

In July 2012, the LSO sent a letter (Notification Letter) to the individual advising her that it possessed reliable information that created substantial doubt regarding her 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 her receipt of the Notification Letter, the individual exercised her right under the Part 710 regulations by requesting an administrative review hearing. The Director of the Office of Hearings and Appeals (OHA) appointed me the Hearing Officer in the case and, subsequently, I conducted an administrative hearing in the matter. At the hearing, the LSO presented no witnesses; the individual presented the testimony of four witnesses, including herself. The LSO submitted seven exhibits into the record; the individual tendered nine 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.³

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 with evidence to convince the DOE that granting 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

² Criterion L relates to information that a person 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. §710.8(l).

³ OHA decisions are available on the OHA website at www.oha.doe.gov. A decision may be accessed by entering the case number in the search engine at www.oha.gov/search.htm.

evidence may be admitted. 10 C.F.R. § 710.26(h). Thus, an individual is afforded the utmost latitude in the presentation of evidence to mitigate the security concerns at issue.

B. Basis for the Hearing Officer's Decision

In personnel security cases arising under Part 710, it is my role as the Hearing Officer 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 previously noted, the LSO cites one criterion as the basis for denying the individual's security clearance, Criterion L. To support its allegations, the LSO notes that (1) the individual failed to file federal and state income taxes for seven years, Tax Year (TY) 2004 through TY 2010; (2) the individual has accrued unpaid federal tax liability of \$37,619.37 and unpaid state tax liability of \$6,885.00; and (3) the individual's federal tax liability resulted from her intentionally claiming nine exemptions when she knew she should only claim one. The individual's failure or inability to live within her means, satisfy her debts and to meet her financial obligations, raises a security concern under Criterion L because her actions may indicate "poor self-control, lack of judgment, or unwillingness to abide by rules and regulations," all of which can raise questions about the individual's reliability, trustworthiness and ability to protect classified information. *See* Guideline F of the *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). Moreover, a person who is financially overextended is at risk of having to engage in illegal acts to generate funds. *Id.*

IV. 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)⁴ and the Adjudicative Guidelines. After due deliberation, I have determined that the individual's access authorization should not be granted. I cannot find that granting the individual a DOE

⁴ Those factors include the following: the nature, extent, and seriousness of the conduct, the circumstances surrounding the conduct, to include knowledgeable participation, the frequency and recency of the conduct, the age and maturity at the time of the conduct, the voluntariness of his 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.

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.

A. Mitigating Evidence

The individual testified that her initial financial problems began through “overspending” when she was 19 years old and not paying attention to her finances. Tr. at 38, 54. She had hoped to get a financial “fresh start” after she filed for bankruptcy in 2005; however, she later learned that her unpaid federal tax debt for TY 2003 could not be discharged in bankruptcy and, following her 2005 bankruptcy, her financial problems with her then-husband increased. *Id.* at 37-39.

Prior to 2003, she had always filed and paid her taxes. *Id.* at 41. The individual believes that 2003 was also the year in which she increased her tax withholdings to nine allowances. *Id.* at 42, 60. She increased her number of withholding allowances because, at the time, she was working a significant amount of overtime and a co-worker suggested that increasing her allowances to nine would increase the amount of her net pay. *Id.* at 40. The individual testified that she forgot she had increased her tax withholdings to nine allowances and did not re-adjust her withholdings for the remainder of that employment which ended in late 2011. *Id.* at 41.

Although she did not file her income tax returns subsequent to TY 2003, she testified that she was constantly aware of needing to do so; however, she was barely getting by financially and she feared that her wages would be garnished. *Id.* at 39-40. The individual testified that she knew that tax filings were required by law and that she owed money to the federal and state governments. *Id.* at 40.

During this period of time, she was working for a different employer in positions of increasing responsibility. She worked in a position of trust which required her to possess a security clearance from another federal agency and required that she reliably handle confidential, private information. She testified that she was employed by her previous employer from 1997 to 2011 and she was well-regarded by her employer and colleagues. *Id.* at 34-37. Her supervisor and a senior management official from her previous place of employment corroborated her testimony. *Id.* at 10-18, 18-25.

