



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



In the matter of:

Applicant for Security Clearance

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ISCR Case No. 16-03996

**Appearances**

For Government: Nicole A. Smith, Esq., Department Counsel  
For Applicant: Alan V. Edmunds, Esq.

05/17/2018

**Decision**

RIVERA, Juan J., Administrative Judge:

Applicant made false statements to employers and made material omissions on his resume. He deliberately violated two employers' policies against outside employment that could lead to a conflict of interest. At his hearing, Applicant continued to perpetuate his false statements. Considering the evidence as a whole, I find Applicant failed to mitigate the Guideline E security concerns. Clearance denied.

**Statement of the Case**

Applicant submitted his most recent security clearance application (SCA) on December 31, 2015. He was interviewed by a government investigator on January 16, 2015, January 30, 2015, and October 27, 2016. After reviewing the information gathered during the background investigation, the Department of Defense (DOD) issued an Statement of Reasons (SOR) on September 25, 2017, alleging security concerns under Guideline E (personal conduct) and Guideline B (foreign influence). Applicant answered the SOR on October 27, 2017, and requested a hearing before an administrative judge from the Defense Office of Hearings and Appeals (DOHA).

The case was assigned to me on April 5, 2018. The DOHA issued a notice of hearing on April 6, 2018, scheduling a hearing for April 10, 2018. At the hearing, the

Government offered five exhibits (GE 1 through 5). Applicant testified, presented the telephonic testimony of one witness, and submitted one exhibit (AE) 1, comprised of Tabs A through Q. All exhibits were admitted as evidence without objection. DOHA received the hearing transcript (Tr.) on April 19, 2018.

### **Procedural Issues**

At hearing, Department Counsel moved to withdraw the Guideline B allegation with its two specifications (SOR ¶¶ 2.a and 2.b), stating that the DOD Consolidated Adjudications Facility had recently adjudicated that security concern in Applicant's favor. (Tr. 8) I granted the motion as requested.

Applicant, through his attorney, requested an expedited hearing. At hearing, he indicated he had sufficient time to prepare and was ready to proceed. He affirmatively waived his right to 15-day advanced notice.

### **Findings of Fact**

In his answer to SOR ¶ 1.a, Applicant admitted that in July 2014, he was terminated from his employment with company T for violating its policy against maintaining a secondary employment that could create the appearance of a conflict of interest. He denied that he falsified his time cards. He admitted that in July 2014, he was terminated from his employment with company P for falsifying or making material omissions on a company record, and that he violated the company's policy against maintaining a secondary employment that could create a conflict of interest. (SOR ¶ 1.b) However, Applicant claimed he was unaware that both companies had policies preventing employees from engaging in outside work.

Applicant's admissions to the SOR allegations and at his hearing are incorporated herein as findings of fact. After a thorough review of the record evidence, and having considered Applicant's demeanor while testifying, I make the following additional findings of fact:

Applicant is 44 years old. He has been offered employment by a federal contractor conditioned on his eligibility to hold a clearance. He graduated from high school in 1994, and received a bachelor's degree (computer science major and a minor in business and information system) in 1998. He is currently working on his master's degree and anticipates completing it in 2019. Applicant married in 1998, and has two children, ages 18 and 11.

Applicant started working for federal contractors in February 2001. Since then, he has worked for nine different federal contractors in Information Technology (IT) positions such as software engineer, computer applications development, and portal administrator. He has extensive training and IT certifications on numerous operating systems, databases, programming languages, application servers' development and design, content management, and cloud computing. Applicant received access to

confidential information in 2007. He was granted a secret clearance in 2012, which was upgraded to a top-secret clearance in 2014.

Applicant was hired by federal contractor T on May 19, 2014. He attended new hire orientation, received a badge, and was asked to read and sign the company's policies brochure. Shortly thereafter, company T requested Applicant be processed for a clearance. Applicant explained he was disappointed by company T because he was under the understanding that he was hired to work a position that required a top-secret clearance. He believed T was not going to assign him to such a position, and he was concerned he would lose his top-secret clearance. Applicant then sought employment with company P for a position requiring a top-secret clearance.

Applicant was hired by company P on June 16, 2014, to work on a position requiring a top-secret clearance. He attended new hire orientation, was issued a badge, and was asked to read and sign the company's policies internet brochure. Company P requested that Applicant be processed for a clearance. Applicant was not allowed to work in any classified projects because his clearance needed to be transferred to his new position. Applicant received training and worked on unclassified projects for both companies for a period. He found the training and experience at company T very valuable. He also enjoyed earning two salaries for a short period.

