

The Individual requested a hearing on this matter. Ex. 2 at 8. The LSO forwarded his request to the Office of Hearings and Appeals (OHA) and the OHA Director appointed me as the Hearing Officer in this matter. At the hearing, the DOE counsel introduced six exhibits into the record (Exs. 1-6). The Individual, represented by counsel, submitted six exhibits (Exs. A-F). Additionally, the Individual presented his own testimony, as well as the testimony of five other witnesses: a former co-worker (Co-Worker), a next-door neighbor (Neighbor), a friend (Friend), a former program manager (Program Manager) and his accountant (Accountant). *See* Transcript of Hearing, Case No. PSH-11-0036 (hereinafter cited as “Tr.”)

II. REGULATORY STANDARD

The regulations governing the Individual’s eligibility for access authorization are set forth at 10 C.F.R. Part 710, “Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material.” The regulations identify certain types of derogatory information that may raise a question concerning an individual’s access authorization eligibility. 10 C.F.R. § 710.10(a). Once a security concern is raised, the individual has the burden of bringing forward sufficient evidence to resolve the concern.

In determining whether an individual has resolved a security concern, the Hearing Officer considers relevant factors, including the nature of the conduct at issue, the frequency or recency of the conduct, the absence or presence of reformation or rehabilitation, and the impact of the foregoing on the relevant security concerns. 10 C.F.R. § 710.7(c). In considering these factors, the Hearing Officer also consults adjudicative guidelines that set forth a more comprehensive listing of relevant factors. *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*).

Ultimately, the decision concerning eligibility is a comprehensive, common-sense judgment based on a consideration of all relevant information, favorable and unfavorable. 10 C.F.R. § 710.7(a). In order to reach a favorable decision, the Hearing Officer must find that “the grant or restoration of access authorization to the individual would not endanger the common defense and security and would be clearly consistent with the national interest.” 10 C.F.R. § 710.27(a). “Any doubt as to an individual’s access authorization eligibility shall be resolved in favor of the national security.” *Id. See generally Dep’t of the Navy v. Egan*, 484 U.S. 518, 531 (1988) (the “clearly consistent with the interests of national security” test indicates that “security clearance determinations should err, if they must, on the side of denials”).

III. FINDINGS OF FACT AND ANALYSIS

A. Whether the LSO Properly Invoked Criterion L

1. Failure to File State and Federal Income Tax Returns

The Individual, in a March 2001 PSI, admitted that he had not filed state or federal income taxes for the years 1998 through 2000. Ex. 6 at 19; Ex. 5 at 30. After this PSI, the Individual filed tax returns for those years. Ex. 5 at 30.

In May 2009, the LSO sent a Letter of Interrogatory to the Individual inquiring about a recent garnishment of his taxes by the state of his residence. Ex. 4 at 1. In his response, the Individual informed the LSO that he was in the process of submitting tax forms to resolve the garnishment. Ex. 4 at 2.

During a July 2011 Office of Personnel Management (OPM) Interview conducted with the Individual by an OPM investigator, the Individual stated that he had not filed federal or state income tax returns for a number of years and that he was going to hire a certified public accountant (CPA) as soon as possible to file these returns.² Ex. 5 at 35, 37. Despite this assertion, the Individual, in fact, did not hire a CPA to file his outstanding returns until the day of his October 2011 PSI. During the October 2011 PSI, the Individual confirmed to the interviewer that he had not filed federal or state tax returns for the years 2003 through 2010. Ex. 5 at 11.

2. The Associated Security Concerns

Criterion L concerns circumstances tending 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). Unwillingness to abide by rules and regulations, such as the requirement to file income tax returns, can raise questions about an individual’s reliability, trustworthiness and ability to protect classified information. *Adjudicative Guideline F*, ¶ 19(g); *Personnel Security Hearing*, Case No. TSO-1072 (October 17, 2011). Given the information indicating that the Individual has a history of failing to file state and federal tax income returns, the LSO had sufficient grounds to invoke Criterion L.

B. Whether the Individual Has Mitigated the Security Concerns

The Individual testified at the hearing that he focuses very heavily on his position at the DOE facility. Tr. at 63. Because of this, he neglects issues involving personal matters such as filing taxes. Tr. at 64. With regard to his failure to file tax returns for the years 1998 through 2000, the Individual testified that, for the first time, he had to file returns using itemized tax deductions. Tr. at 64. The Individual testified that he was confused by the filing of itemized deductions. Tr. at 64-65. Additionally, the Individual testified that, during this period, he was, in essence, doing the job of two employees by serving as a team leader and a project leader for two major programs at the DOE facility. Tr. at 65. Consequently, the Individual found it difficult to balance his professional responsibilities and to “keep track” of his income taxes. Tr. at 65. The Individual did not seek professional help to prepare the tax returns for these years because of an incident using a tax professional to prepare a prior year’s return. Tr. at 65-66. Specifically, the tax professional’s mistake with this return cost the Individual additional tax penalties. Tr. at 66.