She believes that she has learned to change and believes her candor with the DOE during her security clearance process reflects the changes she has made in her life. She has divorced her husband and has also relocated to a new city as part of starting her employment with a DOE contractor in October 2011. *Id.* at 55. In November 2011, after considerable time working with the Internal Revenue Service to reconstruct her tax records, she filed her federal tax returns for TY 2004 through TY 2010. She entered into a tax payment agreement with the IRS around March 2012. *Id.* at 45-46. In April 2012, she filed her state tax returns for TY 2004 through 2010 and entered into a tax payment agreement with her state in September 2012. *Id.* at 47; Ex. B. To assure that she is able to meet her obligations under her tax payment agreements, she began working a part-time job in June 2012; at both her part-time job and the DOE contractor where she works full-

time she has declared zero allowances for tax withholding purposes. Tr. at 48, 82; Ex. C; Ex. D.

B. Hearing Officer Evaluation of Evidence and Findings of Fact

The individual is to be commended for the actions that she has taken during the past 12 months to improve her financial situation: she has filed seven years of delinquent federal and state tax returns; she has entered into tax repayment agreements with both federal and state authorities; she has adjusted her tax withholding allowances to an appropriate number; and she has undertaken a second job to assure that she has sufficient income to meet her obligations. However, in analyzing the individual's eligibility for access authorization, these positive changes need to be viewed in context of the totality of the individual's situation.

1. Income Taxes

The individual acknowledges the accuracy of the facts set forth by the LSO in the Summary of Security Concerns attached to the Notification Letter. Those facts, as modified by the testimony and documents accepted into the record of hearing, are as follows:

- The individual filed her federal income tax return for TY 2003 on time, but was not able to pay the amount due; \$1,024.65, including interest and penalties, is currently outstanding. Tr. at 64-65; Ex. A at 2.
- The individual did not file her federal income tax returns for TY 2004 through TY 2010 until November 14, 2011; \$37,247.92, including interest and penalties, is currently outstanding. Ex. 7 at 27-28; Ex. A at 2.
- The individual filed her federal income tax return for TY 2011 on time; however, the IRS subsequently adjusted her return which resulted in the individual owing an additional \$1,551.46 in taxes that she was unable to pay. Tr. at 45-46; Ex. A at 2.
- The individual entered into a ten-year payment agreement with the IRS for payment of her delinquent federal income taxes in or around March 2012 (which was subsequently modified in July 2012 to incorporate additional taxes due for TY 2011) and five monthly payments have been made pursuant to that payment plan. Tr. at 70; Ex. 4; Ex. G at 4; Ex. H.
- The individual did not file her state income tax returns for TY 2003 through TY 2010 until March 2, 2012; \$10,210.00, including interest and penalties, is currently outstanding. Tr. at 47; Ex. 5; Ex. B.
- The individual entered into a five-year payment agreement with her state tax authorities for payment of her delinquent state income taxes on or about September 10, 2012, and payments have not begun. Tr. at 81; Ex. B.

Although the individual's financial problems began when she was young and in a troubled domestic situation, her inability or unwillingness to satisfy her income taxes has been continuous from TY 2003 through TY 2011. This pattern persisted into her maturity as an adult and survived the termination of her troubled domestic situation.

In prior cases involving financial irresponsibility, Hearing Officers have held that “[o]nce an individual has demonstrated a pattern of financial irresponsibility, he or she must demonstrate a new, sustained pattern of financial responsibility for a period of time that is sufficient to demonstrate that a recurrence of the past pattern is unlikely.” *See Personnel Security Hearing*, Case No. PSH-11-0015 (2011); *Personnel Security Hearing*, Case No. TSO-1078 (2011); *Personnel Security Hearing*, Case No. TSO-1048 (2011); *Personnel Security Hearing*, Case No. TSO-0878 (2010); *Personnel Security Hearing*, Case No. TSO-0746 (2009). Here, the individual has exhibited a sustained pattern of financial irresponsibility for at least seven years and has begun to address these issues only within the prior twelve months. She still has substantial tax debt outstanding and has made insubstantial payments under her tax repayment agreements to resolve it. At this point, it is too early to find that the individual has demonstrated a sustained period of financial responsibility for a significant period of time relative to her demonstrated financial irresponsibility.

