

* The original of this document contains information which is subject to withholding from disclosure under 5 U.S.C. 552. Such material has been deleted from this copy and replaced with XXXXXX's.

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

In the Matter of:	Personnel Security Hearing)	
)	
Filing Date:	November 26, 2012)	
)	Case No.: PSH-12-0135
)	

Issued : February 12, 2013

Hearing Officer Decision

Wade M. Boswell, Hearing Officer:

This Decision concerns the eligibility of XXXXXXXXXXXXXXXX (hereinafter referred to as "the individual") to hold an access authorization¹ under the Department of Energy's (DOE) regulations set forth at 10 C.F.R. Part 710, Subpart A, entitled, "General Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material." As fully discussed below, after carefully considering the record before me in light of the relevant regulations and Adjudicative Guidelines, I have determined that the individual's access authorization should not be restored at this time.

I. Background

The individual is employed by a DOE contractor in a position that requires that he hold a DOE security clearance. In August 2008, as part of a routine reinvestigation of the individual's eligibility to maintain access authorization, the U.S. Office of Personnel Management reviewed the individual's credit report which showed a judgment, collection accounts and charged-off accounts aggregating nearly \$53,000. The individual reported that he had retained an attorney to file for bankruptcy, but the bankruptcy had not been filed yet. Exhibit 9 at 56. The Local Security Office (LSO) conducted a personnel security interview (PSI) with the individual on January 14, 2009, to address concerns about the individual's finances. *See* Exhibit 10. The individual reiterated his intention to

¹ Access authorization is defined as "an administrative determination that an individual is eligible for access to classified matter or is eligible for access to, or control over, special nuclear material." 10 C.F.R. § 710.5(a). Such authorization will be referred to variously in this Decision as access authorization or security clearance.

file for bankruptcy and, subsequently, provided a letter dated February 16, 2009, from an attorney which indicated that the attorney had been paid and that the individual's bankruptcy petition should be filed within two weeks. *See* Exhibit 10; Exhibit 11 at 3.

Three years later, in March 2012, the LSO obtained a new credit report on the individual which showed no indication that the individual had filed for bankruptcy protection during the intervening period. Instead, the credit report showed deterioration of the individual's financial situation as he had had additional judgments issued against him and his judgments, collection accounts and charged-off accounts aggregated nearly \$101,000. *See* Exhibit 12. The LSO conducted another PSI with the individual on April 24, 2012, to discuss his financial situation. *See* Exhibit 13. The individual indicated that his prior attorney had retired prior to filing the individual's bankruptcy petition and that the individual had met with a new attorney, but had not had the money to proceed with a bankruptcy filing. The individual also stated that his original attorney had advised him to discontinue paying his creditors since they would be part of his bankruptcy petition and, as a result, he had not paid his creditors since 2007. *Id.* at 18. The individual subsequently provided documentation that he had made an initial payment to the new attorney and intended to pay the balance of the attorney's fees on May 11, 2012. *See* Exhibit 11 at 1.

On September 27, 2012, the LSO sent a letter (Notification Letter) to the individual advising him that it possessed reliable information that created substantial doubt regarding his 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 *See* Exhibit 4.

Upon his receipt of the Notification Letter, the individual exercised his 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 testified, but presented the testimony of no other witnesses. The LSO submitted 13 numbered exhibits into the record; the individual tendered four exhibits (Exhibits A-D). 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

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.

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 restoring his 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 his 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 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 suspending the individual's security clearance, Criterion L. To support its allegations, the LSO notes, *inter alia*, (1) the 2008 credit report on the individual which showed one judgment (\$8,690), three charged-off accounts (aggregating \$5,744), and three collections accounts (aggregating \$41,353); (2) the 2012 credit report on the individual which showed three judgments (aggregating \$26,277), five charged-off accounts (aggregating \$11,723) and eight collections accounts (aggregating \$62,758); (3) the individual's acknowledgment that he had not paid his creditors since 2007; and (4) the individual's failure to comply with his representations to the LSO in January 2009 that he would address his outstanding indebtedness by filing for bankruptcy. *See Ex. 4.* The individual's failure or inability to live within his means, satisfy his debts and to meet his financial obligations,

raises a security concern under Criterion L because his 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.*

In light of the information available to the LSO, the LSO properly involved Criterion L.

