

KEYWORD: Guideline B; Guideline E

DIGEST: The Judge’s conclusion that Applicant’s false statements were deliberate was based upon substantial evidence. Although evidence of service to the national security in high-risk situations is entitled to greater weight in Guideline B cases than would evidence merely of compliance with security procedures, the same may not hold true under Guideline E. A Judge may weigh the evidence differently under different Guidelines. Adverse decision affirmed.

CASE NO: 13-00142.a1

DATE: 10/15/2014

DATE: October 15, 2014

In Re:)	
)	
-----)	ISCR Case No. 13-00142
)	
Applicant for Security Clearance)	
)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

Sheldon I. Cohen, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On June 14, 2013, DoD issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline B (Foreign Influence) and Guideline E (Personal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On July 31, 2014, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Juan J. Rivera 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 finding that Applicant had made false statements during the processing of several security clearance applications (SCA), whether the Judge's whole-person analysis complied with the requirements of the Directive, and whether the Judge's adverse decision was arbitrary, capricious, or contrary to law. The Judge's favorable findings under Guideline B are not at issue in this appeal. Consistent with the following, we affirm.

The Judge's Findings of Fact

The Judge made the following findings pertinent to the issues raised in this appeal. Applicant was born in another country. He attended a university there for two years, in the early 1990s. He received two "career certificates," each signifying completion of a year of study. These certificates made no mention of Applicant's receipt of an associate's or bachelor's degree. Applicant presented no evidence to show that he had attended any other foreign university before or after the dates of attendance listed above. In the late 1990s, Applicant attended a U.S. university. He did not complete a degree.

Applicant filed for Chapter 7 bankruptcy in 2005. The filing listed total assets of \$9,450 and total liabilities of over \$94,000. These liabilities included a \$50,000 promissory note on a personal loan from his father-in-law, ten credit accounts totaling over \$39,000, and the remainder that consisted of debts to utilities, medical providers, and an insurance company. Applicant provided the list of creditors and collection notices to his bankruptcy attorney. He signed the bankruptcy petition, though he claimed that he did not read it.

Applicant is alleged to have falsified SCAs completed in 2009, 2011, and 2012. In these documents, he disclosed his bankruptcy petition but claimed that his total liabilities were only \$12,000. He attributed this error to an honest mistake. He claimed that he had never been aware of his total liabilities.

Applicant is also alleged to have falsified his 2011 SCA by claiming that he attended a foreign university from 1986 to 1990 and to have received a bachelor's degree. In a handwritten SCA submitted in 2005 or 2006, he stated that he had attended a foreign university for four years and had received an associate's degree. At the hearing, he claimed he had attended a foreign university part time from 1986 to 1992. During cross-examination, he stated that he attended a foreign university full time for a period and earned 40-50 academic credits. His documentary evidence showed only the career certificates referenced above. He failed to corroborate his various claims to have received academic degrees from any foreign university.

The SOR alleges that Applicant made false statements to officials investigating his requests for a clearance. Specifically, in 2009 and again in 2012 he minimized his bankruptcy liabilities by claiming that he owed only \$12,000 rather than the \$94,000 set forth in his bankruptcy petition.

Applicant served in the U.S. military for three years. He received imminent danger pay during three tours overseas. He stated that, since leaving the military, he has been deployed to

dangerous parts of the world where he has risked his life in support of U.S. military objectives. He was wounded as result of a roadside bomb. He enjoys an excellent reputation for trustworthiness, courage, and determination under enemy fire. He submitted numerous training certificates, a medal citation, and civilian performance evaluations showing that he had exceeded expectations.

The Judge's Analysis

As stated above, the Judge cleared Applicant under Guideline B. Regarding the falsifications described in his Findings, the Judge concluded that they were deliberate. He stated that Applicant's contention that his bankruptcy liabilities were only \$12,000 lacked credibility. The Judge stated that Applicant was aware of his liabilities, insofar as he himself had incurred them and was receiving the creditors' notices of delinquency. It was he who provided this information to his bankruptcy attorney, and he appeared in person in court before the Bankruptcy Judge. The Judge also stated that Applicant's claims about his educational attainments lacked credibility. The only evidence in the record showed the two "career certificates." Applicant provided nothing to corroborate his claims to have received an academic degree. The Judge found that some of Applicant's statements on this matter were inconsistent.

Accordingly, the Judge concluded that Applicant's false statements raised concerns under Guideline E.¹ The Judge found that none of the Guideline E mitigating conditions applied to Applicant's false statements. He stated that Applicant had made no effort to correct them and that they were material and relevant to the security clearance process.

