positions (QNSP). In response to the question, "In the past seven years, have you failed to file or pay Federal, state, or other taxes when required by law or ordinance," the individual indicated "no." Ex. 12 at 32. In response to a question regarding whether she had ever had a lien placed against her property, she also responded "no." *Id.* However, the individual's background investigation revealed unpaid taxes, as well as tax liens, and other delinquent debts. As a result, a PSI was conducted on July 10, 2015.

During the PSI, the individual indicated that she was unaware of the tax liens until she sought to purchase a home in 2015, and the liens became an issue in the purchase. Ex. 13 at 7.

The individual acknowledged ongoing issues with bills and with her taxes, stating that the issues began around 1995, when she first separated from her husband. *Id.* at 23-24. She stated that she would frequently file her taxes, but not make any payments due; instead, she would rely on a refund the following year in order to pay the previous year's taxes. *Id.* at 23-24, 27.

The individual further stated that she reconciled with her husband in 2000, but that he was not working at the time. *Id.* at 28. She indicated that he had not been filing his taxes during their separation. *Id.* She stated that, when attempting to purchase a home, "it was discovered that I did not file, they claim I did not file a 2010 or 2011 [tax return], so I'm in the process of filing that." *Id.* at 31. She asserted, however, that she believed she had filed for those years. *Id.* at 33. When asked if she believed they were filed "correctly," she stated, "yes." *Id.*

On January 28, 2016, a LOI was sent to the individual, requesting further information regarding her finances. Specifically, the LOI asked about her filings for tax years 2010 through 2013. In her response dated February 3, 2016, the individual indicated the following, with respect to each tax year:

- 2010: “Filed July/August 2015”
- 2011: “Filed July/August 2015 Thought I filed through Turbo tax apparently there were problems & was never fixed or filed for 2010 & 2011.”
- 2012: “Filed July/August 2015 Relocated from Hawaii to Las Vegas in the haste to obtain employment & residence totally spaced it.”
- 2013: “Filed July/August 2015”
- 2014: “Filed June 2015 prior to the previous years above.”

Ex. 8 at 1. Thereafter, on March 23, 2016, the LSO sent the individual her Notification Letter.

In her appeal, dated April 15, 2016 (Appeal), the individual stated, “...I don’t recall all that I said in that interview At the time I was 10 days homeless, a home purchase gone bad.” Appeal at 1. She further stated:

“I’m not a dishonest person, perhaps a little irresponsible. I had a lot of life happenings supporting my son(s) through college, my husband being unemployed sporadically definitely led me through bad credit & a lot of unpaid bills.”

Id. At the bottom of the appeal letter, she wrote “I had to refile 2010 & 2011 because my husband’s taxes weren’t filed. *See* IRS note enclosed.” *Id.* She enclosed a notice from the IRS, dated

September 2, 2015, addressed to her husband, indicating that returns had not been filed for 2010 or 2011. *Id.* at attachment 2.

The individual also enclosed screenshots from TurboTax showing the amount of Federal and state taxes due for tax year 2011. *Id.* at attachment 3. There is no indication on the form that the tax return was actually filed with the IRS.

The record includes a number of other notices from the IRS, including²:

- February 23, 2015, “Notice of intent to seize (levy)” for 2012 taxes (Ex.10 at 1);
- September 2, 2015, notice of missing tax returns for 2010 and 2011 (Ex. 2, attachment 2);
- November 16, 2015, “Second reminder” of unpaid taxes for 2014 (Ex. 8, attachment 4); and
- December 21, 2015, “Notice of intent to seize (levy)” for 2014 (Ex. 8, attachment 1).

² Most of these notices are addressed to the individual and her husband jointly, and utilize his Social Security Number (SSN). For the tax years 2010 and 2011, IRS records indicate the husband’s SSN as the “taxpayer identification number”, and the individual’s SSN as the “spouse taxpayer identification number.” *See* Ex. 10.

While the individual states that she was never notified of the failure to file 2011 returns, Tr. at 31, official records provided by the Internal Revenue Service (IRS) at the request of the individual show the following entries for the 2011 tax year:

- Inquiry for non-filing of tax return, November 21, 2012; and
- Notice issued, December 10, 2012.

At the hearing, the individual stated that she was not aware of any other outstanding debts, other than to the IRS. Tr. at 12. With respect to the 2010 and 2011 returns, she stated that she believed that she had filed them, but “I wanted to clear this up since the interview, so I just refiled them.” *Id.* at 15. However, under further questioning, she stated that she was “not sure” if she had filed for 2011. *Id.* at 29, 33, 44.

The individual stated that she anticipated a refund for her 2010 taxes, when she believed they had been filed in 2011, but could not explain why she did not question the fact that she never received a refund. *Id.* at 25, 27. She then indicated that, in discussions with the IRS in 2015, “the woman tells me I filed 2010, but could not determine whether or not it was a joint [filing] or head of household [filing] or what … and so she says to refile it. So she sent me the transcript, and that’s why I refiled it.” *Id.* at 37.

The individual testified that she filed her 2010 return as a “joint account;” however, the individual then states that she filed it as “head of household.” *Id.* at 19-20. She reiterated that a number of years had to be refiled because her husband had not filed. *Id.* at 50. “I filed, because we were in and out of our marriage.” *Id.*

She also stated that she refiled her 2013 return in 2015, even though she believed she had previously filed it. *Id.* at 21.

