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DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Hearing Officer's Decision

Name of Case: Personnel Security Hearing

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Case Number: VSO-0573

This Decision concerns the eligibility of XXXXX (hereinafter referred to as "the individual") to hold an access authorization (also called a security clearance). The local DOE security office determined that information in its possession created substantial doubt about the individual's continued eligibility for an access authorization under the Department of Energy (DOE) regulations set forth at 10 CFR Part 710, Subpart A, entitled "Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material." As explained below, I have concluded that the individual's access authorization should be not be restored.

Background

The individual is employed by a contractor at a DOE facility, and had a job that required an access authorization. The local DOE security office issued a Notification Letter to the individual on July 17, 2002. The Notification Letter alleges that DOE has substantial doubt about the individual's continued eligibility for a clearance, based upon disqualifying criteria set forth in section 710.8, paragraphs (f) and (l).

The Notification Letter states that the individual deliberately misrepresented, falsified or omitted significant information from several security forms he submitted to DOE in 1994, 1996, and 2001. The information the individual allegedly omitted from those forms concerns delinquent taxes, tax liens, delinquent debts, and the garnishment of his wages by the Internal Revenue Service. Those are the security concerns under paragraph (f) of Section 710.8.

In addition, the Notification Letter states that the individual's actions raise concerns that he 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. According to the Notification Letter, the individual was arrested twice by a local police

department in 1985 and in 1992 on harassment charges, and he was arrested in 2002 on five warrants for income tax evasion charges brought by the state where the DOE facility is located. The Notification Letter further alleges that the individual engaged in dishonest behavior by falsifying his time sheet while working for one previous employer in 1986, and that he was fired for theft of property from another former employer in 1994. In addition, the Notification Letter alleges that the individual failed to honor his financial obligations by failing to pay state taxes in his state of residence and other debts, that several Federal tax liens were filed against him, and that the individual tried to evade Federal income taxes by filing W-4 withholding forms claiming that he was "exempt," and that he was not a "United States person." These are the security concerns under paragraph (1) of Section 710.8.

Because of these security concerns, the case was referred for administrative review. The individual filed a request for a hearing on the concerns in the Notification Letter. DOE transmitted the individual's hearing request to the Office of Hearings and Appeals (OHA), and the OHA Director appointed me as Hearing Officer in this case.

At the hearing I convened, the DOE Counsel called two witnesses: a personnel security specialist and the individual's former supervisor at the DOE facility. The individual represented himself, aided by a co-worker at the DOE facility (hereinafter referred to as "the Assistant"). The Assistant, a layperson without a college degree, claims to have studied the tax laws extensively, and is a tax protestor of some local notoriety. The individual testified on his own behalf, and called four other witnesses: his same former supervisor called by the DOE, the Assistant, a member of the police force at the DOE facility, and two other contractor employees at the DOE facility who, at one time, were also tax protestors. The DOE submitted 27 written exhibits. DOE's Exhibit 11 consists of many separate documents provided by the individual to support his legal arguments that the tax laws are invalid and do not apply to him. In addition, the individual submitted a videotape from Larken Rose, a tax protestor, and another written exhibit consisting of Internal Revenue Service (IRS) Publication 515, "Withholding Tax on Nonresident Aliens and Foreign Entities" (November 2001).

Standard of Review

The applicable DOE regulations state that "[t]he decision as to access authorization is a comprehensive, common-sense judgment, made after consideration of all the 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 CFR § 710.7(a). In resolving questions about the individual's eligibility for access authorization, I must consider the relevant factors and circumstances connected with the individual's conduct. These factors are set out in § 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 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.

A DOE administrative review proceeding under 10 CFR Part 710 is authorized when the existence of derogatory information leaves unresolved questions about an individual's eligibility for access authorization. A hearing is "for the purpose of affording the individual an opportunity of supporting his eligibility for access authorization." 10 CFR § 710.21(b)(6). Once DOE has presented derogatory information affecting an individual's eligibility for access authorization, the individual must come forward with evidence to convince DOE that restoring his or her access authorization "would not endanger the common defense and security and would be clearly consistent with the national interest." See, e.g., *Personnel Security Hearing* (Case No. VSO-0013), 24 DOE ¶ 82,752 at 85,511 (1995), and cases cited therein. The DOE regulations were amended in 2001 to state that any doubt regarding an individual's eligibility for access authorization shall be resolved in favor of the national security. 10 CFR § 710.7(a). For the reasons discussed below, it is my opinion that the individual has not resolved the concerns in the Notification Letter, and therefore his access authorization should not be restored.