In the whole-person analysis, the Judge noted evidence of Applicant's good duty performance while deployed in dangerous conditions. He stated that this evidence was sufficient to mitigate the Guideline B concerns but that Applicant had not met his burden of persuasion regarding his false statements.

Discussion

Applicant contends that the Judge erred in his findings of deliberate falsification. We examine a Judge's findings of fact 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. In evaluating an applicant's *mens rea*, a Judge must consider the applicant's answers in light of the record as a whole. *See, e.g.*, ISCR Case No. 12-02296 at 2 (App. Bd. Mar. 12, 2014).

¹Directive, Enclosure 2 ¶ 16(a): "deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determination employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities[.]"

Directive, Enclosure 2 ¶ 16(b): "deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority, or other official government representative[.]"

In this case, the Judge’s findings that Applicant was aware of the extent of his debts, that the information in Applicant’s bankruptcy petition concerning his debts came from Applicant himself, and that he had signed the bankruptcy petition support the Judge’s conclusion that Applicant was well aware that his liabilities greatly exceeded the \$12,000 he had claimed during the processing of his SCAs. His findings that Applicant had only received two “career certificates” and that there was no evidence of further academic attainment support a reasonable inference that Applicant knowingly misstated his college record. In addition, the Judge’s finding that Applicant had made inconsistent statements regarding his alleged falsifications undercuts Applicant’s credibility. We give deference to a Judge’s credibility determinations. Directive ¶ E3.1.32.1. The record as a whole supports the challenged findings of deliberate falsification.

Applicant contends that the Judge failed properly to apply the whole-person concept. He cites to record evidence that, he argues, the Judge failed to consider in evaluating Applicant’s case for mitigation. In particular, he argues that the Judge did not consider his evidence that he had served the U.S. under circumstances involving considerable personal risk. Though acknowledging that we have previously addressed this kind of evidence in the context of Guidelines B and C, he contends that it should weigh heavily with regard to Guideline E as well.

As Applicant notes, we have previously stated that, in cases involving applicants with ties to other countries, evidence of significant contributions to U.S. national security in dangerous, high-risk circumstances is entitled to greater probative weight than evidence of mere compliance with security rules and regulations. *See, e.g.*, ISCR Case No. 10-05329 at 2 (App. Bd. Oct. 17, 2011). Guideline B cases envision a concern that an applicant may be exposed to a conflict of interest, for example that he or she may be seriously tempted to reveal national secrets to protect close relatives threatened by a hostile government. An applicant who has risked his own safety on behalf of the U.S. has demonstrated a willingness to subordinate his personal interests to those of national security, and this is entitled to significant weight in evaluating whether he will resolve conflicts of interest in favor of national security. In the case before us, the Judge cited explicitly to evidence of Applicant’s courage in the performance of duty in clearing him of all Guideline B allegations.

However, a Judge may weigh the same evidence differently under different Guidelines. *See, e.g.*, ISCR Case No. 13-01281 at 4 (App. Bd. Aug. 4, 2014). In the case before us the connection between Applicant’s fortitude in the face of danger and his prospects for reliability and candor is less compelling than the connection between that evidence and his willingness properly to resolve Guideline B conflicts of interest. Guideline E is particularly concerned with any failure to provide full, frank and truthful answers in connection with a clearance investigation. In fact, evidence of such failure “will normally result in an unfavorable clearance action[.]” Directive, Enclosure 2 ¶ 15. Of course, falsifications can be mitigated in a number of ways.² However, evidence of a virtue like physical courage, that is not specifically related to truthfulness, may be insufficient to persuade a Judge of an applicant’s intention to self-report future security incidents, which is part of the

²See the mitigating conditions described in Directive, Enclosure 2 ¶ 17 as well as the whole-person factors outlined in ¶ 2(a).

Guideline E concern.³ Read in its entirety, Applicant’s argument in the case before us is essentially a disagreement with the Judge’s weighing of the evidence, which is not enough to show that the Judge mis-weighed the evidence. The Judge’s whole-person analysis complied with the requirements of the Directive. Moreover, Applicant has not rebutted the presumption that the Judge considered all of the evidence in the record. *See, e.g.*, ISCR Case No. 12-00678 at 2 (App. Bd. Jun. 13, 2014).

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.”

Order

The Decision is **AFFIRMED**.

Signed: Michael Ra’anan
Michael 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

³*See* ISCR Case No. 08-09232 at 3, n. 3 (App. Bd. Sep. 9, 2010), in which we quoted a Judge’s treatment of an applicant’s deliberate omissions: “His failure to give full, frank, and candid answers . . . and his lack of credibility in his hearing testimony undermine his evidence of reform and rehabilitation. It does so because honesty and willingness to self-report are key factors or considerations in this regard.”