



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



In the matter of:

Applicant for Security Clearance

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ISCR Case No. 15-07277

Appearances

For Government: Andrea Corrales, Esq., Department Counsel
For Applicant: Dana D. Jacobson, Esq.

02/01/2017

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 February 22, 2016, 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 March 15, 2016, and requested a hearing. The case was assigned to me on June 17, 2016, and was scheduled for hearing on August 3, 2016. At hearing, the Government's case consisted of three exhibits (GEs 1-3). Applicant relied on two witnesses (including himself) and five exhibits (AEs A-E). The transcript (Tr.) was received on August 12, 2016.

Procedural Issues

Before the close of the hearing, Applicant requested the record be kept open to permit the opportunity to supplement the record with ISCR Appeal Board decisions covering omissions in security clearance applications. For good cause shown, Applicant was granted ten days to supplement the record. The Government was afforded three days to respond.

Within the time permitted, Applicant supplemented the record with ISCR Appeal Board decisions ISCR Case No. 03-11448 (App. Bd. Aug. 10, 2004) and ISCR Case No. 02-09389 (App. Bd. Dec. 29, 2004) These decisions were admitted without objection for consideration as precedential authority.

Summary of Pleadings

Under Guideline E, Applicant allegedly (a) was terminated from Company A in January 2013 due to unsatisfactory work performance; (b) was terminated from Company B in April 2010 for cause; and (c) falsified his Electronic Questionnaires for Investigations Processing (e-QIP) certified in March 2014 by denying termination from either Company A or Company B and failing to disclose both terminations.

In his response to the SOR, Applicant denied his termination from Company A, admitted his termination from Company B, and claimed he will provide information in extenuation and mitigation. He admitted his falsification of his March 2014 e-QIP and claimed he will provide information in extenuation and mitigation.

Findings of Fact

Applicant is a 58-year-old linguist employed by 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 his first wife in May 1984 and was divorced from her in March 1985. (GE 1) He remarried in June 1987. (GE 1; Tr. 46) He has two adult children from his second marriage who are college students. (GE 1; Tr. 47) He has no children from his first marriage. (GE 1)

Applicant immigrated to the United States in August 1981 and became a naturalized U.S. citizen in September 1992. (GE 1; Tr. 47-48) He has two brothers who like himself are naturalized U.S. citizens. (GE 1; Tr. 47) Applicant claimed no education credits in the past ten years. He was trained in Arabic before immigrating to the United States in 1981 and is confident in his understanding of the different Arabic dialects (Tr. 50-51, 86) He passed his first U.S. linguist test in 2001 and has worked as a translator since 2003. (Tr. 50-51) While his specialty is Arabic, he is also fluent in French and English, but not in Farsi. (Tr. 51) He has held a security clearance since 2004. (Tr. 56, 96-97)

Applicant has worked for his current employer as a linguist since November 2013. (GE 1) Between February 2013 and November 2013, he was unemployed looking for work while doing a few part-time linguist assignments. (GE 1; Tr. 99) He deployed to Iraq in 2006, where he worked in and out of local populations. (Tr. 55-56) From July 2006 to October 2006, Applicant worked in Iraq as a translator in Arabic. (Tr. 56) The military commander he was initially paired with in Iraq during his 2006 tour urged him to improve his computer skills with Microsoft Office. (Tr. 58-59) Overall, though, Applicant was highly regarded for his linguist skills by commanders who worked with him in the field in Iraq. (AE A)

Between 2008 and 2009, Applicant worked in Northern Iraq with his military team chief and with other military team chiefs during the remainder of his tour. (AE A; Tr. 56) In the language test he completed in October 2008, he encountered problems expressing ideas and complex sentence structures, but passed his language test that year. (AE D; Tr. 59)

Applicant worked for Company A between September 2012 and January 2013. (GE 1) While employed at Company A, Applicant translated with the same methods he was trained to use. His supervisor (a female lead linguist) strongly disagreed with Applicant's translation methods and prompted his employer to terminate his services in January 2013 for unsatisfactory performance. (GEs 1-2) Applicant attributed his termination to his embarrassing his supervisor in front of other colleagues with his challenge of a particular translation method she favored. (Tr. 69-71) Before his termination, he was never informed that his work was unsatisfactory. (Tr. 55-67) He always received positive appraisals for trustworthiness and reliability from military commanders he translated for in the field. (Tr. 26-31, 60-61) And he followed their recommendations on improving his computer skills with a completed Windows 7 course in July 2010, for which he received a certificate of completion. (Tr. 61)

