



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



In the matter of:

Applicant for Security Clearance

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ISCR Case No. 16-03659

**Appearances**

For Government: Daniel F. Crowley, Esq., Department Counsel

For Applicant: *Pro se*

03/01/2018

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**Decision**

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CREAN, Thomas M., Administrative Judge:

Applicant provided sufficient evidence to mitigate security concerns for criminal conduct under Guideline J, but he did not provide sufficient evidence to mitigate personal conduct security concerns under Guideline E. Eligibility for access to classified information is denied.

**Statement of the Case**

On June 3, 2015, Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP) to retain a security clearance required for employment with a defense contractor. (Item 3) A security investigator from the Office of Personnel Management (OPM) interviewed Applicant on January 15, 2016. (Item 3, Personal Subject Interview (PSI)) After reviewing the background investigation, the Department of Defense (DOD) could not make the affirmative findings required to issue a security clearance. On May 11, 2017, DOD issued a Statement of Reasons (SOR) to Applicant detailing security concerns for criminal conduct under Guideline J, and personal conduct under Guideline E. (Item 1) The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel*

*Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) effective in the DOD on September 1, 2006.

While this case was pending a decision, the Director of National Intelligence issued Security Executive Agent Directive 4, establishing National Security Adjudicative Guidelines for *Determining Eligibility for access to Classified Information or Eligibility to Hold a Sensitive Position* (AGS), which he made applicable to all covered individuals who require initial or continued eligibility for access to classified information or eligibility to hold a sensitive position. The new AGs supersede the September 1, 2006 AGs, and are effective on or after June 8, 2017. Accordingly, I have evaluated Applicant's security clearance eligibility under the new AGs.

Applicant answered the SOR on May 30, 2017. He admitted the specification under each guideline with detailed explanation. He requested that the matter be decided on the written record. (Item 2) Department Counsel submitted the Government's written case on July 14, 2017, and Applicant was provided the opportunity to file objections and to submit material to refute, extenuate, or mitigate the disqualifying conditions. Applicant filed a response to the file of relevant material (FORM) on August 25, 2017. (Item 15) Department Counsel had no objection to consideration of Applicant's response to the FORM. (Item 16) The case was assigned to me on December 12, 2017.

### **Procedural Issues**

Applicant was advised in the FORM that the summary of the PSI (Item 4) was not authenticated and could not be considered over his objection. He was further advised that he could make any corrections, additions, or deletions to the summary to make it clear and accurate. He was additionally advised that if no objection was raised to the summary, the administrative judge could determine that he waived any objection to the admissibility of the PSI summary. Applicant, in his response to the FORM, did not make any corrections to the PSI or raise any objection to consideration of the PSI. Since there is no objection by Applicant, I considered information in the PSI in my decision.

### **Findings of Fact**

After thoroughly reviewing the case file, I make the following findings of fact. Applicant is 54 years old. He graduated from high school in June 1981, and received a bachelor's degree in electrical engineering in June 1986. He has worked in various engineering positions for defense contractors and government agencies since receiving his engineering degree. He worked as an engineer for a DOD agency from February 2009 to April 2015. Since May 2015, he has worked as an engineer for a defense contractor. He continually had eligibility for access to classified information since 1989. He married in April 1991 and has three children.

Under Criminal Conduct, the SOR alleges that Applicant was convicted in April 2015 in federal court of a misdemeanor charge of conflict of interest. He was sentenced to probation of one year, community service, and a fine. He was released from

probation early for his good work and behavior, and he completed all other parts of his sentence. The same conduct is alleged as a personal conduct security concern under Guideline E.

In 1989, Applicant was employed as an engineer by a defense contractor, Company A. His employer had a contract to design and build an electronic countermeasure system for the U.S. Navy. Applicant worked on the conceptualization, design, and development of the system and its parts. He gained technical knowledge and experience, and became a subject matter expert on the system.

At the same time, Applicant started an electronics design, manufacturing, and supply power modules business from his home, Company 2. Company 2 bid on various non-government contracts providing power supply modules to various private businesses in State N where he lived from 1988 to 1994. As the business grew, he started bidding on government contracts. In 1994, Company 1 tasked Applicant to find a cheaper power source for the power module for the electronic countermeasure system they supplied to the U.S. Navy. Applicant could not find one but told his supervisor he could build the power supply modules for half the cost using his private business, Company 2. Company 1 agreed and sub-contracted with Applicant and Company 2 to fill power module orders for the U.S. government contract. Applicant continued to work for Company 1, and Company 2 was still a subcontractor to Company 1 to fill orders for the power modules. From 1994 until 2001, Applicant filled orders and did not believe his private business work was a conflict of interest at Company 1.

