



**DEPARTMENT OF DEFENSE  
DEFENSE OFFICE OF HEARINGS AND APPEALS**



In the matter of: )  
)  
) ISCR Case No. 18-00562  
)  
Applicant for Security Clearance )

**Appearances**

For Government: Michelle Tilford, Esq., Department Counsel  
For Applicant: N. James Turner, Esq.

03/28/2019

**Decision**

KILMARTIN, Robert J., Administrative Judge:

Applicant failed to mitigate the security concerns under Guideline F, financial considerations, and Guideline E, personal conduct. Applicant’s eligibility for access to classified information is denied.

**Statement of the Case**

Applicant submitted a security clearance application (SCA) on September 13, 2016. On August 20, 2018, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline F, financial considerations, and Guideline E, personal conduct. The DOD CAF acted under Executive Order (EO) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AGs) implemented by DOD on June 8, 2017.

Applicant timely answered the SOR, admitting all of the SOR allegations except SOR ¶ 2.c alleging falsification of his SCA. He admitted failing to timely file federal income tax returns for seven years and to violating his employer’s policies about safe

workplace and computer use, as alleged in SOR ¶¶ 2.a, and 2.b. Applicant also requested a hearing before an administrative judge. The case was assigned to me on January 25, 2019. On February 7, 2019, the Defense Office of Hearings and Appeals (DOHA) notified Applicant that the hearing was scheduled for February 28, 2019. I convened the hearing as scheduled.

Government Exhibits (GE) 1 through 7 were admitted into evidence without objection. At the hearing, Applicant testified and his counsel submitted documents, which were marked as Applicant's Exhibits (AE) A through D, and admitted without objection. DOHA received the transcript (Tr.) on March 11, 2019.

### **Findings of Fact<sup>1</sup>**

Applicant is 61 years old. He graduated from high school in 1975, and has some college, but no degree. (Tr. 43) He is married since 1980 with four adult children, and six grandchildren. Applicant served honorably as a radar man in the U.S. Navy from 1975 to 1979, and he earned several awards for his military service. (Tr. 40) He has been employed as a logistics manager for a major federal contractor since 1983. He reports having a security clearance for 42 years, without incident. (Tr. 9)

The SOR alleges his failure to timely file federal income tax returns for seven years from tax year (TY) 2010 to TY 2016. Applicant admitted this allegation in his answer to the SOR. Applicant testified that he has recently filed all of the delinquent federal income tax returns. (Tr. 44-45) He provided answers to interrogatories in April 2018 indicating that he does not owe unpaid federal income taxes for any period, and he does not owe unpaid state income taxes. He also attached Internal Revenue Service (IRS) income tax transcripts for TY 2010 through TY 2017.

The IRS transcripts reveal that Applicant filed his income tax returns late in all relevant years as follows: TY 2010 filed April 21, 2013; TY 2011 filed April 22, 2013; TY 2012 filed May 22, 2013; TY 2013 filed August 28, 2017 (more than three years late); TY 2014 secured February 27, 2018; TY 2015 filed January 22, 2018; and TY 2016 filed January 23, 2018. He also attached a copy of a FORM 1040 income tax return for TY 2017 indicating that he earned adjusted gross income (AGI) of \$225,298. (GE 2) Applicant testified that he employed a certified public accountant (CPA) starting in 2014-2015; he never requested an extension of time to file income tax returns late; and he was never penalized by the IRS. (TR. 45-47)

Applicant testified that "I just believed because there was money coming back, there was no concern. I had the mindset that the government is making out because their holding onto my money longer." (Tr. 47) He did not know that willful failure to file income tax returns timely, when required, would constitute a misdemeanor under