Applicant was employed by Company B in February 2009 as a linguist. (GEs 1 and 3; Tr. 101-106) He worked at this company for almost 16 months before he was terminated for cause in June 2010 for insubordination. (GEs 1 and 3) In an OPM interview in May 2014, his supervisor confirmed that Applicant was terminated because he was not translating his message in Arabic and Farsi correctly according to another linguist attached to Applicant's brigade. (AE E) Applicant acknowledged he was not fluent in Farsi. (AE E; Tr. 51) Applicant was notified of his termination for cause in a letter of April

8, 2010. (GE 3) The termination letter he acknowledged and signed for on April 8, 2015, cited insubordination, general demeanor, and attitude as the principal reasons for his termination. (GE 3) Applicant's explanations confirm his disagreements with his Company B supervisor and provide some support for his dispute of the basis of the cited justifications by Company B for terminating his linguist services. (GE 3; Tr. 71-76) His supervisor's summarizations of his incorrectly translating messages in Farsi provide corroboration of his employer's termination for cause.

Prior to his Company B termination, Applicant was never told by his supervisor that she was unhappy with his translations. (AE E; Tr. 74-75) In her interview with an agent of the Office of Personnel Management (OPM), his supervisor spoke of her own inadequate language skills and acknowledged she did not speak either Arabic or Farsi. (AE E, at 162) Applicant challenged his supervisor's adverse recommendations with Company B's management before he received his termination letter. (AE B) He cited his lengthy service in Iraq with military commands and the improvements he has made in his computer skills and translations with command support. (AE B)

Applicant's appeals to Company B management were not enough to persuade management to retain his services. One day later (on April 15, 2010), Applicant received his termination notice. (GE 3) Applicant did not challenge his termination or seek reconsideration with the company for the adverse separation actions taken. Without more evidence from Applicant, Company B's assigned reasons for terminating him for cause in April 2010 cannot be considered arbitrary or wrongful. While Applicant garnered strong support for his language skills from field commanders he worked with in Iraq, their favorable impressions are not enough to discredit the assigned insubordination reasons for his Company B termination for cause.

Applicant's e-QIP omissions

In March 2014, Applicant completed an e-QIP application. He answered "no" to the questions asked of him in Section 13C about whether he had ever been fired from a job, quit after being told he would be fired, left by mutual agreement following charges or allegations of misconduct, or left by mutual agreement following notice of unsatisfactory performance. (GE 1) Applicant admitted to intentionally failing to disclose his involuntary separations from Company A and Company B out of embarrassment and concern his disclosures could adversely affect his future employment. (Tr. 94-95)

In April 2014, Applicant was twice interviewed by an OPM agent. (AE E; Tr. 69-71) In each interview, Applicant declined to voluntarily disclose his Company A and Company B terminations. When questioned by Department Counsel at hearing, he attributed his omissions to embarrassment and concerns that his disclosures could adversely effect his job and clearance. (Tr. 69-71, 110-112, 116-118)

Applicant's stated understanding that his e-QIP and OPM omissions were small in nature (Tr. 112) are not supported by the evidence developed in the record. Applicant's omission involved employment terminations. (2010 and 2013) that are both recent and

material to a determination about his continued eligibility to hold a security clearance. Considering all of the facts and circumstances, inferences are warranted that Applicant's omissions were made knowingly and willfully.

Endorsements and awards

Applicant is well-regarded by his past military superiors who worked closely with him during his deployments to Iraq between 2003 and 2009. (AE A; Tr. 26-31) Applicant's military superior (A), an Army ranger who deployed to Iraq on multiple occasions between 2004 and 2009, worked with Applicant in 2008 and 2009. (Tr. 16-22) A credited Applicant with performing his linguist duties well without any complaints. (Tr. 28-29) Applicant consistently impressed A with his linguist skills and cultural awareness. (AE S; Tr. 25-29)

Other military superiors who worked closely with Applicant on his Iraq deployments between 2003 and 2009 offered strong praise for Applicant's linguist abilities and responsible team efforts. (AE A) Each of these military superiors commended Applicant's demonstrated determination, positive attitude, and professionalism in his job and protecting classified information. (AE A) Military officers who worked directly with Applicant since 2014 praised the excellent translation work he provided his military superiors while deployed in Iraq. (AE A) All of these former military officers credited Applicant with exercising sound judgment and maintaining professionalism. (AE A)

Friends who socialize with Applicant characterize him as a good person and friend over the years of his close relationships with their families. (AE A) They consider Applicant and his family to be outstanding people. (AE A)

Applicant's awards include the Iraqi Campaign Medal (awarded in October 2006 by his senior Air Force commander), which recognized Applicant's contributions and sacrifices during Operation Iraqi Freedom and his personal efforts in the global war on terrorism. (AE C) Applicant's award covered his cited exemplary service from July 21, 2006 to October 21, 2006.