Applicant continued to work for both companies concurrently. He was charging company T 80 hours a pay period and charging company P 40 hours a week. Security officers noticed dual requests for clearances for Applicant by two different federal contractors. They started an investigation and notified the companies' security officers. On July 24, 2014, Applicant's manager at company T asked Applicant whether he was working for company P. Applicant lied to his manager at company T, and told him that he had not heard back from company P and that he had no plans to work for them.

Company T confirmed Applicant's employment for company P and fired him on July 25, 2014. On that day, Applicant left company T at noon and went to work for company P. He charged company T ten hours in his time card, and eight hours on his company P time card. Applicant denied he falsified any time cards at company T. He averred that he was putting in 16-hour days to finish his tasks for both employers. He noted that for most of the two-week period in question, he was on vacation in another state and in a foreign country.

Applicant was confronted by company P personnel about whether he was working for company T on July 25, 2014. Applicant asked to resign from company P. On July 25, 2014, company P issued Applicant a "Notification of Termination" stating that his employment was terminated because he violated the company's conflict of interest policy (maintaining a secondary employment), and for falsifying or making a material omission on a company record or resume.

Applicant claimed he was unaware that both companies had policies that prevented second jobs with companies that could create the appearance of a conflict of

interest. He acknowledged that he should have read both companies' policies and should have disclosed his employment situation to both employers. He took responsibility for not disclosing his outside employment to both employers and for violating the companies' policies. Applicant believes that he already paid the price for his actions when he was fired from both companies. Applicant further believes that these incidents are mitigated through the passage of time and his otherwise successful 19-year career working for government contractors.

Applicant is considered to be a valuable employee, who is honest, and trustworthy. He is technically proficient, dedicated, and willing to go the extra mile to get the job done. His references consider him to be security conscious and a person that follows rules and regulations. They recommended his eligibility for a clearance without reservations. Applicant's performance appraisals indicate he mostly exceeds expectations.

### **Policies**

The SOR was issued 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* (Directive) (January 2, 1992), as amended; and the *National Security Adjudicative Guidelines* (AG), implemented by the Director of National Intelligence, Security Executive Agent Directive (SEAD) 4, which are applicable to all adjudicative decisions issued on or after June 8, 2017.

Eligibility for access to classified information may be granted "only upon a finding that it is clearly consistent with the national interest to do so." Exec. Or. 10865, § 2. The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security, emphasizing that "no one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).

The AG list disqualifying and mitigating conditions for evaluating a person's suitability for access to classified information. Any one disqualifying or mitigating condition is not, by itself, conclusive. However, the AG should be followed where a case can be measured against them, as they represent policy guidance governing access to classified information. Each decision must reflect a fair, impartial, and commonsense consideration of the whole person and the factors listed in SEAD 4, App. A ¶¶ 2(d) and 2(f). All available, reliable information about the person, past and present, favorable and unfavorable, must be considered.

Security clearance decisions resolve whether it is clearly consistent with the national interest to grant or continue an applicant's security clearance. The Government must prove, by substantial evidence, controverted facts alleged in the SOR. If it does, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. The

applicant bears the heavy burden of demonstrating that it is clearly consistent with the national interest to grant or continue his or her security clearance.

Persons with access to classified information enter into a fiduciary relationship with the Government based on trust and confidence. Thus, the Government has a compelling interest in ensuring each applicant possesses the requisite judgment, reliability, and trustworthiness of those who must protect national interest as their own. The “clearly consistent with the national interest” standard compels resolution of any reasonable doubt about an applicant’s suitability for access in favor of the Government. “[S]ecurity clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531; SEAD 4, ¶ E(4); SEAD 4, App. A, ¶¶ 1(d) and 2(b). Clearance decisions are not a determination of the loyalty of the applicant concerned. They are merely an indication that the applicant has or has not met the strict guidelines the Government has established for issuing a clearance.

## **Analysis**

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

AG ¶ 15 articulates the security concern for personal conduct:

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 provide truthful and candid answers during national security investigative or adjudicative processes.

In July 2014, Applicant violated two federal contractors’ policies prohibiting their employees from having outside employment that could give the appearance of or cause a conflict of interest. He also made a false statement and omitted information from at least one of the federal contractor’s documents when he failed to reveal his employment by other federal contractor. Applicant’s omission, if deliberate, would trigger the applicability the following disqualifying conditions under AG ¶ 16:

(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 national security eligibility or trustworthiness, or award fiduciary responsibilities;

(b) deliberately providing false or misleading information; or concealing or omitting information, concerning relevant facts to an employer, investigator, security official, competent medical or mental health professional involved in making a recommendation relevant to a national

security eligibility determination, or other official government representative; and

(c) 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 or sensitive information. This includes, but is not limited to, consideration of: . . . (3) a pattern of dishonesty or rule violations . . . .

