

KEYWORD: Guideline E; Guideline E; Guideline J

DIGEST: The Judge’s findings of deliberate falsification are supported by substantial record evidence. There is no right to a security clearance. The Board finds no errors in the Judge’s decision. Adverse decision affirmed.

CASENO: 04-00096.ind

DATE: 04/05/2007

DATE: April 5, 2007

In Re:)	
)	
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SSN: -----)	ISCR Case No. 04-00096
)	
Applicant for Security Clearance)	
)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Ray T. Blank, Jr., Department Counsel

FOR APPLICANT

Kenneth R. Rhoad, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On February 24, 2005, DOHA issued a statement of reasons advising Applicant of the basis for that decision—security concerns raised under Guideline F (Financial Considerations), Guideline E (Personal Conduct), and Guideline J (Criminal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On May 31, 2006, after the hearing, Administrative Judge Michael H. Leonard denied Applicant’s request for a

security clearance. Applicant timely appealed pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raised the following issue on appeal: whether the Judge erred in finding that Applicant had intentionally falsified his security clearance application and whether the Judge's unfavorable clearance decision under Guidelines E and J was arbitrary, capricious, or contrary to law.¹ We affirm the decision of the Judge.

Whether the Record Supports the Administrative Judge's Factual Findings

A. Facts

The Judge made the following findings that are pertinent to this appeal: In 2002, Applicant filled out his security clearance application. Question 36 of the application required him to state whether, within the previous seven years (which dated back to October 10, 1995) he had had a lien placed against him for failure to pay taxes or for other debts. Applicant answered this question "no." Question 38 required him to state whether he had any debts over 180 days delinquent. Applicant stated only that he had a \$1600 credit card debt. Question 39 required Applicant to state whether he was currently over 90 days delinquent on any debts. Applicant answered the question "no."

In answering these questions, Applicant did not state that the Internal Revenue Service had placed a lien against him in 1998 for failure to pay taxes in tax years 1991, 1992, and 1996.² Applicant explained to the investigator that he believed that he only had to list debts that arose within the seven year window, rather than debts that were ongoing. In responding to interrogatories, Applicant attributed his false answer under question 36 to poor memory. At the hearing, he initially stated that he was unaware of the 1998 tax lien, although he subsequently admitted that his employer told him about it. Decision at 4.

B. Discussion

The Appeal Board's review of the Judge's finding of facts is limited to determining if they are supported by substantial evidence—such relevant evidence as a reasonable mind might accept as adequate to support such a conclusion in light of all the contrary evidence in the record." Directive ¶ E3.1.32.1. "This is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's findings from being supported by substantial evidence." *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620-21, 86 S. Ct. 1018, 16 L. Ed. 2d 131 (1966)). In evaluating the Judge's finding, we give deference to the Judge's credibility determinations. Directive ¶ E3.1.32.1.

We have examined the challenged findings of fact in light of the record evidence. It is clear, and Applicant does not now deny, that he answered the questions at issue incorrectly. The Judge noted Applicant's inconsistent statements as to his awareness of the 1998 tax lien. He also took into account the gravity and the ongoing nature of Applicant's problems with the IRS as establishing that he could not reasonably have believed that his answers to question 38 and 39 were truthful.

¹The Judge's favorable decision under Guideline F is not at issue on appeal

²The Judge also found that the IRS placed a tax lien against Applicant in 1995 for tax years 1988, 1990, and 1993.

Additionally, the Judge was in a position to observe Applicant's demeanor and assign it appropriate weight in evaluating the case. See Directive ¶ E3.1.32.1. (“[T]he Appeal Board shall give deference to the credibility determinations of the Administrative Judge. . .”). Accordingly, we conclude that the Judge's findings of deliberate falsification are supported by substantial record evidence.

Whether the Record Supports the Administrative Judge's Ultimate Conclusions

A Judge is required to “examine the relevant data and articulate a satisfactory explanation for” the decision, “including a ‘rational connection between the facts found and the choice made.’” *Motor Vehicle Mfrs. Ass'n. of the United States v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)). The Appeal Board may reverse the Judge's decision to grant, deny, or revoke a security clearance if it is arbitrary, capricious, or contrary to law. Directive ¶ E3.1.32.3. Our scope of review under this standard is narrow and we may not substitute our judgment for that of the Judge. We review matters of law *de novo*.

There is no right to a security clearance. See *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). Once the government raises security concerns under the Directive, the burden of persuasion shifts to the applicant to establish that it is clearly consistent with the national interest for him to receive a clearance. See Directive ¶¶ E3.1.13; E3.1.14; EO 10865 (Feb. 20, 1960)(as amended). In the instant case, the Judge properly concluded that Applicant's conduct, as reflected in the record, raised security concerns under Guideline E, specifically Personal Conduct Disqualifying Condition (PCDC) 2.³ He also properly concluded that the evidence establishes concerns under Guideline J.⁴ The Judge stated that Applicant's explanations for his false answers contain “too many inconsistencies,” undermining his credibility and impairing his effort to meet his burden of persuasion. After considering Applicant's arguments on appeal, we find no error in the Judge's decision. As the trier of fact, the Judge must weigh the evidence as a whole and decide whether the favorable evidence outweighs the unfavorable evidence, or *vice versa*. An applicant's disagreement with the Judge's weighing of the evidence, or an ability to argue for a different interpretation of the evidence, is not sufficient to demonstrate the Judge weighed the evidence or reached conclusions in a manner that is arbitrary, capricious, or contrary to law. See ISCR Case No. 04-04132 (App. Bd. Jan. 26, 2007).

³“The deliberate omission, concealment, or falsification of relevant and material facts from any personnel security questionnaire...” Directive ¶ E2.A5.1.2.2.

⁴Directive ¶ E2.A10.1.1.

Order

The decision of the Judge denying Applicant a clearance is AFFIRMED.

Signed: Michael Y. Ra'anan
Michael Y. Ra'anan
Administrative Judge
Chairman, Appeal Board

Signed: William S. Fields
William S. Fields
Administrative Judge
Member, Appeal Board

Signed: James E. Moody
James E. Moody
Administrative Judge
Member, Appeal Board