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. These guidelines 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 changes; (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

Security concerns are raised over Applicant’s two involuntary terminations from his employments in 2013 and 2010: one for unsatisfactory work performance and another for cause, respectively, and for his knowing and deliberate omissions of his terminations in his 2014 e-QIP and ensuing OPM interviews. All of these security concerns are raised under Guideline E.

Involuntary terminations

Based on Applicant’s two involuntary terminations from his employers (Company A and Company B) in 2013 and 2010 for unsatisfactory performance and cause, respectively, security concerns are raised about his trustworthiness and reliability. Applicant never formally challenged the terminations or appealed the outcomes. Applicant’s terminations are covered by DC ¶ 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 person may not properly safeguard protected information.” DC ¶ 16(c) fully applies to the judgment issues raised by Applicant’s involuntary terminations.

Applicant’s 2013 and 2010 terminations were not all the result of cited inadequate linguist skills in Arabic and Farsi. He was certified in Arabic and spent many years imbedded with military superiors in combat zones throughout Iraq. Based on his certified educational proficiencies and favorable impressions he forged with his military superiors in Iraq, he was consistently extolled as a valued linguist to his assigned commands. The evidence supports conclusions that most of his cited failings in his termination letters had more to do with his reported poor communication skills with his lead linguists that affected both his work product and standing with his employers. The cited reasons for his terminations, though, are enough to sustain the terminations, absent more evidence from

Applicant as to why his employers were not justified in taking the termination actions they elected to undertake.

DOHA jurisdiction over employment issues is limited and is generally confined to assessing the factual basis of employment decisions for their effect on security clearance eligibility assessments. Based on the information provided from Applicant and his employers, Applicant's explanations are insufficient to refute the factual allegations of his Company A and Company B employers. Under these circumstances, no conclusions can be made that Applicant's employers' (Companies A and B) termination actions were either arbitrary or erroneous.

Mitigation of the adverse personnel actions taken by Companies A and B against Applicant is available to him. Most of Applicant's linguist assignments drew highly favorable assessments and recommendations. With the exception of the adverse impressions drawn by his senior linguists with Companies A and B, neither of whom could claim perfected linguist skills in either Arabic or Farsi, Applicant was able to demonstrate superior linguistic abilities blended with consistently reported excellent interpersonal skills in his established relationships with his assigned military superiors in Iraq.

Employing a whole-person assessment, any adverse inferences to be drawn from Applicant's cited unsatisfactory work performance with Company A and insubordination with Company B must be balanced with the positive reinforcements he received from his Iraqi language certifications and the exemplary service he consistently provided the military superiors he served with while deployed in Iraq for extended periods between 2003 and 2009. Applicant's noted achievements include the positive endorsements he received from his military superiors and service awards he earned. His awards include the Iraqi Campaign Medal awarded in 2006. His achievements must be carefully balanced with his involuntary terminations.

Considering all of the facts and circumstances surrounding Applicant's linguist services he provided multiple employers while serving in Iraq between 2003 and 2013, personal conduct concerns over Applicant's involuntary terminations covered by SOR ¶¶ 1.a and 1.b of Guideline E are mitigated.

E-QIP omissions and misstatements

In the process of completing an e-QIP in 2014, Applicant committed multiple omissions about his employment history. Applicant's proven omissions of his employment terminations from Company A and Company B in 2013 and 2010, respectively, reflect recurrent acts of falsification that cannot be reconciled with principles of honesty and good judgment. Considered together under all of the circumstances, Applicant's multiple omissions reflect knowing and wilful misconduct that raise security concerns under Guideline E.

One of the disqualifying conditions covered by Guideline E is 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(a) may be considered in evaluating Applicant’s multiple e-QIP omissions about his employment.

Traditional assessments of falsification in ISCR proceedings include considerations of motive in determining whether particular applicants engaged in knowing and willful concealment. Both Guideline E and relevant case authorities underscore the importance of motive and subjective intent considerations in gauging knowing and willful behavior. See ISCR Case No. 03-10380 at 5 (App. Bd. Jan. 6, 2006)(citing ISCR Case No. 02-23133 (App. Bd. June 9, 2004)). See, generally, *United States v. Chapin*, 515 F.2d 1274, 1283-84 (D.C. Cir. 1975); *United States v. Steinhilber*, 484 F.2d 386, 389-90 (8th Cir. 1973); *United States v. Diogo*, 320 F.2d 898, 905 (2d Cir. 1963). Put differently, the Government must be able to negate any reasonable interpretation that will make Applicant’s explanations about his termination omissions in his e-QIP factually justifiable. Use of a subjective intent test is not intended to straightjacket either party with particular words and phrases, but rather to avert definitional traps.