With respect to her 2014 taxes, the individual testified that she received an extension to file, and filed within that extension. *Id.* at 48. However, during her PSI, she indicated she had filed after the extension expired. Ex. 13 at 40.

She stated, “Since the interview, I’ve been confused as to what I owe. And until today, I still don’t know what the outcome is since the interview. Since I’ve filed all these taxes, it’s still in assessment.” *Id.* at 12. She stated that she is sending \$75 a month until she learns what she owes, and works out an official plan with the IRS. Tr. at 12-13.

When asked what she had done “to ensure that the 2010, 2011 concerns don’t repeat themselves,” the individual stated, “I’ve been paranoid since the last interview, I’m still paranoid until I can iron all this out, make payments, come clean. I’ll be aware, so aware.” Tr. at 40. She further stated,

I have a degree in accounting. So I am aware that tax is important and it should be a priority. I do know this. So going forward, I’ll try to be diligent about our taxes, now that we’re in a better place.

Id. at 67.

The individual testified that personal issues impacted her tax filings, stating:

Between my husband and I, we separated for four years, reconciled, separated, and reconciled. It's behind us now. We're in a better place. My husband was unemployed for a long while, which made things really hard for me, and that's why the confusion in filing my taxes. I did head of household, because in those years my husband was absent.

Id. at 53-54.

The individual's husband testified on her behalf, stating that she usually filed the taxes, and that there had been times when he failed to file his own. *Id.* at 67. When asked about the individual's character and judgment, he stated, "That's why I'm married to her 30 years." *Id.*

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 not be restored.

The Notification Letter states that the individual acknowledged in her LOI response that she filed her 2010 and 2011 federal tax returns in July or August 2015, substantially beyond the legal deadline for filing. There appears to be some confusion on the part of the individual regarding when she actually filed. She has asserted at various times throughout these proceedings that she: filed both timely; filed 2010 timely, but wasn't sure about 2011; and filed both untimely.³

I find that there is ample information in the Notification Letter to support the LSO's reliance on Criterion L. Failure to satisfy debts or meet financial obligations may indicate poor self-control, lack of judgment, or unwillingness to abide by rules and regulations, all of which can raise questions about an individual's reliability, trustworthiness, and ability to protect classified information. See Adjudicative Guidelines, Guideline F. Failure to file federal or state tax returns is specifically mentioned under Guideline F as being a condition that could raise a security concern and may be disqualifying.

The Adjudicative Guidelines provide a list of conditions that could mitigate this type of security concern, including:

- (a) the behavior happened so long ago, was so infrequent, or occurred under such circumstances that it is unlikely to recur and does not cast doubt on the individual's current reliability, trustworthiness, or good judgment;

³ From the individual's demeanor at the hearing, it seems clear that she is simply confused about what happened, and not intending to engage in deception.

- (b) the conditions that resulted in the financial problem were largely beyond the person's control (e.g. loss of employment, a business downturn, unexpected medical emergency, or a death, divorce or separation), and the individual acted responsibly under the circumstances;
- (c) the person has received or is receiving counseling for the problem and/or there are clear indications that the problem is being resolved or is under control;
- (d) the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts.

Adjudicative Guidelines, Guideline F, § 20(a)-(d).

While the individual appears to be making an effort to resolve her situation, the concerns have not been mitigated. As of the time of the hearing, the individual was still unaware of the extent of her tax liability, due to issues in her filings throughout the years. She only satisfied her obligation to file her 2010 and 2011 returns in July or August of 2015; she acknowledged filing her 2012 taxes in 2015, saying that she "totally spaced it"; she acknowledged filing her 2013 taxes in 2015 (although she believed she had previously filed); and she acknowledged filing her 2014 tax returns late, after an extension had lapsed. In fact, the individual acknowledged issues with her tax filings dating back to 1995.⁴

For these reasons, and the individual's general confusion regarding her tax filings, I find that she has failed to mitigate the concerns. Specifically, the individual has not shown that: (a) the behavior occurred so long ago, or was so infrequent, that it is unlikely to recur, and does not cast doubt on her reliability, trustworthiness, or good judgment; (b) she acted responsibly, under the circumstances; or (c) there is clear evidence that the problem is being resolved or is under control. *See Adjudicative Guidelines, Guideline F, § 20(a)-(c).* While the individual has made what appears to be a good-faith effort to file and pay her taxes, she has not yet established a track record of timely filing and payment which would evidence mitigation under Adjudicative Guideline F, § 20(d).

I am instructed by the regulations to resolve any doubt as to a person's access authorization eligibility in favor of the national security. 10 C.F.R. § 710.7(a). Accordingly, under the present circumstances, I must find that the individual's access authorization should not be restored.

⁴ The Notification Letter cited only issues with the individual's 2010 and 2011 taxes, and those are the only years considered herein in determining whether the Notification Letter was supported. Other years are considered in this decision only with respect to whether the individual has established mitigating factors, pursuant to the Adjudicative Guidelines.

VI. Conclusion

Upon consideration of the entire record in this case, I find that there was evidence that raised doubts regarding the individual's eligibility for a security clearance under Criterion L of the Part 710 regulations. I also find that the individual has not presented sufficient information to fully resolve those concerns. Therefore, I cannot conclude that restoring the individual's suspended DOE 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). Accordingly, I find that the DOE should not restore the individual's suspended DOE access authorization.

The parties may seek review of this Decision by an Appeal Panel, under the regulation set forth at 10 C.F.R. § 710.28.

Neil Schuldenfrei
Administrative Judge
Office of Hearings and Appeals

Date: August 4, 2016