

KEYWORD: Guideline E; Guideline F

DIGEST: The Judge’s adverse decision under Guideline E merely states that Applicant knowingly falsified material facts on his security clearance application by answering “no” to questions 38 and 39. There is record evidence not cited by the Judge which undermines his statement with regard to some of Applicant’s debts. Adverse decision remanded.

CASENO: 05-03472.a1

DATE: 03/12/2007

DATE: March 12, 2007

In Re:)	
)	
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SSN: -----)	ISCR Case No. 05-03472
)	
Applicant for Security Clearance)	
)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Melvin A. Howry, Esq., Department Counsel

FOR APPLICANT

Elizabeth L. Newman, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On July 29, 2005 DOHA issued a statement of reasons advising Applicant of the basis for that decision—security concerns raised under Guideline F (Financial Considerations) and Guideline E (Personal Conduct) pursuant to Department of Defense Directive 5220.6 (Jan. 2, 1992,

as amended) (Directive). Applicant requested a hearing. On June 8, 2006, after the hearing, Administrative Judge Barry M. Sax 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 issues on appeal: whether the Administrative Judge's findings that Applicant falsified answers relating to finances on an October 2003 security clearance application were supported by substantial evidence; and whether the Judge's conclusions were arbitrary and capricious. We remand the Administrative Judge's decision to deny the clearance.

Whether the Record Supports the Judge's Factual Findings

A. Facts

The Administrative Judge ultimately concluded in favor of Applicant under Guideline F regarding five delinquent debts listed in the statement of reasons (SOR). Department Counsel did not appeal the Judge's favorable ruling regarding the underlying debts. Therefore, it is necessary to recite the facts concerning Applicant's indebtedness only insofar as they relate to the falsification issues that form the basis for this appeal.

The Administrative Judge's decision contains no detailed exposition of facts regarding Applicant's alleged falsification of two questions on his security clearance application (SF 86). In his findings of fact, the Judge merely states that Applicant knowingly falsified material facts on his October 13, 2003 security clearance application when responding to Question 38¹ and Question 39² by answering "no." The Judge's decision contains no analysis or discussion of any record evidence or exposition of specific facts that would provide support for these findings. The Judge does not identify the specific debts that Applicant lied about in his findings of fact, but comments made by the Judge in the conclusions section of his decision clearly indicate that he found that Applicant's falsifications extended to all five debts.³

There is evidence in the record, not cited by the Administrative Judge, that is pertinent to the issues raised on appeal. That evidence is as follows:

The debt listed in subparagraph 1.a. of the SOR (a student loan debt in the amount of \$1,507.00) is established in the record by references in a credit report dated June 6, 2005 (Govt. Ex. 4) and in a credit report dated September 12, 2005 (Govt. Ex. 5). On both reports the debt is listed as an unpaid collection item with a list date of March 2004 and a last activity date notation of August 2003. No other objective information about the status of this debt on October 13, 2003, the day Applicant completed his security clearance application, exists in the record. Applicant admitted the debt in his answer to the SOR but made no comments concerning its date of origin or delinquency history. At the hearing, Applicant testified that while he was on active duty with the Navy, the

¹**"Your Financial Delinquencies- 180 days-** In the last 7 years, have you ever been over 180 days delinquent on any debt(s)?"

²**"Your Financial Delinquencies- 90 Days-** Are you currently over 90 days delinquent on any debt(s)?"

³The Administrative Judge's conclusions read in pertinent part: "2.a. and 2.b.- Applicant's overall explanation for not citing the debts alleged under 1.a.- 1.e. is that. . . Applicant's explanations are not persuasive."

Veterans Administration was paying for his education expenses. It was later determined that the government would no longer provide this benefit to Applicant and the bills for his education expenses were then passed on to him. Applicant testified that he was not made aware of this until after he had done the background investigation. (Tr. pp. 19-20).