Findings of Fact

The individual does not dispute the facts about his failure to file state and Federal income tax returns for at least five of the years during the period 1995–2002. These are the most significant actions charged in the Notification Letter, and this proceeding has properly focused on them. In Personnel Security Interviews (PSIs) conducted by the DOE in 1995 and 1997, the individual earlier addressed the circumstances of the two harassment arrests cited in the Notification Letter, and the situations involved in his dismissal by two prior employers. See DOE Exhibits 14 (1997 PSI Transcript) and 18 (1995 PSI Transcript). Before the individual's attempt to evade his state and Federal income tax obligations came to light, the DOE considered resolved the security concerns raised by the two harassment arrests and the two dismissals by former employers, but resurrected them in the Notification Letter as evidence of the individual's pattern of unusual conduct. In my view, however, those events occurred many years ago, and it is not necessary to consider them to resolve the present case.

Testimony of the Witnesses

The Personnel Security Specialist

The DOE personnel security specialist explained that the individual's failure to pay taxes raised a security concern because it shows disrespect for the law. Hearing Transcript, hereinafter cited as "*Tr.*," at 19. She related that in a PSI she conducted with the individual in January 2002, he indicated "he had not paid tax, that he did not believe in paying tax, and did not believe he owed tax," when in fact, he had four tax liens against him at the time. *Id.* According to the security specialist, the individual's failure to disclose information about the tax liens in the PSI raises questions about his honesty. In addition, the existence of the tax liens raises questions about the individual's financial irresponsibility, and his susceptibility to coercion. *Id.* at 20. The security

specialist also noted that the individual had given an affidavit to his employer claiming that he was a nonresident alien, and thus exempt from taxation. *See* DOE Exhibit 5. She pointed out that if the individual were in fact a nonresident alien, he would not be eligible for a security clearance. *Tr.* at 20. On the basis of the individual's actions summarized above, the security specialist stated that the DOE was concerned about his honesty, reliability and trustworthiness, and his vulnerability to pressure, coercion and blackmail. *Id.* at 25-26. Finally, the security specialist agreed that the DOE expects an individual to comply with the law even if he disagrees with it, and to challenge the law in court rather than just disregarding it. *Id.* at 45.

The Individual

The individual has not tried to mitigate the concerns in the Notification Letter about his attempt to evade his state and Federal income tax obligations in the usual manner, by offering explanations, apologies, or showing that he has resolved his tax deficiencies. Instead, he has challenged the validity of his obligation to pay taxes on the basis of tax protestor rhetoric. *See* DOE Exhibit 11 (documents provided by the individual); Larken Rose videotape; *Tr.* at 103-114. The individual asserts he has a right to due process, and that DOE should not have suspended his clearance until his tax protest is resolved on the merits. *Id.* at 100. In addition, the individual claims he is being treated unfairly because of his race, and that his clearance would not have been suspended for tax evasion if he were white. *Id.*

Although the individual clung to his position about the invalidity of the tax laws, their inapplicability to him, and his confusion about their meaning, *id.* at 135, he conceded that he will eventually have to pay his Federal and state income taxes because the IRS has filed Federal tax liens against him and garnished his salary, and the state attorney general's office has charged him with five counts of tax evasion, a crime under state law. The individual claims that his lawyer is negotiating with the state attorney general's office to get a reduction of charges and a settlement of his tax liability. *Id.* at 115-118. The individual maintains that the amount of his tax liability cannot be accurately assessed by the liens and indictments filed against him, which he claims are overstated. *Id.* at 132, 139.

The Individual's Former Supervisor

The individual's former supervisor was called as a witness by both the DOE Counsel and the individual. He testified that the individual was a good employee, reliable, dependable, with good judgment, and willing to work extra hours on short notice. *Id.* at 10-14. The former supervisor considered the individual's failure to pay taxes "kind of outside the work scope." *Id.* at 14.

