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

In the Matter of: Personnel Security Hearing)
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Filing Date: August 27, 2021) Case No.: PSH-21-0110
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Issued: February 16, 2022

Administrative Judge Decision

Kristin L. Martin, Administrative Judge:

This Decision concerns the eligibility of XXXXX XXXXX (hereinafter referred to as “the Individual”) for access authorization under the Department of Energy’s (DOE) regulations set forth at 10 C.F.R. Part 710, entitled, “Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material.”¹ For the reasons set forth below, I conclude that the Individual’s security clearance should not be restored.

I. BACKGROUND

The Individual is employed by a DOE Contractor in a position which requires that he hold a security clearance. Derogatory information was discovered regarding the Individual’s failure to file state and federal tax returns. The Local Security Office (LSO) began the present administrative review proceeding by issuing a Notification Letter to the Individual informing him that he was entitled to a hearing before an Administrative Judge in order to resolve the substantial doubt regarding his eligibility to hold a security clearance. *See* 10 C.F.R. § 710.21.

The Individual requested a hearing and the LSO forwarded the Individual’s request to the Office of Hearings and Appeals (OHA). The Director of OHA appointed me as the Administrative Judge in this matter. At the hearing I convened pursuant to 10 C.F.R. § 710.25(d), (e) and (g), the Individual testified on his own behalf. *See* Transcript of Hearing (hereinafter cited as “Tr.”). The LSO submitted seven exhibits, marked as Exhibits 1 through 7 (hereinafter cited as “Ex.”). The Individual submitted 18 exhibits, marked as Exhibits A through R.

¹ Under the regulations, “‘Access authorization’ means 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 also be referred to in this Decision as a security clearance.

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 Guideline 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). These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in the adjudicative process.

Guideline F (Financial Considerations) addresses “[f]ailure to live within one's means, satisfy debts, and meet financial obligations.” Adjudicative Guidelines at ¶ 18. It is well established that failure or inability 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 information. *Id.* The conditions set forth in that guideline that could raise a disqualifying security concern are inability to satisfy debts or unwillingness to satisfy debts; a history of not meeting financial obligations; deceptive or illegal financial practice; consistent spending beyond one's means or frivolous or irresponsible spending; failure to file or fraudulently filing annual Federal, state, or local income tax returns or failure to pay annual Federal, state, or local income tax as required; unexplained affluence; borrowing money or engaging in significant financial transactions to fund gambling or pay gambling debts; and concealing gambling losses, family conflict, or other problems caused by gambling. Adjudicative Guidelines at ¶ 19.

The LSO alleges that the Individual failed to file his state and federal taxes for tax years 2014 through 2018. Accordingly, the LSO's security concerns under Guideline F are justified.

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 entire process is a conscientious scrutiny of a number of variables known as the “whole person concept.” Adjudicative Guidelines ¶ 2(a). The protection of the national security is the paramount consideration. 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

The Individual submitted into evidence copies of his state and federal tax returns for tax years 2014 through 2020. Ex. A–G. He testified that he had been working on getting the returns file consistently for years and had never chosen to ignore the issue. Tr. at 36–37. However, in a post-hearing affidavit, the Individual testified that he followed up with the IRS after the hearing to get proof of filing and learned that his 2015 tax returns had not been received. Ex. O at 1. He resubmitted all of his missing tax returns, sending them via certified mail, and provided evidence of their receipt. Ex. P. Furthermore, he submitted an affidavit from an IRS Agent which stated that the Individual had filed tax returns for all tax years from 2013 through 2020. Ex. N at 3.

The Individual had previously been heavily invested in real estate, owning an S corporation and a network of LLCs which owned and managed nearly 100 properties. Tr. at 16–17, 35. In 2015, the Individual began shutting down his business. *Id.* at 17. He had no staff remaining at that time. *Id.* As early as 2014, the Individual was working with an accountant (“P.S.”) and had been having difficulty getting P.S. the necessary financial information, in the correct format, for P.S. to file his tax returns. *Id.* In the absence of staff employees, the Individual struggled even more to get P.S. the necessary tax information. *Id.* at 17–18. In 2015 or 2016, P.S. retired and the Individual began working with another Certified Public Accountant (CPA) in 2016. *Id.* at 18, 21. Again, the Individual struggled to provide the necessary tax information in the proper format for his CPA. *Id.* at 50–51; Ex. H at 2.

The CPA also faced barriers, including acquiring another firm and moving to a new building, that significantly slowed her work on the Individual’s tax returns for a period of time. Tr. at 18. The Individual’s exhibits indicate that, at times, he had difficulty staying current on his payments to the CPA and other obligations related to his properties. Ex. H at 7–8. In late 2019 or early 2020, the Individual told the CPA that he wanted to terminate her services because she had yet to file even his 2013 tax returns, despite the fact that he had employed her for several years. Tr. at 19. The CPA apologized for the delays and helped the Individual understand how to provide information in a way that would be useful for her to file his returns. *Id.* Eventually, the CPA filed his 2013 tax returns. *Id.* After that, the Individual’s CPA was able to prepare and file tax returns in two weeks. *Id.* at 20. The CPA told the Individual that all of his tax returns had been filed in January or February of 2021. *Id.* at 25.

In mid-2021, the Individual was contacted by a local IRS agent because certain documents were missing from a filing. *Id.* at 22, 24. At that time, the Individual asked to confirm that the IRS had received his returns and the agent informed him that they had only received tax returns for tax years

2013 and 2017. *Id.* at 22. The agent told him that he could bring her physical copies of the missing tax returns, which he did. *Id.* at 23.

