

The Notification Letter also informed the individual that he was entitled to a hearing before a Hearing Officer in order to resolve the substantial doubt concerning his eligibility for access authorization.

The individual requested a hearing in this matter. The LSO forwarded this request to the Office of Hearings and Appeals, and I was appointed the Hearing Officer. The DOE introduced nine exhibits into the record of this proceeding. Exhibits 1 through 9. The individual introduced five exhibits, Exhibits A through E, and presented the testimony of three witnesses, in addition to his own testimony.

II. DEROGATORY INFORMATION AND THE ASSOCIATED SECURITY CONCERNS

The Part 710 regulations require that I “make specific findings based upon the record as to the validity of each of the allegations” in the Notification Letter. 10 C.F.R. § 710.27(c). In this case, the Notification Letter cited information pertaining to paragraph (l) of the criteria for eligibility for access to classified matter or special nuclear material set forth at 10 C.F.R. § 710.8. Exhibit 1.³

First, the Notification Letter sets forth allegations regarding the individual’s failure to file taxes, specifically his admission that he had not filed federal or state income taxes since 2000, that he had told the OPM investigator in March 2011 that he would file his taxes as soon as possible but had not done so by the time of the PSI in June 2011, and his admission that he had been “very irresponsible when it comes to filing taxes.” Exhibit 1 at 3. The validity of these allegations is not in dispute.

However, there are apparent errors in the second set of allegations, concerning the individual’s “pattern of noncompliance with laws.” *Id.* Each of the eight relevant allegations concern traffic violations dating from 2003 through 2011. The second allegation states that U.S. Customs officials detained the individual in May 2008 due to a bench warrant issued when he failed to appear in court regarding an October 2010 speeding citation. Based on the hearing testimony of the individual, Hearing Transcript (Tr.) at 71-74, and the OPM investigative report, Exhibit 6 at 6, I find that the speeding citation in question was issued in September 2007, not October 2010.⁴ Relying on the same evidence, I also find that the third of these allegations should refer to the September 2007 speeding citation, rather than to a July 2006 parking ticket, an error that appears to be due to information provided by the individual on a Questionnaire for National Security Positions. Exhibit 8 at 10.

Regarding the sixth of these allegations, I do not find sufficient support in the record for the allegation that the individual received a traffic citation in September 2003. This allegation appears to be based on information the individual provided in his interview with an OPM investigator in 2005, Exhibit 7 at 14, though the relevant court records cited in the OPM investigative report indicate that the individual’s statement would have more likely been referring to a citation he received in November 2003, which is

³ Criterion (l) defines as derogatory information that an individual has “[e]ngaged 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.” 10 C.F.R. § 708.8(l).

⁴ This allegation also includes a statement that the individual’s driver’s license was suspended for his failure to appear in court in response to the speeding citation, though the individual testified that he was not aware of this suspension. Tr. at 76. I find this allegation sufficiently supported by the OPM investigative report, *id.*, which references relevant court records, including notations of an “MVD suspension” on March 4, 2008, and a subsequent notation of “MVD release” on October 1, 2009. Exhibit 6 at 6. Moreover, despite the individual’s testimony that he was not aware of this suspension, I note that the individual also testified that he was unaware of a subsequent suspension of his license in November 2010, which is not in dispute, until informed of the suspension during a May 2011 traffic stop. Tr. at 80.

cited in a separate allegation in the Notification Letter. *Id.* at 24-25.

Aside from the above, I find that the allegations in the Notification Letter accurately reflect the record in this case, and I note here that the individual has not disputed that he was stopped for traffic violations three times in 2003, and once in each of the years 2004, 2007, 2010, and 2011. *Id.* at 67-68, 73-74, 76-81. Neither does he dispute that he failed to appear in court as required in connection with all but the last two traffic stops. *Tr.* at 67-68, 73-75.5

This derogatory information adequately justifies the DOE's invocation of criterion (1), and raises significant security concerns. "Conduct involving questionable judgment . . . or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness and ability to protect classified information." *Revised Adjudicative Guidelines for Determining Eligibility for Access to Classified Information*, The White House (December 19, 2005) (*Adjudicative Guidelines*), Guideline E.

III. REGULATORY STANDARDS

The criteria for determining eligibility for security clearances set forth at 10 C.F.R. Part 710 dictate that in these proceedings, a Hearing Officer must undertake a careful review of all of the relevant facts and circumstances, and make a "common-sense judgment . . . after consideration of all relevant information." 10 C.F.R. § 710.7(a). I must therefore consider all information, favorable and unfavorable, that has a bearing on the question of whether restoring the individual's security clearance would compromise national security concerns. Specifically, the regulations compel me to consider the nature, extent, and seriousness of the individual's conduct; the circumstances surrounding the conduct; the frequency and recency of the conduct; the age and maturity of the individual at the time of the conduct; the absence or presence of rehabilitation or reformation and other pertinent behavioral changes; the likelihood of continuation or recurrence of the conduct; and any other relevant and material factors. 10 C.F.R. § 710.7(c).