The Individual's Assistant

The Assistant testified that after "extensive research" into the Internal Revenue Code, he and the individual both came to the conclusion "that the law does not apply to us, and that in fact, it probably, quite probably, is unconstitutional on its face." *Id.* at 49. At this point, I cautioned the Assistant that he would not be permitted to testify as an expert and give his opinion on the tax laws,

which are presumed to be valid. *Id.* at 50. ^{1/} The Assistant recounted how he did not file a Federal Form 1040 for three years. When the IRS contacted him, the Assistant responded with two legal opinion letters that he had purchased for \$50 each before he decided not to file. *Id.* at 53. When the IRS threatened to institute liens against the Assistant, he “caved to their pressure,” and filed his state and Federal tax returns. *Id.* at 57. The Assistant, unlike the individual, was never charged with or arrested for income tax evasion by the state attorney general. The Assistant, unlike the individual, has never needed a clearance while working at the DOE facility. *Id.* at 55.

The Individual’s Co-Workers

The individual next called two co-workers at the DOE facility. The first co-worker testified that he did research on the tax laws, “and from what I grasped—from what I read—it was clear cut that there was an option, and that paying taxes or filing taxes was voluntary, and I had the option whether or not do so.” So based on the information, the first co-worker “made the decision not to [file].” *Id.* at 60. After about a year and a half, the state government asked the first co-worker why he had not filed his taxes. He responded by sending the state a pre-written opinion letter which he had obtained from the Assistant, and questioned why he had to file taxes. Eventually the state government threatened the first co-worker with criminal charges if he did not file his taxes, and he hired a CPA to prepare his missing returns. Shortly thereafter, the first co-worker was arrested on state tax charges. However, he got a lawyer, paid his taxes, and the charges against him were reduced to a misdemeanor. The first co-worker was interviewed by the local DOE security office, but since he paid his taxes promptly after his failure to file came to light, his security clearance was never suspended. *Id.* at 62-66.

The second co-worker testified that she had studied “several tax codes along with the regulations through seminars and reading for myself.” *Id.* at 79. I found the second co-worker to be an evasive witness who testified reluctantly. She admitted that she once had a clearance, but it was terminated after the local DOE security office learned she was arrested by the state for income tax evasion. She pled guilty to a misdemeanor, and eventually paid her taxes. According to the second co-worker, the DOE security office determined that she did not need a clearance to perform her job duties. Like the individual and the Assistant, this witness also recited tax protestor rhetoric, and maintained the tax laws did not apply to her. *See generally Tr.* at 78-97.

The DOE Facility Police Officer

The individual called a police officer employed by a contractor at the DOE facility, who testified that he had done research on the tax laws, and concluded “they were just not right, they’re not implemented right.” *Id.* at 69. He read an article in a newspaper about several arrests at the facility of persons charged with income tax evasion by the state government. On cross-examination, the

^{1/} In a prehearing conference on September 24, 2002, I advised the individual that he could submit any legal arguments on the invalidity of the tax laws in writing. The individual submitted the documents compiled in DOE Exhibit 11, and the Larken Rose videotape.

facility police officer agreed with the DOE Counsel that a person who disagreed with a law could challenge it in court, but he should not break the law. *Id.* at 76. However, he also agreed with the Assistant that it would be “a different case” if a person “has done research, believes they do understand the law, and has determined the law does not apply to them.” *Id.* at 77.

Analysis

The individual did not controvert the charges in the Notification Letter that he failed to inform DOE of his extensive tax delinquencies, and flouted his obligations under the tax laws. Accordingly, I find there is a proper basis for the charges in the Notification Letter. As explained below, I further find the individual has failed to mitigate the security concerns under 10 CFR §710.8(f) and (l) about his failure to file and pay income taxes. Instead, he offered tax protestor rhetoric to argue that the tax laws do not apply to him. He argued that he is entitled to “due process,” meaning that the DOE should have waited to suspend his clearance until he has finally exhausted his tax protests with the IRS and the state prosecutor’s office. He also accused the local DOE security office of racial discrimination, arguing that it treated him and other tax protestors who are minorities differently than tax protestors who are white. These arguments are without merit.