The debt listed in subparagraph 1.b. of the SOR (a bill from a medical provider in the amount of \$ 80.00) is established in the record by references in the credit report dated June 6, 2005 (Govt. Ex. 4) and in the credit report dated September 12, 2005 (Govt. Ex. 5). On both reports the debt is listed as an unpaid collection item with a list date of July 2004 and a last activity date of May 2004. No other credit report information is contained in the record concerning the status of this debt on October 13, 2003, the day Applicant completed his security clearance application. At the hearing, Applicant placed into evidence a bill (monthly statement) from the health care provider dated April 5, 2004. (App. Ex. C). The bill indicated that Applicant owed \$ 80.44, but also indicated that the account was current as of that date. The bill also indicates that the bill was for goods and services provided in March 2004. Applicant denied that he owed this debt in his answer to the SOR, as he felt it was the responsibility of his insurance provider. Ultimately, he paid the bill himself in August 2005 to get the matter off his credit report (App. Ex. C, Tr. p. 20).

The debt listed in subparagraph 1.c. of the SOR (a debt from a military exchange in the amount of \$413.00) is established in the record by references in the credit report dated June 6, 2005 (Gov. Ex. 4) and in the credit report dated September 12, 2005 (Govt. Ex. 5). The June 6, 2005 credit report indicates that the account was opened in August 1993, the credit information was reported in April 2005, an amount of \$ 222.00 was past due and the date of last account activity was October 1999. The September 12, 2005 credit report indicates that the account was opened in August 1993, the credit information was reported in August 2005, an amount of \$134.00 was past due and the date of the last account activity was October 1999. Both credit reports indicate that the account was closed at Applicant's request on an unspecified date. Applicant admitted the debt in his answer to the SOR but made no comments concerning its date of origin or delinquency history. Applicant made a partial payment on the account in August 2005 (App. Ex. D). Applicant testified at the hearing that he paid the debt off on some unspecified date and he testified to his belief that at the time the debt was paid off he believed it was 30 days late (Tr. p. 21). Applicant submitted documents post-hearing indicating that the account was paid off in April 2006 (App. Ex. H1, H2).

The debt listed in subparagraph 1.d. of the SOR (a debt from the purchase of auto tires with a credit card in the amount of \$1,923.00) is established in the record by references in a credit report dated April 8, 2004. That report lists a debt report date of September 2003, a past due amount of \$1,712.00, and a last activity date of September 1999 (Govt. Ex. 3). The debt is also referenced in the June 6, 2005 credit report where a report date of May 2005 is listed along with a past due amount of \$1923.00 and a last activity date of September 1999. The report also identifies it as a collection account and notes that the creditor has been unable to locate Applicant. (Govt. Ex. 4). The debt is also referenced in the September 12, 2005 credit report where an August 2005 report date is listed along with a past due amount of \$1964 and a last activity date of September 1999. The account is again identified as a collection account. (Govt. Ex. 5). Applicant denied that this was his debt in his answer to the SOR. Later, during his hearing testimony, he acknowledged the debt as being his after conducting some research. He stated that the account originated in the mid to late 1980's and he had not made a payment on the debt since 1990 or 1991. He testified that the last he knew of the account was that it had been written off as a bad debt, and that at the time he filled out his security clearance

application, the debt did not come to mind at all. (Tr. pp. 21, 31). In the Conclusion section of the Judge's decision the Judge made the following sustainable finding of fact:

“1.d - Applicant denied any knowledge of this debt of \$1,923.00 and had begun an investigation to discover the truth (Response to SOR). On November 23, 2003, he sent a letter to the credit reporting service disputing the debt and asking for investigation and response (AX E and AX F), Applicant now realized this is his debt, just one that originated under another creditor's name (Tr at 21). He has set up a payment plan to resolve the outstanding debt (*Id.*)”

Decision at 4.

The debt listed in subparagraph 1.e. of the SOR (an automobile purchase in the amount of \$14,108.00) is established in the record by a reference in the credit report dated April 8, 2004. That report lists the date of the initiation of the debt as June 2003. The 2004 credit report also lists the debt as being current and contains the annotation, “pays as agreed.” (Govt. Ex 3). The two 2005 credit reports indicate that, by then, the account had fallen into arrears and the vehicle had been repossessed. (Govt. Ex 4 and 5).