A DOE administrative proceeding under 10 C.F.R. Part 710 is "for the purpose of affording the individual an opportunity of supporting his eligibility for access authorization." 10 C.F.R. § 710.21(b)(6). Once the DOE has made a showing of derogatory information raising security concerns, the burden is on the individual to produce evidence sufficient to convince the DOE that granting or restoring 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). *See Personnel Security Hearing*, Case No. VSO-0013 (1995), (*affirmed* by OSA, 1996), and cases cited therein. The regulations further instruct me to resolve any doubts concerning the individual's eligibility for access authorization in favor of the national security. 10 C.F.R. § 710.7(a).

IV. ANALYSIS

The discussion that follows addresses, in turn, the evidence the individual has presented to resolve the two categories of concern in this case, first with respect to his failure to file federal and state income tax returns beginning in 2000, and second regarding his traffic violations from 2003 to 2011 and his failure to appear in court in connection with five of those incidents. For the reasons explained below, I find

⁵ Prior to the hearing in this matter, the individual disclosed that he "recently paid a traffic citation for allegedly using a cellular telephone while operating a motor vehicle." Letter from Attorney for Individual to Steven Goering, Office of Hearings and Appeals (November 20, 2011). At the hearing, the individual testified that he was, in fact, not using a cellular telephone on that occasion, but he decided to not contest the charge, and paid a \$160 fine. *Tr.* at 85-89.

that, while the individual has offered credible explanations for his behavior, he has not sufficiently resolved the concerns in this case.

A. Failure to File Income Tax Returns

First, with respect to his failure to file tax returns, the individual testified that, prior to his June 2011 PSI, he believed that, “as long as you didn’t owe any money, you didn’t need to file.” Tr. at 33. Though the individual does not recall how the topic of taxes came up during his February 2011 OPM interview, he stated that the investigator advised him to file his delinquent tax returns, as the DOE was “starting to take these things more seriously, and you should file these soon.” *Id.* at 39. The individual testified that he took this not to mean that he was *required by law* to file taxes, but that, from the perspective of the DOE, “it might look strange if most people are filing their tax returns and I haven’t for quite a while, that [it] could look suspicious, for instance, and so I could see how that could be a bit of a red flag.” *Id.* at 39-40.

In one sense, the individual’s explanation is somewhat difficult to believe, given that he is highly educated, *id.* at 31-32, and his comportment at the hearing revealed no lack of intelligence or sophistication. On the other hand, neither did the individual’s demeanor in his testimony give me cause to doubt the truthfulness of his account. 10 C.F.R. § 710.27(b) (“In reaching the findings, the Hearing Officer shall consider the demeanor of the witnesses who have testified at the hearing, the probability or likelihood of the truth of their testimony, [and] their credibility, . . .”). Nor is there evidence in this case of inconsistencies in the individual’s explanations, or that he was motivated by a concern that he would be unable to pay any taxes he owed. In prior cases, such evidence has undermined the credibility of testimony from individuals who have claimed to be unaware of their legal obligation to file tax returns. *See, e.g., Personnel Security Hearing, Case No. TSO-0982 (2011).*

What is still troubling, however, is that, for over ten years, the individual did not bother to actually determine if he would have owed taxes had he filed a return. Instead, he relied upon the fact that he had received tax refunds in the past and that his filing status and number of dependents (none) had not changed over the years. Tr. at 33-34.

So I continued in not filing throughout the 2000s. I also in the back of my mind was thinking, "Well, if I did at any point incur a tax liability, if there was ever a situation in which -- in which something changed in terms of the amount of withholding, then, you know -- and if things did change, then I would hear from the IRS or from the [state income tax authority]," and I never did, so I figured everything was fine.

Tr. at 34. The individual later explained that his “state of mind at the time” was “sure enough that I don’t have to do it that I’d rather not bother, and if it turned out that I was -- I was incorrect, I imagined, rightly or wrongly at the time, that they would let me know about that and then I would file.” *Id.* at 111.

