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**United States Department of Energy
Office of Hearings and Appeals**

In the Matter of: Personnel Security Hearing)
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Filing Date: March 7, 2013)
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) Case No.: PSH-13-0029
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Issued: July 1, 2013

Hearing Officer Decision

Steven L. Fine, Hearing Officer:

This decision concerns the eligibility of XXXXXX (hereinafter referred to as "the Individual") to obtain a security clearance under the regulations set forth at 10 C.F.R. Part 710, entitled "Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material." For the reasons set forth below, I conclude that the Individual's security clearance should not be restored.

I. BACKGROUND

The Individual failed to meet his financial and legal obligations dating back to at least 2005, when he discontinued filing state and local taxes for two businesses he owns, and began using sales taxes receipts he collected from customers of those businesses on behalf of state and local governments to pay other debts incurred by those businesses.

Unable to resolve the security concerns raised by the Individual's failure to file taxes returns, failure to pay taxes, diversion of the sales tax receipts and inability or unwillingness to acknowledge that he had acted inappropriately, the LSO initiated administrative review proceedings by issuing a letter (Notification Letter) advising the Individual that it possessed reliable information that created a substantial doubt regarding his eligibility to hold a security clearance. In the Notification Letter, the LSO set forth the derogatory information at issue and advised that the derogatory information fell within the purview of potentially disqualifying

criteria set forth in the security regulations at 10 C.F.R. § 710.8, subsection (l) (Criterion L).¹

The Notification Letter informed the Individual that he was entitled to a hearing before a Hearing Officer in order to resolve the substantial doubt regarding his eligibility for access authorization. The Individual requested a hearing, and the LSO forwarded his request to the Office of Hearings and Appeals (OHA). The Director of OHA appointed me as the Hearing Officer in this matter on March 8, 2013.

At the hearing I convened pursuant to 10 C.F.R. § 710.25(e) and (g), I took testimony from the Individual. *See* Transcript of Hearing, Case No. PSH-13-0029 (hereinafter cited as “Tr.”). The LSO submitted 11 exhibits, marked as DOE Exhibits A through K, and the Individual submitted 19 exhibits, marked as Individual’s Exhibits 1 through 19.

II. STANDARD OF REVIEW

The Hearing Officer's role in this proceeding is to evaluate the evidence presented by the agency and the Individual and to render a decision based on that evidence. *See* 10 C.F.R. § 710.27(a). The regulations state that “[t]he decision as to access authorization is a comprehensive, common-sense judgment, made after consideration of all relevant information, favorable or unfavorable, as to whether the granting or continuation of 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 have considered the following factors in rendering this decision: the nature, extent, and seriousness of the conduct; the circumstances surrounding the conduct, including knowledgeable participation; the frequency and recency of the conduct; the Individual's age and maturity at the time of the conduct; the voluntariness of the Individual's 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. *See* 10 C.F.R. §§ 710.7(c), 710.27(a). The discussion below reflects my application of these factors to the testimony and exhibits presented by both sides in this case.

III. FACTUAL BACKGROUND

The Individual, a long-time employee of a DOE contractor, is a real estate investor with a portfolio of properties, including two motels that he purchased in 1986 and 1995. Tr. at 5. The

¹ Specifically, the Notification Letter alleges that the Individual 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 . . . a pattern of financial irresponsibility, . . . or violation of any commitment or promise upon which DOE previously relied to favorably resolve an issue of access authorization eligibility.

state and local governments in which the two motels are located, require that operators of motels collect occupancy and sales taxes from customers who rent units in motels. Tr. at 41-43; Exhibit B at 39. Motel operators are then required to remit these proceeds to the state revenue authority and to file yearly returns with the state revenue authority. In 2005, expenses for these two properties began to exceed the incomes generated by the two properties due to a reduction in revenue (resulting from a loss of free advertising) and increased costs (resulting from increased heating oil prices). Tr. at 11; Exhibit B at 31-35. In 2005, and continuing through 2011, the Individual discontinued remitting the proceeds of the sales and occupancy taxes he was collecting to the state revenue authority. Tr. at 11. Instead, he used the proceeds of the sales and occupancy taxes he was collecting from his customers on behalf of the state to pay other creditors of the two motels. Exhibit B at 50.

On September 20, 2011, the Individual submitted a Questionnaire for National Security Positions (QNSP) that he had completed as part of a routine re-investigation of his clearance to the LSO. In this QNSP, the Individual informed the LSO that he was “behind on paying sales tax from two businesses, beginning about 2005 through to the present. It is probably about \$20,000 owed.” Exhibit A at 34. He also reported that he was “behind on the 2010 property taxes on certain parcels . . . I owe about \$6,500.00 for 2010.” *Id.* at 36. Finally, he reported that “There was a property lien for unpaid . . . county sales tax that was lifted when the taxes were paid. . . This was for \$17,000.” *Id.* at 38.