In his answer to the SOR and in his hearing testimony, Applicant alludes to an awareness of past overdue debts and states that he should have paid more attention when answering the security clearance application questions and done more research into his credit status, but he stated it was not his intention to mislead anyone. (Tr. p. 23). In his answer to the SOR, Applicant indicated that while there were periods in his credit history of late payments for various reasons, he honestly did not recall being late on his debts for the 90 day and 180 periods referenced in the security clearance application. In his answer to the SOR (dated August 7, 2005), Applicant stated that he had recently reviewed a copy of his credit report and noticed that “there has been recorded history of over 180 days late.”⁴ In his hearing testimony, when referencing the 180 day and 90 day time frames on the security clearance application questions, Applicant stated that he was not aware of anything (any debt) “. . . that was lingering on me for these time frames.” (Tr. pp. 22-23).

B. Discussion

The Appeal Board's review of the Administrative Judge's findings of fact is limited to determining if they are supported by substantial record 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 finding from being supported by substantial evidence.” *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620-21 (1966). In evaluating the Administrative Judge's findings, we are required to give deference to the Administrative Judge's credibility determinations. Directive ¶ E3.1.32.1.

On appeal, Applicant argues that there is insufficient record evidence to support the Administrative Judge's findings that Department Counsel established its case with regard to

⁴This particular credit report was never admitted into evidence.

Guideline E. With reference to each of the five debts alleged to be the subject of Applicant's false answers to questions 38 and 39 of the security clearance questionnaire, Applicant asserts that (a) there is no record evidence to establish that the debts had been 180 days old within 7 years or were currently 90 days old when Applicant filled out his security clearance application on October 13, 2003; and (b) there is no record evidence to establish that Applicant had knowledge of the five overdue debts on October 13, 2003. Applicant's arguments have mixed merit.

(a) Applicant persuasively argues that, with regard to the debts alleged in subparagraphs 1.a., 1.b., and 1.e. of the SOR, there is no record evidence that these debts were historically (within 7 years) 180 days delinquent or were 90 days delinquent at the time Applicant completed his answers to Questions 38 and 39. With regard to the debts listed alleged in subparagraphs 1.b. and 1.e. of the SOR, the record evidence cited in preceding paragraphs indicates that there is no evidence that these debts were ever delinquent prior to October 13, 2003. In fact, there is no record evidence to establish that the debt alleged in subparagraph 1.b. even existed on October 13, 2003. Moreover, both debts 1.b. and 1.e. are listed as current on documents prepared subsequent to October 13, 2003. Regarding the debt alleged at subparagraph 1.a. of the SOR, the record evidence indicates that the last activity date on the debt was in August 2003, only two months prior to Applicant's completion of the security clearance application. There is no indication in the record evidence as to when this debt became delinquent or when collection action commenced. Accordingly, the documentary record does not establish that the debt was 180 days delinquent during the 7 year period prior to October 13, 2003 or was 90 days delinquent on October 13, 2003.

Applicant's statements in his answer to the SOR and in his hearing testimony contain nonspecific admissions of awareness of past debt arrearages and general expressions of regret at not researching his finances more thoroughly before answering Questions 38 and 39 on his security clearance application. However, these statements are qualified in that Applicant essentially denies that he had debt arrearages that fell within the parameters of the two questions, and he does not specifically reference any of the debts listed in the SOR. Accordingly, these statements fall considerably short of admissions that would aid in establishing that Applicant was required to divulge these three debts on the security clearance application. Applicant's statements do nothing to fill the evidentiary gap that exists in the written record with regard to the debts alleged in subparagraphs 1.a., 1.b., and 1.e. being historically 180 days delinquent or 90 days delinquent on the date Applicant completed his application.

Before Department Counsel can establish that Applicant answered Questions 38 and 39 on his security clearance application falsely, it must first establish that he answered the questions *incorrectly*. As the preceding analysis of the record evidence indicates, it has failed to do so with regard to the debts alleged in subparagraphs 1.a., 1.b., and 1.e. of the SOR. Regarding these three debts, since there is no record evidence indicating that the three debts fall within the parameters of Questions 38 and 39, the Administrative Judge had no factual or legal basis for finding Applicant falsified the security clearance application by not listing such past due debts in response to Questions 38 and 39. *See, e.g.,* ISCR Case No. 00-0250 at 4 (App. Bd. Jul. 11, 2001).

