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**DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS**

In the Matter of Personnel Security Hearing)

Filing Date: September 23, 2011)

Case No.: TSO-1116

Issued: March 23, 2012

Hearing Officer Decision

Valerie Vance Adeyeye, Hearing Officer:

This Decision concerns the eligibility of XXXXXXXXXXXXXXXXXXXX (hereinafter referred to as "the individual") to hold an access authorization 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." As set forth below, it is my decision, based on the evidence and testimony presented in this proceeding, that the individual's access authorization ("security clearance" or "clearance") should be restored.

I. Background

The individual is an employee of a Department of Energy (DOE) contractor who has held a security clearance for several years. During a routine reinvestigation, the local security office (LSO) discovered that the individual had not filed federal taxes for the tax years 2008 and 2009. In July 2011, the LSO interviewed the individual during a Personnel Security Interview (PSI), but that interview did not resolve the security concerns. The LSO suspended his clearance and, in August 2011, the LSO informed the individual that it had received derogatory information that created a doubt regarding his continued eligibility for access authorization. See Notification Letter (August 2011). The Notification Letter stated that the derogatory information regarding the individual falls within the purview of 10 C.F.R. § 710.8 (l) (Criterion L).¹

¹ DOE invokes Criterion L when it is in possession of information that indicates that the individual has engaged in unusual conduct or is subject to circumstances which tend to show that he is not honest, reliable, or trustworthy or which furnish reason to believe that he may be subject to pressure, coercion, exploitation, or

The Notification Letter refers to the following derogatory information from the July 2011 PSI that raised concerns about the individual's honesty, reliability and trustworthiness: (1) the individual admitted that he did not file federal income tax returns for tax years 2008 and 2009, despite notification by the Internal Revenue Service (IRS) in March 2011 that he had not filed his returns; (2) the individual admitted that the IRS had notified him that he owed \$5,995 in back taxes for tax year 2008, but he had not responded to the notice; and (3) the individual admitted that he had not filed 2010 taxes and the extension of his filing date was set to expire in October 2011.

In September 2011, the individual sent a letter to DOE Personnel Security and exercised his right under Part 710 to request a hearing in this matter. 10 C.F.R. § 710.21(b). The Director of OHA appointed me as Hearing Officer in this case. After conferring with the individual and the appointed DOE counsel, 10 C.F.R. § 710.24, I set a hearing date. At the hearing, the individual testified on his own behalf and called two additional witnesses. DOE counsel called the individual as a witness. The transcript taken at the hearing shall be hereinafter cited as "Tr." Various documents that were submitted by the parties during this proceeding constitute exhibits to the hearing transcript and shall be cited as "Ex." DOE exhibits are numbered, and the individual's exhibits are lettered.

II. Analysis

The applicable 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 of 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). Although it is impossible to predict with absolute certainty an individual's future behavior, as the Hearing Officer I am directed to make a predictive assessment. There is a strong presumption against the granting or restoring of a security clearance. See *Department of Navy v. Egan*, 484 U.S. 518, 531 (1988) ("clearly consistent with the national interest" standard for the granting of 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).

I have thoroughly considered the record of this proceeding, including the submissions of the parties, the evidence presented and the testimony of the witnesses at the hearing convened in this matter. 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): 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 of the individual at the time of the conduct; the voluntariness of the participation; the absence or presence of rehabilitation or reformation and other pertinent behavioral changes; the motivation for the conduct; the potential for

duress which may cause him to act contrary to the best interests of the national security. 10 C.F.R. § 710.8 (l).

pressure, coercion, exploitation, or duress; the likelihood of continuance or recurrence; and other relevant and material factors. After due deliberation, I find that the individual's access authorization should be restored because I conclude that such a grant would not endanger the common defense and security and would be clearly consistent with the national interest. 10 C.F.R. § 710.27(a). The specific findings that I make in support of this determination are discussed below.

