

KEYWORD: Guideline F; Guideline E

DIGEST: The Judge's error in her findings of fact was harmless. The record contains substantial evidence that Applicant's false statement was deliberate. Applicant did not rebut the presumption that the Judge considered all of the evidence. The interview summary stated that there is nothing in Applicant's record that would subject him to blackmail. This was Applicant's answer to the interviewer's question, not the interviewer's opinion as to Applicant's security eligibility. Adverse decision affirmed.

CASE NO: 12-12139.a1

DATE: 09/13/2016

DATE: September 13, 2016

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In Re:)	
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-----)	ISCR Case No. 12-12139
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Applicant for Security Clearance)	
_____)	

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 security clearance. On April 28, 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 hearing. On June 28, 2016, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Carol G. Ricciardello 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 erred in her findings and whether the Judge's decision was arbitrary, capricious, or contrary to law. The Judge found in favor of Applicant on the Guideline F allegations and one falsification allegation under Guideline E. She found against him on another falsification allegation. Her favorable findings were not raised as an issue on appeal. Consistent with the following, we affirm the Judge's unfavorable decision.

The Judge's Findings of Fact

Applicant, who is 65 years old, retired from the military in 1989 after 20 years of service. He earned a master's degree in 2004. He attributed his financial problems to his 2005 divorce. His ex-wife left him with the children, about \$135,000 in debt, two car payments, and the mortgage payments. He was able to pay the debts until he became unemployed for about six months in late 2008. He later negotiated settlements with many of the creditors and in some cases received an IRS Form 1099-C (cancellation of debt) for the amount he did not pay.

In May 2012, Applicant completed a security clearance application (SCA). He answered "No" to questions that asked if he had any bills or debts turned over to a collection agency; if he had any account or credit card that had been suspended, charged off, or cancelled for failing to pay as agreed; if he had been over 120 days delinquent on any debt; or if he was currently over 120 days past due on any debt. During a background interview, Applicant acknowledged the debts in SOR ¶¶ 1.a (about \$21,800) and 1.d (about \$3,200) became past due in 2005 or 2006, but did not recall any collection information about those accounts. He also could not recall when the debt in SOR ¶ 1.c (about \$17,900) was opened, went past due, or the amount owed. He had made payment arrangements with the creditor to pay \$250 a month to resolve the debt in SOR ¶ 1.c. His intention was to pay off the debts as soon as possible. When Applicant was confronted about five other collection accounts totaling about \$85,000 during the interview, he agreed these accounts belonged to him and indicated they were either paid or were under payment arrangements with the creditors.

In his Answer to the SOR, Applicant wrote the debts in SOR ¶¶ 1.a, 1.c, and 1.d were closed and stated "Account was not delinquent at time of completion of questionnaire." Decision at 4. His Answer contradicted information he provided during his background interview. His credit report of July 2012 also reflected the dates of last activity for debts in SOR ¶¶ 1.a and 1.d was March 2008 and for the debt in SOR ¶ 1.c was May 2012. In a later SOR Answer, Applicant stated that he did not deliberately fail to report the information and completed the SCA during a time at which his mother had suffered a severe stroke that caused in her death in March 2012 and his wife was diagnosed with a serious disease that later caused her death.

At the hearing, Applicant testified that he was aware of the debts in SOR ¶¶ 1.a, 1.c, and 1.d when he completed the SCA. He was aware he had bills that were turned over to collection agencies and some that had been or were more than 120 days delinquent or past due. He explained that his failure to disclose the debts was because he was going through an emotional time due to his mother's passing and his wife's diagnosis. He also stated that he read the questions too quickly and does not know why he did not answer the questions correctly. The Judge found Applicant's testimony was not credible.

The Judge's Analysis

The Judge concluded that Applicant deliberately failed to disclose his delinquent debts when he completed his SCA. She noted he was aware of the delinquent debts when he completed the SCA and denied having them in his SOR Answer. She found that his falsifications are not considered minor and do not rise to the level of occurring under unique circumstances. His failure to disclose the delinquent debts on his SCA casts doubt on his reliability, trustworthiness, and good judgment.