To the extent that the Administrative Judge articulated a specific rationale in his decision for his findings that Applicant falsified his security clearance application, he did so almost exclusively on the basis of a negative assessment of Applicant's credibility. (Decision at p. 5). However, where the record evidence does not establish that Applicant was required to divulge the three debts on his

security clearance questionnaire, a negative assessment of Applicant's credibility is irrelevant in establishing that Applicant engaged in falsification regarding them. The Board has long held that an Administrative Judge cannot use a credibility determination as a substitute for record evidence. *See, e.g.*, ISCR Case No. 96-0608 at 3 (App. Bd. Aug. 28, 1997). Applicant is correct in asserting that, in the absence of record evidence supporting a controverted SOR allegation, mere disbelief in an applicant's statements is an insufficient basis for the Administrative Judge to find the Applicant engaged in the conduct alleged.

With regard to the debts listed at subparagraphs 1.c. and 1.d. of the SOR, the landscape is somewhat different. According to the entries in the credit reports in evidence, these debts appear much older than the three debts previously discussed, and the credit reports indicate account delinquencies combined with "last activity" dates that, unlike the other three debts, are many years in the past. Moreover, in regard to the debt listed at subparagraph 1.d., Applicant acknowledged during his hearing testimony that the debt arose in the 1980's and he hadn't paid on it since the 1990's. (Tr. At p. 31). Given the state of the record, the Board determines that, with regard to the debts listed in subparagraphs 1.c. and 1.d., there is some evidence from which the Administrative Judge could reasonably infer that the debt delinquencies included 180 and 90 time periods, and consequently could find that Applicant's "no" answers to Questions 38 and 39 were incorrect. Such a finding would not, however, be dispositive of the issue of Applicant's falsification since the mere proof of an omission or an incorrect answer, standing alone, does not establish or prove an applicant's intent or state of mind when the omission or incorrect response occurred. *See, e.g.*, ISCR Case No. 02-23133 at 5 (App. Bd. Jun. 9, 2004). For a finding of falsification to be sustainable, the Judge would still have to make findings about Applicant's culpable state of mind that are reasonably supported by the record evidence.

Notwithstanding the fact that there is record evidence that could support a finding that Applicant was required to report the subparagraph 1.c. and 1.d. debts on his security clearance application, the Board will not affirm the Administrative Judge's overall finding of falsification on the basis of the record evidence regarding these two debts. We decline to do so for the following reasons: (i) as indicated in preceding paragraphs, the Judge's finding of falsification contained no description or analysis of the status of the five debts on October 13, 2003, the components of Question 38 and 39, and no discussion of the issue of whether Applicant was required to report them; (ii) the Judge's finding of falsification contained no comprehensive description or analysis of Applicant's state of mind on October 13, 2003 when he completed the application; (iii) the finding of falsification relies too heavily (indeed, almost exclusively) on the Judge's negative assessment of Applicant's credibility which is, in turn, based upon the Judge's conclusion that Applicant's explanations as to why he completed the security clearance application the way he did were not persuasive (it should be remembered that Applicant's explanations do not address any of the debts specifically and fall short of being an admission that he was required to answer Questions 38 and 39 in the affirmative); and (iv) the Judge's ultimate finding of falsification assumes that Applicant lied as to all five debts listed in the SOR and his negative credibility assessment is based upon that assumption— in other words, the Judge assessed the number and dollar amount of Applicant's debts

in the aggregate and then concluded that Applicant's explanations were not plausible in the face of the totality of this evidence.⁵

(b) Applicant asserts on appeal that there is no record evidence that Applicant had knowledge of the five overdue debts on October 13, 2003. Given the Board's ruling that there is no basis for the Administrative Judge to find falsification regarding the subparagraph 1.a., 1.b., and 1.e. debts because of a lack of evidence that the debts were actually 90 or 180 days overdue, the issue of Applicant's knowledge of them is essentially moot. Regarding the subparagraph 1.c. and 1.d. debts, Applicant's argument that there is no evidence that could establish Applicant's knowledge of them is incorrect. The issue of Applicant's knowledge is an issue of Applicant's state of mind. Applicant's denials of any intent to falsify the October 13, 2003 security clearance application are relevant evidence that the Judge, on remand, will be required to consider. However, Applicant's statements about his intent or state of mind are not binding or conclusive on the Judge. As a practical matter, when an applicant denied that he or she engaged in falsification, proof of the applicant's intent or state of mind is rarely based on direct evidence, but often must rely on circumstantial evidence. *See, e.g.*, ISCR Case No. 02-15935 at 6 (App. Bd. Oct. 15, 2003). 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 for a Judge to make a finding of falsification based on circumstantial evidence of an applicant's intent or state of mind. *See, e.g.*, ISCR Case No. 00-0601 at pp. 2-3 (App. Bd. Sep. 21, 2001); ISCR Case No. 99-0194 at 3 (App. Bd. Feb. 29, 2000). *See also* Black's Law Dictionary, 6th edition (West Publishing, 1990) at p. 810 (noting that intent is "[a] mental attitude which can seldom be proved by direct evidence, but must ordinarily be proved by circumstances from which it may be inferred"). After a review of the record evidence in the case, the Board declines to rule that, as a matter of law, there is insufficient evidence upon which the Judge can make inferences about Applicant's state of mind concerning the two remaining debts at the time he completed the security clearance application.