A. Findings of Fact

In 1980, while working a full-time job, the individual started a side business in order to make extra money for his new family. *Id.* at 65. His wife, who stayed at home with their children, served as his receptionist but the individual handled all of the business finances and filed the family tax returns. *Id.* at 63. Sales peaked between 1993 and 1995. *Id.* at 66. While sales were good, the individual kept organized records and always filed his taxes on time. However, when business slowed due to a change in consumer tastes, he became lax in his recordkeeping and did not file his taxes in a timely manner. PSI at 13-16, 18, 26-40. Nonetheless, the individual did make estimated payments to the IRS each year, and calculated that he was due a refund each tax year. Tr. at 101-102. In 2004, the contractor hired the individual and the DOE granted him a security clearance. *Id.* at 99. Between 2004 and 2006, the individual did not file his federal tax returns but he continued to pay estimates of the taxes due to the IRS.

The individual's wife had been the primary caretaker of her elderly mother for years but in 2007, his mother-in-law became very sick and suffered many hospitalizations. His wife became "consumed" with her mother's care and moved into her mother's house across town for long periods of time in order to care for her mother. *Id.* at 42. As a result, there was much less communication between the couple. In December 2010, the individual's mother-in-law passed away. *Id.* at 50. In March 2011, the IRS contacted the individual and told him that he had not filed his 2008 taxes. Ex. N. The IRS had calculated his taxes based on an assumed filing category of "single," and under that assumption the individual owed \$5,995 in delinquent taxes. PSI at 17-23, 41; Ex. 1. During a July 2011 PSI, the individual admitted that he had not filed his taxes for 2008, 2009, or 2010, and that he had not responded to the IRS regarding the notice sent to him about his arrears. PSI at 14-23, 37, 41.

B. DOE's Security Concerns

As for Criterion L, the LSO alleges that the individual has engaged in unusual conduct or is subject to circumstances which tend to show that he is not honest, reliable, or trustworthy, or which furnishes reason to believe that he may be subject to pressure, coercion, exploitation, or duress which may cause him to act contrary to the best interests of the national security. 10 CFR 710.8 (l). The unusual conduct in this case is the individual's failure to file federal tax returns for the tax years 2008 and 2009.

In a July 2011 PSI, the individual acknowledged that he had not filed his tax returns for those years because he was disorganized, he had not made much income from his side business, and he knew that he was owed a refund for each year from the IRS.

Notwithstanding the anticipation of a refund, failure to file annual federal, state, or local income tax returns is a security concern. See Memorandum for Director, Information Security Oversight Office from Assistant to the President for National Security Affairs, White House, Revised Adjudicative Guidelines for Determining Eligibility for Access to Classified Information (December 29, 2005) (Guidelines), Guideline F, ¶19 (g). Failure or inability to 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. See Guideline F, ¶18. Thus, the LSO's concern in this case is valid.²

C. Hearing Testimony

The individual testified at the hearing and also called two colleagues and his wife as character witnesses. Tr. at 12-48. All of the character witnesses described the individual as an honest, truthful and trustworthy person. They all testified that if he needed any help with the taxes, they were available and that they would remind him of his obligations.

The individual's wife testified that during their marriage the individual was responsible for paying family financial obligations. She had spent much of her time in the past few years living with her elderly mother who was sick and needed care. *Id.* at 42. Thus, her communication with her husband was not as regular as if they had lived in the same residence. However, she has told him that she will be more aware of the tax deadlines now and pay more attention to family finances. *Id.* at 46. Her husband does not have any philosophical reason for not paying taxes. She explained that the problem arose because his recordkeeping was spotty and his files were disorganized, becoming even more so as his business fell off and he earned less money. *Id.* at 44-45.

The individual testified that he began a side business in 1980 in order to earn more money, since his wife stayed home with their children. *Id.* at 96-98. In the early years, the business earned some income, but as the industry changed, he made fewer sales. *Id.* at 99. During that time, his recordkeeping became spotty, and he was not paying much attention to the business. He filed his taxes on time prior to 2004. Tr. at 75. However, he then filed an extension for tax years 2004 through 2006, and made payments to the IRS in the amount he estimated that he owed in taxes. He filed his 2007 taxes on time. Tr. at 79. Unfortunately, his mother-in-law's health then began a rapid decline and she experienced many hospitalizations and medical crises. *Id.* at 79-80. His wife moved in with her mother and he took responsibility for the bills and upkeep of the house. Around 2009, he began a different business that makes sales thru Ebay, which maintains the records he needs.