In 2001, Company 3 purchased Company 1 and became the prime contractor for the countermeasure system to the Navy. At the same time, Applicant left Company 1 to work for Company 4, which did not have government contracts. He continued to fill orders for the power modules from his personal business for Company 3. Company 4 never asked Applicant about his outside private business, and Applicant did not disclose his private work activity to Company 4. Applicant did not believe his outside activities were a conflict of interest for Company 4. In 2003, Company 4 eliminated the department where Applicant worked, and Applicant looked for other employment. He still had his private business supplying power modules.

In April 2006, Applicant was hired as an engineer by a private company, Company 5, and moved to State V. He told his former supervisor at Company 1, who now was working for Company 3, that he still operated Company 2 and suggested it as a way to meet the needs of the Navy. His former supervisor told her superiors at Company 3 that Company 2 could be an alternative supplier of the power modules. The supervisor felt it was fair to use Company 2 since it would save the government money. Applicant's previous arrangement with Company 3 to provide the power modules had not been reduced to writing. It was agreed with his supervisor at Company 5 that Applicant would continue to supply the power modules to Company 3. Applicant believed his ownership of the company was not considered a conflict of interest since management knew of the arrangement.

In February 2009, Applicant was offered a government engineering position with a Navy command. Shortly after starting to work for the government, his supervisor told him that he needed to receive appropriate permission for his outside employment. Applicant was granted approval to run his outside business and still work on the countermeasure system for the U.S. Navy as a government engineer. However, he was advised that whenever there were any discussions or issues involving the countermeasure system, he was to recuse himself. Applicant continued to work for the government, and he excused himself from any meetings or discussions on the countermeasure system.

In 2010, Applicant's private company, company 2, agreed to a purchase order for power modules from a private company, Company 6, which was now subcontracted to provide power modules to the prime contractor, Company 3. Company 6 hired Applicant's wife to make the power modules for the countermeasure system in her and Applicant's garage. At the same time, Applicant's government department was reorganized and Applicant was given additional responsibility for finance, budgeting, purchase orders, and supply requests for the countermeasure system. Applicant's supervisor had Applicant complete government financial disclosure forms. Applicant did not report any financial gain from Company 2 or his wife on his financial disclosure forms in 2010, 2011, or 2012.

Applicant taught his wife how to make the power supply modules for the countermeasure system in 1994. Applicant was informed by Company 3 in 2009 that they could not do business with Company 2, his original company, because of a conflict of interest. To solve the problem, Applicant suggested to Company 3 that his wife's original employer, Company 6, be contracted to supply the power modules. Applicant's wife had previously been employed by company 6, which was a sub-contractor to Company 3, to make the power supply modules. Applicant was also told by Company 3 that there may be a conflict of interest with that arrangement. Applicant started to seek ways to avoid the appearance of a conflict of interest.

Applicant's wife left her employment with Company 6 in February 2012, and formed her own business, Company 7, in March 2013. Applicant's wife was listed as the sole owner of Company 7 under her maiden name rather than her married name to remove or separate her activities from Applicant's company. Company 7 was contracted to provide power modules to Company 3 for the countermeasure system in 2013 and 2014. In 2013 and 2014, Applicant did not reveal that he or his wife received any additional financial income from Company 7, as required, on his financial disclosure form. He did not report his wife's income from her contract with Company 3, as required on the financial disclosure form. Applicant stressed that his business activities were well known by management, his coworkers, and friends. (Item 9, Item 11, and Item 13)

On his financial disclosure form in 2014, Applicant failed to list his wife's income from the Company 7, but noted that she was attempting to sell the power module business. Applicant and his wife earned approximately \$185,000 in commission from

Company A for the sale of power supply modules. The total amount of the contracts for the power supply modules from 2009 to 2014 was approximately \$412,000. (Item 13)