Under the facts and circumstances of this case, Applicant’s omissions and misstatements were repeated in his e-QIP and ensuing OPM interviews. over a two-month period and cannot be reconciled with actions indicative of mistake or misunderstanding. Applicant’s explanations are not enough to dispel inferences of knowing and wilful falsification of his 2014 e-QIP and ensuing statements provided to the interviewing OPM agent.

Applicant provided two Appeal Board cases that found sufficient mitigation from whole-person assessments to mitigate falsification findings that lacked applicable mitigating conditions under a Guideline E analysis. The cases are distinguishable, however, from Applicant’s case. In ISCR Case No. 03-11448 at 3-4 (App. Bd. August 10, 2004), the Appeal Board found sufficient whole person honesty in the record to mitigate falsification findings even without the availability of mitigating conditions. Whether the trial judge found enough past marijuana use to find the necessary materiality to satisfy 18 U.S.C. § 1001 criteria is unclear. From the record in ISCR Case No. 03-11448, *supra*, it is not clear either whether Applicant was afforded an opportunity to provide voluntary corrections in an OPM interview.

Similarly, in ISCR Case No. 02-09389, at 3-4 (App. Bd. Dec. 29, 2004), the Appeal Board found no mitigating conditions that could be applied to the applicant’s serious multiple omissions of drug-related incidents, but was still able to mitigate the applicant’s falsification findings on the strength of a favorable whole-person analysis. See ISCR Case No. 02-09389, *supra*. Whether Applicant was afforded a post-e-QIP opportunity to make voluntary corrections of his omitted drug use is unclear.

The facts in Applicant’s case are distinguishable from those covered in the cases cited by Applicant. Not only did the omitted involuntary terminations in Applicant’s completed e-QIP meet the materiality requirements of *United States v. Gaudin*, 515 U.S.

506, 509-511, *supra*, but Applicant was afforded multiple opportunities to provide voluntary corrections in OPM interviews conducted just a month after he completed his e-QIP.¹ In circumstances where repeated omissions have been found with the requisite materiality, motive, and specific intent, the Appeal Board has consistently found no room for mitigation under any of the specific mitigating conditions or whole-person analysis. See, e.g., ISCR Case No. 02-15935 at 5-6 (App. Bd. Oct. 15, 2003); ISCR Case No. 01-12737 at 2-3 (App. Bd. Aug. 7, 2002); and ISCR Case No. 01-07735 at 3-4 (App. Bd. June 25, 2002).

Holding a security clearance involves the exercise of important fiducial responsibilities, among which is the expectancy of consistent trust and candor. Demonstrated integrity and reliability in a person cleared to access classified information is required precisely to inspire trust and confidence in the holder of the clearance. See *Snepp v. United States*, 444 U.S. 507, 511 n.6 (1980). Historically, falsification of a security questionnaire or a written statement given to an investigator conducting a background investigation “constitutes misconduct that casts serious doubts on an applicant’s judgment, reliability, and trustworthiness.” ISCR Case No. 01-07735, *supra*, at 3. Applicant’s fact situation falls squarely within the parameters historically observed by the Appeal Board and generally cannot be mitigated without persuasive evidence of overall trustworthiness and reliability.

Based on the developed facts in the record, mitigating conditions are not available to Applicant to correct his judgment lapses associated with his deliberate omissions of his terminations from employment with Companies A and B in his completed e-QIP and OPM interviews that followed. MC ¶ 17(a), “the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts,” is not available to help Applicant undue the adverse effects of his determined deliberate omissions and misstatements. His multiple omissions and misstatements are neither minor, aged by time, nor voluntarily corrected in his OPM interviews, and they continue to reflect judgment and trust lapses by Applicant incompatible with holding a security clearance.

In evaluating all of the circumstances surrounding Applicant’s withholding of material information about his work terminations in the e-QIP he completed and ensuing OPM interviews, his explanations for his repeated omissions are insufficient to 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). Applicant’s omissions of the involuntary terminations attributable to him are not mitigated under MC ¶ 17(a) of Guideline E.

¹ These OPM interviews were not alleged in the SOR. However, they are pertinent in evaluating Applicant’s motives for omitting his involuntary terminations in his 2014 e-QIP and in making a whole person assessment. See, e.g., ISCR Case No. 12 04554 at 2, Note 1 (App. Bd. July 25, 2004)

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 2014 e-QIP he completed and in his ensuing OPM interviews. Judgment lapses demonstrated in his completion of his e-QIP and OPM interviews are not surmounted by the positive contributions he made with the military commands he was assigned to in Iraq for which he was recognized with excellent endorsements and awards. His positive contributions are not enough to overcome the negative inferences drawn from his repeated omissions in his e-QIP and ensuing OPM interviews about his overall reliability and trustworthiness. Unfavorable conclusions warrant with respect to the allegations covered by SOR ¶ 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

Subparagraphs 1.a-1.b: For Applicant

Subparagraph 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

