

pursuant to 10 C.F.R. § 710.25(d), (e) and (g). *See* Transcript of Hearing, Case No. PSH-19-0040 (hereinafter cited as “Tr.”). The LSO submitted seven exhibits, marked as Exhibits 1 through 7 (hereinafter cited as “Ex.”). The Individual submitted 21 exhibits, marked as Exhibits A through Q.

II. THE NOTIFICATION LETTER AND THE ASSOCIATED SECURITY CONCERNS

As indicated above, the Notification Letter informed the Individual that information in the possession of the DOE created a substantial doubt concerning his eligibility for a security clearance. That information pertains to Guidelines E and F of the *National Security Adjudicative Guidelines for Determining Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position*, effective June 8, 2017 (Adjudicative Guidelines).

Under Guideline E, the LSO alleges that the Individual had signed a QNSP on February 13, 2018, certifying that in the last seven years, he had filed and paid Federal taxes when required by law or ordinance, when he had allegedly not filed his Federal income taxes for the 2015 and 2016 tax years. If true, this information would have adequately justified the LSO’s invocation of Guideline E and would have raised significant security concerns. The Adjudicative Guidelines state: “Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual’s reliability, trustworthiness, and ability to protect classified or sensitive information. Of special interest is any failure to cooperate or provide truthful and candid answers during national security investigative or adjudicative processes.” Guideline E at § 15. Among those conditions set forth in Guideline E that could raise a disqualifying security concern are: (a) deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire . . . used to conduct investigations, . . . determine national security eligibility or trustworthiness, or award fiduciary responsibilities.” Guideline E at §16(a). However, as I will discuss in detail below, I find that the Individual had, in fact, filed his Federal taxes for tax years 2015 and 2016 when he signed the QNSP on February 13, 2018.

Under Guideline F, the LSO alleges that the Individual has a history of failing to meet his financial obligations, and failing to file his Federal and state tax returns. To this end, the LSO alleged that the Individual has failed to file his Federal income tax returns for tax years 2015, 2016, and 2017, and has failed to file his state tax returns for tax years 2011, 20013, 2014, 2015, 2016, and 2017. These allegations adequately justify the LSO’s invocation of Guideline F. Guideline F (Financial Considerations) provides: “failure to live within one’s means, satisfy debts, and 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 or sensitive information.”² Guideline F at § 18. Guideline F sets forth nine conditions that “could raise a security concern and may be disqualifying.” Guideline F at § 19. Among these conditions that can raise security concerns under Guideline F are an individual’s inability to satisfy debts; unwillingness to satisfy debts regardless of the ability to do so; history of not meeting financial obligations; a history of late payments or non-payment, other

² Guideline F further provides: “Financial distress can also be caused or exacerbated by, and thus can be a possible indicator of, other issues of personnel security concern such as excessive gambling, mental health conditions, substance misuse, or alcohol abuse or dependence. An individual who is financially overextended is at greater risk of having to engage in illegal or otherwise questionable acts to generate funds.” Guideline F at § 18.

negative financial indicators; failure to file annual Federal or state income tax returns, and failure to pay annual Federal, or state income tax. Guideline F at § 19(a), (b), (e), and (f).

III. REGULATORY STANDARDS

A DOE administrative review proceeding under Part 710 requires me, as the Administrative Judge, to issue a Decision that reflects my comprehensive, common-sense judgment, made after consideration of all of 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). 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 at the hearing with evidence 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 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). Hence, an individual is afforded the utmost latitude in the presentation of evidence to mitigate the security concerns at issue.

The discussion below reflects my application of these factors to the testimony and exhibits presented by both sides in this case.

IV. FINDINGS OF FACT

On November 8, 2017, the Individual filed his Federal tax returns for tax years 2015 and 2016 with the Internal Revenue Service (IRS). Ex. A. and Ex. B.

