

The individual requested a hearing in this matter. The LSO forwarded this request to OHA, and I was appointed the hearing officer. The DOE introduced five exhibits into the record of this proceeding. The individual introduced 21 exhibits, and presented the testimony of six witnesses, in addition to his own testimony.

II. DEROGATORY INFORMATION AND THE ASSOCIATED SECURITY CONCERNS

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 Under this criterion, the LSO cited the individual's failure to file federal and state tax returns for 2009 and 2010, and his admission that he owed \$1,050 in state taxes and \$2,025 in federal taxes for tax year 2008. Exhibit 1. On January 18, 2012, the individual filed a response stating that, as of January 12, 2012, he had filed his past due state and federal tax returns, and had paid \$75 toward his 2008 state tax liability. Exhibit 2.

The above information adequately justifies the DOE's invocation of criterion (l), and raises significant security concerns. The failure or inability to live within one's means, satisfy debts, and meet financial obligations, including the failure to file tax returns as required, 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 Revised Adjudicative Guidelines for Determining Eligibility for Access to Classified Information*, The White House, Guideline F (December 19, 2005) [hereinafter *Adjudicative Guidelines*]. Further, an individual who is financially overextended is at risk of having to engage in illegal acts to generate funds. *Id.*

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

³ Paragraph (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).

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). 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

As noted above, the individual has not disputed the allegations set forth in the Notification Letter. Exhibit 2. He has, however, offered some evidence of progress toward resolving the concerns raised by the allegations. Nonetheless, as discussed below, I cannot find that the individual has resolved the concerns raised by his failure to file income tax returns, nor has he established a pattern of financial responsibility that would resolve the risk of a recurrence of his past financial irresponsibility.

A. Failure to File Income Tax Returns

Regarding his failure to file tax returns for 2009 and 2010, the individual testified that he “was under the impression that you had three years to file taxes, and I actually found a statute in the federal guidelines there that says that you have three years to file taxes, seven years to pay them.” Hearing Transcript (Tr.) at 59; *see* Tr. at 64 (citing Department of Treasury, Internal Revenue Service, Publication 17, *Your Federal Income Tax* 17 (2011) [hereinafter *IRS Publication 17*]).

The individual’s reference to this IRS publication in no way mitigates the concern raised by his failure to file state and federal income tax returns in 2009 and 2010. First, the individual would have no reason to believe that this publication applied to his obligation to timely file a *state* income tax return. Second, the portion of the IRS publication the individual cited is found under the heading “How Long to Keep Records,” and unambiguously sets forth *not* how long an individual has to file a tax return, but rather “the period of time in which you can amend your return to claim a credit or refund or the IRS can assess additional tax.” *IRS Publication 17* at 17.⁴

Most important, the individual testified that he first became aware of this IRS publication only six to eight months prior to the March 2012 hearing, Tr. at 90, and that before this “didn’t really know exactly how it’s supposed to be, because I’ve -- I guess I’ve never really had to read up on the way the tax laws were.” *Id.* at 86. As such, the publication, regardless of its content, can offer no explanation as to his claimed misunderstanding, at the time he was required to file his state and federal tax returns, of his legal obligation to file the returns, and appears to be to have been offered only as a *post hoc* justification of his failure to file. *See* Exhibit 4 at 101. Indeed, in the November 2011 PSI, Exhibit 4, the individual makes no mention of the IRS publication, nor his purported impression, related at the hearing, that he “had three years” to file tax returns. Instead, asked if he was aware of his legal obligation, he responded that he “didn’t know legally I had to, but I, I knew I should file them. . . . I knew I had to file ‘em.” *Id.* at 101.

⁴ Just as clearly set forth in the same publication is the April filing deadline, under the heading “When Do I Have to File,” as well as the procedure for requesting a “6-month” filing extension. *Id.* at 9-10.

A more credible reason for the individual's failure to file his 2009 and 2010 returns is found in his January 18, 2012, response to the Notification Letter, in which he does not claim that he was not aware of his obligation to file tax returns, but instead states that he "did not file the 2009 and 2010 [federal and state] income taxes because I was having some financial difficulty and I put them off hoping I would be able to satisfy them in a timely manner." Exhibit 2 at 1. Similarly, in the November 2011 PSI, the individual indicated that he did not file returns for 2009 and 2010 because he did not feel he could afford to pay the taxes due. Exhibit 4 at 97.

However, even this reason, while on its face more credible, becomes more difficult to believe in light of other evidence in the record. The individual provided IRS documents showing that he filed his 2008 federal tax return on July 13, 2009, but did not pay the taxes due at that time. Exhibit I. In his PSI, the individual explained that he "didn't have the money to pay the whole amount back then." Exhibit 4. Thus, the individual clearly knew that he could satisfy his obligation to file income tax returns without, at the same time, having to pay the taxes due. Nonetheless, the individual failed to file his 2009 and 2010 federal tax returns until January 2012.⁵

Finally, the individual testified to being "overwhelmed" due to a divorce, child support obligations, and issues between him and his ex-wife over their two children. Tr. at 87-88. Yet, the individual's divorce took place in April of 2005, Exhibit 5 at 16, and he nonetheless managed to comply with his obligation to file returns for previous tax years 2005 through 2007 and, albeit three months late, for tax year 2008. Moreover, the individual appears to have filed these returns despite financial problems that led him to file a Chapter 7 Bankruptcy Petition in December 2009. In fact, the individual's failure to file his 2009 and 2010 tax returns occurred *after* his debts were discharged through the bankruptcy in April 2010, Exhibit 3 at 1, presumably relieving his financial burdens.

