KEYWORD: Guideline E; Guideline F

DIGEST: The Judge's material findings about Applicant's failure to disclose his former employment on his SCA, including that he did so out of "insecurity and fear" and "thought it was a waste of time to fill out the paperwork[,]" are supported by substantial evidence. Adverse decision affirmed.

CASENO: 11-07487.a1

DATE: 08/17/2018

DATE: August 17, 2018

In Re:	)	
	)	
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	)	
	)	
Applicant for Security Clearance	)	
	)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT
James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT
I. Charles McCullough, III, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On March 11, 2015, DoD issued a statement of reasons (SOR) advising Applicant of the basis for that decision -- security concerns raised under Guideline E (Personal Conduct) and Guideline F (Financial Considerations) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). On February 24, 2016, and November 28, 2016, Department Counsel amended the SOR by adding Guideline F allegations. Applicant requested a hearing. On April 27, 2018, after the hearing, Administrative Judge Arthur E. Marshall, Jr., denied Applicant's request for a security clearance. Applicant appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raised the following issue on appeal: whether the Judge's adverse decision was arbitrary, capricious, or contrary to law.[1] As amended, the SOR alleged nine Guideline E allegations and 26 Guideline F allegations. The Judge found against Applicant on four falsification allegations under Guideline E and against him on 21 delinquent debt allegations under Guideline F. The Judge found in favor of Applicant on the remaining SOR allegations that have not been raised as an issue on appeal and are not discussed further in this decision. Consistent with the following discussion, we affirm the Judge's decision.

The Judge's Findings of Fact

Applicant is a company executive in his early 40s who is pursuing doctorate degrees. He honorably served in the U.S. military for four years. He is divorced and has four minor children.

In 2008, Applicant completed a security clearance application (SCA), which was not the first that he has submitted. In responding to the SCA question that asked him to list each of his employment activities for the past seven years, he did not disclose a position he held with a defense contractor from late 2004 to late 2005. "When asked whether he purposefully excluded this information, he conceded he did so out of 'insecurity and fear' (Tr. 38-39) He also noted that he 'thought it was a waste of time to fill out the paperwork.' (Tr. 38-39)." Decision at 2.

In the SCA, Applicant responded "No" to the question that asked whether, in the past seven years, he was "1. Fired from a job. 2. Quit a job after being told you would be fired. 3. Left a job by mutual agreement following allegations of misconduct. 4. Left a job by mutual agreement following allegations of unsatisfactory performance. 5. Left a job for other reasons under unfavorable circumstances. By answering 'no,' Applicant failed to disclose that he left the job noted above by mutual agreement following an involuntary termination, which he contested, and allegations of conflict of interest." Decision at 2-3. When asked if the termination was involuntary,

[1] Applicant's appeal brief was submitted in a timely manner on June 11, 2018. On July 27, 2018, the law firm representing Applicant sent a letter to the Appeal Board indicating a new lawyer has been assigned to represent Applicant. The letter also submitted a number of documents that are not part of the record and makes additional arguments on behalf of Applicant. The letter arrived after the briefing process closed and, therefore, was not timely. It contains new evidence that the Appeal Board is prohibited from considering. Directive ¶ E3.1.29. Furthermore, the Directive authorizes only one brief from each party. *See, e.g.*, ISCR Case No. ISCR Case No. 12-09389 at 3, n.1 (App. Bd. Sep. 18, 2015).

he stated, "there was for a time a way of looking at it that way, but it was unwound . . . should never have happened . . . And the official record [now] states that it didn't happen." Decision at 3, citing Tr. 43. He provided a positive letter of recommendation from the vice president of that former company.

In the SCA, Applicant responded "No" to the question that asked whether he ever had any contacts with a foreign government or its representatives other than on official U.S. Government business. In doing so, he failed to disclose that, during a trip to a foreign country in the fall of 2004, he had contact with foreign government and local officials for the purpose of soliciting business from them. He concluded he had "nothing to report" because he did not specifically remember any of the foreign officials and did not have ongoing contact with them. Decision at 3.

