



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
) ISCR Case No: 18-02824
)
)
Applicant for Security Clearance)

For Government: Moira Modzelewski, Esq., Department Counsel
For Applicant: Mark S. Zaid, Esq.

11/13/2019

Decision

DAM, Shari, Administrative Judge:

Applicant falsified official investigative reports. He did not mitigate the resulting personal conduct security concerns. National security eligibility for access to classified information is denied.

Statement of the Case

On March 4, 2019, the Department of Defense (DoD) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline E, Personal Conduct 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 *National Security Adjudicative Guidelines for Determining Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position* (AG), effective within the DOD on June 8, 2017.

Applicant answered the SOR in writing (Answer) on April 3, 2019, and requested a hearing before an administrative judge. On June 27, 2019, the Defense Office of

Hearings and Appeals (DOHA) assigned the case to me. On July 10, 2019, DOHA issued a Notice of Hearing setting the case for August 15, 2019. The case was heard as scheduled. Department Counsel offered Government Exhibits (GE) 1 through 3 into evidence, and called one witness. Applicant testified, and offered Applicant Exhibits (AE) A through N into evidence. All exhibits were admitted. References in this Decision to Applicant's exhibits cite the Bates number stamped on the upper middle of each page.

DOHA received the hearing transcript (Tr.) on August 23, 2019. The record remained open until August 30, 2019, to give Applicant an opportunity to submit additional evidence. Applicant timely submitted AE O and a revised Exhibit List. Department Counsel had no objections to these submissions and they are admitted.

Findings of Fact

The SOR in this case alleged the following:

¶ 1.a: You were terminated from your position as an Investigator with the Office of Personnel Management (OPM) in [date omitted] after an Integrity Assurance (IA) investigation determined that you had falsified at least 35 source contacts in federal background Reports of Investigation transmitted as complete between September 2013 and September 2014.

Applicant denied this sole allegation (Answer).

Applicant's Background

Applicant is 55 years old. He has been married since 1993 and has four children. He has earned a bachelor's and a master's degree. He served in the National Guard from 1981 to 1985, and then was on active duty with the Army until 1992, when he was honorably discharged. While on active duty, he was a master communications instructor. In 2011, he enlisted in the Air Force as inactive reserve. (GE 1; AE A) He has held a Top Secret security clearance since December 2008. (Tr. 131; GE 1; AE F)

From 2007 to 2016, Applicant was employed as a background investigator for OPM. Since 2017, he has worked at a military base, providing escort, and management services. In addition, he coaches sports for high school students. (Tr. 129-130; AE A)

In his June 2016 security clearance application (SCA), Applicant disclosed that he was fired from his position with the OPM in February 2016. He stated the reason for the termination involved inaccuracies in reports of investigation (ROI) that he completed in 2013. He noted that sources could not recall being interviewed two years later in 2015. (GE 1)

Investigation of Applicant

During October 2014, a special agent for the OPM interviewed JE, who was a personal-reference source in a background investigation for another individual. During that interview, JE asked the special agent why none of his personal-reference sources were interviewed during his last background investigation that occurred in 2013 while he was stationed overseas. JE also reported to the special agent that he had not been interviewed as a subject during his security clearance investigation, but had received his security clearance in December 2013. (AE E at 36-37)

After reviewing JE's investigative file, the special agent learned that Applicant handled JE's background investigation, and stated in an ROI that he had interviewed JE on November 1, 2013. The special agent forwarded that information to the IA of the OPM. Another special agent then contacted JE's personal-reference sources, whom Applicant had reported in an ROI that he had interviewed. During November 2014, the special agent re-interviewed one of JE's personal-reference sources, VK, and inquired about VK's earlier interview with Applicant. VK told the special agent that he was never interviewed by Applicant or any other investigator concerning JE, and that he was on temporary duty away from the reported location on the date that Applicant's ROI reported the interview had taken place. (AE D at 20-21) VK also gave information to the special agent that was inconsistent with facts recorded in Applicant's ROI regarding, "occupational title, dates and locations of association with [JE], and [VK's] knowledge of [JE's] family members." (AE F at 237)

Upon receiving the above information, the IA initiated a targeted review of all cases Applicant completed between July 2014 and November 2014, while Applicant was stateside. (AE D at 21) The targeted review gathered all ROIs submitted by Applicant during that period and assigned investigators to begin contacting individuals named in the ROIs, who had given statements as subjects, personal-reference sources for subjects, or sources for personnel records. (AE D, AE F at 229)

In an unrelated adverse personnel action imposed during December 2014, Applicant was issued a 30-day suspension for reporting inaccurate information on a travel voucher in the amount of \$3,184. This disciplinary action was for travel fraud and involved international travel claims he had submitted from January 2009 through November 2013, which included the time frame relevant in this case. (AE F at 266) Applicant testified that he was not required to reimburse the Government. (Tr. 181-182)

