

KEYWORD: Guideline F; Guideline E

DIGEST: The Judge properly examined the entire record in making his finding that Applicant's omissions to the SCA were deliberate. Applicant failed to rebut the presumption that the Judge considered all of the record evidence in rendering his unfavorable decision. Adverse decision affirmed.

CASE NO: 08-05637.a1

DATE: 09/09/2010

DATE: September 9, 2010

In Re:)	
)	
-----)	ISCR Case No. 08-05637
)	
Applicant for Security Clearance)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Daniel F. Crowley, Esq., Department Counsel

FOR APPLICANT

Javier N. Maldonado, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On July 30, 2009, DOHA 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 decision on the written record. On May 10, 2010, after considering the record, Administrative Judge David M. White 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 erred in concluding that Applicant's omissions on his security clearance application (SCA) were deliberate; whether the Judge failed to consider all of the record evidence; whether the Judge's application of the pertinent mitigating conditions was erroneous; and whether the Judge's whole-person analysis was erroneous.¹ Consistent with the following discussion, we affirm the Judge's decision.

The Judge made the following pertinent findings of fact: Applicant is an employee of a small-business Defense contractor. This is his first application for a security clearance.

In the late 1990s and early 2000s, Applicant worked with his wife in certain private business ventures. One of them was the marketing of a beverage that, while popular in Mexico, did not sell well in the U.S. Additionally, in 2004, Applicant's daughter was diagnosed with a serious illness which took her life four years later. Applicant paid for his daughter's extensive medical treatment. Because of his business difficulties and expenses associated with his daughter's illness, Applicant accumulated significant debts, owed to three companies.

Applicant attempted to resolve his financial problems by seeking to negotiate with his creditors. However, they were not responsive. He therefore entered into an agreement with a debt arbitration company (DAC) to act on his behalf. His agreement with DAC required him to stop making payments to his creditors and, instead, make monthly payments to DAC for use in negotiating settlements. Applicant was aware that, by stopping his payments, his creditors would consider his debts to be delinquent. Thanks in part to the efforts of DAC, Applicant's delinquent debts have all been settled.

In completing his SCA, Applicant answered "no" to two questions. These questions inquired if he had had delinquent debts during the previous seven years and if he were currently over 90 days delinquent on any debt. His answers were not true, because at the time he completed the SCA he had knowingly ceased paying his creditors over a year prior. The Judge found that Applicant's answers to these questions were deliberately untrue.

Judge's Finding of Deliberate Falsification

Applicant contends that the Judge erred in his finding that he had deliberately provided false answers to the questions at issue here. He contends that the record does not support such a conclusion. He argues that, in evaluating the SCA omissions in light of the Guideline E mitigating factors, the Judge, in effect, improperly shifted the burden of production from the Government to Applicant.

When an applicant denies an allegation contained in a SOR, the Government must produce substantial evidence of the truth of the allegation. Substantial evidence means "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 the case of an omission in a SCA

¹The Judge made favorable findings for all of the Guideline F allegations. Therefore, they are not at issue in this appeal.

or some other document, the Government's burden of production requires more than merely showing that the omission occurred. Rather, the Government must present substantial evidence that the omission was deliberate. In evaluating whether the Government has met its burden of production concerning an omission, the Judge must examine the omission in light of the record as a whole. *See* ISCR Case No. 07-16511 at 4 (App. Bd. Dec. 4, 2009).

In the case under consideration here, Applicant's answer to the SOR contained a denial of deliberate falsification. Accordingly, the Judge was required to examine the entirety of the record evidence in evaluating whether the Government had met its burden of production. In this case, the Judge discussed Applicant's high level of education (two years of graduate work), his business and financial experience, and record evidence that Applicant was aware at the time he entered into the agreement with DAC that his debts would become delinquent.² The Judge also considered Applicant's exculpatory explanations for the omissions, contained in his answers to the SOR and to DOHA interrogatories, and concluded that they lacked credibility. The Judge's conclusion that Applicant had deliberately omitted his delinquent debts from his SCA is sustainable. Insofar as he reasonably concluded that these omissions constituted Guideline E security concerns, the Judge did not err in evaluating the evidence in light of Applicant's burden of persuasion as to mitigation.³

Remaining Issues

Applicant contends that the Judge failed to consider all of the record evidence, for example Applicant's efforts to resolve his outstanding debts, his cooperation with the security clearance investigation, and what he views as the relatively minor nature of the misconduct at issue in this appeal. However, a Judge is presumed to have considered all of the record evidence. *See, e.g.*, ISCR Case No. 09-05830 at 2 (App. Bd. Jun. 25, 2010). Applicant's presentation on appeal is not sufficient to rebut the presumption that the Judge considered all of the record evidence. Neither is it sufficient to demonstrate that the Judge exaggerated the significance of Applicant's SCA omissions or otherwise mis-weighted the evidence.⁴

After reviewing the record, we conclude that the Judge examined the relevant data and articulated a satisfactory explanation for the decision, "including a 'rational connection between the

²*See* Item 2, Answer to SOR, which includes a copy of Applicant's agreement with DAC. This document states in part: "Money will accumulate in your account while we work with your creditors, and therefore your monthly payment to them will fall behind. This will show up on your creditor report as missed payments." *See also* Item 8, Answer to Interrogatories, which contains a summary of Applicant's personal subject interview. In addressing his arrangement with DAC, he stated that "prior to the initiation of these payments [to DAC], he was advised by [DAC] to wait one month so that his accounts would reflect a status of delinquency. [DAC] could then step in as the negotiating team."

³*See* Directive ¶ E3.1.15. "The applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven by Department Counsel, and has the ultimate burden of persuasion as to obtaining a favorable clearance decision."

⁴Applicant states in his appeal brief the following: "Importantly, no oral testimony was taken to determine whether Applicant demonstrated the demeanor or character of someone who cannot be believed." Applicant Brief at 6. Because Applicant had requested a decision on the written record, however, he gave up the opportunity to testify personally. To the extent that Applicant is raising an issue of denial of due process, we conclude that the record does not support such a claim.

facts found and the choice made, ” both as to the mitigating conditions and the whole-person factors. *Motor Vehicle Mfrs. Ass’n of the United States v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)(quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)). The Judge’s adverse 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).

Order

The Judge’s adverse security clearance decision is AFFIRMED.

Signed: Jeffrey D. Billett
Jeffrey D. Billett
Administrative Judge
Chairperson, Appeal Board

Signed: William S. Fields
William S. Fields
Administrative Judge
Member, Appeal Board

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