On February 13, 2018, the Individual signed and submitted a QNSP to the LSO. Section 26 of the QNSP asked the Individual "In **the last seven (7) years** have you failed to file or pay Federal, state, or other taxes when required by law or ordinance?" (emphasis in the original). The Individual answered in the affirmative. Ex. 6 at 58. The QNSP further required the Individual to report each year that he failed to file Federal or state tax returns. The Individual reported that he had failed to file state tax returns for tax years 2011, 2012, 2013, 2014, 2015, and 2016. Ex. 6 at 58-60. The Individual did not indicate that he had not filed his Federal tax returns for tax years 2015 and 2016. Ex. 6. The Individual further indicated that he intended "to start filing process in Feb 2018." Ex. 6 at 58-60.

A background investigation of the Individual was conducted by the Office of Personnel Management's Federal Investigative Services (FIS). The Individual was interviewed by a FIS Investigator on May 16, 2018 (the FIS Interview). Ex.7 at 93. During the FIS Interview, the

Individual admitted that he had not filed state tax returns for 2012 and 2013 in one state (State A) and 2011, 2014, 2015, 2016, and 2017, in another state (State B). Ex. 7 at 96. The FIS Investigator's report states: "Subject did not file federal income taxes in 2015, 2016 or 2017 **before the filing deadline.**" Ex. 7 at 96 (emphasis added). The FIS Investigator's report further states:

Subject filed the back taxes last year and sent checks for \$1,439 with his 2015 return and \$2,520 with his 2016 federal return. The IRS has since sent Subject checks for overpayment - \$1,117 for the 2016 tax year and Subject is expecting to receive another check of \$3,957 from the IRS for money due in claiming the child tax credit for one or both of those tax years.

Ex. 7 at 96 (emphasis added). The FIS Investigator indicated that the Individual explained his failure to file his returns by stating that "he believed he did not have any tax liability and wanted to wait to claim any refund for a rainy day when he needed the money." Ex. 7 at 96.

The LSO issued LOI's to the Individual. On April 8, 2019, the Individual submitted his responses to these LOIs (the Response). Ex. 5 at 9. In the Response, the Individual admitted that he had not filed state tax returns for tax years 2011, 2012, and 2013, for State A, and tax years 2011, 2013, 2014, 2015, 2016, and 2017, for State B. Ex. 5 at 1-5. The Individual explained his failure to file these state tax returns by claiming that he had misplaced some financial forms after moving, and further stating that there had "been no urgency on my part," because he expected to receive refunds for those tax years. Ex. 5 at 1-5. LOI Question No. 21 cited the Individual's statement to the FIS Investigator that he had filed his tax year 2015 and tax year 2016 Federal returns. Ex. 5 at 6. However, LOI Question No. 30 asked: "Explain why question number 26 on the QNSP that you signed February 13, 2018 . . . may have been answered incorrectly. In the QNSP, you failed to list that you had not filed your federal income taxes for the 2015, 2016, 2017 tax years.³" Ex. 5 at 8. The Individual responded by stating: "I am corresponding with the IRS about the returns in question. I have an appointment with the IRS on April 22, 2019." Ex. 5 at 8.

On September 12, 2019, the Individual submitted a letter from a Certified Public Accountant (the CPA) indicating that the CPA was representing the Individual before the United States Tax Court. Ex. B at 1. The CPA further indicated that he was "in the process of reviewing, correcting, and filing returns with IRS and with [State A] and [State B] taxing authorities." Ex. B at 1. The CPA further stated:

It is anticipated that all individual income tax filings, both federal and state, will be submitted by the end of this month. The delay in filings relates to having to obtain W-2 copies from employers going back to 2012. While the IRS has provided federal taxable amounts reported on W-2s, the IRS records do not include amounts reported on the W-2 for state income tax withholding. This information is necessary to file accurate state returns.

³ The Individual's Federal tax returns for tax year 2017 were not due until April 2018, several months after the Individual submitted the February 13, 2018, QNSP.

Ex. B at 1. The Individual also submitted a copy of a Power of Attorney that he signed on June 26, 2019, appointing the CPA as his representative before the IRS and state taxing authorities. Ex. B at 2.