During February 2015, the IA transferred Applicant's case to the OPM Office of Inspector General (IG) for potential prosecution. In March 2015, the OPM IG advised the IA to address Applicant's misconduct administratively rather than criminally. According to a senior advisor for the IG, their office initially misunderstood that this case involved not only the travel voucher case, but also multiple allegations of ROI falsification. (AE F at 230)

In March 2015, Applicant attended an administrative inquiry with the branch chief of the IA, to discuss the reported discrepancies between Applicant's ROIs for JE and VK, and their subsequent statements to other investigators. During this interview, Applicant claimed that he had no recollection of the JE case. He denied falsifying his ROIs of either JE or VK, or any other investigative reports. He could not explain why his ROI contained information that was different from the information subsequently obtained by another investigator. He signed an affidavit denying that he had falsified any of his ROIs. (AE D at 23)

Later in March 2015, the IA initiated a recovery process to determine the scope of possible falsifications by Applicant. The process included a targeted review of Applicant's completed cases from August 2013 to November 2013, while he was overseas, and from May 2014 to November 2014, while he was stateside, as well as pending cases. The recovery process required identification of all sources listed in Applicant's ROIs during those periods, including subject interviews, personal-reference source interviews, and record checks. Subsequently, all identified individuals were re-interviewed by other investigators. (AE D at 221, 224-227) The cost of the recovery process for this re-investigation was \$123,066. (AE F at 265)

On September 15, 2015, the branch chief issued his Executive Summary (Summary) of the findings of the recovery process and review of Applicant's cases. It revealed:

The number of Applicant's cases reviewed: 127

The number of individuals re-interviewed as sources or subjects: 444

The number of sources with confirmed falsifications: 32

The number of sources that presented other falsification indicators or testimonies that could not be validated: 147

While testifying about his Summary, the branch chief defined a 'confirmed falsification' in this case as one in which the evidence demonstrated with 100% confidence that a source was not interviewed, did not provide a record, or did not have a specific recollection of a meeting. (Tr. 35-36)

The Summary states that the above statistics relate to the timeframe when Applicant was overseas from August 2013 to November 2013. (AE F at 280-283) No additional instances of falsification were found for the time period from May 2014 to November 2014. (AE F at 230)

On October 14, 2015, the Department of Justice formally declined prosecution of the case initiated by the IA against Applicant, based on the possible misunderstanding of the scope of the falsifications and the choice of pre-interview self-incrimination warnings that were given to Applicant, which were appropriate for an administrative proceeding

instead of a criminal proceeding. (AE F at 238) Subsequently, Applicant was not prosecuted for the falsifications. (Tr. 27)

The branch chief interviewed Applicant for the second time later in October 2015. Applicant was questioned in detail about the 35 cases listed in the Summary. (AE D at 24-34) Thirty-two sources reported to investigators that they had never been interviewed by Applicant; two stated they did not provide Applicant a record as he claimed; and one subject said he was never interviewed by Applicant. Applicant denied all wrongdoing and asserted that he interviewed all sources and subjects listed in his ROIs. He could not provide an explanation for the discrepancies in information in his reports and the information in the investigators' reports. He did not offer mitigating explanations as to why sources would state they were not interviewed. He acknowledged that he could have failed to record the date of an interview in his notes, and then guessed at the correct date when he drafted the ROI. (GE 3; AE D at 27-35)

Applicant testified at the hearing that, during his second interview, he recalled interviewing JE on October 28, 2013, because of JE's location. (Tr. 154-156) He explained the reason that this October date was different than the date on his ROI, November 1, 2013, was because he probably inserted the date he drafted the ROI as the date of the interview. (Tr. 161) He had previously stated in his January 2016 written response to OPM's proposed removal of him from employment, that any of his date errors could have occurred because the database software automatically inserted the date the report was drafted as the interview date. (AE F at 246)

The branch chief testified that when Applicant was confronted during his second interview about VK's statement that he was out of the country on the date Applicant reportedly interviewed him, Applicant attributed the date mistake to a typographical error. (Tr. 47) The branch chief also stated that, while being interviewed, Applicant "could only provide limited information about three people, in terms of recollection. The other 32 Applicant categorically denied, but couldn't provide any explanation or mitigating factor." (Tr. 85-86) On November 23, 2015, the branch chief issued his final Report of Investigation regarding the falsification allegations involving Applicant. In it, he summarized the scope of the investigation; his two interviews with Applicant; a list of the 35 sources re-interviewed; and Applicant's response to each source's or subject's claim that they had not been interviewed. (AE D)

