

KEYWORD: Guideline F; Guideline E

DIGEST: When evaluating the deliberate nature of an applicant's omissions a Judge consider the applicant's mens rea in light of the entirety of the record evidence. Adverse decision affirmed.

CASENO: 15-01070..a1

DATE: 03/09/2016

DATE: March 9, 2016

In Re:)
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 -----) ISCR Case No. 15-01070
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 Applicant for Security Clearance)
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APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

Ryan C. Nerney, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On August 1, 2015, DoD issued a statement of reasons (SOR) advising Applicant of the basis for that

decision—security concerns raised under Guideline F (Financial Considerations) and Guideline E (Personal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a decision on the written record. On December 23, 2015, after considering the record, Defense Office of Hearings and Appeals (DOHA) Administrative Judge David M. White denied Applicant’s request for a security clearance. Applicant appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raised the following issues on appeal: whether the Judge’s findings of fact contained errors and whether the Judge’s adverse decisions was arbitrary, capricious, or contrary to law. Consistent with the following, we affirm.

The Judge’s Findings of Fact

Applicant retired from the U.S. military in 2012 and has worked for his current employer ever since. Applicant’s SOR alleged one delinquent mortgage account, which the Judge resolved in his favor based upon evidence that Applicant had cured the delinquency. The SOR also alleged other debts that had been opened between 1998 and 2007 and that became delinquent between 2008 and 2012. Applicant contends that these debts were the result of identity theft. He did not provide corroboration for his claim to have contacted the companies involved after his clearance interview in 2012. He did nothing further until he received the SOR, at which point he hired an attorney to challenge the debts. He signed an Identity Theft Victim’s Complaint and Affidavit, in which he stated that he had not filed a complaint with law enforcement officials regarding the matter. One credit reporting agency deleted some debts from Applicant’s report, and a creditor sent Applicant a letter certifying that one credit card account had been used fraudulently. The Judge entered favorable findings regarding this credit card. However, he found that Applicant’s affidavit does not explain his delay in reporting the theft nor does it provide details to establish that the theft actually occurred.

In completing his security clearance application (SCA), Applicant failed to disclose his delinquent debts. He claimed that he did not know that he had any delinquent debts at the time he completed the SCA. He explained his ignorance of the mortgage delinquency by attributing it to a frequent transfer of the loan between lending institutions, which prevented his automatic payments from going through. The Judge found, however, that at the time he completed the SCA the particular lender had held the loan for four years and that Applicant’s payments had been delinquent for 15 months. “It would strain credulity to conclude that Applicant neither received notice from the lender nor realized that more than \$10,000 in extra funds remained in his bank account due to missed payments.” Decision at 4. He found that Applicant’s own evidence, a credit report included in Applicant Exhibit A, showed that at the time he signed his SCA Applicant had been more than 120 days delinquent on his mortgage.

The Judge also found that Applicant’s claims of ignorance regarding his other delinquent debts were not persuasive. He noted the length of time over which the accounts were opened and over which they became delinquent. “All of the accounts reflect lengthy periods during which the purported identity thief made timely payments toward the balances due, before failing to pay as

required.” *Id.* He stated that Applicant did not provide enough information to lend credibility to his claim not to have known about his debts at the time he completed his SCA.

There is no evidence of financial counseling, a budget, the quality of Applicant’s duty performance, or track record regarding handling sensitive information. He stated that Applicant had submitted no character evidence concerning his judgment, trustworthiness, or reliability. The Judge also noted that, insofar as Applicant had elected a decision on the written record, he did have an opportunity to evaluate Applicant’s demeanor.

The Judge’s Analysis

As stated above, the Judge resolved the mortgage debt and one credit card debt in Applicant’s favor. However, he reached unfavorable findings for the other debts, concluding that Applicant’s claims of identity theft were not credible. He also found that Applicant was not credible in claiming to have been ignorant of the debts alleged in the SOR. The Judge stated that Applicant is a person with extensive experience in applying for security clearances and that he offered “no believable rationale for ignorance of substantial delinquent mortgage and consumer debts.” *Id.* at 7. The Judge found that Applicant’s omissions from the SCA were deliberate.

Discussion

Applicant challenges the Judge’s finding that his omissions from the SCA were deliberate. We examine a Judge’s findings to see if they are supported by “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the same record.” Directive ¶ E3.1.32.1. When evaluating the deliberate nature of an applicant’s omissions or false statements, a Judge should consider the applicant’s *mens rea* in light of the entirety of the record evidence. *See, e.g.*, ISCR Case No. 14-04226 at 3 (App. Bd. Aug. 18, 2015).