Failure to file tax returns and pay taxes on time raises a serious security concern. *Personnel Security Hearing* (Case No. VSO-0081), 25 DOE ¶ 82, 805 (1996). In prior decisions involving individuals who failed to file and pay taxes, OHA Hearing Officers have generally looked at the reasons for the failure to file, and the actions the individuals have taken to reform their behavior and make amends for past delinquencies. *Compare Personnel Security Hearing* (Case No. VSO-0048), 25 DOE ¶ 82,776 (1995), *aff’d*, 25 DOE ¶ 83,010 (1996) (clearance revoked when the individual made no attempt to file delinquent returns or mitigate financial irresponsibility), *with Personnel Security Hearing* (Case No. VSO-0065), 25 DOE ¶ 82,795 (1996) (clearance restored after individual took steps to organize financial records, retained assistance to file overdue tax returns and filed those returns before the hearing). In *Personnel Security Hearing* (Case No. VSO-0061), 25 DOE ¶ 82,791, *aff’d*, 25 DOE ¶ 83,015 (1996), a Hearing Officer considered and rejected the same kind of tax protestor rhetoric that the present individual has advanced. Those arguments, to the extent that they are comprehensible, have been “universally rejected” by the courts. *See Williams v. Commissioner*, 114 T.C. 136 (2000), and other court decisions compiled in DOE Exhibit 26; *see also* DOE Exhibit 27, “The Truth About Frivolous Tax Arguments” and cases cited therein. The evidence in the present case leads me to conclude that the individual refused to file his tax returns on time because of a desire for personal gain or an intent to defy the law. Both are reasons not to restore his access authorization.

The individual’s “due process” argument has no basis in the DOE regulations regarding eligibility for access authorization. No individual has a right to a security clearance. It is granted when the DOE needs an individual to have access to classified matter or special nuclear material in order to perform work for its mission, but only after a determination that granting the clearance “would not endanger the common defense and security and would be clearly consistent with the national interest.” 10 CFR § 710.7(a). Any doubt regarding an individual’s eligibility for access authorization must be resolved in favor of the national security. *Id.* The individual’s deliberate failure to comply with the tax laws

is derogatory information that causes DOE to have substantial doubt about his continued eligibility for a clearance under 10 CFR § 710.8(f) and (l). Due process grants the individual the right to the present administrative review hearing on his eligibility for access authorization. It does not require the DOE to wait to make that determination until the individual has exhausted his frivolous tax protester arguments before the IRS and the state courts.

A hearing on an individual's eligibility for access authorization under 10 CFR Part 710 is not the proper forum in which to raise allegations of racial discrimination. Nevertheless, I have considered the individual's discrimination argument and find that the record does not show the local DOE security office used race to determine whether to suspend or restore a clearance after the holder failed to file and pay taxes. Quite to the contrary, the testimony of the first co-worker shows that when a cleared employee at the DOE facility who failed to file and pay taxes "caved" (to use the Assistant's phrase), and promptly filed and paid his taxes, the local security office considered its concerns about that person resolved, and his clearance was continued. The first co-worker was a member of the same minority group as the individual. Nor does the testimony of the second co-worker, who was also a minority, support the individual's racial discrimination argument. Although she did not resolve her tax problems as quickly as the first co-worker, and her clearance was terminated because it was no longer needed, her case was not sent through the administrative review process. The only conclusion I can draw from the present record is that the local security office did not discriminate against the individual, but properly suspended his clearance and referred him for administrative review because he submitted false, misleading and incomplete information about the nature and extent of his tax delinquencies, and then maintained that the tax laws did not apply to him.

The individual conceded that he would eventually have to pay his taxes because the IRS has filed liens and garnished his salary, and he wanted to avoid going to jail on the state charges. At the time of the hearing, however, the individual's Federal and state tax delinquencies were still unresolved, and he remained defiant. His selection of the "Assistant," a known tax protestor, to help him at the hearing was ill-advised, and it contributed little or nothing to the individual's interests.

Conclusion

Based on the record in this proceeding, I find that the individual has failed to resolve the security concerns under 10 CFR § 710.8(f) and (l) raised by his failure to inform DOE of his tax delinquencies, and failure to meet his obligations under the tax laws. For the reasons explained in this Decision, I find the individual has failed to show that restoring his access authorization would not endanger the common defense and security and would be clearly consistent with the national interest. Accordingly, it is my decision that the individual's access authorization should not be

restored. The individual may seek review of this Decision by an Appeal Panel under the regulation set forth at 10 CFR § 710.28.

Thomas O. Mann
Hearing Officer
Office of Hearings and Appeals

Date: June 19, 2003