Discussion

Applicant contends that the Judge erred in finding that he testified he was aware of the delinquent debts when he completed his SCA. Our reading of the transcript supports Applicant's contention. While he testified that he had debts that were delinquent in 2009, he never testified that he was aware he had delinquent debts when he submitted the SCA. Tr. at 38-39, 49-53, and 70-71. For the reasons discussed below, the Judge's error does not warrant any corrective action.

The record contains sufficient evidence for the Judge to have concluded that Applicant was aware of the delinquent debts in SOR ¶¶ 1.a, 1.c, and 1.d when he submitted his SCA. In this regard, Applicant testified that his financial problems were attributable to his divorce in 2005. Although he continued to make payments on the debts until he became unemployed for about six months in late 2008, he testified that the debts became delinquent in 2009. Tr. 38-39, 70. Credit reports confirm the delinquencies, which occurred within the seven-year reporting requirement for most of the pertinent SCA questions.¹ Government Exhibits 2 and 4. He hired a debt consolidation service in 2009. Government Exhibit 3. He testified that he started to resolve the delinquent debts in 2013. Tr. at 39. He had been living at the same address for the past 21 years and, except for the time frame he employed the debt consolidation service, he would have received creditor bills at that address. Tr. at 68-69.

The evidence was sufficient for a reasonable person to conclude Applicant knew of the debts when he submitted the SCA. Based on that evidence, the Judge's erroneous finding that Applicant testified that he was aware of the debts upon submission of the SCA was harmless because she likely would have rendered the same decision even if she had not committed that err. *See, e.g.*, ISCR Case No. 14-03601 at 3 (App. Bd. Jul. 1, 2015).

Applicant also contends that the evidence does not establish that he deliberately failed to disclose the delinquent debts. In evaluating whether the Government has presented substantial evidence regarding the deliberate nature of a false statement or omission, the Judge must examine the statement or omission in light of the record as a whole. *See, e.g.*, ISCR Case No. 14-04226 at

¹ The pertinent questions are in Section 26 of the SCA (Government Exhibit 1). With the exception of the question that asked Applicant if he was currently over 120 days delinquent on any debt, the other pertinent questions required reporting of financial delinquencies if they occurred "In the past seven (7) years" before submission of the SCA.

3 (App. Bd. Aug. 18, 2015). As a practical matter, a finding that an omission was deliberate may not always be based on an applicant's statements concerning his intent or state of mind 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. ISCR Case No. 12-05850 at 4 (App. Bd. Apr. 12, 2013). In this case, the Judge considered the record evidence in light of her assessment of Applicant's credibility.² From our review of the record, the Board concludes the Judge's finding that Applicant deliberately failed to disclose debts on his SCA reflects a reasonable interpretation of the record evidence and is sustainable.

Applicant presented other arguments for challenging the Judge's decision. For example, he pointed out that he omitted information about his family members in his SCA and argues those omissions are a testament to the emotional stress that he was under when he submitted that application. While the Judge did not make any findings about other omissions in the SCA, Applicant's arguments are neither enough to rebut the presumption that the Judge considered all of the evidence in the record nor are they sufficient to show that the Judge weighed the evidence in a manner that was arbitrary, capricious, or contrary to law. *See, e.g.*, ISCR Case No. 14-01284 at 3 (App. Bd. Apr. 6, 2015). Additionally, Applicant highlighted that in the summary of his security clearance interview the interviewer commented that the omission of family information in Applicant's SCA was an inadvertent oversight and the interviewer also stated: "There was nothing in the [Applicant's] background or regarding [Applicant's] character or conduct to include financial issues and discrepant information that could result in exploitation, blackmail or coercion." Government Exhibit 3. As the Board has noted in the past, such comments summarize Applicant's answers to the interviewer. They do not constitute the interviewer's considered opinion as to Applicant's worthiness for a clearance. In any event, even if an interviewer provided such an opinion it would not bind the DoD in its evaluation of an applicant's case. *See, e.g.*, ISCR Case No. 14-03069 at 3 (App. Bd. Jul. 30, 2015).

The Judge examined the relevant evidence and articulated a satisfactory explanation for the decision. Applicant has not identified any harmful error likely to change the outcome of the case. 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."

² Of note, Applicant testified that he could not explain why he stated in his Answer to the SOR that each of the debts in SOR ¶¶ 1.a, 1.c, and 1.d were not delinquent at the time he completed the SCA. Tr. at 70.

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