On March 27, 2012, the LSO conducted a Personnel Security Interview (PSI) of Individual, in which he admitted he might be “a few months late” on some of his property taxes. Exhibit B at 36. He further stated: “but I don’t worry about it. . . I’d rather worry about the maintenance and making sure the places are filled rather than paying every freaking bill on time, . . . For me, taxes is the second priority.” *Id.* at 36. The Individual admitted he still owed the state for delinquent sales taxes. *Id.* at 41. During this PSI, the LSO informed him that he needed to provide certain financial information by May 7, 2012. *Id.* at 42-49. He did not meet that deadline.

The Individual repeatedly refused to state when he last filed his local sales tax returns. *Id.* at 41, 44. He subsequently admitted that he had not been paying the sales tax and that he was in arrears. *Id.* at 44. The Individual also admitted that he and a partner had purchased an investment property in 2011. *Id.* at 13-14, 51. The Individual admitted that his yearly income, including salary, social security, military pension, and profits from his businesses is approximately \$202,000. *Id.* at 39.

In January 17, 2013, the LSO conducted another PSI of the Individual. During this PSI, the Individual admitted that he still had not filed his state sales tax forms for the motels or paid those delinquent taxes. Exhibit H at 3-4. However, the Individual stated that he had filed a request with the state to pay those taxes back under the state’s tax amnesty program. *Id.* at 4.

On May 17, 2013, the Individual filed a response to the Notification Letter with this office (the Response). In the Response, the Individual admits: “When I was having these financial difficulties, I opted to delay paying the sales taxes until such time that I had enough motel income to pay them.” Response at 1. He further states that he had entered into an amnesty agreement with the state tax authority and had paid off all of his obligations under that

agreement. *Id.* The Individual submitted Exhibits 3 through 18, which document that he has done so. *Id.* The Individual stated that he had paid off all local government occupancy taxes through 2013. *Id.* at 2. The Individual also stated that he had paid all of his outstanding local government property tax balances and submitted Exhibit 17 documenting that he had done so. *Id.* at 3. The Individual noted that he had self-disclosed his tax delinquencies to the DOE. *Id.* at 2. The Individual argued “Perhaps DOE does not understand private business. If there is sufficient income, paying bills is not an issue. If a business suffers a loss of income, that is beyond its control, that doesn’t necessarily mean the owner is dishonest or a liar or a cheat.” *Id.* at 2. The Individual asserted that it was appropriate for him to have used sales and occupancy tax receipts to satisfy debts to other creditors of the motels because he was not using the money for personal expenses. *Id.* at 2. However, the Individual admitted that he was using his “personal money” to support the motels. *Id.* at 2. The Individual also submitted a copy of a credit report, dated May 5, 2013, showing that he has no current delinquencies and an excellent credit score (722). Exhibit 1. The Individual denied the Notification Letter’s charge that he had invested in real estate during the past seven years. Response at 6.

IV. DEROGATORY INFORMATION AND SECURITY CONCERNS

The record shows that the Individual has a pattern of financial irresponsibility and tax delinquency. The Individual’s pattern of financial irresponsibility and tax delinquency raises significant security concerns under Criterion L. The Revised Adjudicative Guidelines state in pertinent part: “Failure or inability to . . . satisfy debts, and 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. An individual who is financially overextended is at risk of having to engage in illegal acts to generate funds Conditions that could raise a security concern and may be disqualifying include: (a) inability or unwillingness to satisfy debts; . . . (d) deceptive or illegal financial practices such as embezzlement, . . . income tax evasion, . . . and other intentional financial breaches of trust; . . . (g) failure to file annual . . . state, or local income tax returns as required . . .” *Revised Adjudicative Guidelines for Determining Eligibility for Access to Classified Information*, issued on December 29, 2005, (Adjudicative Guidelines) Guideline F at ¶¶ 18, 19. In addition, the inability or unwillingness of the Individual to admit that his diversion of tax receipts and tax delinquencies were inappropriate, raises questions about the Individual’s judgment, honesty, and reliability. The Adjudicative Guidelines state in pertinent part: “Conduct involving questionable judgment . . . can raise questions about an individual's reliability, trustworthiness and ability to protect classified information.” Adjudicative Guidelines at ¶ 15.

V. ANALYSIS

The Individual contends that he is financially responsible and argues that none of his actions evidence a significant defect in his judgment, reliability, or trustworthiness. To this end, he contends: (1) he has now satisfied all of the outstanding debts; (2) he has an excellent credit rating and no delinquent debts; (3) he used the tax receipts for business expenses rather than for personal use; and (4) he self-disclosed all of his tax issues to DOE. I will address each of these contentions below.

