DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
	)	
----------	)	ISCR Case No. 12-03158
	)	
	)	
Applicant for Security Clearance	)	

Appearances

For Government: Allison O,Connell, Esq., Department Counsel
For Applicant: *Pro se*

10/22/2014

Decision

WESLEY, Roger C., Administrative Judge:

Based upon a review of the pleadings, exhibits, and testimony, I conclude that Applicant did not mitigate the security concerns regarding his personal conduct. Eligibility for access to classified information is denied.

Statement of Case

On April 25, 2014, the Department of Defense (DoD) Consolidated Adjudications Facility (CAF) issued a Statement of Reasons (SOR) detailing reasons why DoD adjudicators could not make the affirmative determination of eligibility for a security clearance, and recommended referral to an administrative judge to determine whether a security clearance should be granted, continued, denied, or revoked. The action was taken under Executive Order 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 September 1, 2006.

Applicant responded to the SOR on May 9, 2014, and requested a hearing. The case was assigned to me on June 26, 2014, and was scheduled for hearing on August 28, 2014. At hearing, the Government's case consisted of four exhibits (GEs 1-4). Applicant relied on one witness (himself) and no exhibits. The transcript (Tr.) was received on October 8, 2014.

Summary of Pleadings

Under Guideline E, Applicant allegedly (a) stated in a Government interview that he feared that if he were offered money to engage in espionage against the United States he would consider doing so; (b) violated his employer's standard policy and procedures when he discussed proprietary information with an employee of another company without requiring the individual to sign a non-disclosure agreement (NDA); and (c) falsified his security clearance application of August 2009 by failing to disclose his employment with another employer out of concern that his primary employment would be compromised if his employer learned of his affiliation with the other entity.

In his response to the SOR, Applicant denied making statements to a Government investigator about engaging in espionage if offered money. He denied violating his employer's standard policy on disclosing proprietary information without an executed NDA. He admitted to his deliberate omission of his Company B employment in the e-QIP he completed in August 2009, while interpreting the intent of the clearance application to cover only major employments and periods of unemployment, and not part-time employment like his Company B consulting arrangement. Applicant further claimed in his SOR response that the work he provided Company B was accomplished on his personal time with no impact on his Company A job responsibilities. He claimed the work he completed for Company B was insignificant and not material to his employment history.

Findings of Fact

Applicant is a 58-year-old engineer for a defense contractor who seeks a security clearance. The allegations covered in the SOR and admitted by Applicant are incorporated and adopted as relevant and material findings. Additional findings follow.

Background

Applicant married in August 1996. (GE 1; Tr. 32) He has one child and two adult step-children from his wife's previous marriage. (GE 1; Tr. 32) Applicant earned a bachelor's of science degree in engineering in December 1977 from a recognized university (GE 1) and a masters of science degree from the same university in December 1978. (GE 1; Tr. 31). He claims no military service. (GE 1; Tr. 31)

Employment history

Applicant was employed by his last firm (Company A) in December 2001. He left this firm in April 2013 over concerns about the proper use of his job skills. (Tr. 32-33) Between December 2008 and January 2009, and again between November 2009 and

January 2010, Applicant held a second job as a 1099 engineering consultant with another firm (Company B). Once he completed his contract work with Company B in January 2010, he severed his employment relationship with the firm. Currently, he is suspended from his new employer (Company C) pending completion of his security clearance investigation. (Tr. 51-52)

Personal conduct issues

In March 2010, while still employed by Company A, Applicant disclosed proprietary information owned by his principal employer (Company A) when he told his Company B employer certain proprietary information pertaining to Company A's business operations. Applicant considered this information insignificant at the time and did not insist on obtaining a signed NDA from this Company B official. (GE 3; Tr. 28) Typically, Applicant assists in the completion of NDAs in these types of situations (Tr. 45-46) and takes responsibility for not insisting on an NDA. He never used any of the proprietary information he obtained from Company A in his work with Company B. (Tr. 47-48) And because he had no previous agreement with Company A requiring his disclosure of outside employment, he did not feel obligated to inform his Company A employer of his Company B affiliation. (Tr. 48)

When completing his e-QIP in August 2009, Applicant omitted any mention of his 1099 affiliation with Company B. (GE 4) At the time, he feared that his disclosure of his Company B affiliation in his e-QIP would compromise his employment with Company A. (GE 4; Tr. 29-30, 37-38) More specifically, were Company A to learn of his providing such information to Company B, he would be punished by having a letter of reprimand placed in his Company A personnel file. (GE 2) Applicant's omission covered prior employment information that was material to a Government assessment of Applicant's suitability to hold a security clearance. (GE 4)

Even if his Company B employment entailed only part-time consulting, such part-time work was clearly covered by Section 13 of the e-QIP he completed in August 2009. (GE 4) Section 13's plain coverage is imputed to Applicant. His claims to the contrary in his ensuing interview with an agent of the Office of Personnel Management (OPM) in January 2012 (GE 3) cannot be reconciled with the clear wording of Section 13.