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<sup>1</sup> Unless stated otherwise, the source of the information in this section is Applicant's September 13, 2016 Security Clearance Application (SCA) and the summary of his personal subject interview (PSI) on October 25, 2017. (GE 1-2)

federal law.<sup>2</sup> (Tr. 45) He testified that it just was not a priority in his life. (Tr. 48) He never contacted the IRS to inquire about possible problems with filing tax returns late. (Tr. 50) When he filed the tax returns late, he received refunds every year, except TY 2013. He was informed that since he filed more than three years late in that particular TY, he was not entitled to the refund that he would have otherwise received. (Tr. 76-77)

Applicant denied the allegation at SOR ¶ 2.c that he falsified material facts when he completed his SCA and responded “No” to all questions in section 26. The allegation states he “deliberately failed to disclose that which is set forth in subparagraphs 1.a and 1.b, above.” SOR ¶ 1.a concerned the failure to file federal income tax returns for TYs 2010–2016, but there is no SOR ¶ 1.b. Applicant testified credibly that when he completed the SCA in September 2016, he was still laboring under the false impression that he did not have to file returns, if he was owed a refund. Thus, he did not deliberately intend to falsify his SCA. He felt that since he had filed or was filing the returns, albeit late, he was in compliance. (Tr. 23-24, 39)

In May 2015, Applicant received a final written warning for violating his employer’s policy for maintaining a safe and respectful workplace free from threats and violence. (GE 7) Applicant was counseling a subordinate, when he became exasperated and behaved in an unprofessional and inappropriate manner by slamming his hands on the table and raising his voice in an angry tone. When the subordinate employee tried to exit the room, Applicant slammed the door and tried to dissuade the subordinate from going to speak to a supervisor. (Tr. 33-34) Applicant testified he never placed a hand on the subordinate, but he was admittedly frustrated with the subordinate’s response. Applicant stated it wasn’t the first time he was called out at work for having a loud voice. (Tr. 35) It was the only written warning that he received. (GE 6, 7)

A joint personnel adjudications system (JPAS) entry dated August 31, 2016, indicates that Applicant received a one-week suspension and final written warning for unauthorized downloads and violation of his employer’s computer-use policies. (GE 5, 6) Applicant admitted this allegation in SOR ¶ 2.b and testified that he was negotiating with an un-cleared person about possible procurement and use of another company’s proprietary information contained on a thumb drive. (Tr. 36-38) He accepted the thumb drive, which contained engineering documents for Applicant’s company to review for a possible bid. (Tr. 37)

A colleague of Applicant’s informed him that the colleague was not comfortable downloading this thumb drive’s contents onto corporate computers of Applicant’s employer because it might violate computer-security policy. (Tr. 63) Applicant testified he was impatient that the thumb drive had not already been scanned by security, and he was motivated to move forward with the project. (Tr. 61-62) He acknowledged his colleague’s concerns and receipt of a June 1, 2016 email advising that the best course was to take the thumb drive to security for screening before insertion.<sup>3</sup> (Tr. 63)

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<sup>2</sup> 26 U.S.C. § 7203.

<sup>3</sup> GE 6, attachment 2.

Applicant nonetheless plugged the thumb drive directly into his employer's computer and uploaded it onto the corporate shared drive. (Tr. 63, 67) He acknowledged that this was an error in judgment. (Tr. 67) No malware infection or damage resulted from this breach of policy. (Tr. 72) Applicant stated that he had taken annual computer-security training and certifications, but earlier computer training did not emphasize the prohibition against introducing outside media (thumb drives, DVDs, CDs) into proprietary corporate-owned computers. (Tr. 74-75)

Applicant sought to improve his computer skills-knowledge, and he took additional courses provided to adjust his leadership style. (Tr. 39) He provided several performance evaluations for each year from 2012 through 2017. (AE A) They reflect that Applicant exceeded or significantly exceeded his employer's goals and expectations most years. He also provided three favorable character reference letters from his pastor, church administrator and a colleague. (AE B-D) They attest to Applicant's character, integrity, honesty and work ethic. I found his testimony was direct and candid.