In the SCA, Applicant responded "No" to the question that asked whether he had been a party to any public record civil court actions in the last seven years. However, he was a defendant in a lawsuit brought by a company in a state county court in about 2006. He contends he answered this question correctly because the suit was brought by a former friend and colleague and never went to trial, but the question does not asked whether the lawsuit went to trial. "Applicant's answer obscured the truth." Decision at 4.

Of the 21 alleged debts for which the Judge found against Applicant, 15 were student loans with unclear status; one is a charged-off second mortgage for about $100,000 with an unclear status; two are unpaid state tax liens totaling about $77,000; one is a child support account in arrears; and two are small cable television collection accounts that are the same debt. Some of the student loans date back to 2005, and were previously in deferment and rehabilitation. Applicant claimed his student loans are in deferment because he is attending school; however, there is no documentation that he was in school, only evidence he registered for upcoming courses. After the hearing, Applicant noted in an email that two of the student loans were being paid by auto-debit and offered various telephone contacts for verification, but the burden was on him—not Department Counsel or the Judge—to establish verification.

Applicant's ex-wife lives in the home with the charged-off second mortgage. He was unable to make payments on the mortgage because of financial issues at work. The last payment on the mortgage was made in 2012. He is in negotiations to settle the mortgage debt and showed he emailed his attorney about the matter. He offered no documentary evidence from the lender about its status. He presented a document showing the child support account remains in arrears. He and his company have the means to pay the tax liens but have not done so as a business strategy.

The Judge's Analysis

Applicant's SCA omissions were intentional and show he exercised a cavalier attitude about the SCA process. While any tensions between Applicant and his former company have been subsequently ameliorated, the fact remains that he was let go from that company "under a cloud," the truth may have been embarrassing, and his SCA answer regarding the termination was patently false. Decision at 9. Applicant had significant foreign governmental contacts on a business trip and,

even though he could not remember specific names of officials, he was not candid in his response and did not put investigators on notice of the situation. The question that asked if he was a party in any public record civil court action was not confusing. It did not ask whether he won or lost in that proceeding or whether it went to trial. Given that he is well-educated and intelligent, his omission about being a party to a court action appears to be intentional. Under these facts, no mitigating conditions apply.

A number of Applicant's debts either remain unpaid or their status is unclear. While he made some progress, his strategy is difficult to discern. Even though he appears to have the resources to make additional progress, some obligations remain outstanding or deferred as a strategy. Such a strategy does little to demonstrate financial responsibility or good judgment. He failed to explain what, if any, reasonable plan he has for addressing his remaining debts.

Discussion

Regarding the falsification allegation relating to Applicant's failure to disclose on his SCA that he was employed by a defense contractor from 2004-2005, he contends that his exchange with the Judge was "garbled" and argues a remand is needed to clarify his testimony. Appeal Brief at 4-7. In support of his argument, he quotes the following exchange:

> [Judge]: -- when you filled out Section 11 --
>
> [Applicant]: Yes.
>
> [Judge]: -- you didn't include the [the specified defense contractor] --
>
> [Applicant]: Yes.
>
> [Judge]: for [late] 2004 to [late] 2005.
>
> [Applicant]: Yes, sir.
>
> [Judge]: Why didn't you?
>
> [Applicant]: I -- because the form goes in a linear way. I didn't know how to stack the paperwork sideways. And then there was some goofy stuff that was going on with [the specified defense contractor] that we'd just kind of wrapped up. So the Government at the [specific location] had offered for me to take over the contract illegally. [Applicant identified the amount of the contract, the name of the program, its purpose, and the government agency that developed it.] My kid brother actually runs all the security over there.
>
> [Judge]: But --

[Applicant]: And so --

[Judge]: -- was it just an oversight or what --

[Applicant]: It -- it was just --

[Judge]: I understand. I remember because this was the paper --

[Applicant]: Yes, sir.

[Judge]: -- the SF-86.

[Applicant]: Yes.

[Judge]: Okay, I remember the format --

[Applicant]: Yes.

[Judge]: -- and how it worked. Did you purposefully exclude it?

[Applicant]: Yes. I'm just going to go with yes. And --

[Judge]: Okay. And the reason was?