Asked to explain his e-QIP omission at hearing, Applicant acknowledged his deliberate omission of his Company B affiliation in his August 2009 e-QIP out of concern his disclosure could have jeopardized his employment relationship with Company A. (GE 3; Tr. 29) He did not disclose the information to the Government before he completed an updated e-QIP in November 2011. (GE 1) Both in this updated e-QIP and in his ensuing interview with an OPM agent in January 2012, he disclosed his Company B employment and his dates of service. (GEs 1 and 3; Tr. 29; 37-38) Considering the facts and circumstances, inferences are warranted that Applicant's deliberate omissions of his Company B employment in his 2009 e-QIP were not excused by his concerns over how his disclosure of his Company B affiliation could jeopardize his employment t relationship with Company A.

Applicant was interviewed by an investigator from another government agency in March 2010. (GE 2; Tr. 36-37) When told by the investigator that his answers were indicative of possible deception, Applicant told the agent that his personal finances are of concern to him; in as much as he and his family "are living beyond their financial means, " as they "were spending more money than they earn." (GE 2; Tr. 39-41) Because of his concerns about his personal finances, Applicant told the investigator "he fears that if he were offered money to engage in espionage against the United States, he would consider doing so rather than reflexively refusing such an offer." (GE 2) Although, he cautioned that he did not believe he would "ultimately engage in espionage against the United States if he were offered money." (GE 2)

In his hearing testimony, Applicant attributed his espionage consideration statements to "clutching at straws" and "looking for things that could possibly be a concern." (Tr. 25) He assured that he would never engage in espionage against the United States for money. (Tr. 27, 42) He stressed his clean record in protecting classified information during the more than eight years he has held a clearance. (GE 2)

While Applicant has never engaged in any form of espionage or compromised classified information at any level of clearance over the extended period of time that he has held a clearance, his expressed thoughts under pressure from a government investigator are material to a trustworthiness assessment and are entitled to considerable weight when appraising Applicant's overall clearance worthiness in conjunction with all of the facts and circumstances associated with Applicant's interview statements.

Over the Christmas and New Years holidays, between December 2008 and January 2009, Applicant worked as a 1099 employee for Company B. (GE 2; Tr. 31-32) During this time he wrote a contract proposal for Company B to assist Company B in "getting a foot in the door" for a designed detection device contract. (GE 2) For his efforts, Company B paid him $2,500. (GE 2) Applicant was careful not to use any Company A proprietary information in the proposal. He was also careful to perform his work on his personal time and in such ways as to avoid any conflicts of interest with his primary Company A employer. (AEs 2 and 3)

In March 2010, Applicant and his Company B counterpart (also a former Company A employee) met with an employee of another firm. (GE 2) In their meeting with this firm, they discussed Company A's involvement in bidding on a Government contract with the other firm's employee. When sharing such information, Company A's policy requires the employee of the company receiving proprietary Company A information to execute an NDA. (GE 2).

Aware of the Company NDA requirement, Applicant neglected to provide NDA forms to the other firm's employees in the meetings they had with them in March 2010. (GE 2) By his own admissions, Applicant "may have crossed the line" in providing proprietary information belonging to Company A when talking to individuals of other firms. (GE 2)

On several occasions during his 12-month affiliation with Company B, Applicant provided proprietary information to Company B that he had acquired at trade shows he attended in Company A's behalf. (GE 2) Applicant was never paid by Company B for supplying this information. Whether this information was material to Company A's bidding interests is unclear. Regardless of the proprietary status of this information, Applicant passed the information to his Company B counterpart without requiring him to sign an NDA. (GEs 2 and 3) Applicant acknowledged his judgment lapses while insisting that none of the information exchanged was material. (Tr. 29)

Endorsements

Applicant is well-regarded by his supervisor (a retired sheriff), who maintains a strictly professional onsite business relationship with Applicant. (Tr. 59) His supervisor considered Applicant trustworthy and reliable. (Tr. 59)

Policies

The AGs list guidelines to be used by administrative judges in the decision-making process covering security clearance cases. These guidelines take into account factors that could create a potential conflict of interest for the individual applicant, as well as considerations that could affect the individual's reliability, trustworthiness, and ability to protect classified information.

The Ags include "[c]onditions that could raise a security concern and may be disqualifying" (disqualifying conditions), if any, and many of the "[c]onditions that could mitigate security concerns." They must be considered before deciding whether or not a security clearance should be granted, continued, or denied. The guidelines do not require administrative judges to place exclusive reliance on the enumerated disqualifying and mitigating conditions in the guidelines in arriving at a decision. Each of the guidelines is to be evaluated in the context of the whole person in accordance with AG ¶ 2(c).

