

KEYWORD: Guideline E; Guideline F

DIGEST: When evaluating the deliberate nature of an alleged falsification, a Judge should consider the applicant's mens rea in light of the entirety of the record evidence. As a practical matter, a finding regarding an applicant's intent or state of mind may not always be based on an applicant's statements, but rather may rely on circumstantial evidence. Additionally, the Appeal Board gives deference to a Judge's credibility determinations. From our review of the record, the Judge's findings that Applicant deliberately falsified SCA responses are based on substantial evidence or constitute a reasonable inference that could be drawn from the record. Adverse decision affirmed.

CASENO: 17-03932.al

DATE: 02/14/2019

DATE: February 14, 2019

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 trustworthiness designation. On March 22, 2018, DoD issued a statement of reasons (SOR) advising Applicant of the basis for that decision—trustworthiness 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 8, 2018, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Matthew E. Malone denied Applicant's request for a trustworthiness designation. Applicant appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raised the following issue on appeal: whether the Judge's decision was arbitrary, capricious, or contrary to law. Consistent with the following, we affirm.

The Judge's Findings of Fact

Applicant is 54 years old, has never been married, and has one adult child. He has worked for defense contractors on a military installation since about 2011.

Under Guideline F, the SOR alleged that Applicant did not file his Federal and state income tax returns for 2014-2016, that he had a Federal tax lien of about \$1,400 for 2013, and had four other delinquent debts totaling about \$3,100. He admitted those allegations with explanations, including that the lien was for state, not Federal, taxes. Department Counsel amended the SOR by changing it to reflect the correct holder of the tax lien and by adding three other delinquent debts totaling about \$11,100. Applicant admitted the new allegations. Under Guideline E, the SOR alleged that Applicant deliberately failed to disclose on his security clearance application (SCA) his charges or arrests for alcohol or drug-related crimes between 1983 and 2000, failed to disclose tax filing and paying deficiencies on his SCA, and provided false information to an investigator about income tax matters. He denied the Guideline E allegation pertaining to the alcohol and drug-related charges, but admitted the other two.

Applicant testified that he had provided his 2014-2016 tax information to an individual to prepare his returns. The individual, however, became involved in an unexplained fraud and did not file Applicant's returns. As of the hearing, the alleged tax income returns, as well as those for 2017, were not filed. In his post-hearing submission, Applicant provided prepared, unsigned, and undated Federal and state tax returns for those years.

All of the debts listed in the SOR remain unresolved. Applicant attributed his financial problems to his mother's medical issues dating back to at least 2005. He relied on credit cards to provide her support and was eventually unable to pay those debts. She passed away in 2018. Applicant intends to resolve his debts by using refunds from his tax returns once they are filed. He expects to resolve all his debts over the next year or so.

Applicant has a lengthy criminal record, including 13 drug-related charges between 1983 and 2000. In his SCA, Applicant answered "no" to the question asking if he ever been charged with an offense involving alcohol or drugs. He did disclose some delinquent debts in his SCA, but answered

“no” to the question that asked if he failed to file or pay his Federal or state taxes in the past seven years. At that time, he knew he had not filed his tax returns for 2014 and owed the alleged state tax lien. When later questioned by an investigator, he confirmed his SCA answers and indicated he had a minor problem with his 2015 returns. His statement to the investigator was false because it implied he filed his returns when he knew he had not done so. Applicant claimed he likely misread the questions because he was tired, stressed, and hurried. He did not explain why he could not simply have answered “yes” to the questions asking about drug-related charges or tax delinquencies. Applicant established a monthly repayment plan with a collection agency that became effective a week after his hearing.

The Judge’s Analysis

Applicant’s debts have been delinquent for several years and remain unresolved. While his financial problems resulted in part from his efforts to care for his mother, he has not shown that he acted responsibly under the circumstances. He has not established any good-faith effort to repay the debts. He did not establish that any of the debts are invalid. He may have filed the missing tax returns after the hearing. He did not mitigate the financial trustworthiness concerns.