[Applicant]: Insecurity and fear. And also I was overworked. I was over-tired. I wasn't sleeping and I thought it was a waste of time to fill out the paperwork.

[Judge]: So you intentionally omitted it?

[Applicant]: Inasmuch as that I – I was contiguous in all my employment dates, but I didn't really know the right way and I didn't really have the brain power at the time to think about how do you interleave, interweave these things. And so I'm just going to own -- I own it. I didn't fill it out the right way. There was some of it that was intentional and there was some of it that was a little bit difficult.

[Judge]: And, well, I guess my problem here is --

[Applicant]: Yes, sir.

[Judge]: -- the term "intentional." Were you -- was it your intent to just delete it because you were confused or was it your intent to mislead?

> [Applicant]: No, not my intent to mislead. Never mislead. I mean, we're here. I am happy to go through and share openly about my entire life. My life is an open book.[2]

Applicant's testimony is understandable. While both the Judge and Applicant may have at times cut each other off during this exchange, interruptions of that nature are common while witnesses are testifying.[3] In this case, the Judge gave Applicant a reasonable opportunity to answer the questions and explain his position. We find no reason to remand this case to clarify Applicant's testimony.

Applicant challenges the Judge's conclusions that his SCA omissions were deliberate. He basically argues the evidence is insufficient to support the Judge's conclusions. He contends that he did not have the intent to mislead by failing to disclose his defense contractor position from 2004-2005 and did not understand how to account on the SCA for the having more than one employment position at the same time. As to that latter claim, we note that Applicant did account for overlapping periods of employment on his SCA. For example, one job he listed was from 08/2003 to present, while another was from 05/2003 to 11/2004. Government Exhibit (GE) 1. It is apparent that Applicant's testimony quoted above contains inconsistencies. A Judge's task is to resolve apparent conflicts in the evidence. *See, e.g.*, ISCR Case No. 14-00281 at 4 (App. Bd. Dec. 30, 2014). While the Judge perhaps should have discussed the conflicting evidence, he is presumed to have considered all of the evidence in the record. *Id*. Applicant has not rebutted that presumption. The Judge's material findings about Applicant's failure to disclose his former employment on his SCA, including that he did so out of "insecurity and fear" and "thought it was a waste of time to fill out the paperwork[,]" are supported by substantial evidence. *See, e.g.*, ISCR Case No. 12-03420 at 3 (App. Bd. Jul. 25, 2014). We resolve this assignment of error adversely to Applicant.

Regarding his failure to disclose the alleged job termination on his SCA, Applicant argues that he completed the contract with that defense contractor in 2005, was released from further contractual obligations, and did not believe he departed that position under unfavorable circumstances. The record contains an affidavit signed by Applicant stating:

> [The employer's program manager], made false claims, stating that [the employer] did not know about my company [name omitted], that there was a conflict of interest between the work I had been conducting for [the employer] and my interest with [my company]. Therefore, [the employer] threatened me and wrongfully terminated my employment in [late] 2005.[4]

Applicant contested that termination. In a settlement agreement in 2006, the employer and Applicant agreed that the employer would expunge Applicant's employment record of any statements that indicated he was terminated because of a conflict of interest or for any other cause,

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[2] Tr. at 37-40.

[3] Similar interruptions occurred when Applicant's Counsel questioned Applicant. *See*, Tr. at 34-36.

[4] GE 12 at 6.

his records would indicate his termination was based on mutual agreement and was amicable, and the employer would provide him with a letter of recommendation.[5] In the SCA, Applicant was asked, in part, whether he "[l]eft a job by mutual agreement following allegations of misconduct." GE 1. In light of the settlement agreement, a question arises whether Applicant may have omitted information about the termination because he believed that subsequent agreement changed the circumstances surrounding the termination and eliminated the "allegations of misconduct." In this regard, it is interesting that Applicant is now arguing that he was not terminated from that job, but instead completed the employment contract. Additionally, we note that beyond the failure to disclose the alleged termination, he also failed to disclose on the SCA that he even held a position with that employer. The multiple nature of Applicant's omissions support a finding that they were deliberate because each is relevant in establishing an intent to conceal information about that employment. *See, e.g.*, ISCR Case No. 14-00978 at 3 (App. Bd. Jun. 16, 2016). We find no reason to disturb the Judge's conclusions that, while any tensions between Applicant and his former company have been subsequently ameliorated, he was let go from that company "under a cloud," the truth about what occurred may have been embarrassing, and his SCA omission regarding the termination was intentional.