In addition to the relevant AGs, administrative judges must take into account the pertinent considerations for assessing extenuation and mitigation set forth in AG ¶ 2(a) of the AGs, which are intended to assist the judges in reaching a fair and impartial commonsense decision based upon a careful consideration of the pertinent guidelines within the context of the whole person.

The adjudicative process is designed to examine a sufficient period of an applicant's life to enable predictive judgments to be made about whether the applicant is an acceptable security risk. The following AG ¶ 2(a) factors are pertinent: (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 chances; (7) the motivation for the conduct; (8) the potential for

pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence.

Viewing the issues raised and evidence as a whole, the following individual guidelines are pertinent in this case:

Personal Conduct

> *The Concern*: Conduct involving questionable judgment, untrustworthiness, unreliability, 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 information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process. AG, ¶ 15.

Burden of Proof

By virtue of the principles and policies framed by the AGs, a decision to grant or continue an applicant's security clearance may be made only upon a threshold finding that to do so is clearly consistent with the national interest. Because the Directive requires administrative judges to make a commonsense appraisal of the evidence accumulated in the record, the ultimate determination of an applicant's eligibility for a security clearance depends, in large part, on the relevance and materiality of that evidence. *See United States, v. Gaudin,* 515 U.S. 506, 509-511 (1995). As with all adversarial proceedings, the judge may draw only those inferences which have a reasonable and logical basis from the evidence of record. Conversely, the judge cannot draw factual inferences that are grounded on speculation or conjecture.

The Government's initial burden is twofold: (1) it must prove by substantial evidence any controverted facts alleged in the SOR, and (2) it must demonstrate that the facts proven have a material bearing to the applicant's eligibility to obtain or maintain a security clearance. The required materiality showing, however, does not require the Government to affirmatively demonstrate that the applicant has actually mishandled or abused classified information before it can deny or revoke a security clearance. Rather, the judge must consider and weigh the cognizable risks that an applicant may deliberately or inadvertently fail to safeguard classified information.

Once the Government meets its initial burden of proof of establishing admitted or controverted facts, the evidentiary burden shifts to the applicant for the purpose of establishing his or her security worthiness through evidence of refutation, extenuation, or mitigation. Based on the requirement of Exec. Or. 10865 that all security clearances be clearly consistent with the national interest, the applicant has the ultimate burden of demonstrating his or her clearance eligibility. "[S]ecurity-clearance determinations should err, if they must, on the side of denials." *See Department of the Navy v. Egan,* 484 U.S. 518, 531 (1988).

Analysis

Applicant is an engineer who was once employed by his primary defense contractor (Company A) while contemporaneously employed on a part-time consulting basis by another engineering firm (Company B). While simultaneously employed by both companies he provided proprietary information of Company A to Company B officials without first obtaining an NDA from the Company B officials. In a subsequent post-polygraph interview with another Government agency, he told the investigator that he feared that if he were offered money to engage in espionage against the United States, he would consider doing so.

In the process of completing an e-QIP in August 2009, he intentionally omitted his Company B employment out of concern his disclosure of his consulting arrangement with Company B could jeopardize his employment relationship with his primary employer (Company A). In both his OPM interview and interrogatory responses that followed, he claimed that his Company B employment was insignificant part-time work that was not material to the information asked for in his e-QIP about his employment relationships. Applicant's intentional omissions were material and were not excused by his concerns over how his disclosure might affect his employment relationship with his primary employer.

Security concerns over Applicant's judgment, reliability and trustworthiness are raised under Guideline E as the result of his (a) expressed fears in a post-polygraph interview that if he were offered money to engage in espionage against the United States he would consider doing so; (b) providing proprietary Company A information to Company B employees without an executed NDA; and (c) falsifying his e-QIP by failing to disclose his Company B employment out of concern his disclosure could compromise his Company A employment. By his statements and actions, Applicant placed in issue his fiducial commitment to safeguarding classified and other sensitive materials.

Several of the disqualifying conditions covered by Guideline E are applicable. DC ¶ 16(a), "deliberate omission, concealment, or falsification of relevant facts to 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;" DC ¶ 16(d)(1), "untrustworthy or unreliable behavior to include breach of client confidentiality, release of proprietary information, unauthorized release of sensitive corporate or other government protected information;" and DC ¶ 16(d)(3), "a pattern of dishonesty or rule violations," apply to Applicant's situation. Each of these disqualifying conditions may be considered in evaluating Applicant's March 2010 interview statements, his breach of Company A proprietary information disclosure standards, and his security-related employment omissions in his August 2009 e-QIP.