The Individual testified that, in 2001, he used commercial tax preparation software to file returns for the years 1998 through 2000. Tr. at 67. In this regard, the Individual testified that he was

² The Notification Letter states that this interview (referred to as a personal subject interview in the Notification Letter) occurred in August 2011. Ex. 1. However, the October 2011 PSI states that this interview occurred in July 2011. Ex. 5 at 39.

motivated by the March 2001 PSI where he was warned that future problems with filing tax returns could result in the loss of his clearance. Tr. at 67-69. After filing these returns, the Individual believed that his failure to file tax returns was a closed issue. Tr. at 70.

The Individual testified that, in 2003, his uncle passed away. Tr. at 70. The Individual inherited a share of a realty trust. Tr. at 71. As a result, the Individual began to receive Schedule Ks reporting income from the trust. Tr. at 71. These forms overwhelmed the Individual with regard to how to report this income for tax purposes. Tr. at 71. The Individual's tax preparation software did not provide a method to include such income in the Individual's tax return. Tr. at 71-72. In 2004, the trust changed into a publicly traded stock company. Tr. at 72. This change and the question of how to report this income further overwhelmed the Individual. Tr. at 72. Consequently, the Individual put the documents relating to the Schedule Ks and other tax forms "to the side." Tr. at 72-73. Despite his intention to address his tax situation "later," the Individual neglected to file his tax returns until 2011. Tr. at 73.

The Individual testified that he now appreciates the seriousness that the DOE places on its security clearance holders being current with regard to their taxes. Tr. at 73-74. His awareness of the importance of filing tax returns promptly was dramatically increased by reading OHA Hearing Officer Decisions involving failure to file tax returns. Tr. at 100-01.

At the hearing, the Individual asserted that his failure to file tax returns will not occur in the future because his witnesses will remind him of the need to file returns and ensure that he will file his tax returns on time. Tr. at 77. The Individual has already begun to collect his 2011 tax forms in a folder for easy reference. Tr. at 102. The Individual also testified that he has never had any other areas in his life that would cause a security concern. Tr. at 77. His current difficulties and the problems they have created in his life have caused him to be "humbled." Tr. at 78. The Individual has sufficient financial resources to immediately pay any penalties the Internal Revenue Service may assess him regarding these late-filed returns.³ Tr. at 104.

The Individual's Accountant testified that she was employed by the Individual to prepare his tax returns for the years 2003 through 2010. Tr. at 83. Because the Individual did not have all of the needed W-2 forms, there was a delay in her preparation of his tax returns. Tr. at 84-85. The Accountant knows of no reason why the Individual should not be able to prepare his 2011 tax return. Tr. at 88. As to the difficulty in filing returns involving Schedule K forms, the Accountant testified that she has been approached by many intelligent clients who come to her because they receive Schedule K-1 forms. Tr. at 92-93. Nonetheless, the Accountant testified that an average taxpayer could file such a return without professional help. Tr. at 92.

The Co-Worker testified as to the Individual's extreme dedication to his assigned projects. The Co-Worker testified that the Individual was very "wrapped-up" in his work and does not pay much attention to his own personal requirements. Tr. at 14. The Co-Worker noted that, while she worked with the Individual, he would neglect various administrative details of his work. Tr. at 14. The Co-Worker believes that "paperwork" overwhelms the Individual. Tr. at 16. Additionally, the Individual does not focus very much with regard to money matters since he is single and has significant income. Tr. at 14-15. In sum, the Co-Worker described the Individual

³ The Individual estimates that the assessed penalties may total approximately \$5,000 to \$7,000. Tr. at 105.

as an “absentminded professor” type of person who focuses on his goal and forgets everything around him. Tr. at 15.

Despite the Individual’s lapses with taxes, the Co-Worker testified that the Individual was very attentive to security issues regarding the projects he was assigned. Tr. at 19. She also testified that when his project needed a classified work area, the Individual was very instrumental in ensuring all security requirements were met, including ensuring that the necessary paperwork was completed. Tr. at 20-21. The Co-Worker testified that the Individual had excellent knowledge of security requirements applicable to their workplace. Tr. at 22-23. She also testified as to the dramatic effect the suspension of his clearance had on the Individual’s life. Tr. at 23. The loss of the Individual’s clearance is so devastating that the Co-Worker believes that the Individual will never again fail to file a tax return. Tr. at 23-24. The Co-Worker also testified that she will remind the Individual to address his income taxes in the future. Tr. at 19.