As to his failure to disclose the foreign contacts, Applicant argues that, during his foreign trip in 2004, he attended meeting with numerous foreign nationals from different countries, made no attempt to record their names, had no further contact with these individuals, denies any intent to conceal this information from the Government, and did not believe this limited exposure to them was reportable. While Applicant disclosed his trip to that foreign country on his SCA, he did not disclose his contacts with foreign government representatives. In a 2009 affidavit, Applicant stated that he met with the governor of a specific province and met with ministries in that country to inquire about business opportunities. GE 12 at 8. We find no reason to disturb the Judge's conclusion that Applicant had an obligation to report such contacts and put investigators on notice of the situation even though he could not remember specific names of officials.

Concerning his failure to report his involvement in a civil lawsuit, Applicant argues the omission was an honest mistake and should be treated as such. However, the Judge reasonably explained the basis for his findings and, in discounting Applicant's explanation for the omission, pointed out that the pertinent SCA question did not ask whether the court action ever went to trial. Applicant's argument on appeal amounts to a disagreement with the Judge's weighing of the evidence. 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.,* ISCR Case No. 15-00650 at 2 (App. Bd. Jun. 27, 2016).

In his appeal brief, Applicant addresses the Judge's adverse findings on the delinquent debts by stating:

[5] GE 12 at 26-30.

> Applicant asserts that each debt listed in the SOR has been paid in full or is being paid pursuant to an agreement and payment schedule deemed acceptable by the noted creditor, and therefore Applicant would claim mitigation under AG ¶ 20(d). Were this case to be remanded, Applicant would provide evidence to fully mitigate all Guideline F concerns. Noteworthy are Applicant's payment of monies owed for child support; the settlement and payment in full of his second mortgage; settlement and payment on both tax liens; and payment as agreed on all outstanding student loans.[6]

In the above quote, it is unclear whether Applicant is asserting the Judge committed an error, whether he is just requesting an opportunity to submit new evidence, or doing both. We note there is no presumption of error below and the appealing party has the burden of raising and demonstrating factual or legal error by the Judge. To the extent that Applicant may be asserting the Judge erred in his adverse findings or conclusions regarding the delinquent debts, he has failed to meet his burden of persuasion. He has neither challenged any of the Judge's specific findings or conclusions regarding the alleged debts nor identified any record evidence that contravenes those findings or conclusions. Moreover, he failed to demonstrate the Judge weighed the evidence in a manner that is arbitrary, capricious, or contrary to law.[7] *Id.* As to Applicant's apparent request for a remand to submit new evidence, the Appeal Board is only authorized to remand a case to correct an identified error. Directive ¶ E3.1.33.2. It is well settled that, absent a showing that an applicant was denied a reasonable opportunity to prepare for the hearing or was denied a reasonable opportunity to present evidence on his or her behalf, an applicant is not entitled to receive a new hearing just so he or she can have another chance to present his or her case. *See, e.g.*, ISCR Case No. 14-03347 at 3 (App. Bd. May 27. 2016).[8] Applicant has not shown that an error occurred that warrants a remand.

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, Encl. 2, App A ¶ 2(b): "Any doubt concerning personnel being considered for national security eligibility will be resolved in favor of the national security."

Order

[6] Appeal Brief at 9.

[7] Even if an applicant has actually paid his debts or is paying them, a Judge may still consider the circumstances underlying the debts for what they may reveal about the applicant's worthiness for a clearance. *See, e.g.*, ISCR Case No. 14-02394 at 3 (App. Bd. Aug. 17, 2015).

[8] Applicant requested and received two continuances to prepare for the hearing. Decision at 2.

The Decision is **AFFIRMED**.

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

Signed: Charles C. Hale
Charles C. Hale
Administrative Judge
Member, Appeal Board

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