The failure to file tax returns and pay taxes raises concerns beyond those associated with other patterns of financial irresponsibility. Failures with respect to taxes are also failures to comply with government rules and regulations, which implies a lack of respect for governmental authority or suggests willingness to disregard rules and regulations when compliance is not personally convenient. The individual acknowledged in her testimony that she was aware that she was violating the law. Tr. at 39-40. Selective compliance with the law is inconsistent with the trustworthiness necessary for access authorization; the ability and willingness to comply with rules and regulations is essential for those people with access authorization. This holding is consistent with that of other Hearing Officers who have held in other tax delinquency cases that “the lack of interest and effort, over a lengthy period, in dealing with taxes is incompatible with the standards required of those who hold an access authorization.” *See Personnel Security Hearing*, Case No. TSO-01078 (2011), *Personnel Security Hearing*, Case No. TSO-0457 (2007), *Personnel Security Hearing*, Case No. TSO-0378 (2006), *Personnel Security Hearing*, VSO-0538 (2002).

2. Tax Withholdings Allowances

The individual acknowledges that around 2003 she increased her tax withholdings to nine allowances in order to increase the amount of her net pay, knowing that she was not entitled to nine allowances. *Id.* at 40-43. She left her tax withholdings unadjusted at nine allowances until late 2011, when she left her prior employment. The individual's tax delinquency would be sufficiently smaller (or perhaps non-existent) had she established her tax withholdings at her legal and appropriate number of allowances. Her testimony that she had simply forgotten to readjust her withholding allowances to the appropriate level is not credible in light of her other testimony that she was aware that she was

receiving a benefit (i.e., higher net pay) as a result of the higher number of allowances and that her income during this period of time was “barely” sufficient to meet her expenses. *Id.* at 39, 43.

Claiming eligibility for tax withholding allowances in excess of that permitted under the federal tax regulations indicates willingness to breach governmental rules and regulations for personal convenience or expediency. As noted above with respect to the failure to file and pay income taxes, such disregard for governmental rules and regulations raises concerns about a person’s willingness or ability to comply with requirements applicable to the classified information.

In a case with similar facts, another Hearing Officer held that a person’s “deliberate decision ... not to pay his taxes by drastically reducing his tax withholding indicates a reckless disregard for basic financial and social obligations [H]is apparent procrastination and indifference concerning his tax obligations in failing to restore his appropriate tax withholdings ... [for three years] raises serious concerns about his reliability.” See *Personnel Security Hearing*, Case No. TSO-0929 (2010), *Personnel Security Hearing*, Case No. TSO-0457 (2007).

In the present case, the individual falsely claimed tax withholding allowances in such a way as to reduce her tax withholdings and increase her net pay and failed to correct the erroneous certification for approximately eight years. While the employee has now corrected the situation, she has done so only within the prior 12 months, which is an insufficient period of time to mitigate the security concern raised by this behavior and to establish her honesty and reliability.

3. Liquidation of Retirement Account

On November 1, 2011, following her resignation from her employment with her prior employer, the individual liquidated her retirement account with the expectation that she would, *inter alia*, pay her delinquent federal and state income taxes. The account was in the amount of \$70,000 of which she received \$45,000 net of taxes and penalties. *Id.* at 65-66; Ex. 7 at 45-46. Such amount would have been sufficient to resolve the tax liability that she had at that time. Instead, the proceeds of the account were used for moving expenses and other outstanding matters and none of the proceeds was used to reduce her tax liability. At the hearing, I asked if she could provide additional details as to how she had spent the \$45,000 that she received upon liquidation of the account. She said she could not. Tr. at 66. At the time that she liquidated her retirement account, she possessed the ability to resolve her tax delinquencies and failed to avail herself of that opportunity. Such failure reflects poorly upon her financial judgment and provides further evidence that she has not made the good faith effort to pay or resolve her overdue taxes which would be required to mitigate the security concern.

Based on the foregoing, I find that the individual has not mitigated the security concerns associated with Criterion L.

C. Conclusion

In the above analysis, I have found that there was sufficient derogatory information in the possession of the DOE that raises 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 not brought forth sufficient evidence to mitigate the security concerns associated with Criterion L. I therefore cannot 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 not be granted. The parties may seek review of this Decision by an Appeal Panel under the regulations set forth at 10 C.F.R. § 710.28.

Wade M. Boswell
Hearing Officer
Office of Hearings and Appeals

Date: November 5, 2012