Applicant was placed on administrative leave in February 2015 and removed from his government position. In April 2015, he pled guilty in federal court to a misdemeanor count of conflict of interest. He was sentenced to a fine of \$20,000, community service, and was placed on supervised probation for one year. He resigned from his government job, paid his fine in full, and completed community service. He was granted early release from probation in October 2015. Applicant was rehired in May 2015 by Company 5. He completed ethics training at Company 5. In June 2015, the Navy initiated debarment proceedings against Applicant and Company 2. Applicant appeared at a hearing and in September 2015, the Navy determined that Applicant and Company 2 would not be debarred. Applicant's wife and Company 7 continue to fill purchase order for power modules from Company 3 as the prime contractor to the Navy. Applicant has had no relationship with Company 3 since his conviction in early 2015. (Items 4 – 10)

In his response to the SOR and his reply to the FORM, Applicant accepted responsibility for his conduct, cooperated completely with the prosecuting authorities, and was candid in responding to questions. His conduct led the sentencing judge to accept his guilty plea, and sentenced him to a minimal sentence. He and his company were not debarred. He emphasized that the disbarment official found that he did not hide his ownership of Company 2; that he applied for and received approval for his outside employment; and that his outside employment was noted on his financial disclosure forms. The debarment official also found that Applicant is a person of integrity. Applicant included many letters of commendation and recommendation from friends, supervisors, and security officials. They uniformly note that Applicant is a person of integrity. The letters opine that Applicant is a trusted person of integrity who is trustworthy, professional, reliable, and honest. (Item 2, Item 15)

## **Policies**

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which must be considered 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 ¶ 2(a), the entire process is a conscientious scrutiny of a number of variables 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 ¶ 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.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, the applicant is responsible for presenting “witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel. . . .” The applicant has the ultimate burden of persuasion for 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 the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation of potential, rather than actual, risk of compromise of classified information.

## **Analysis**

### **Criminal Conduct**

Criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. By its very nature, it calls into question a person's ability or willingness to comply with laws, rules, and regulations (AG ¶ 30). Applicant's conviction for a business conflict of interest in 2015 raises security concerns and questions about Applicant's judgment, reliability, trustworthiness, and his ability and willingness to comply with laws, rules, and regulations. The following Criminal Conduct Disqualifying Conditions under AG ¶ 31 are of concern:

- (a) a pattern of minor offenses, any one of which on its own would be unlikely to affect a national security eligibility decision, but which in combination cast doubt on the individual's judgment, reliability, and trustworthiness; and
- (b) evidence (including, but not limited to, a credible allegation, an admission, and matters of official record) of criminal conduct, regardless of whether the individual was formally charged, prosecuted, or convicted.

The court records as well as Applicant's admissions are evidence of Applicant's convictions for a conflict of interest, and raise questions about Applicant's judgment,

reliability, and trustworthiness. Once a concern is raised regarding an Applicant's security clearance eligibility, there is a strong presumption against the grant or maintenance of a security clearance. After the Government presents evidence raising criminal conduct security concerns, the burden shifts to the applicant to rebut or mitigate those concerns. Applicant stated that his past criminal conduct is not a security concern.

I considered the following Criminal Conduct Mitigating Conditions under AG ¶ 32:

- (a) so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment;
- (b) the individual was pressured or coerced into committing the act and those pressures are no longer present in the person's life;
- (c) no reliable evidence to support that the individual committed the offense; and
- (d) there is evidence of successful rehabilitation; including but not limited to the passage of time without recurrence of criminal activity, restitution, compliance with the terms of parole or probation, job training or higher education, good employment record, or constructive community involvement.

The mitigating conditions applies. Applicant was advised as early as 2009 that his ownership of Company 2 and his role as a government employee could be a conflict of interest. His supervisor, in approving his outside employment with Company 2, directed that he moderate his government activities when discussing and considering work done by Company 2. The evidence shows that Applicant moderated his government duties, and that he advised Company 3 that the conflict of interest issues were resolved. Company 2 continued to supply power modules to Company 3 for the Navy.

In 2012, Company 3 advised Applicant that they still had conflict of interest concerns from his role as a government employee and owner of Company 2. In 2013, Applicant's wife started working with Company 6 making power modules in her garage for Company 3 to supply to the Navy. When Applicant could not supply the power modules to Company 3 through Company 2, Applicant suggested Company 6 supply the power modules to Company 3. Applicant's wife was making the power modules for Company 3. Company 3 advised Applicant that they were still concerned about a conflict of interest with that arrangement. Applicant's wife then formed Company 7 under her maiden name to avoid any appearance of conflict of interest. Company 7 started to and continues to provide power modules to Company 3 for the Navy.