In February 2016, the area chief for the OPM submitted a memorandum recommending Applicant's removal from his position as an investigator based on his failure to provide accurate information in 34 ROIs. (AE F at 236) Her report included a separate analysis of the evidence for each of the 31 separate personal-reference sources, 1 subject, and 2 record providers. She incorporated in each case analysis information from Applicant's ROIs; information gathered by investigators during re-interviews; and Applicant's statements in his October 2015 affidavit and interview, and statements in his January 2016 written response. Applicant consistently denied allegations of falsification. In each case, the area chief found no explanation or reason why any of the sources or

subjects would assert they had not been interviewed, if they had been interviewed. (AE F at 238-265)

Additional information, provided by the 34 source witnesses who stated that they were not interviewed by Applicant, included: seven personal-reference sources (PC, SD, BR, JG, RT, JH, and EL) who said they did not know the subject of the interview; two personal-reference sources (PC and MH) who said they did not know the subject well enough to be interviewed; three personal reference sources (TR, MC, and JH) who said they would have remembered if Applicant had interviewed them about another subject because Applicant had done their background investigations; three personal-reference sources (MD, VK, and R J-J) who said they could not have been interviewed on the date listed on the ROI because they were no longer overseas on those dates; and two record sources (KS and JC) who said they did not have access to the personnel files of the named subject, as noted in the ROIs. (AE F at 238-265)

JC, a record source for a subject, executed an affidavit on August 18, 2019, in which he clarified that he did not provide Applicant a hard copy of the subject's personnel file, but did allow Applicant access to the subject's electronic personnel file. (AE K) Based on this affidavit, the branch chief reconsidered the falsification charge involving JC. (Tr. 100) One personal-reference source, RT, executed an affidavit on August 15, 2019, in which he stated he was interviewed about subjects JP and JN, but did not recall the timeframes or name of investigator who interviewed him. (AE O)

Applicant submitted an affidavit from JE, executed on August 18, 2019. In it, JE stated that his post-traumatic stress disorder could have interfered with his ability to recall speaking or having contact with Applicant between October and November 2013 about his personal background investigation. (AE N)

The branch chief testified that he reviewed JE's affidavit and noted that JE did not definitively state that he had not been interviewed by Applicant. The branch chief pointed out nine discrepancies between information reported by Applicant in his ROI and information reported by the investigator during JE's re-interview. While some of the facts were minor, the branch chief stated that Applicant's reported information regarding JE's divorce and a collection account were vastly different from the investigator's report. Those differences appeared to be significant for reporting purposes and added to the accuracy of the investigator's interview. (Tr. 101-102)

In April 2016, another reviewing Federal agency recommended debarment of Applicant, based on the falsifications in his investigative reports which he submitted to OPM. (AE F) OPM apparently never issued a final debarment decision. (Tr. 169)

Applicant's Testimony

Applicant denied that he submitted ROIs with fabricated information. (Tr. 131) From fall of 2013 to March of 2015, Applicant estimated that he had conducted over 1,500 source and subject interviews. (Tr. 154)

In his defense, Applicant submitted 12 pages from his schedule book covering the weeks of September 1, 2013, to November 4, 2013. The schedule book contains names of some interviewees, some locations, and some travel expenses. (AE C) Based on a review of his schedule, Applicant said that he remembered the October 28, 2013 interview with JE because of the listed location of the interview. He then described details of the location. (Tr. 154-156)

In response to a question about VK's assertion that he could not have been interviewed on the date Applicant reported in the ROI because he was out of the country, Applicant challenged that statement, claiming that he has an ROI documenting the interview and emphasizing that he conducted the interview. (Tr. 156-157)

Applicant acknowledged that there were discrepancies between the dates on his interview schedule and the dates listed on the ROI regarding when he conducted interviews of JE and VK. Applicant said that he typed the wrong dates on his ROIs. He pointed out another instance in which he made a similar typographical error in an ROI. On September 5, 2013, he recorded a scheduled source interview with RD, however, the date on the ROI is September 26, 2013, the date he drafted the report. (Tr. 176-177; AE C)

While testifying, Applicant was questioned about discrepancies between information in his ROI and information an investigator obtained during the re-interview of JG. Applicant reported that JG had daily contact with subject VJ. The investigator reported that JG said he did not know VJ well enough to do a personal-reference source interview. Applicant attributed the interview discrepancies to the passage of time between his 2013 interview and the investigator's 2015 re-interview. He also stated, "how they ask the question and what questions they ask" could account for reported differences. (Tr. 189; AE E at 115-117)

At his hearing, Applicant was asked about a discrepancy between information in his ROI of a personal-reference source interview of GL, and information in the re-interview report by the investigator. Applicant stated in his ROI that GL had daily contact with the subject since 2007 at a variety of events. Applicant testified that GL described the subject as caring, hardworking, and possessing other positive qualities, as he reported in the ROI. GL told the investigator that he was not interviewed by Applicant and did not know the subject. Applicant did not provide a clear explanation for this inconsistency. (Tr. 189-193)

Applicant testified that he believed this ROI falsification case was initiated because he filed an EEO complaint against his chain of command in 2013 relating to being disciplined for submitting inaccurate travel vouchers. He believes it was initiated in retaliation because he did not have a history of falsification charges prior to this case. (Tr. 195-197) This defense is not persuasive because the inquiry into the falsifications began before he was disciplined for travel fraud, and he offered no explanation why more than 30 named sources or subjects would tell independent investigators that Applicant's reports were false in an effort to jeopardize his employment.