Applicant intended to deceive the Government by withholding information from his SCA and by making false statements to the investigator. The pertinent SCA questions plainly required him to make the disclosures. Applicant claim about misreading the questions was not credible. It is not reasonable to conclude that Applicant overlooked either the 13 times he had been charged with drug-related offenses or his failure to file his taxes. His statements to the investigator also implied he filed his taxes when he knew he had not.

Discussion

Applicant’s brief contains documents and information that was not previously submitted to the Judge. We cannot consider new evidence on appeal. Directive ¶ E3.1.29.

Applicant challenges the Judge’s adverse findings regarding the two alleged SCA falsifications. He first contends that he mistakenly answered “no” to the SCA question that asked if he ever had been charged with an offense involving alcohol or drugs. He argues that he most likely did not read the question correctly because he was tired, stressed, and unwisely completed it late at night shortly before it was due. He states that he intended to disclose the truth as he did over six years earlier when he applied for his job. Additionally, he states that he answered “no” to the SCA question that asked if he failed to file or pay his Federal or state taxes when required in the past seven years because he believed he had three years to file those tax returns and was unaware he

owed past-due state taxes.¹ When evaluating the deliberate nature of an alleged falsification, a Judge should consider the applicant's *mens rea* in light of the entirety of the record evidence. *See, e.g.*, ADP Case No. 15-07979 at 5 (App. Bd. May 30, 2017). As a practical matter, a finding regarding an applicant's intent or state of mind may not always be based on an applicant's statements, but rather may rely on circumstantial evidence. *Id.* Additionally, the Appeal Board gives deference to a Judge's credibility determinations. Directive ¶ E3.1.32.1. From our review of the record, the Judge's findings that Applicant deliberately falsified SCA responses are based on substantial evidence or constitute a reasonable inference that could be drawn from the record. *See, e.g.*, ADP Case No. 15-07979 at 4. Finally, we note Applicant has not challenged the Judge's adverse finding that he provided false information to the investigator, which is sufficient independently to support the Judge's denial of his security clearance.

The balance of Applicant's arguments amount to a challenge to the Judge's weighing of the evidence. For example, he argues that his debts were the result of him providing support to his ailing mother, that he routinely filed his tax returns within the three-year period for obtaining a tax refund, and that he is a loyal and trustworthy employee. As the trier of fact, the Judge has to weigh the evidence as a whole and decide whether the favorable evidence outweighs the unfavorable evidence, or *vice versa*. A party's disagreement with the Judge's weighing of the evidence, or an ability to argue for a different interpretation of the evidence, is not sufficient to demonstrate the Judge weighed the evidence or reached conclusions in a manner that is arbitrary, capricious, or contrary to law. *See, e.g.*, ADP Case No. 16-01251 at 2 (App. Bd. Jun. 7, 2017).

The Judge examined the relevant evidence and articulated a satisfactory explanation for the decision. The decision is sustainable on this record. The standard applicable to trustworthiness cases is that set forth in *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988) regarding security clearances: such a determination "... may be granted only when 'clearly consistent with the interests of the national security.'" *Id.* *See also, Kaplan v. Conyers*, 733 F.3d 1148 (Fed. Cir. 2013), *cert. denied*.

¹ The Judge's decision contains a paragraph that is inconsistent with Applicant's admissions and denials to the Guideline E allegations as they appeared in the answer to the SOR. This appears to be based on Applicant's testimony that contradicted the clear language of his written answers. Reading the decision as a whole, we conclude that this paragraph did not likely affect the final outcome of the case.

Order

The Decision is **AFFIRMED**.

Signed: Michael Ra'anan

Michael Ra'anan
Administrative Judge
Chairperson, Appeal Board

Signed: James F. Duffy

James F. Duffy
Administrative Judge
Member, Appeal Board

Signed: Charles C. Hale

Charles C. Hale
Administrative Judge
Member, Appeal Board