

*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: August 23, 2021) Case No.: PSH-21-0097
)
)
_____)

Issued: January 7, 2022

Administrative Judge Decision

James P. Thompson III, Administrative Judge:

This Decision concerns the eligibility of XXXXX XXXXX (the “Individual”) to hold an access authorization under the United States Department of Energy’s (DOE) regulations, set forth at 10 C.F.R. Part 710, “Procedures for Determining Eligibility for Access to Classified Matter and Special Nuclear Material.”¹ As discussed below, after carefully considering the record before me in light of the relevant regulations and the *National Security Adjudicative Guidelines for Determining Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position* (June 8, 2017) (“Adjudicative Guidelines”), I conclude that the Individual’s access authorization should not be restored.

I. BACKGROUND

A DOE contractor employs the Individual in a position that requires possession of a security clearance. In 2018, the Individual completed a Questionnaire for National Security Positions (QNSP). In response to one of the questions, he disclosed that he failed to pay his federal and state taxes in 2016. The DOE Local Security Office conducted an investigation and learned that the individual failed to file federal tax returns and pay federal taxes for other years. Subsequently, the LSO informed the Individual by letter (“Notification Letter”) that it possessed reliable information that created substantial doubt regarding his eligibility to possess a security clearance. In an attachment to the Notification Letter, entitled Summary of Security Concerns, the LSO explained that the derogatory information raised a security concern under Guideline F of the Adjudicative Guidelines.

¹ The regulations define access authorization 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). This Decision will refer to such authorization as access authorization or security clearance.

The Individual exercised his right to request an administrative review hearing pursuant to 10 C.F.R. Part 710. The Director of the Office of Hearings and Appeals appointed me as the Administrative Judge in this matter, and I subsequently conducted an administrative review hearing. *See* Transcript of Hearing (Tr.). At the hearing, the Individual testified on his own behalf. The Individual submitted two exhibits, marked Exhibits A and B. The LSO submitted ten exhibits, marked Exhibits 1 through 10.²

II. THE NOTIFICATION LETTER AND THE ASSOCIATED SECURITY CONCERNS

As indicated above, the LSO cited Guideline F (Financial Considerations) of the Adjudicative Guidelines as the basis for concern regarding the Individual's eligibility to possess a security clearance. Ex. 1. Guideline F provides that that an individual's "[f]ailure 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." Guideline F at ¶ 18. A condition that could raise a security concern is an individual's "[f]ailure to file . . . federal, state, or local income tax returns or failure to pay [income tax] as required[.]" *Id.* at ¶ 19(f). The Notification Letter cited that the Individual failed to file his federal income tax returns for several years. Ex. 1. The above information justifies the LSO's invocation of Guideline 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 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) (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 or her eligibility for an access authorization. The Part 710 regulations are drafted to permit the introduction of a very broad range of evidence at personnel security hearings. Even appropriate hearsay evidence may be admitted. *Id.* at

² The LSO's exhibits were combined and submitted in a single, 401-page PDF workbook. Many of the exhibits are marked with page numbering that is inconsistent with their location in the combined workbook. This Decision will cite to the LSO's exhibits by reference to the exhibit and page number within the combined workbook where the information is located as opposed to the page number that may be located on the page itself.

§ 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

In the Individual's 2018 QNSP submitted as part of his access authorization reinvestigation, he explained that he failed to file his 2016 federal income tax return because of his divorce proceedings. Ex. 9 at 92. He also stated that he would "satisfy" his tax-related obligations after he received a portion of his ex-wife's retirement fund pursuant to the divorce. *Id.*

The record includes a 2019 report that contains statements made by the Individual to an investigator from the Office of Personnel Management (OPM) regarding the Individual's failure to file his federal tax returns. Ex. 10. The Individual again explained that, at that time, he did not pay his federal income taxes because he was waiting for his ex-wife's "retirement company" to issue him a check for his portion of her retirement funds. *Id.* at 162. The Individual told the investigator that he had an appointment with an attorney and expected to resolve the issue within the next forty-five days. *Id.*

The record also includes two Letters of Interrogatory (LOI) which contain the Individual's responses to questions regarding his tax-related conduct. Ex. 7; Ex. 8. The responses were provided approximately one year after his OPM interview. *Id.* Therein, he admitted that he failed to file federal income tax returns for 2016, 2017, 2018, and 2019. Ex. 8 at 30, 32. He again stated that, once he received a qualified domestic relations order (QDRO) as part of his divorce settlement, he would obtain a tax accountant to address his 2016 tax filing obligations and any other outstanding tax liability. Ex. 7 at 22-23; Ex. 8 at 30-31. He indicated that his "wish and goal is to have all . . . back taxes paid in full by [the] 2020 tax season." Ex. 7 at 24.