In the case before us, the Judge cited to evidence that at the time Applicant completed the SCA the same mortgage lender had held his account for several years. A credit report supports this finding. Applicant’s Credit Report dated August 2012, at 5. The Judge’s conclusion that it is implausible that Applicant had no notice of his delinquency in making his mortgage payments, either from the lender or from examining his bank account, is sustainable, given the record that was before him. Concerning the other debts, we note Applicant’s own evidence, the letter from his attorney, which states that these accounts were not merely stolen, but were actually opened, by an identity thief. Letter from Attorney, dated October 26, 2015. Applicant’s credit reports show that many of these debts became delinquent after several years had elapsed from the date they were opened. One, in fact, was opened in 1998. *See, e.g.*, Credit Report, *supra*, at 6. It is reasonable to conclude from this document that, prior to its becoming delinquent, the accounts were paid satisfactorily. A reasonable person could conclude, as did the Judge, that it is unlikely that a thief would open an account and apparently make payments on it on Applicant’s behalf for years before letting it become

delinquent.¹ Accordingly, the Judge's conclusion that Applicant likely knew about his delinquencies at the time he submitted his SCA is consistent with the record that was before him. His finding about the deliberate nature of these delinquencies is sustainable.

Applicant challenges the Judge's conclusion that his claims of identity theft were not believable. We give deference to a Judge's credibility determinations. Directive ¶ E3.1.29. For similar reasons to those addressed above, we find no basis to disturb the Judge's conclusion that Applicant's presentation lacked credibility. We also note the Judge's finding that Applicant claimed to have become aware of the purported identity theft during his clearance interview, which took place in 2012 (*see* Applicant's written statement, dated October 27, 2015, included in Applicant Exhibit A) yet undertook no substantive actions to address this matter until he received the SOR in August 2015. We have often noted that the timing of debt payments is relevant in evaluating an applicant's case for mitigation, in that an applicant who waits until his clearance is in jeopardy before resolving debts might be lacking in the judgment expected of those with access to classified information. *See, e.g.*, ISCR Case No. 14-01243 at 3 (App. Bd. Jun. 18, 2015). Similarly, timing is also relevant in evaluating the credibility of Applicant's contention that some person or persons fraudulently used his credit card accounts to acquire a substantial amount of debt in Applicant's name. Applicant's failure to act for three years raises a reasonable suspicion that his challenge to the legitimacy of his debts was merely an effort to protect his clearance. The record supports the Judge's conclusion that Applicant's contentions, without more, were not worthy of belief.

Applicant has cited to a Hearing Office case that, he contends, supports his case for a clearance. We have given this case due consideration as persuasive authority. However, Hearing Office cases are not binding on other Hearing Office Judges or on the Appeal Board. *See, e.g.*, ISCR Case No. 14-03747 at 3 (App. Bd. Nov. 13, 2015). Applicant cites to evidence that, he believes, the Judge failed to consider, such as his contention that he had been a victim of identity theft, that he had hired an attorney to assist him in challenging the debts, that he served for many years in the military, etc. Applicant's brief is not enough to rebut the presumption that the Judge considered all of the evidence in the record. *See, e.g.*, ISCR Case No. 14-06093 at 3 (App. Bd. Dec. 4, 2015). Applicant challenges the Judge's weighing of the evidence, particularly regarding his claims to have been a victim of identity theft. However, an ability to argue for an alternative interpretation of the evidence is not sufficient to show that the Judge's weighing of the evidence was arbitrary, capricious, or contrary to law. *See, e.g.*, ISCR Case No. 14-06440 at 4 (App. Bd. Jan. 8, 2016).

The Judge examined the relevant data and articulated a satisfactory explanation for the decision. The decision is sustainable on this record. "The general standard is that a clearance may be granted only when 'clearly consistent with the interests of the national security.'" *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). *See also* Directive, Enclosure 2 ¶ 2(b): "Any doubt concerning personnel being considered for access to classified information will be resolved in favor of the national security."

¹A credit report is generally sufficient to establish a *prima facie* case that an applicant owes the debts listed therein, thereby raising concerns under Guideline F. *See, e.g.*, ISCR Case No. 14-03612 at 3 (App. Bd. Aug. 25, 2015).

Order

The Decision is **AFFIRMED**.

Signed: Michael Y. Ra'anan

Michael Y. Ra'anan
Administrative Judge
Chairperson, Appeal Board

Signed: Jeffrey D. Billett

Jeffrey D. Billett
Administrative Judge
Member, Appeal Board

Signed: James E. Moody

James E. Moody
Administrative Judge
Member, Appeal Board