

KEYWORD: Guideline F; Guideline E

DIGEST: Applicant failed to demonstrate that she had been granted a third continuance of her case. The Judge did not deny Applicant the due process afforded under the Directive. The Judge’s finding that Applicant had falsified her answers in her clearance application is sustainable. Applicant failed to rebut the presumption that the Judge considered all of the evidence. Adverse decision affirmed.

CASE NO: 10-07104.a1

DATE: 02/25/2013

DATE: February 25, 2013

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| In Re:                           | ) |                        |
| -----                            | ) | ISCR Case No. 10-07104 |
|                                  | ) |                        |
| 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 March 7, 2012, 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 November 30, 2012, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Paul J. Mason 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 she was denied due process; whether the Judge erred in concluding that she had deliberately provided false answers in her security clearance application (SCA); and whether the Decision was arbitrary, capricious, or contrary to law. The Judge's favorable findings under Guideline F are not at issue in this appeal. Consistent with the following, we affirm.

The Judge made the following findings pertinent to the issues raised on appeal: Applicant's SOR alleged that she had provided false answers to certain questions on her SCA.<sup>1</sup> The Judge found that Applicant had provided several explanations for her answers. He found that she variously claimed that she had made an honest mistake, that she should have answered the questions in the affirmative, and that she should have reviewed her answers before submitting the SCA.

In the Analysis, the Judge noted that in her Answer to the SOR, Applicant appeared to claim to be unaware of the judgment against her. This was not consistent with her testimony that she knew she had a judgment against her and should have answered the question "yes." Applicant also stated that she had intended to disclose the judgment against her but unaccountably failed to do so. He found that she made another explanation for her false statements in that she claimed to have paid off the debts, which, in her view, provided some excuse for her answers. The Judge stated the following:

After carefully weighing Applicant's answers and her testimonial responses to SOR ¶¶ 2.a, 2.b, and 2.c, it is clear that she deliberately falsified the [SCA] to conceal relevant information about her financial problems and improve her chances of receiving security clearance access. Decision at 8.

In evaluating the mitigating conditions, the Judge stated that Applicant had made no efforts to correct her false answers and that she continued to deny that she had falsified the SCA. In the whole-person analysis, the Judge concluded that Applicant's failure simply to admit her falsifications undercut her efforts to demonstrate mitigation.

Applicant has raised an issue of due process. Her brief refers to matters outside the record, which we generally are not able to consider. Directive ¶ E3.1.29. However, we have, in appropriate cases, considered evidence outside the record insofar as it raises issues of due process, jurisdiction, etc. *See, e.g.*, ISCR Case No. 09-05486 at 3 (App. Bd. Aug. 1, 2012). In this case we will consider Applicant's assertions insofar as they shed light on her claim that the Judge granted her a continuance that DOHA subsequently failed to schedule.<sup>2</sup>

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<sup>1</sup>The SOR alleged at ¶ 2(a) that Applicant had failed to disclose a judgment against her in the amount of \$5,856. At ¶ 2(b), the SOR alleged that Applicant had deliberately failed to disclose that several of her delinquent debts had been turned over to a collection agency. ¶ 2(c) alleged that Applicant had failed to disclose that a specified account had been charged off. The Judge found that these false answers were deliberate. The SOR alleged one other falsification, but the Judge resolved that one in Applicant's favor.

<sup>2</sup>Department Counsel did not file a Reply Brief.

The hearing in Applicant's case was originally scheduled for June 22, 2012. However, the Judge granted a continuance until August 30, 2012. On that date Applicant was in an automobile accident,<sup>3</sup> so the hearing was again continued, this time until October 1, 2012. Applicant argues that she was granted another continuance, until October 15, 2012. She states that she had been unable to attend this last hearing, due to a death in the family, and got in touch with the Department Counsel to reschedule it. However, she states that Department Counsel never got back with her.

The transcript demonstrates that, at the end of the October 1, 2012, hearing, the Judge agreed to hold the record open until October 16, 2012, in order to enable Applicant to submit additional evidence. He advised Applicant as follows: "October 16<sup>th</sup>, you have until that particular day to submit information to [Department Counsel], and then he will pass that information to me." Tr., October 1, 2012, at 81. At the end of the hearing the Judge announced adjournment. Tr., October 1, 2012, at 83. There is nothing in the record to demonstrate that Applicant submitted additional documentation during the time extension she had been granted. The Judge stated that the record closed on October 16, 2012. Decision at 2.

The record provides no support for Applicant's contention that she had been granted a third continuance of her hearing. To the contrary, the Judge simply held the record open until October 16 for the submission of additional documentation, which Applicant apparently failed to do. The Judge's instructions to Applicant were clear and, even if Applicant actually believed she had received a further continuance, such a belief was not reasonable under the circumstances. Accordingly, we conclude that Applicant was not denied the due process afforded her by the Directive. *See, e.g.*, ISCR Case No. 11-06659 at 3-4 (App. Bd. Oct. 22, 2012).

Applicant takes issue with the Judge's finding that she had deliberately falsified her answers to the SCA. In analyzing an applicant's *mens rea*, a Judge must consider the applicant's answers in light of the entire record. *See, e.g.*, ISCR Case No. 10-04821 at 4 (App. Bd. May 21, 2012). In this case, the Judge cited to Applicant's inconsistent statements, her acknowledgment that she should have answered at least one of the questions differently, and her failure give a reasonable explanation for the false statements. This evidence supports the Judge's finding about the deliberate nature of the falsifications. To a certain extent, Applicant's argument on appeal repeats her presentation at the hearing. As such, it amounts to nothing more than a challenge to the Judge's weighing of the evidence. It is not sufficient to undermine the finding at issue.

Applicant contends that the Judge failed to consider all of the record evidence, such as her claims that certain of the debts were not owed and evidence which she believes demonstrates her trustworthiness. Concerning the debts, the Judge entered favorable findings regarding all of the Guideline F allegations. Moreover, he made a finding describing her testimony concerning her honesty and trustworthiness. Applicant has not rebutted the presumption that the Judge considered all of the evidence in the record. *See, e.g.*, ISCR Case No. 11-02311 at 4 (App. Bd. Nov. 26, 2012).

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<sup>3</sup>The Judge opened the hearing on August 30, in order to make part of the record the circumstances of Applicant's failure to appear due to the accident. A transcription of this hearing is included in the record.

The record supports a conclusion that the Judge examined the relevant data and articulated 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. 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). *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 Y. Ra’anan  
Michael Y. Ra’anan  
Administrative Judge  
Chairperson, Appeal Board

Signed: Jean E. Smallin  
Jean E. Smallin  
Administrative Judge  
Member, Appeal Board

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