On October 3, 2019, the Individual submitted a letter from the CPA, dated September 24, 2019. Ex. E. In this letter, the CPA reported that the Individual had submitted his Federal income tax returns for tax year 2017. Ex. E at 1. The CPA further indicated that the Individual had recently filed his outstanding tax returns from State A and State B as well. Ex. E at 1. The Individual further submitted copies of those filings. Ex. F; Ex. G; Ex. H; Ex. I; Ex. K; Ex. L; Ex. M; Ex. N; Ex. O; Ex. P. The CPA reported that the Individual's recent tax filings indicated that he owed the IRS \$1,929 for Federal tax year 2017. Ex. E at 2. He further reported that these returns indicated that the Individual owed State B \$221, for tax year 2012, \$377 for tax year 2015, \$683 for tax year 2016, and \$1,243 for tax year 2017. Ex. E at 2. The Individual also owes State A \$585 for tax year 2012, and \$180 for tax year 2013. Ex. E at 2. The Individual is owed a refund of \$2,156 from the IRS as a result of a settlement with the IRS. Ex. E at 2. State B also owes refunds to the Individual of \$56 for tax year 2011, \$72, for tax year 2013, and \$121 for tax year 2014. Ex. E at 2.

The Hearing

At the Hearing, the Individual mitigated the security concerns raised by the LSO's allegation that he failed to report his failure to file his Federal tax returns for tax years 2016 and 2017, by convincingly showing that he had, in fact filed his Federal tax returns for those years at the time he submitted his February 13, 2018, QNSP. Tr. at 28, 38.

The Individual testified that he hired the CPA, in June 2019, in order to ensure that all of his tax returns were filed. Tr. at 10-11, 26. As a result, he testified, he has now filed all of his outstanding tax returns. Tr. at 13. He testified that his Federal tax return for tax year 2017 had just been filed two days earlier. Tr. at 19, 29. The Individual admitted that he still has some outstanding tax debts that have not yet been resolved. Tr. at 13. However, he expects to be able to resolve these debts, since his fiancée has recently become employed as a registered nurse, and their household income has doubled. Tr. at 13. His annual income is \$72,000, and his fiancée has a similar income. Tr. at 33-34. The Individual testified that he has entered into a payment plan with the IRS for his unpaid taxes for tax years 2017 and 2015. Tr. at 18, 27. The Individual testified that the IRS now owes him \$2,156 as a result of his successfully challenging the IRS's determinations in tax court. Tr. at 18, 27. He plans to use that payment to address his other tax debts. Tr. at 27. The Individual admitted that he will need to set up a payment plan with State B, and plans to do so in the near future. Tr. at 20, 27. The Individual also admitted that he has outstanding tax debts to State A. Tr. at 23. The Individual, however, does not know what his monthly payments will be for these payment plans. Tr. at 31. The Individual agreed that he owes State B \$765, and State A \$2,275. Tr. at 32-33. The Individual also owes the IRS \$248. Tr. at 33. The Individual noted that his household income now exceeds \$100,000 and that he plans to pay off his past debts quickly. Tr. at 34. The Individual further testified that the CPA had successfully challenged his previous Federal income tax assessment for 2016, and now plans to use the precedent established by that challenge in order to challenge the Federal income tax assessment for 2015. Tr. at 37. The Individual expects to receive approximately \$5,000 if he prevails in that challenge. Tr. at 37.

When the Individual was asked why had had failed to file so many tax returns, he stated: “ The reason why I choose not to do my taxes right away is because I'm usually owed money back every year so I look at it as money in the bank whenever I can get to it.” Tr. at 19. He further stated that he now realizes that he is required to file tax returns, even if he believes he is owed a refund. Tr. at 19, 24.

The Individual attempted to mitigate the security concerns raised by his failure to file his tax returns in a timely manner by stating: “I think that I've complied with filing all my taxes now and I'm not going to let it get this far again . . . I filed my 2018 taxes on time. And this is like a huge headache for me, and I don't care to go through this again.” Tr. at 26. He further indicated that he is going to have the CPA prepare his tax returns in the future. Tr. at 27. He concluded the hearing by stating:

It's in my best interest to stay on top of these finances and paying my taxes on time. I realize my mistake, and I plan on moving forward and not making this mistake again. As I said, it's far better in my interest to keep my job rather than try to skedaddle by with \$3,500.

Tr. at 38.

V. ANALYSIS

Guideline E

As discussed above, the LSO's allegations under Guideline E were based upon an invalid factual basis.