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 restored at this time. I cannot find that restoring the individual’s DOE 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 does not contest the accuracy of the charges set forth in the Notification Letter. Tr. at 46, 47. He testified that the past due debts enumerated by the LSO are accurate; the credit report that he submitted prior to the hearing does not raise any significant doubts as to the accuracy of the LSO’s information. *Id.* at 39, 40, 46, 47; see Ex. A. Rather, the individual’s position is that he intends to resolve his financial situation through filing for bankruptcy relief and circumstances to date have delayed him from doing so.

The individual testified that he had always maintained good credit until he and his first wife divorced. He incurred debt in order to replace things that he lost in the divorce and he was able to stay current on that debt until he re-married and had the added responsibilities of a new family. Tr. at 43, 44, 50. When he realized that he was unable to pay his debts, he consulted and retained Attorney #1 to file a petition for bankruptcy. He first met with Attorney #1 in the summer of 2007, which was prior to the periodic reinvestigation which raised concerns about his financial responsibility. Attorney #1 had

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.

advised the individual that he did not need to pay on his debts since they would be discharged in bankruptcy. The individual, who had discontinued paying certain debts in 2006, discontinued payments on his remaining consumer debt in 2007 following his consultation with Attorney #1. Ex. 3 at 18; Tr. 13, 40-42. The individual testified that subsequent to having paid Attorney #1 in full, Attorney #1 retired and was unavailable to file the individual's bankruptcy petition. *Id.* at 17. Attorney #1 refunded payments that the individual had made and, prior to retaining a new attorney, those funds were used to make emergency repairs to heating and cooling equipment at his rental home and to pay unexpectedly high utility bills that had resulted from the malfunctioning equipment. *Id.* at 23.

The individual consulted with Attorney #2 in September 2011 and, shortly after the 2012 PSI, made an initial payment to Attorney #2 and stated his intention to pay the balance in order to commence bankruptcy proceedings within a short period of time. *Id.* at 22, 26-29; Ex. 11 at 1. Several months later, the individual submitted the necessary documentation to Attorney #2 who advised him that his situation may not qualify for a Chapter 7 bankruptcy petition and may need to proceed under Chapter 13. Tr. at 22. Attorney #2 does not handle Chapter 13 filings and, in late summer or early fall 2012, referred the individual to Attorney #3. *Id.* at 22, 48.

The individual made payments to Attorney #3 on each of the two days prior to the hearing and testified that he would be paying the balance of the attorney and filing fees later that day. Ex. C; Tr. at 33. Attorney #3 provided a letter that, subject to receipt of the balance of her fees and receiving remaining documents, she would be filing the individual's bankruptcy petition within 15 days of the hearing. Ex. D.

B. Hearing Officer Evaluation of Evidence and Findings of Fact

As of the date of the hearing, the individual had not filed a petition in bankruptcy, although he does not dispute that he has outstanding consumer debt of approximately \$75,000 in collections or charged-off status. Tr. at 46-47. Even if the individual had filed for bankruptcy and succeeded in having his debts discharged in bankruptcy prior to the hearing, such discharge of a person's indebtedness by a bankruptcy court does not eliminate any security concerns which arise from the circumstances which led to the bankruptcy petition. *See Personnel Security Hearing*, Case No. VSO-0414 (2001); *Personnel Security Hearing*, Case No. TSO-0217 (2005). I would still have been required to analyze the manner in which the person reached the point at which it became necessary to seek help from the bankruptcy court. *See Personnel Security Hearing*, Case No. VSO-0288 (1999); *Personnel Security Hearing*, Case No. TSO-0217 (2005).