The Individual submitted documentation and testified at the hearing that he has now satisfied all of his outstanding tax liabilities. *Id.* at 17-21. Moreover, he testified that he has taken a number of steps to improve the motels' cash flow and that they are now profitable. Tr. at 12. He testified that his cash flow will now allow him to pay all of his future tax obligations. *Id.* at 13. The Individual has also submitted a recent credit report showing that he currently has no delinquent debts and has an excellent credit rating. This evidence shows that the Individual has "initiated a good-faith effort to repay overdue creditors or otherwise resolve debts." See Adjudicative Guideline D at ¶ 20(d). However, other security concerns raised by his conduct remain unresolved. In addition to the evidence showing that he procrastinated in addressing his tax delinquencies, the record also shows that he diverted tax receipts he was required to remit to the state revenue authority to pay the debts of two businesses he owned as self-proprietorships, therefore improving his own financial circumstances at the expense of the state and local governments. When confronted by the LSO with evidence that he had done so, he acknowledged no wrongdoing on his part.

The Individual initially testified that he wished the DOE would have let him know that his failure to address his tax delinquencies might cost him his security clearance.² Tr. at 56. He subsequently admitted that even though the LSO had questioned him about his outstanding tax delinquencies during the March 27, 2012, PSI, he did not address most of these delinquencies until after his January 17, 2013, PSI, because he "procrastinated." Tr. at 56-58, 61.

The Individual admitted that he chose to pay other creditors rather than the state and local governments because the negative consequences of failing to pay these creditors would be more immediate than those that would result for failing to remit the tax receipts. Tr. at 25-32, 54-55. The Individual testified at the hearing that he always intended to eventually pay the delinquent taxes, but he was waiting until business conditions would improve so he could do so. Tr. at 11-12. The Individual argued that this decision was reasonable and appropriate and should not raise any security concerns. Tr. at 32, 39-40. The Individual admitted that he made a conscious choice to use the state's money, rather than his own income, to pay his bills. *Id.* at 44. He further admitted that his use of the tax receipts lessened the amount of his own personal funds he had to use to pay the motel's creditors. *Id.* at 44-45. He admitted that he did not take meaningful action to remit the sales tax money he owed until after his security clearance was suspended, because he was "procrastinating." Tr. at 61.

The Individual asserts that his diversion of the tax receipts he collected from the motels' customers to pay the motel's creditors was justified, since he was using the state and local governments' money to pay "business" expenses rather than "personal" expenses. Rather than mitigate the security concerns raised by his diversion of tax receipts he collected and held on behalf of the state and local government, this statement magnifies the security concerns raised by the diversion, since it shows that the Individual lacks the judgment to hold a security concern or is hoping to deceive DOE, which raises even greater concerns about his honesty and reliability.

² During his March 27, 2012, PSI, the Individual was repeatedly warned that the DOE considered his tax delinquencies and failure to file tax returns to be serious security concerns that might result in the loss of his security clearance if he could not document that he filed his tax returns and paid his taxes. Exhibit B at 36, 41-51.

The Individual also seeks to mitigate the security concerns raised under Criterion L by asserting that he self-disclosed all of the derogatory information to the LSO. The Individual claims that the DOE would never had known about his tax delinquencies and failure to file tax returns, if he had not informed the LSO about them. Even if this assertion was true, which it is not,³ it would still not mitigate the security concerns raised by the Individual's behavior in this case.

In summary, the record shows that the Individual has collected sales and occupancy taxes from his customers at two motels he owns. Instead of remitting these funds to the state and local governments as he was required to do, the Individual chose to lessen his losses on those properties by diverting those tax receipts and using them to pay other expenses of those businesses, allowing him to continue to invest in new property.⁴ When he was questioned about this behavior during the PSI and at the hearing, the Individual asserted that his actions were appropriate. It is therefore clear that the Individual does not acknowledge the inappropriateness of his actions. I find that he lacks the judgment, honesty, and reliability to maintain a DOE security clearance. For the reasons discussed above, I find that the security concerns under Criterion L raised by the Individual's financial conduct remain unresolved.

VI. CONCLUSION

After carefully considering the evidence before me, I find that the Individual has not resolved the security concerns raised under Criterion L. Therefore, the Individual has not demonstrated that restoring his security clearance would not endanger the common defense and would be clearly consistent with the national interest. Accordingly, I find that the Individual's security clearance should not be restored. The Individual may seek review of this Decision by an Appeal Panel under the procedures set forth at 10 C.F.R. Part 710.28.

Steven L. Fine
Hearing Officer
Office of Hearings and Appeals

Date: July 1, 2013

³ During the March 27, 2012, PSI, it was clear that the OPM investigation revealed that several tax liens had been filed against the Individual. Exhibit B at 38.

⁴ The Individual denied investing in real estate during the period in which he was failing to pay taxes, even though he previously admitted (during the March 27, 2013, PSI) that he purchased an interest in an investment property in 2011. Tr. at 34; Exhibit B at 13-14, 51.