Considering the individual’s hearing testimony as a whole, I find that it is not the individual’s ignorance of the law that raises questions regarding his judgment and reliability, but rather his willingness to assume he was in compliance with the law, even as he mistakenly understood it. As it turns out, the individual had delinquent state tax liability for 2007, 2008, and 2009. Exhibit A at 8-10; Exhibit C at 2-4. Citing this fact, the individual frankly acknowledged he made “an error in judgment” by not staying “on top of it as I should have been.” *Id.* at 54. However, even if the individual had been fortunate enough to have assumed *correctly* that he did not owe taxes in any year, I would find his somewhat cavalier approach to his legal obligation to reflect a lack of judgment, even more so in a person with a security clearance, which the individual testified he has held since 2000. *Id.* at 113.

B. Traffic Citations and Failure to Appear in Court

As noted above, the record contains undisputed allegations of seven traffic citations for various violations over a nine-year period, twice for non-working headlights, twice for an expired registration, twice for speeding, and once for failure to present proof of insurance. Exhibit 1 at 3-4. In isolation, each of these could be considered a relatively minor offense. *Adjudicative Guideline* at Guideline E (concern could be mitigated where “offense is so minor . . . that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment”). On the other hand, taken together, the violations arguably form a pattern of failure to follow rules, with the latest conduct occurring as recently as May 2011.

However, what is of more concern, in my opinion, is the individual's actions, or lack thereof, after receiving many of these citations. The individual does not dispute that he failed to appear in court in five of these cases. In his testimony, the individual explained that he would “categorize various items in my life” such that certain things such as work and paying his rent on time “were always going to be at the front of my mind,” Tr. at 69, while there were

other things where I sort of let them -- I see now sort of, in hindsight, I let them slip, and I would -- these were particularly things that I knew that, "Well, it's going to be a little bit of an annoyance for me to deal with it"; and then, eventually, when I get around to it, it's something that I can clear up very quickly and then I'll do it and it will be done and there won't be any consequences, just that maybe it's going to take me a little longer to do it.

Id. at 70.

Clearly, the individual's failure on five occasions to comply with the requirements of the citations issued to him, resulting at least twice in a suspension of his license and penalties on other occasions, raises serious questions regarding his ability, if not his willingness, to comply with rules and regulations generally. While I find the individual's explanation of his behavior to be sincere, I cannot find that it in any way mitigates the concern raised by his conduct.

The individual testified that, as a result of the present proceeding, “I no longer sort of view things as being of primary importance and somewhat secondary importance. Now, I mean, everything is primary importance, . . .” Tr. at 74. Indeed, the record reflects the fact that he has acted more promptly in response to citations received in the past year. *See* Tr. at 80-81, 88-89. Nonetheless, the repeated nature of the individual's conduct over many years, in spite of facing tangible consequences, raises questions as to whether there has now been a truly durable change in his behavior.

In this regard, I note the individual's testimony that being stopped by U.S. Customs officials in May 2008 for failure to take care of a November 2007 traffic citation “sensitized” him to the consequences of “slack[ing] off in traffic matters, . . . and so that was something that I had sort of said to myself, “Well, I'm never going to let that happen again, I'm going to make sure I take care of these things.” Tr. at 82. However, the record indicates that the individual, despite his knowledge of an outstanding warrant for his arrest, did not take action to resolve the matter until the fall of 2009, nearly a year and a half later. Exhibit 6 at 6 (court records as reflected in OPM investigative report); *see* Tr. at 76.

V. CONCLUSION

I have no doubt that the process the individual has now been through regarding his security clearance has made an indelible impression on him. Thus, I would be surprised if the individual did not make every effort in the future to handle similar matters in a more timely fashion. However, the ultimate issue in this case, given a longstanding pattern of behavior that has manifested itself as recently as 2011, is whether the individual will be able to demonstrate consistently good judgment and reliability in the future, particularly in his responsibilities as a holder of a security clearance.

In the latter respect, there was very positive testimony at the hearing from both the individual's supervisor and a co-worker regarding the individual's conduct on the job in his handling of security issues and classified matter. Tr. at 13-17, 25. This stands in marked contrast to the undisputed behavior that has raised security concerns in the present case, and is to the individual's credit. However, even if I were fully convinced that the individual would follow all rules and regulations pertaining to security matters, I would still have concerns regarding whether his behavior outside of work, as it has in the past, might run afoul of the law and render him susceptible "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. § 708.8(l).

For the reasons set forth above, based on my review of the entire record, I cannot find sufficiently resolved the concerns under criterion (l) raised by the individual's repeated failure to comply with the law over a period of approximately eleven years. Therefore, the individual has not demonstrated that restoring his access authorization would not endanger the common defense and would be clearly consistent with the national interest. Accordingly, I find that the DOE should not restore the individual's security clearance. The individual may seek review of this Decision by an Appeal Panel under the procedures set forth at 10 C.F.R. § 710.28.

Steven J. Goering
Hearing Officer
Office of Hearings and Appeals

Date: February 3, 2012