Applicant's March 2010 post-polygraph interview statements, although subsequently revised, reflect potentially serious breaches of his fiduciary duty to protect and safeguard classified and sensitive information in his custody and control. Where

doubts are raised about an applicant's commitments to protecting national security, *Egan* principles teach that they should be resolved in the Government's favor. *See Department of the Navy v. Egan, supra.* While Applicant's cited high stress levels during his polygraph examination and ensuing post-polygraph interview are understandable, his statements cannot be fully mitigated by later revisions or explanations of his responses.

Applicant's post-polygraph admissions cover more than his expressed intentions about the possibilities of his engaging in espionage at some undefined future date. Applicant's admissions included his affirmations of his efforts on behalf of his Company B employer to discuss Company A-owned proprietary information to a Company B employee. By his own accounts, his disclosures quite possibly violated his company's standard policy and procedures to the extent they involved his discussion of proprietary information owned by Company A without enlisting the Company B employee to sign an NDA. DC ¶ 16(d)a)(1) fully applies to Applicant's sharing of Company A proprietary information without requiring a signed NDA. Applicant provided no documented evidence to refute or minimize his previous admissions.

Applicant's deliberate omissions of his Company B employment in the e-QIP he executed in August 2009 are fully proven as well. His omissions were made out of concern for how his disclosure of his Company B employment could affect his employment with Company A. His omissions were motivated by his desire to conceal his other employer if he could do so through his adoption of a narrow interpretation of the term "employment."

Under the facts and circumstances of this case, Applicant's omissions were not only deliberate but were material to a Government assessment of his continued eligibility to access classified information. *See United States, v. Gaudin, supra.* Section 13 of his August 2009 e-QIP asks for information about all of Applicant's employment activities and expressly includes both full-time and part-time work, paid or unpaid. (GE 4) Considering his education and experience, his adopted narrower interpretation is neither plausible nor credible and cannot be reconciled with the plain wording of Section 13 of his e-QIP.

Mitigation is difficult to achieve under the facts presented. Applicant's omission corrections to the employment-related questions posed in the August 2009 e-QIP he completed were furnished over two years later and do not meet the prompt, good-faith requirements of either MC ¶ 17(a), "the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts," or MC ¶ 17(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 is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment." Likewise, his answers to employment-related questions posed by the OPM agent who interviewed him in January 2012 cannot be fully reconciled with the prompt, good-faith requirements of MC ¶ 17(a), or the infrequent, unique circumstances criterion of MC ¶ 17(c). And none of the other mitigating conditions covered by Guideline E apply to Applicant's situation.

In evaluating all of the circumstances surrounding Applicant's withholding of material information about his employment in the e-QIP he completed, the answers he provided in his ensuing OPM interview, his interrogatory responses, and his hearing testimony, his explanations and timing of his corrections are insufficient to convincingly refute or mitigate the deliberate falsification allegations. Questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations, are each core policy concerns of the personal conduct guideline (AG ¶ 15). Considering all of the circumstances surrounding his March 2010 post-polygraph statements about the possibilities of his engaging in espionage for money; his disclosures of Company A proprietary information without the required NDA; and his omissions of his employment relationship with Company B in the 2009 e-QIP he completed, his admitted omissions and actions are neither refuted nor mitigated

From a whole-person standpoint, the evidence is insufficient to demonstrate that Applicant has mounted responsible, good-faith efforts to provide accurate background information to the Government in the 2009 e-QIP he completed. While his civilian service is recognized and commended, it is not enough to meet security eligibility requirements.

Applicant's post-polygraph admissions, his disclosure of proprietary information to a potential bidding competitor, and his e-QIP omissions were material and precluded him from meeting the conditions of demonstrated trust and reliability necessary to satisfy minimum security eligibility requirements under Guideline E. Overall, Applicant's explanations are not persuasive enough to warrant conclusions that the allegations relative to his (a) expressed fears that he would consider espionage against the United States in exchange for money, (b) disclosures of proprietary information to a potential competitor, and (c) 2009 e-QIP omissions covering his employment with Company B are either refuted or mitigated.

In making a whole-person assessment, careful consideration was given to the respective burdens of proof established in *Egan* (*supra*), the AGs, and the facts and circumstances of this case in the context of the whole person. Unfavorable conclusions warrant with respect to the allegations covered by subparagraphs 1.a-1.c.

Formal Findings

In reviewing the allegations of the SOR and ensuing conclusions reached in the context of the findings of fact, conclusions, conditions, and the factors listed above, I make the following formal findings:

GUIDELINE E (PERSONAL CONDUCT): AGAINST APPLICANT

Subparas. 1.a through 1.c: Against Applicant

Conclusions

In light of all the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant or continue Applicant's security clearance. Clearance is denied.

Roger C. Wesley
Administrative Judge