

KEYWORD: Guideline F; Guideline E

DIGEST: Debts may fall off credit reports for various reasons, including the passage of time. The fact that a debt no longer appears on a credit report does not establish any meaningful, independent evidence of the disposition of the debt. Adverse decision affirmed.

CASENO: 15-07979.a1

DATE: 05/30/2017

DATE: May 30, 2017

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| In Re:<br><br>-----<br><br>Applicant for Public Trust Position | )<br>)<br>)<br>)<br>)<br>)<br>) | ADP Case No. 15-07979 |
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**APPEAL BOARD DECISION**

**APPEARANCES**

**FOR GOVERNMENT**

James B. Norman, Esq., Chief Department Counsel

**FOR APPLICANT**

*Pro se*

The Department of Defense (DoD) declined to grant Applicant a trustworthiness designation. On May 8, 2016, DoD issued a statement of reasons (SOR) advising Applicant of the basis for that decision—trustworthiness 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 hearing. On March 3, 2017, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Matthew E. Malone denied Applicant’s request for a trustworthiness designation. Applicant appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raised the following issue on appeal: whether the Judge's decision was arbitrary, capricious, or contrary to law. Consistent with the following, we affirm.

### **The Judge's Findings of Fact**

Applicant is a 57-year-old employee of a defense contractor. His most recent divorce ended in 2014, after a three-year separation.

The Government alleged Applicant had 18 delinquent debts totaling about \$15,000. A credit report documents those debts. Applicant admitted some of the debts in his response to the SOR. In 2015, he submitted an electronic questionnaire for investigations processing (e-QIP) in which he did not list any of his debts in response to the financial questions. He denied falsifying his e-QIP, claiming he did not know about the debts because he did not review his credit report before completing the application.

During a background interview in 2015, Applicant affirmed his responses in the e-QIP. When the investigator confronted him with the contents of a credit report, Applicant was able to provide details about two debts (SOR ¶¶ 1.a and 1.b). He stated he was completely unfamiliar with some of the debts or was unaware marital debts became delinquent. He attributed the debts to his ex-wife's financial management. He also testified that his wife won a significant amount of money in a lottery around the time they separated. She agreed to pay their debts if he agreed not to pursue any share of the lottery winnings. He did not present any documentation of an agreement made as part of their separation or divorce. He claims two debts are attributable to medical care provided to his adult son, who is his namesake.

At the conclusion of the background interview, he stated his intention to pull his credit report and contact creditors to make arrangements for payment or other resolutions. The record contains no information showing he contacted the creditors or challenged any debts until after the SOR was issued. All of his claims about the status of the debts are based on a credit report from May 2016.

In 2015, Applicant's son was injured in an accident and was unable to support his family. Applicant provided his son about \$1,000 per month for about a year. There is no indication that Applicant has incurred any new past-due debts. References from coworkers and associates show he has a good reputation at work and in the community for trustworthiness and integrity.

### **The Judge's Analysis**

As of the hearing, numerous debts attributable to Applicant remain unresolved. In about 2011, he experienced unforeseen circumstances when he and his third wife separated. His claim that his ex-wife was responsible for paying their marital debts is not supported by any objective evidence. The record as a whole shows that Applicant did not address his finances in a timely, productive, or substantive way until after it was clear his debts might adversely impact his eligibility for a position of trust. He did not demonstrate that his financial problems are under control. He disputes many of the debts simply because they do not appear on his May 2016 credit report. He did not meet his burden of producing information that refutes or mitigates the trustworthiness concerns about his finances.

Applicant denied the falsification allegation. He completed similar questionnaires at other times in his career. He provided conflicting and unsubstantiated information about what he believed were his obligations regarding the debts from his third marriage. His failure to mention until the hearing something as unique as his ex-wife's lottery winning as a basis for believing the largest debts were paid undermines his credibility. His failure to list the debts in SOR ¶¶ 1.a and 1.b shows he intended to conceal the true scope of his financial problems. Mitigating Conditions 17(a)<sup>1</sup> and 17(b)<sup>2</sup> do not apply. He affirmed his e-QIP responses before being confronted with the delinquent debts in his credit report. He did not rely on anyone's advice in answering the e-QIP and persists in his claim that he was unaware of the debts that should have been reported.

## **Discussion**

Applicant's brief contains information that was not submitted to the Judge. We cannot consider such new evidence on appeal. Directive ¶ E3.1.29.

Applicant contends that he presented a more recent credit report that differs from the one that the Government offered into evidence. The fact that Applicant can argue for an alternative interpretation of the evidence is alone not sufficient to demonstrate error. *See, e.g.*, ISCR Case No. 03-20327 at 2 (App. Bd. Oct 26, 2006). The credit report offered by the Government as well as Applicant's admissions regarding some of the debts provided a sufficient basis for the Judge to conclude that Disqualifying Conditions 19(a) "inability or unwillingness to satisfy debts" and 19(c) "a history of not meeting financial obligations" applied and for the burden to shift to Applicant to present evidence to rebut, explain, extenuate, or mitigate those trustworthiness concerns. Directive E3.1.15. We find no error in the Judge's conclusion that Applicant's reliance on a later credit report failed to mitigate the security concerns. In the past, the Appeal Board has held that a credit report, in and of itself, may not be sufficient to meet an applicant's burden of persuasion as to mitigation. Debts may fall off credit reports for various reasons, including the passage of time. The fact that a debt no longer appears on a credit report does not establish any meaningful, independent evidence of the disposition of the debt. *See, e.g.*, ISCR Case No. 14-03612 at 3 (App. Bd. Aug. 25, 2015).