The Individual testified that he was still waiting to receive his tax documents for tax year 2021 and intended to file very shortly after receiving them. *Id.* He intended to start the process early so that he had time to go to a different tax preparer if his CPA took too long. *Id.* at 30–31. His daughter worked for an accounting firm and, if needed, he planned to use an accountant from her office so that his tax returns could be timely filed. *Id.* at 34. He had already identified an accountant he would work with from that office. *Id.* at 36. However, he believed that the CPA would be able to file his taxes for 2021 without issue. *Id.* at 38. In his post-hearing affidavit, the Individual testified that he would not continue working with the CPA due to her failure to file his 2015 taxes, and that he had set up a meeting with a new accountant. Ex. N at 1.

The Individual was able to liquidate most of his properties in 2015, however he still had approximately 10 properties that he had been unable to sell due to a group mortgage with a prepayment penalty and an issue with a special permit for a house on federal land. Tr. at 20–21.

The Individual owed around \$200,000 total in federal and state taxes from tax years 2018 through 2020. Tr. at 39. He had not yet set up a payment plan for the delinquent amount because the IRS had not yet processed all his returns, but he stated that he intended to pay \$5,000 monthly. *Id.* at 40–42. This amount was dependent upon the sale of the property on federal land because he would no longer have to pay for its mortgage or upkeep. *Id.* However, the sale had not been finalized. *Id.* The Individual testified that the buyer had been involved for about two years but he anticipated having the sale finalized in about a month. *Id.* He would not receive any cash from the sale. *Id.* at 42. The Individual testified that he had continued to have financial difficulties in 2021, but he felt that things were improving. *Id.* at 56–57.

V. ANALYSIS

A person who seeks access to classified information enters into a fiduciary relationship with the government predicated upon trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours. The government places a high degree of trust and confidence in individuals to whom it grants access authorization. Decisions include, by necessity, consideration of the possible risk that the applicant may deliberately or inadvertently fail to protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information.

The issue before me is whether the Individual, at the time of the hearing, presents an unacceptable risk to national security and the common defense. I must consider all the evidence, both favorable and unfavorable, in a commonsense manner. “Any doubt concerning personnel being considered for access for national security eligibility will be resolved in favor of the national security.” Adjudicative Guidelines ¶ 2(b). In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record. Because of the strong presumption against granting or restoring security clearances, I must deny access authorization if I am not convinced that the LSO’s security concerns have been mitigated such that restoring the Individual’s clearance is not an unacceptable risk to national security.

Failure to live within one's means, satisfy debts, and fulfill state and federal obligations can raise questions about an individual's reliability and trustworthiness. Adjudicative Guidelines at ¶ 18. Guideline F provides, in relevant part, that the following conditions may mitigate security concerns:

- (1) 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 (*id.* at ¶ 20(a));
- (2) the conditions that resulted in the financial problem were largely beyond the person's control (e.g., loss of employment, a business downturn, unexpected medical emergency, a death, divorce or separation, clear victimization by predatory lending practices, or identity theft), and the individual acted responsibly under the circumstances (*id.* at ¶ 20(b));
- (3) the individual has made arrangements with the appropriate tax authority to file or pay the amount owed and is in compliance with those arrangements. (*id.* at ¶ 20(g)).

These mitigating factors have not been met. While the Individual has filed his taxes, he had not completely done so by the hearing date. He testified that he attempted to file his completed tax returns multiple times, which speaks to his intent to meet his obligations. However, the fact that it took so many attempts calls into question his ability to meet his obligations in the future. The Individual chose to remain with a CPA who, according to his testimony, was not capable of preparing his returns in a timely manner and who was not capable of filing his taxes properly. It was not until after the hearing that the Individual decided to seek out a new accountant to assist with his tax obligations. This calls the Individual's judgment into question. I cannot be sure that the Individual is able to ensure that his taxes are timely filed in the future.

Regarding payment of his past due taxes, the Individual has not set up any payments, recurring or otherwise, with the IRS or his state tax entity. While he cannot negotiate a payment plan until his taxes are filed, he is able to make one-time payments toward past due amounts. He has not done so. Furthermore, the Individual's ability to set up a payment plan once his returns are processed is contingent upon the completion of a home sale that has been in process for two years. There is no assurance it will be resolved soon, and I cannot be sure that he will be able to enter into or adhere to a payment plan with his federal or state taxation entities. Moreover, the amount the Individual owes is significant. Such a large tax debt increases the Individual's risk of compromise because it will likely remain an issue for years to come.

For the foregoing reasons, I find that the Individual has not mitigated the Guideline F concerns.

VI. CONCLUSION

Upon consideration of the entire record in this case, I find that there was evidence that raised concerns regarding the Individual's eligibility for a security clearance under Guideline F of the Adjudicative Guidelines. I further find that the Individual has not succeeded in fully resolving those concerns. Therefore, I cannot conclude that restoring DOE access authorization to the Individual "will not endanger the common defense and security and is clearly consistent with the national interest." 10 C.F.R. § 710.7(a). Accordingly, I find that the DOE should not restore access authorization to the Individual at this time.

The parties may seek review of this Decision by an Appeal Panel, under the regulation set forth at 10 C.F.R. § 710.28.

Kristin L. Martin
Administrative Judge
Office of Hearings and Appeals