### **Policies**

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are used in evaluating an applicant's eligibility for access to classified information.

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. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG, Appendix A, ¶ 2(a), the adjudicative process is an examination of a sufficient period and a careful weighing of a number of variables of an individual's life to make an affirmative determination that the individual is an acceptable security risk. This is known as the "whole-person concept." The administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision.

The protection of the national security is the paramount consideration. AG, Appendix A, ¶ 2(b) requires that "[a]ny doubt concerning personnel being considered for national security eligibility will be resolved in favor of the national security." In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, an "applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or

mitigate facts admitted by applicant or proven by Department Counsel, and has the ultimate burden of persuasion as to obtaining a favorable security decision.”

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 reposes a high degree of trust and confidence in individuals to whom it grants access to classified information. Decisions include, by necessity, consideration of the possible risk that an applicant may deliberately or inadvertently fail to 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.

Section 7 of EO 10865 provides that decisions shall be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.”

## **Analysis**

### **Guideline F, Financial Considerations**

The security concern relating to financial considerations is set out in AG ¶ 18:

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. 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 abuse, 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 . . . .

This concern is broader than the possibility that an individual might knowingly compromise classified information in order to raise money. It encompasses concerns about an individual’s self-control, judgment, and other qualities essential to protecting classified information. An individual who is financially irresponsible may also be irresponsible, unconcerned, or negligent in handling and safeguarding classified information.

AG ¶ 19 provides conditions that could raise security concerns. The following applies here:

(f) failure to file or fraudulently filing annual federal, state or local income tax returns or failure to pay annual federal, state or local income taxes as required.

Applicant's failure to timely file federal income tax returns as alleged in the SOR, is confirmed by his IRS income tax transcripts, clearance interview, and answer to the SOR. The Government produced substantial evidence to support the disqualifying condition in AG ¶ 19(f), thereby shifting the burden to Applicant to produce evidence to rebut, explain, extenuate, or mitigate the facts.<sup>4</sup> Applicant has not met that burden. He exercised poor judgment in repeatedly failing to file, or filing federal income tax returns late, for seven years from 2010-2016.

The guideline also includes conditions that could mitigate security concerns arising from financial difficulties. The following mitigating conditions under AG ¶ 20 are potentially applicable:

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

Applicant was under the mistaken impression that he did not have to file federal income tax returns timely if he was to receive a refund. He did not contact the IRS or solicit advice about the validity of this belief. He testified that he hired a CPA starting in 2014-2015, and he received refunds for each relevant TY from 2010 – 2016, with the exception of TY 2013. He provided the IRS tax transcripts that substantiate his testimony that he has now filed the federal tax returns, albeit late. Although he derived his income almost exclusively from the Navy or federal contractors (federal taxes) for almost four decades, he did not view filing his tax returns timely as a high priority. His efforts to resolve his tax issues have not met the mark. In short, his response has been too little, too late.

### **Guideline E, Personal Conduct**

The security concern for personal conduct is set out in AG ¶ 15, as follows:

The Concern. 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. The following normally will result in an unfavorable national security eligibility determination, security clearance action, or cancellation of further processing for national security eligibility:

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<sup>4</sup> Directive ¶ E3.1.15. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep 22, 2005) (An applicant has the burden of proving a mitigating condition, and the burden of disproving it never shifts to the Government).

(a) refusal, or failure without reasonable cause, to undergo or cooperate with security processing, including but not limited to meeting with a security investigator for subject interview, completing security forms or releases, cooperation with medical or psychological evaluation, or polygraph examination, if authorized and required; and

(b) refusal to provide full, frank, and truthful answers to lawful questions of investigators, security officials, or other official representatives in connection with a personnel security or trustworthiness determination.