Nonetheless, the individual contended at the hearing that he "in no way blatantly disregard[ed] the law. I didn't interpret that it was a breaking of the law for not filing my taxes, and I acknowledge that it was my fault for not doing so. You know, I take full responsibility for not doing that." Tr. at 66. He gave assurances that, in the future, there would be no more "problems as far as anything goes on me breaking the law." *Id.*

Despite the individual's statement that he has taken responsibility for his actions, I find, running through the various explanations for his failure to follow the law, a common thread of minimization of the seriousness of his actions, particularly as to whether they were deliberate. Based upon my evaluation of the record, I conclude that the individual knew that he was required to file and pay his taxes on time, but made a conscious decision to not do so. That he has now filed his delinquent tax returns is certainly a good thing. But, given that he has done so only recently, and without a more unqualified acceptance of responsibility for his past actions, I am not confident that the concerns raised by the individual's failure to file tax returns have yet been resolved. *See* 10 C.F.R. § 710.7(c) (relevant factors include "recency of the conduct").

⁵The IRS records indicate that the individual did timely file with the IRS an application for extension of time to file his 2010 tax return, Exhibit O, though the records do not show any such application was ever filed with respect to his 2009 tax return. Exhibit J. In any event, the application for tax year 2010 clearly states that its purpose was solely to "apply for 6 more months" to file a tax return, and did not excuse an indefinite delay in filing. Department of Treasury, Internal Revenue Service, Form 4868, *Application for Automatic Extension of Time To File U.S. Individual Income Tax Return* 1 (2010).

B. Financial Irresponsibility and Unwillingness or Inability to Satisfy Debts

In the Notification Letter, the LSO characterized the individual's outstanding state and federal income tax liability as evidence of his "financial irresponsibility and unwillingness or inability to satisfy his debts." Exhibit 1. In his written response to the Notification Letter, he stated that, when he contacted both the IRS and state authorities "to make payment arrangements, I was told that I couldn't make any payment until" he filed his 2009 and 2010 income tax returns.

At the hearing, the individual presented documents from both the IRS and his state showing that he filed these past due returns in January 2012, and that he had made arrangements to make monthly payments of \$124 and \$50, respectively, toward his federal and state income tax liability. Exhibits J, L, M, O, R, and S. After the hearing, the individual submitted evidence of initial payments made to both the IRS and his state. Exhibit U. The individual has also submitted an estimate of his monthly expenses and net income, showing total expenses of \$1,904 and net pay of \$2,550. Exhibit D.

In prior cases involving financial considerations, 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, e.g., Personnel Security Hearing, Case No. TSO-1078 (2011); Personnel Security Hearing, Case No. TSO-0878 (2010); Personnel Security Hearing, Case No. TSO-0746 (2009).*

Here, there is a clear pattern of financial irresponsibility with regard to his failure, until very recently, to pay anything toward tax liabilities that have been delinquent since early 2009. The individual's claim that he was unable to make any payment arrangements regarding his 2008 tax year liability until he filed his 2009 and 2010 returns, while credible, in no way mitigates the concern caused by his inaction. In fact, if true, this impediment to making payment arrangement should have simply underscored for the individual the need to file his 2009 and 2010 returns.

The fact that the individual has recently made arrangements to pay off his tax debts may mark the beginning of a sustained pattern of financial responsibility. Such a pattern, however, has clearly not yet been established. In the meantime, there are reasons to remain cautious as to the risk of a recurrence of the individual's past pattern of irresponsibility.

First, in a November 2009 PSI, conducted when he was preparing to file for bankruptcy, the individual stated that he had contacted both state and federal authorities regarding his 2008 tax liability, and that he had it "set up" to make payments to satisfy that liability once he was through the bankruptcy proceeding. Exhibit 5 at 22-24. However, the individual did not follow through on this plan, despite having his other debts discharged through the Chapter 7 bankruptcy in April 2010. Exhibit 3 at 1.

Moreover, if the estimate of income and expenses submitted by the individual is accurate, and his monthly income exceeds his expenditures by over \$600 per month, one would have expected the individual to have accumulated a commensurate amount in savings each month. But, as of the time of the March 2012 hearing, the individual estimated that he had a *total* of \$600 in savings. Tr. at 74. When I pointed this out to the individual, he responded by noting that, prior to October of 2011, his child support payment had been higher, as he had been paying for support of his then-minor son. Tr.

at 75. Though the individual submitted documents demonstrating that his monthly child support payments did decrease by \$300 as of October 2011, Exhibits A and B, this still would mean that the individual's income would have exceeded his expenses by \$300 per month. In fact, the amount of excess monthly income would have been even greater prior to January 2011, when, according to the individual's response to the Notification Letter, he changed job positions and took a "large pay cut." Exhibit 2.

Other than noting purchases he made for Christmas and that he "had to buy some tires," Tr. at 75, the individual has offered no explanation that comes close to reconciling these discrepancies in the account of his finances. This is not to say that the individual may not be able to follow through in paying off his debts going forward, but until he has actually demonstrated his ability to do so, I cannot find that he has resolved the concerns raised by the past mishandling of his finances.

V. 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 at issue. I therefore cannot find that restoring 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 restored. The parties may seek review of this Decision by an Appeal Panel under the regulations set forth at 10 C.F.R. § 710.28.

Steven J. Goering
Hearing Officer
Office of Hearings and Appeals

Date: April 4, 2012