At the hearing, the Individual did not dispute the information contained in the Notification Letter but instead provided additional information to mitigate the security concerns. He testified that his repeated failure to file federal tax returns was due to a lapse in judgement and stemmed, in part, from his contentious separation and divorce, which began in 2016 and was finalized in 2018. Tr. at 11-13. He explained that he became too focused on securing the QDRO to obtain the funds he needed to pay off the personal and tax debt accrued during his marriage. *Id.* at 11. He also testified that he did not file tax returns because he thought that he would owe money that he would be unable to pay. *Id.* at 28.

He further testified that, while he was awarded significant funds through the QDRO, his ex-wife continued to make it extremely difficult for him to recover the funds. *Id.* at 15-17. He also had difficulty obtaining access to the funds because, as he explained, the financial organization that held them was "hostile" and "resistant" towards his efforts. *Id.* at 21. He finally gained access to the funds, and he credited his success to the efforts of a QDRO attorney he hired, a person that he stated "restored [his] faith in the legal system and why [people] need an attorney." *Id.* at 16. He subsequently contacted a tax accountant in early November 2021: three weeks before this hearing.

Id. at 23. He testified that he was letting his accountant “dictate how to file [his tax returns and pay off his other debt].” *Id.* at 20. He expected the accountant to review his financial circumstances and create a plan to resolve his tax-related issues by the end of 2021. *Id.* at 22. He also testified that he would never be in a similar position again because he believed that the money he received through the QDRO would more than satisfy his tax liability. *Id.* at 50.

Finally, the Individual explained that he did not seek tax assistance until he knew how to access the funds awarded in the QDRO. *Id.* at 23. He testified that he was supposed to meet his accountant the week of the hearing, but the accountant “got called out of the city.” *Id.* at 21. The accountant had asked him to reschedule the meeting, which he planned to schedule for the following week. *Id.* at 31. He also disclosed, for the first time, that he failed to file a federal tax return for the year 2020. *Id.* at 28, 38. He explained that this recent failure was due to his desire to handle all his delinquent tax filings simultaneously. *Id.* at 28. He also disclosed that his accountant had asked him to come in for a meeting ahead of the 2020 filing deadline, but he instead decided to focus on obtaining the QDRO funds. *Id.* at 39-40. He testified that, going forward, he planned to schedule yearly appointments with his accountant to address his future tax filings requirements, and he accepted “full responsibility for not handling some things correctly.” *Id.* at 32, 35.

V. ANALYSIS

A. Guideline F Considerations

Under Guideline F, the following relevant conditions could mitigate security concerns based on financial considerations:

- (c) 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;

...

- (g) The individual has made arrangements with the appropriate tax authority to file or pay the amount owed and is in compliance with those arrangements.

Adjudicative Guidelines at ¶ 29.³

I find that the Individual has not put forth sufficient evidence to resolve the security concerns under the above mitigating conditions. Turning first to ¶ 29(c), the Individual has not yet received financial counseling because he has not yet scheduled an appointment or met, in any substantive way, with the accountant whom he plans to work with to resolve his tax issues. Furthermore, there is no clear indication the problem is being resolved because the Individual has not yet contacted the Internal Revenue Service or otherwise taken sufficient action to initiate the process of resolving

³ The additional mitigating conditions for Guideline F are not applicable to these facts.

his tax-related issues. My above findings also preclude the application of ¶ 29(g) because they establish the Individual has not made any arrangements with the appropriate tax authority.

The Individual's actions to date are too little too late. His inaction is made more concerning by the fact that he possessed a security clearance at all times, and, even after being interviewed by an OPM investigator regarding these specific tax issues and stating he would work to resolve them, he again failed to file a federal tax return for 2020. The difficulty he may have experienced in obtaining access to the QDRO funds, if credited as true, does not excuse his failure to take any number of reasonable actions along the way to begin the process of resolving his tax-related issues. Furthermore, his continuing decision to delay meeting with his accountant does not demonstrate good judgement, especially when his own testimony displays appreciation for the advice and guidance a professional, such as a lawyer or accountant, could provide. Accordingly, I find that the Individual has failed to resolve the Guideline F concerns.

VI. CONCLUSION

In the above analysis, I found that there was sufficient derogatory information in the possession of the DOE that raised a security concern under Guideline F of the Adjudicative Guidelines. After considering all the relevant information, favorable and unfavorable, in a comprehensive, common-sense manner, including weighing all of the testimony and other evidence presented at the hearing, I find that the Individual has not brought forth sufficient evidence to resolve the security concerns set forth in the Summary of Security Concerns. 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 regulation set forth at 10 C.F.R. § 710.28.

James P. Thompson III
Administrative Judge
Office of Hearings and Appeals