Applicant knew of his wife's actions in forming her own company and continuing to provide power modules to the Navy through another company. In 2015, he pled guilty to the conflict of interest charge. He completed all components of his sentence, and was released early from his probation. He successfully completed ethics training with his new employer. He and his company were not debarred from working for or with the government. The circumstances of this case are unusual and not likely to recur. Applicant presented sufficient information to mitigate criminal conduct security concerns.

## **Personal Conduct**

Conduct involving questionable judgment, lack of candor, dishonesty, or willingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness, and ability to protect classified information. Personal conduct is a security concern because 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 and sensitive information. Personal Conduct is always a security concern because it indicates whether the person's past conduct justifies confidence that the person can be trusted to properly safeguard classified or sensitive information. (AG ¶ 15).

Applicant pled guilty of a conflict of interest between his government position and a business he owned that supplied parts to the government. Applicant used his insider knowledge gained from work with contractors and the government to manufacture and provide power modules through various contractors to the Navy. Applicant's conflict of interest between his civilian government position and his ownership of a company doing business with the government raises the following disqualifying conditions under AG ¶16:

(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.

I considered the following Personal Conduct Mitigating Conditions under AG ¶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 it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment;

(d) the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the



stressor, circumstances, or factors that contributed to untrustworthy, unreliable, or other appropriate behavior, and such behavior is unlikely to recur;

(e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress; and

(f) the information was unsubstantiated or from a source of questionable reliability.

The mitigating conditions do not apply. The conflict of interest activities are recent having occurred as late as 2014 and 2015. Applicant's conduct was not isolated. He was advised in 2009 that he should not participate in any government action or discussions on the system he provided. He complied with the directions. However, when advised by the primary contractor in 2013 of their concern of a potential conflict of interest, he developed schemes to have different contractors with ties to his wife's business provide the products so he and his wife could profit from the business. His wife went so far as to use her maiden name rather than her married name for her business. Applicant also did not divulge on his financial disclosure forms his wife's ownership of her company and the funds she received as he was required to do. Applicant took extraordinary steps to shield his and his wife's connection to the business. His actions were deliberate and did not happen under unusual circumstances and they are likely to recur.

There is no evidence of remorse for his personal conduct. While his criminal conduct has been rehabilitated by the serving of his sentence, he did not demonstrate that his conduct does not cast doubt on his reliability, trustworthiness, and good judgment. A significant amount of time has not passed since the issues dealing with a conflict of interest occurred. He did not consult with supervisors, ethics, or legal personnel to assure the business arrangements were appropriate and not a conflict of interest. In his financial disclosure forms for 2013 and 2014, Applicant did not disclose his wife's business interests or profits they received for the sale of the power module. Applicant did not present information to demonstrate changed circumstances or conduct sufficient to indicate a finding of reform or rehabilitation. The evidence of Applicant's efforts to circumvent conflict of interest regulations shows a lack of judgment, untrustworthiness, and an unwillingness to comply with rules and regulations. It leads to the conclusions that his lack of candor shows that he may not properly safeguard classified or sensitive information

### **Whole-Person Concept**

Under the whole-person concept, an administrative judge must evaluate an applicant's eligibility for access to classified information by considering the totality of the applicant's conduct and all relevant circumstances. The administrative judge should consider the nine adjudicative process factors listed at AG ¶ 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 ¶ 2(c), the ultimate determination of whether to grant eligibility for access to classified information must be an overall common-sense 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 considered Applicant's contributions to the defense industry and his long years of civilian service. I considered the letters of commendation and recommendations that he submitted and the opinions that he be granted eligibility for access to classified information. In requesting an administrative determination, Applicant chose to rely on the written record. In so doing, he must sufficiently supplement the record with relevant and material facts regarding his personal conduct, and adequately articulate his positions, and provide facts to mitigate the security concerns. In short, the file as a whole does not contain sufficient information to mitigate criminal and personal conduct security concerns.

Overall, the record evidence leaves me with questions and doubts concerning Applicant's judgment, reliability, and trustworthiness. Applicant did not establish his suitability for access to classified information. For all these reasons, I conclude Applicant failed to mitigate the personal conduct security concerns. Eligibility for access to classified information is denied.

### **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 J:	FOR APPLICANT
Subparagraph 1.a;	For Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant

## **Conclusion**

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

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THOMAS M. CREAN  
Administrative Judge