Character References

Applicant's wife submitted an affidavit on behalf of her husband. She served on active duty in the Air Force for one enlistment and is currently a DoD civilian employee. She holds a security clearance. She attested to Applicant's diligent work ethic and honesty. (AE J)

An investigator for another Federal agency submitted an affidavit. She asserted that Applicant is dedicated to public service and said that she finds it difficult to believe that he would jeopardize national security. (AE L)

A commanding officer in the Navy submitted an affidavit. He has known Applicant since 2012. He worked with Applicant for three months while they were overseas. He never observed Applicant engage in unethical behavior. (AE M)

Policies

When evaluating an applicant's suitability for national security eligibility, the administrative judge must consider the AG. In addition to brief introductory explanations for each guideline, the AG list potentially disqualifying and mitigating conditions, which are useful 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 AG ¶ 2 describing the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶ 2(c), 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. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

Directive ¶ E3.1.14 requires the Government to present evidence to establish controverted facts alleged in the SOR. Directive ¶ E3.1.15 states that an "applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven by Department Counsel, and has the ultimate burden of persuasion as to obtaining a favorable clearance 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 protect or 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 Executive Order 10865 provides that an adverse decision shall be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See *also* Executive Order 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information.)

Analysis

Guideline E: Personal Conduct

AG ¶ 15 explains the security concerns relating to 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 cooperate or provide truthful and candid answers during national security investigative or adjudicative processes.

AG ¶ 16 describes conditions that could raise a security concern and may be disqualifying. Two may potentially apply in this case:

(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

(e) personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress by a foreign intelligence entity or other individual or group. Such conduct includes:

(1) engaging in activities which, if known, could affect the person's personal, professional, or community standing.

There is sufficient evidence to establish disqualifying security concerns under AG ¶¶ 16(b) and 16(e)(1). Applicant deliberately provided false and inaccurate information to the Government, which was relevant to a determination of numerous applicants' national security eligibility. Applicant's personal misconduct creates a vulnerability to exploitation

or duress by other individuals, as it is the type of activity which, if known, could and would affect his personal and professional standing.

AG ¶ 17 provides two conditions that could mitigate the security concerns raised under this guideline. They are:

(a) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts; and

(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.

The evidence does not establish mitigation under AG ¶ 17(a). Applicant did not make any effort to disclose or correct the 32 instances of falsified information that he submitted as part of his background investigations for individuals seeking security clearances prior to being confronted with the evidence. He then denied all allegations and continues to deny that he deliberately falsified background information that he submitted to the OPM as part of his employment duties.

The evidence does not establish mitigation under AG ¶ 17(c). Applicant's misconduct is not minor, but serious and egregious, in that it compromises procedures established to safeguard classified and other sensitive information. It occurred numerous times from August 2013 to November 2013, demonstrating Applicant's pattern of dishonesty, bad judgment, and unreliability.

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 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) 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 national security eligibility must include 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 facts and circumstances surrounding this case. I have incorporated my comments under Guideline E in my whole-person analysis. Some of the factors in AG ¶ 2(d) were addressed under that guideline, but some warrant additional comment.

Applicant is an intelligent and educated 55-year-old man, who served in the military and worked as a background investigator for the OPM from 2007 to 2016. His wife and two colleagues attest to his honesty. While testifying, he exhibited knowledge and enthusiasm for his job. He was obviously successful in it for several years.

After reviewing the transcript and the numerous and lengthy exhibits, six significant issues dominate my concerns in this case: (1) the scope of the investigation shows 32 confirmed cases of falsification; (2) Applicant's consistent denial that he has not intentionally filed one false or inaccurate ROI; (3) his failure to provide a plausible explanation for the allegations; (4) his lack of remorse for any aspect of his behavior that contributed to the expensive re-investigation of his work product; (5) his previous discipline for submitting inaccurate travel vouchers; and (6) the potential serious impact that his failure to conduct reliable investigations could have on national security by those seeking security clearances who might not have been eligible. The record evidence leaves me with serious doubts as to Applicant's judgment and suitability for a security clearance. Applicant failed to mitigate the security concerns arising under the personal conduct guideline.

Formal Findings

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

Paragraph 1, Guideline E:	AGAINST APPLICANT
Subparagraph 1.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 a security clearance. National security eligibility for access to classified information is denied.

SHARI DAM
Administrative Judge