In assessing possible mitigation of the security concerns arising from the individual's indebtedness, I note that the individual has substantial delinquent consumer debt outstanding to a number of different creditors, none of whom has received payments since 2007.⁵ Tr. 40, 42. These financial irregularities are current, not infrequent or distant

⁵ At one point during the hearing, the individual stated that the credit report he submitted into evidence reflected some payment activity on some of his accounts in 2008 and 2010. Tr. at 40. He was unable to

in time. (Cf. Adjudicative Guidelines at Guideline G, ¶20(a) which states mitigation of financial considerations may be considered if “*the behavior happened so long ago, was so infrequent ... and does not cast doubt on the individual’s current reliability, trustworthiness, or good judgment*” (emphasis added).)

In seeking to understand whether the individual’s indebtedness resulted from conditions which were beyond his control, I questioned the individual about the impact of his divorce from his first wife and any unexpected medical expenses. While he did incur debt to replace items he lost in the divorce and for uncovered medical and dental expenses, these items do not appear to have been the sole source of his financial difficulties.⁶ Tr. at 43, 47, 49. The individual testified that not all of the delinquent debt arose from post-divorce expenses and that he was unable to quantify the amount of debt incurred for uncovered medical and dental expenses. *Id.* at 47, 49. Even if he had established a causal relationship between his debt and conditions that were outside of his control, the individual presented no evidence that would suggest that his actions in incurring such debts had been responsible and, in fact, characterized his post-divorce spending as irresponsible. *Id.* at 43. Based on the record of this case, I am unable to find that the individual’s financial situation arose from circumstances beyond his control. (Cf. Adjudicative Guidelines at Guideline G, ¶20(b) which states mitigation of financial considerations may be considered if “the conditions that resulted in the financial problem were largely beyond the person’s control (e.g., ... *unexpected medical emergency, or a death, divorce or separation ...*) and the individual acted responsibly under the circumstances” (emphasis added).)

The individual did not provide any evidence of receiving any counseling with respect to his financial issues. The individual testified that he had not completed the on-line credit counseling that is a prerequisite for filing a petition in bankruptcy. Attorney #1 was waiting for him to complete this training in February 2009 and Attorney #3 was waiting for him to complete this training at the time of the hearing in 2013. Tr. at 12-13, 19, 35. Cf. Adjudicative Guidelines at Guideline G, ¶20(c).

As noted, the individual testified that his creditors have not been paid since 2007. Tr. at 40, 42. The decision to discontinue payment followed a consultation with Attorney #1 who advised that payment was unnecessary since these debts would be discharged in bankruptcy. *Id.* at 40. While the individual may have manifested an intent in 2007 to file bankruptcy, he had not done so as of the date of the hearing in 2013.⁷ There is no

point me to any such *payments* on the credit report and, when questioned, could not recall having made any payments in 2008 or 2010. *Id.* at 41-42. His alternative testimony that no payments had been made since 2007 is more credible.

⁶ The individual’s testimony appears to be the reverse: he was able to stay current on the debt he incurred following his divorce until he remarried and assumed additional financial obligations associated with his new family. Tr. at 50.

⁷ The individual has stated that his inability to file bankruptcy was his lack of money for the attorney and filing fees. However, the individual has had opportunities to fund such bankruptcy expenses (e.g., receiving a tax refund of approximately \$7,000 in 2012 which he used to prepay to a family member his rent for a year), but has not made those expenses a priority. Tr. 25.

evidence that the individual made any effort to communicate or negotiate with his creditors during the intervening years. This is particularly concerning in light of Attorney #2 having advised the individual that he may not qualify for a Chapter 7 bankruptcy discharge of indebtedness and that the budget the individual submitted prior to the hearing indicated that he had monthly surplus income in excess of \$750.00. *See* Ex. B. To leave overdue debt outstanding for such a significant period of time without making an effort to repay or otherwise resolve it is inconsistent with the expectations of those holding access authorization. *Cf.* Adjudicative Guidelines at Guideline G, ¶20(d).

From the record in this case, it appears that the individual has exhibited a sustained pattern of financial irresponsibility for many years and may now seek bankruptcy protection. 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-12-0103 (2012); *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 not even begun rectifying his financial difficulties.

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

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 associated with Criterion L. 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 at this time. 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: February 12, 2013