Proof of an omission, standing alone, does not establish or prove an applicant's intent or state of mind when the omission occurred. (ISCR Case No. 03-10380 at 5 (App. Bd. Jan. 6, 2006)). Considering the evidence as a whole, including Applicant's age, education, work experience, and his testimony and demeanor while testifying, I find that Applicant deliberately made a false statement concerning his concurrent employment with two federal contractors with the intent to mislead the federal contractor. I also find that he deliberately violated the two federal contractors' policies against outside employment. The above disqualifying conditions are raised by the evidence and are applicable. Additional inquiry about the possible applicability of mitigating conditions is required.

AG ¶ 17 lists conditions that could potentially mitigate the personal conduct security concerns:

(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's evidence is insufficient to mitigate the Guideline E security concerns. He claimed that he was not aware that both federal contractors had policies against outside employment. His claims lack credibility for several reasons. IT is a very competitive field in which companies zealously protect their trade secrets, processes, and proprietary information. While in college, Applicant completed a major in computer science and a minor in business and information systems. Likely, he was made aware of employees having to sign nondisclosure, noncompetitive agreements, and conflict of interest policies as part of the IT businesses' practices.

Applicant started working for federal contractors in 2001. Since then, he has worked for nine different federal contractors in several IT positions. He has extensive training and IT certifications on numerous operating systems, databases, and programming languages. He received access to confidential information in 2007, and was granted a secret clearance in 2012, which was upgraded to a top-secret clearance in 2014. It is likely that during his education, extensive training, certification process, and experience working in the IT field he became aware of the conflict of interest policies enforced by many companies.

Applicant's knowledge of the companies' conflict of interest policies is demonstrated by his false statements to both companies' personnel to cover his outside employment. A manager of company T asked Applicant whether he was working for company P in July 2014. Applicant lied to his manager and told him that he had not heard back from company P and that he had no plans to work for them. At the time, he was working full-time for both companies. Applicant lied because he was aware of company's T policy against outside employment.

Additionally, Applicant made a false statement and made material omissions on company documents submitted to company P. He failed to disclose his then full-time employment with company T. When confronted by company P personnel about whether he was working for company T, Applicant asked to resign and he was terminated on July 25, 2014.

At his hearing, Applicant continued to claim that he had not been aware of both employers' policies against outside employment and conflict of interest. His testimony lacks credibility and diminishes the weight of his other mitigating evidence. Considering the evidence as a whole, I find Applicant failed to mitigate the Guideline E security concerns.

### **Whole-Person Concept**

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case, and under the whole-person concept. SEAD 4, App. A, ¶¶ 2(a) and 2(d). I have incorporated my comments under Guideline E in my whole-person analysis. Some of these factors were addressed under those guidelines, but some warrant additional comment.

Applicant has 19 years' experience working for federal contractors. He has had access to classified information since 2007. Based on his references' statements, Applicant is a valuable employee, and is honest, and trustworthy. He is technically proficient, dedicated, and willing to go the extra mile to get the job done. His references consider him to be security conscious and a person that follows rules and regulations. They recommended his eligibility for a clearance without reservations. Applicant's performance appraisals indicate he mostly exceeds expectations.

The rationale and factors for denying his clearance eligibility are more substantial. Applicant made a false statement and made material omissions in documents submitted to a prospective employer. He failed to disclose his then full-time employment with another company. Applicant deliberately violated the policies of his two employers against outside employment that could lead to a conflict of interest.

At his hearing, Applicant continued to claim that he had not been aware of both employers' policies against outside employment. His testimony lacks credibility and diminishes the weight of his other mitigating evidence. Moreover, Applicant's failure to acknowledge his wrong behavior, and his repeated falsifications to cover his behavior, demonstrate that his questionable behavior may recur. Considering the evidence as a whole, I find Applicant failed to mitigate the Guideline E security concerns.

### **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 E:	AGAINST APPLICANT
Subparagraphs 1.a and 1.b:	Against Applicant
Paragraph 2, Guideline B:	WITHDRAWN
Subparagraphs 2.a and 2.b:	WITHDRAWN

### **Conclusion**

In light of all the circumstances presented by the record in this case, it is not clearly consistent with the national security interests of the United States to grant eligibility for a security clearance to Applicant. Clearance is denied.

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JUAN J. RIVERA  
Administrative Judge