In March 2011, the IRS notified him that he had not filed his 2008 returns and they calculated that he owed \$5,995. Ex. N. He ignored the notice. However, after his PSI, he called the IRS to find out what years he had not filed his taxes. Tr. at 76. He then began working on filing those returns. As regards the \$5,995 in past due taxes that was mentioned in the IRS notice of March 11, the individual explained that this amount was based on a

² Decisions issued by the Office of Hearings and Appeals (OHA) are available on the OHA website located at <http://www.oha.doe.gov>. The text of a cited decision may be accessed by entering the case number of the decision in the search engine located at <http://www.oha.doe.gov/search.htm>.

calculation of filing as a single taxpayer, the most conservative tax estimate. Ex. N. However, when he actually filed the 2008 return, he received a refund of \$2,777. Tr. at 86-90; Ex. J.

He then filed tax returns for 2009, 2004, 2006, and finally 2010 (before the expiration of his extension in October 2011). Tr. at 88. He did not receive the refunds owed to him in 2004-2006 because he filed his returns more than three years after they were due. *Id.* at 90. The IRS sent him refunds for 2008, 2009, and 2010. Ex. J-L. According to account transcripts from the IRS, he has filed all returns through 2010, and owes no money to the IRS. *Id.* at 91; Ex. C-H. As of the date of the hearing, he had started working on his 2011 taxes. Tr. at 92. He now consults with a financial counselor and has a file cabinet dedicated to his business records. All of his records are now in one location and he will go to an accountant if he is overwhelmed by the task of doing his taxes. *Id.* at 111. He has also started to meet with a financial planner. His daughter maintains a duplicate copy of the electronic records of his business. *Id.* at 85.

D. Mitigation of Security Concerns – Criterion L (Unusual Conduct)

I conclude that the individual has provided evidence that mitigates the Criterion L security concerns. First, the individual has presented credible evidence that disputes the legitimacy of the past-due debt mentioned in the Notification Letter and he has provided documented proof of evidence of actions to resolve the issue. Guideline F, ¶ 20 (e). The IRS stated that he owed \$5,995, but that was based on classifying him as single instead of married. In fact, the individual was due a refund for that year. Guideline F, ¶ 20(d). Second, the record contains many clear indications that the problem is under control. *Id.* at ¶ 20(c). The individual has filed all of his outstanding returns, and the IRS account transcripts confirm that he does not owe any debt to the IRS. He now has an accountant and a financial planner to assist him in the future with his personal and business finances. Through Ebay, the individual is able to maintain electronic records, and his daughter maintains duplicate electronic records. Finally, his wife is now aware of the problem and, no longer distracted by the task of caring for a sick parent, can pay more attention to her husband's handling of the finances.

Further, I conclude that the individual was not trying to deceive the government by not filing his taxes. There is no evidence in the record of income tax evasion or any other intentional financial breach of trust. *Id.* at ¶ 19(d). In fact, the individual lost money by not filing taxes and has forfeited refunds owed to him for those years. There is no evidence that the financial problem was due to drug abuse, alcoholism, gambling problems or any other issue of security concern. *Id.* at ¶ 19(f). The individual has showed genuine remorse, is current on his taxes, and has now identified financial professionals to help him with his venture. In addition, his family is aware of the problem and engaged in monitoring his business activities. Thus, I conclude that the individual has fully mitigated the Criterion L concerns.

III. Conclusion

As explained in this Decision, I find that the DOE properly invoked 10 C.F.R. § 710.8 (I). After a review of the record and consideration of the Adjudicative Guidelines, I find that the security concerns of Criterion L have been mitigated. Based on the record before me, I find that restoring the individual's access authorization would not endanger the common defense and security and would be consistent with the national interest. Accordingly, I find that the individual's access authorization should be restored at this time. Any party may seek review of this Decision by an Appeal Panel under the procedures set forth at 10 C.F.R. § 710.28.

Valerie Vance Adeyeye
Hearing Officer
Office of Hearings and Appeals

Date: March 23, 2012