Applicant argues the Government violated his rights by trying to introduce a credit report at the hearing and expresses a concern that his personal information from that credit report may have been compromised. Appeal Brief at 2. Applicant is apparently referring to a credit report that the Government offered into evidence, but withdrew before the Judge made a ruling on its admissibility. Tr. at 28-32. The Board has no jurisdiction to rule on Applicant's concern regarding the Government's procurement and handling of that credit report, but we note that there is a presumption that Government officials carry out their duties properly and in good faith. *See, e.g.*, ISCR Case No. 02-20947 at 3 (App. Bd. Jun. 18, 2004).

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<sup>1</sup> Directive, Enclosure 2 ¶ 17(a) states: "the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts[.]"

<sup>2</sup> Directive, Enclosure 2 ¶ 17(b) states: "the refusal or failure to cooperate, omission, or concealment was caused or significantly contributed to by improper or inadequate advice of authorized personnel or legal counsel advising or instructing the individual specifically concerning the security clearance process. Upon being made aware of the requirement to cooperate or provide the information, the individual cooperated fully and truthfully[.]"

The balance of Applicant's arguments regarding the financial trustworthiness concerns amount to a claim that the Judge mis-weighed the evidence. For example, he argues that the medical debts are the responsibility of his son who has the same first, middle, and last names as him and that he wrote letters to some creditors offering payment plans but has not received responses back from them. The Judge made findings of fact relating to those matters. As the trier of fact, the Judge has to weigh the evidence as a whole and decide whether the favorable evidence outweighs the unfavorable evidence, or *vice versa*. A party'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, e.g.*, ADP Case No. 13-00584 at 3 (App. Bd. Apr. 24, 2014).

Applicant claims that his due process rights were violated because he did not have an opportunity to cross-examine the female investigator who conducted his background interview. He also claims he was discriminated against based on his gender because the female investigator asked him improper questions about his latest divorce and made inappropriate comments about men. We note that he did not raise these issues earlier in this proceeding.<sup>3</sup> At the hearing, he did not object to the admission of the summary of the background interview into evidence and adopted it as a summary of the matters discussed during the interview. Tr. at 26. By adopting the summary of the interview at the hearing, Applicant eliminated the need for the Government to call a witness to authenticate that document (Directive E3.1.20), and the Government was not required otherwise to call the investigator as a witness. Furthermore, Applicant has not identified any particular fact in the summary of the interview that is inaccurate. In short, Applicant alleged an error occurred during his background investigation, but failed to proffer or establish how that error may have harmed him. Based on our review of the record, we conclude Applicant has failed to make a *prima facie* showing of a due process violation.

Applicant contends the Government did not prove he intentionally omitted information from his e-QIP. Specifically, he asserts the Government produced no evidence to show he was aware of the debts on his credit report and that he tried to hide them. 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. 14-04198 at 2 (App. Bd. Apr. 26, 2017). As a practical matter, a finding regarding an applicant's intent or state of mind may not always be based on an applicant's statements, but rather may rely on circumstantial evidence. It is not mere speculation or surmise for a Judge to make a finding of fact about an applicant's intent or state of mind based on circumstantial evidence. To the contrary, it is legally permissible to do so. *See, e.g.*, ISCR Case No. 06-21972 at 3 (App. Bd. Nov. 6, 2009). Of note, the Appeal Board also gives deference to a Judge's credibility determinations. Directive E3.1.32.1. From our review of the record, the Judge's conclusion that Applicant deliberately falsified his e-QIP is based on substantial evidence, or constitute reasonable inferences that could be drawn from the record. *See, e.g.*, ISCR Case No. 15-07277 at 3 (App. Bd. Apr. 26, 2017).

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<sup>3</sup> As noted above, the Directive E3.1.29 prohibits us from considering new evidence on appeal. We have in the past, however, considered such evidence concerning the threshold issues of jurisdiction or due process. *See, e.g.*, ISCR Case No. 14-00812 at 2 (App. Bd. Jul. 8, 2015).

The Judge examined the relevant evidence and articulated a satisfactory explanation for the decision. The decision is sustainable on this record. The standard applicable to trustworthiness cases is that set forth in *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988) regarding security clearances: such a determination “. . . may be granted only when ‘clearly consistent with the interests of the national security.’” *See, e.g.*, ADP Case No. 14-03541 at 3 (App. Bd. Aug 3, 2015). *See also Kaplan v. Conyers*, 733 F.3d 1148 (Fed. Cir. 2013), *cert. denied*.

### **Order**

The Decision is **AFFIRMED**.

Signed: Michael Ra’anan  
Michael Ra’anan  
Administrative Judge  
Chairperson, Appeal Board

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

Signed: James F. Duffy  
James F. Duffy  
Administrative Judge  
Member, Appeal Board