Guideline F

By failing to file his tax returns for an extended period, from 2011, through 2017, the Individual has exhibited poor judgment, shown that he cannot be relied upon, and shown that he cannot be considered trustworthy. The only explanation provided by the Individual for his failure to file his taxes is troubling; he claimed that he believed that he was owed a refund for each of these years and considered these alleged unclaimed refunds to be assets. As discussed above, the Individual actually owed taxes for most of these tax years, and his tax liability for those years actually exceeded his unclaimed refunds by approximately \$3,500. Moreover, the Record shows that the Individual was actually experiencing financial hardship during this period, which suggests either that his explanation was not credible, or that he exhibited poor judgment by failing to utilize these resources. *See* Ex. 6 at 61-65 (reporting several personal debt issues during this time period on his QNSP); Ex. 6 at 18-23 (reporting several periods of unemployment during this time period on his QNSP).

The Individual, has however, belatedly taken the appropriate actions to address his failure to file his tax returns. He has hired a CPA, and he has filed all of his outstanding tax returns. He has not, however, as of the closing of the Record on October 29, 2019, shown that he has entered into final payment plans with the IRS and the state taxing authorities.

Guideline F provides seven conditions that can mitigate security concerns, four of which apply to circumstances present in the instant case. Guideline F at § 20. The Individual has not shown that any of these conditions are sufficiently present in the instant case.

Section 20(a) provides that mitigation could occur if: “the behavior happened so long ago, was so infrequent, or occurred under such circumstances that it is unlikely to recur and does not cast doubt on the individual's current reliability, trustworthiness, or good judgment.” The Individual’s pattern of failing to file his tax has continued until relatively recently, and therefore cannot be said to have occurred long ago. Moreover, the Individual’s pattern of failing to file his tax return occurred over an extended period of time, from 2011 through 2017, and therefore cannot be considered to have occurred under such circumstances that it can be considered unlikely to recur. The recentness of the Individual’s failures to file his tax returns continues to cast doubt upon his current reliability, trustworthiness, or good judgment.

Section 20(c) provides that mitigation could occur if: “the individual has received or is receiving financial counseling for the problem from a legitimate and credible source, such as a non-profit credit counseling service, and there are clear indications that the problem is being resolved or is under control.” The Individual has obtained the services of the CPA and has filed each of the outstanding tax returns. However, these actions have occurred under the pressure of the present proceeding, and the Individual has not yet shown that he will be able, or willing to repay his outstanding tax obligations. Moreover, any mitigation provided by the Individual’s recent filing of his tax returns is overshadowed by the longstanding nature of the behaviors that have raised these security concerns. Accordingly, I find that this condition does not mitigate the security concerns raised under Guideline F.

Section 20(d) provides that mitigation could occur if: “the individual initiated and is adhering to a good-faith effort to repay overdue creditors or otherwise resolve debts.” While the Individual has initiated an effort to repay his overdue tax obligations, he has not yet entered into finalized repayment plans with each of his tax creditors. Therefore, this condition is not yet present in the instant case.

Section 20(e) provides that mitigation could occur if: “the individual has made arrangements with the appropriate tax authority to file or pay the amount owed and is in compliance with those arrangements. However, the Individual has not made final arrangements with the IRS or the state taxing authorities to repay. Therefore, this condition is not present in the instant case.

Since the Individual has not shown that any of the conditions that can mitigate security concerns arising under Guideline F at § 20 have been met in the present case, I am not convinced that the Individual has sufficiently mitigated the significant security concerns arising under Guideline F, from his failure to file his Federal and state tax returns for several years.

VI. CONCLUSION

For the reasons set forth above, I conclude that the LSO did not properly invoke Guideline E. However, I also conclude that the LSO properly invoked Guideline F. After considering all of the evidence, both favorable and unfavorable, in a common sense manner, I find that the Individual has not mitigated the security concerns raised under Guideline F. Accordingly, the Individual has

not demonstrated that granting his security clearance would not endanger the common defense and would be clearly consistent with the national interest. Therefore, the Individual's security clearance should be denied. The parties may seek review of this Decision by an Appeal Panel under the procedures set forth at 10 C.F.R. § 710.28.

Steven L. Fine
Administrative Judge
Office of Hearings and Appeals