AG ¶ 16 describes conditions that could raise a security concern and may be disqualifying. The following disqualifying conditions are potentially applicable:

(a) deliberate omission, concealment or falsification of relevant facts from any personnel security questionnaire, personal history statement or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities;

(c) credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the individual may not properly safeguard classified or sensitive information; and

(d) credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the individual may not properly safeguard classified information. This includes but is not limited to, considerations of:

(2) any disruptive, violent, or other inappropriate behavior; and

(4) evidence of significant misuse of government or other employer's time or resources.

Insufficient evidence has been presented to conclude that Applicant deliberately intended to falsify section 26 of his SCA. He violated his employer's computer use and safe workplace policies and received a final written warning. He wrongfully introduced the un-cleared contents of a thumb drive into the shared-drive server of his company

computer. He did so after a discussion with a colleague and an email dated June 1, 2016, cautioning against it. AG ¶¶ 16(c) and 16(d)(2) and (4), are implicated and the focus shifts to a determination of which, if any of the mitigating conditions apply.

AG 17. Conditions that could potentially mitigate security concerns  
Include:

(c) the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment; and

(d) the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances or factors that contributed to untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur.

Applicant testified that the April 2015 incident when he pounded his hands on a table and slammed a door on a subordinate was not the first time that he was called out for being loud and disruptive. It was not a one-time outburst. He has acknowledged his emotional leadership style and made great strides to improve by attending company training and taking courses to improve his counseling manner and computer skills. This incident occurred over four years ago.

He plugged a contraband, un-cleared, thumb drive into the corporate shared-drive almost three years ago. He was forward-leaning and wanted to move ahead with the project. Although he had been cautioned not to plug it in before screening the thumb drive at security, he acknowledge he acted impulsively in doing so. He subsequently had formal corporate computer security training explicitly prohibiting this practice. It was a significant lapse in judgment and a direct violation of his employer's computer-use policy prohibiting external media. He also violated company safe workplace policy when he slammed the door on his subordinate. He has demonstrated a pattern of unwillingness to comply with rules and regulations. These characteristics indicate he may not properly safeguard classified information. AG ¶¶17(c) and 16 (d) apply only partially. Insufficient time has elapsed since these lapses to safely conclude that such behavior is unlikely to recur.

### **Whole-Person Concept**

Under the whole-person concept, the administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of the applicant's conduct and all the circumstances. The administrative judge should consider the nine adjudicative process factors listed at AG, Appendix A, ¶ 2(d):



(1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowledgeable participation; (3) the frequency and recency of the conduct; (4) the individual's age and maturity at the time of the conduct; (5) the extent to which participation is voluntary; (6) the presence or absence of rehabilitation and other permanent behavioral changes; (7) the motivation for the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence.

Under AG, Appendix A, ¶ 2(c), the ultimate determination of whether to grant eligibility for a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. I have incorporated my comments under Guidelines E and F in my whole-person analysis. Some of the factors in AG, Appendix A, ¶ 2(d) were addressed under that guideline. Applicant raised a family and served honorably in the Navy. He made significant contributions to the DOD for several decades. Most importantly, Applicant has not mitigated the specific allegations in the SOR concerning his failure to file federal income tax returns timely for seven years, and repeated violations of company policy. He has not met his burden of production.

Applicant did not intend to falsify his 2016 SCA. However, his judgment remains a security concern. There is insufficient evidence to conclude that his financial problems are under control, and he will not repeat his previous behavior. The record evidence leaves me with questions and doubts as to Applicant's suitability for a security clearance. For all these reasons, I conclude Applicant has not mitigated the financial considerations security concerns arising under Guideline F, or the personal conduct security concerns under Guideline E.

### **Formal Findings**

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline F:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant
Paragraph 2, Guideline E:	Against Applicant
Subparagraph 2.a – 2.b:	Against Applicant
Subparagraphs 2.c:	For Applicant

## **Conclusion**

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the interests of national security to grant Applicant a security clearance. Eligibility for access to classified information is denied.

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Robert J. Kilmartin  
Administrative Judge