Given the Board's rulings in this case, remand of the case to the Administrative Judge is the appropriate disposition. On remand, the Administrative Judge should restrict his inquiry to evidence of falsification only as it relates to the debts alleged in subparagraphs 1.c. and 1.d. of the SOR. In so doing, the Judge should reassess the evidence relating to Applicant's state of mind and the Judge should also reassess Applicant's credibility as it relates to alleged falsification of the remaining debts.

Whether the Record Supports the Administrative Judge's Ultimate Conclusions

An Administrative 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.*

⁵The Board's assertion here is based on the following paragraph from the Conclusions section of the Judge's decision: "Applicant's explanations are not persuasive. Considering the dollar size and nature of the delinquent debts, Applicant's explanations and excuses are simply not credible and do not come close to outweighing the substantial and objective evidence supporting the SOR's financial-related allegations." While this portion of the Judge's decision is not a model of clarity, it appears that he is assessing Applicant's credibility and denials of falsification with reference to an undivided whole of debt evidence. The Board cannot sustain any portion of the Judge's falsification finding under such circumstances after it has ruled that there is no basis for the Judge's finding of falsification regarding three of the five debts alleged.

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 Administrative 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 Administrative Judge. We may not set aside an Administrative Judge’s decision “that is rational, based on consideration of the relevant factors, and within the scope of the authority delegated to the agency. . .” *Motor Vehicle Mfrs. Ass’n*, 463 U.S. at 42. We review matters of law *de novo*.

On appeal, Applicant asserts that the Administrative Judge’s ultimate conclusions in the case were arbitrary, capricious, or contrary to law. To the extent that Applicant’s arguments about the Judge’s conclusions cover the Judge’s resolution of the issue of whether or not Applicant engaged in falsification, those arguments have been addressed in the preceding sections of this decision. In addition, Applicant argues that it was error for the Judge to conclude that any falsifications Applicant may have engaged in were not mitigated.

The Administrative Judge’s decision contains no discussion or analysis of the mitigating factors potentially relevant to this case. The decision contains only the short statement: “*Mitigating Conditions*: none that are established by the record.” Given the Board’s other rulings in the case, on remand, the Judge should reassess the applicability of the Guideline E mitigating conditions as well as the more general considerations listed at ¶ E.2.2.1. of the Directive.

Order

The judgment of the Administrative Judge denying Applicant a clearance is REMANDED.

Signed: Michael Y. Ra’anan

Michael Y. Ra’anan
Administrative Judge
Chairman, Appeal Board

Signed: Jeffrey D. Billett

Jeffrey D. Billett
Administrative Judge
Member, Appeal Board

DISSENTING OPINION OF ADMINISTRATIVE JUDGE JAMES E. MOODY

I have examined the Judge's findings, and have taken especial note of the one quoted by my colleagues concerning Applicant's confusion as to the debt referenced in paragraph 1.d of the SOR. I agree that this finding is sustainable. In my view, the Judge's findings viewed as a whole do not rationally support a conclusion that Applicant intended to deceive in answering the SOR as he did, even as regards the surviving allegations. *See* ISCR Case No. 99-0228 at 5 (App. Bd. Mar. 12, 2001) (An Administrative Judge's decision can be arbitrary and capricious if it fails to articulate a satisfactory explanation for its conclusions, including a rational connection between the facts found and the choice made). I would reverse the decision of the Judge and grant Applicant a security clearance.

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