

KEYWORD: Guideline E; Guideline L

DIGEST: Applicant’s presentation sufficient to mitigate Guideline E security concerns arising from omission to SCA. Record supports a favorable whole-person analysis. Favorable decision affirmed.

CASENO: 09-05655.a1

DATE: 08/24/2010

DATE: August 24, 2010

In Re:)	
)	
-----)	ISCR Case No. 09-05655
)	
Applicant for Security Clearance)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Julie R. Mendez, Esq., Department Counsel

FOR APPLICANT

Elizabeth L. Newman, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On December 29, 2009, DOHA issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline E (Personal Conduct) and Guideline L (Outside Activities) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On May 12, 2010, after the hearing, Administrative Judge Mark Harvey granted Applicant’s request for a security clearance. Department Counsel appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Department Counsel raised the following issues on appeal: whether the Judge erred in his application of the pertinent Guideline E mitigating conditions and whether the Judge’s whole-person

analysis was arbitrary, capricious, or contrary to law.¹ Consistent with the following discussion, we affirm the Judge's decision.

The Judge made the following pertinent findings of fact: Applicant is a program manager for a Defense contractor, Company A. He holds a Bachelor's degree in civil engineering and a Master's in Environmental Engineering.

Applicant has been employed by Company A for 11 years. From 2006 until 2009, he also was associated with Company B, another Defense contractor. He provided Company B with technical oversight, to ensure contract compliance. Applicant did not receive a salary from Company B, but he did receive shares of stock along with attendant dividends. Applicant grew disenchanted with the business practices of Company B, concluding that others associated with the company were not putting in sufficient effort. He also was concerned about possible improprieties in the company's IRS filings.

In March 2009, Applicant completed a security clearance application (SCA). Section 13 of the SCA inquired about an applicant's employment for the previous 7 years, whether full time or part time, paid or unpaid, consulting or contracting, etc. Applicant did not disclose his work for Company B.

Subsequently, in April 2009, Applicant was interviewed by an OPM investigator. Applicant volunteered information about his employment with Company B without first having been asked. "There is no evidence that OPM would have inevitably discovered the existence of Applicant's relationship with [Company B]." Decision at 5. Applicant did not want Company A to learn about his association with Company B. This was due to the disagreement he had with Company B over their business practices. Within 30 days of the interview, Applicant terminated his relationship with Company B, giving back his shares of stock. He then informed Company A of that relationship.

We have examined the issues raised by Department Counsel in light of the record as a whole. We note the Judge's findings and record evidence that Applicant had (1) corrected the omission in his SCA without first having been confronted with the facts; (2) cooperated with the follow-up questioning by the investigator; (3) resigned from Company B; (4) notified Company A of his association with the other company; and (5) received a letter from the President of Company A to the effect that Applicant's work with Company B had not been in conflict with his duties at Company A. We conclude that these unchallenged findings support a favorable whole-person analysis and that the Judge's decision is sustainable.

Order

¹The Judge's favorable finding under Guideline L is not at issue in this appeal.

The Judge's favorable security clearance decision is AFFIRMED.

Signed: Jean E. Smallin

Jean E. Smallin
Administrative Judge
Member, Appeal Board

Signed: James E. Moody

James E. Moody
Administrative Judge
Member, Appeal Board

SEPARATE OPINION OF ADMINISTRATIVE JUDGE MICHAEL Y. RA'ANAN

I cannot vote to affirm because Applicant made an additional statement which undercuts mitigation. In his response to the SOR he explains his failure to list his positions with Company B (President, Chief Executive Officer and a member of the Board of Director's). He first explains that he did not list it under Question 13 (Employment) because he was not an employee. He later adds that he knew that it was information of interest "but there did not seem to be any appropriate place to put it on the SF-86." While the most straightforward place to put such information he knew was of interest was in Question 13, there was actually another place he could have put information. There is an Additional Comments section at the end of the form. He left it blank. His explanation in his response to the SOR that there did not seem to be any appropriate place to put it on the SF-86 is not credible, and is recent.

Signed: Michael Y. Ra'an

Michael Y. Ra'an
Administrative Judge
Chairperson, Appeal Board