The Neighbor and Friend testified as to the Individual’s excellent character, judgment and reliability. Tr. at 27, 29, 31, 41-42. Both agreed with the Co-Worker’s characterization of the Individual as an “absentminded professor” who puts tremendous effort and hours into his work at the DOE facility. Tr. at 27-28, 37-38, 42. Both testified as to the Individual’s efforts in providing food to personnel dealing with two extended local emergencies. Tr. at 24, 27, 38-40. The Neighbor, who performs tax preparation services for others, testified that he will remind the Individual about filing taxes and, if asked, would prepare the Individual’s tax returns. Tr. at 30. The Friend testified that he and the Individual’s other friends would ensure that the Individual files his taxes in the future by reminding the Individual as to the necessity of filing tax returns. Tr. at 43.

The Program Manager testified that, in 2004, he and the Individual were involved in an important project and the Individual had a very heavy workload. Tr. at 53. The Individual was “pushed very hard” to fulfill the project. Tr. at 53-54, 59. When he left his position in 2007, the Program Manager testified that his successor was “even more of a bear on putting pressure on people than I [the Program Manager] am.” Tr. at 61-62. The Program Manager stated that the Individual was instrumental in resolving various conflicts and security issues. Tr. at 55-56.

In deciding whether an individual has mitigated the security concerns, a Hearing Officer must consider all relevant factors having a bearing on an individual’s fitness to obtain or retain a security clearance. *See* 10 C.F.R. § 710.7(c). According to the *Adjudicative Guidelines*, among the factors that may serve to mitigate security concerns raised by an individual’s financial problems, such as a failure to file required tax returns, are that “the behavior happened so long ago, was so infrequent, or happened under such circumstances that it is unlikely to recur or does not cast doubt on the individual’s current reliability, trustworthiness, or good judgment,” and “the conditions that resulted in the financial problem were largely beyond the person’s control . . . and the individual acted responsibly under the circumstances.” *Adjudicative Guidelines*, Guideline F, ¶ 20; *see Personnel Security Hearing*, Case No. TSO-0971 (March 1, 2011) (individual filed tax returns once he received necessary information from bankruptcy trustee); *Personnel Security Hearing*, Case No. TSO-1072 (October 17, 2011).

While none of the mitigating factors specifically referenced in the *Adjudicative Guidelines* seem applicable in this case, the record demonstrates severable mitigating factors. The Individual has now submitted tax returns for the years 2003 through 2010. Further, the Individual's failure to file tax returns does not appear to have been motivated by financial problems. The late-submitted federal tax returns for the period 2003 through 2010 indicate that, in four of the returns, the Individual was owed a refund. Ex. A. Of these returns, the largest amount of federal income tax owed in one year was \$882 (before penalties). Ex. A. With regard to the late-submitted state income tax returns, the Individual was due a refund in two of the eight years and the largest amount owed in any one year was \$782 (before penalties).⁴ Ex. A. The Individual has testified that as soon as the Internal Revenue Service calculates the penalties for the late filing of federal income tax returns he will be able to pay them in full. Tr. at 103-04. I find all of the witnesses' testimony credible as to the underlying cause of the Individual's failure to file – the Individual's total absorption in his work. Finally, there is also very positive testimony from the Co-Worker and the Program Manager as to the Individual's conduct on the job as to his handling of security issues. The record before me indicates that the Individual is outstanding at his profession and a thoughtful and giving member of his community. These attributes deserve high praise.

Nonetheless, I cannot find that there is sufficient evidence to resolve the Criterion L concerns raised by the Individual's repeated failure to file tax returns for the past eight years. Significantly, despite prior counseling by the LSO during the 2001 PSI, the Individual failed again to file timely tax returns for an extended period. Ex. 6 at 25. The failure to heed this warning constitutes a significant lapse in judgment. Additionally, the Individual has only recently remedied the tax issues before him. While the Individual's witnesses have testified that they will prompt the Individual to file his tax returns in the future, I cannot find that these assurances, by themselves, resolve the concerns raised by the Individual recent eight-year failure to file returns. *See Personnel Security Hearing*, Case No. TSO-1108 (February 3, 2011)(despite individual's excellent record in security matters at work, individual's repeated failure to comply with the law by filing taxes and resolving traffic tickets is such to require non-restoration of clearance). Absent a longer period where the Individual demonstrates compliance with his legal responsibilities, I cannot find that the Criterion L concerns have been resolved.

IV. CONCLUSION

Upon consideration of the entire record in this case, I find that there was sufficient evidence to raise 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 resolve the concerns raised by the Criterion L derogatory information. Therefore, I cannot conclude that restoring the Individual's suspended access authorization "would not endanger the common defense and security and would be 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 access authorization at this time.

⁴ The 2009 and 2010 State income tax returns indicated that the Individual owed \$27 and \$30 dollars respectively. Ex. A.

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

Richard A. Cronin, Jr.
Hearing Officer
Office of Hearings and Appeals

Date: March 28, 2012