UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

FRED L. McCREARY	DOCKET NUMBER SF07318411049
v.	
OFFICE OF PERSONNEL MANAGEMENT	DATE: MAY 13 1985

OPINION AND ORDER

Based on the results of a routine investigation, the Office of Personnel Management (OPM) determined that appellant did not meet the suitability requirements for continued employment in his competitive Federal service position of Supply Management Officer with the Department of the Air Force. Accordingly pursuant to its authority under 5 C.F.R. § 731.201, OPM directed the Air Force to remove appellant. In addition, OPM rated ineligible appellant's two pending applications for other positions. OPM based its determination on appellant's record of recent criminal conduct involving repeated acts of violence, and his intentional falsification of his Personal Qualifications Statements (SF-171) with respect to such criminal conduct. On appeal to the San Francisco Regional Office, the presiding official found that OPM had failed to demonstrate that appellant's criminal conduct was an appropriate basis either for ordering his removal or for finding him unsuitable for the two named positions. Initial Decision (I.D.) at 6. The presiding official further found, however, that appellant had intentionally failed to list on his SF-171's two misdemeanor convictions, and that the

intentional omissions provided the requisite nexus to support both OPM's removal instruction and its determination that appellant was not suitable for Federal employment I.D., at 7-8. Thus, the presiding official affirmed both actions.

In his petition for review, appellant disputes the presiding official's finding that his failure to list the two misdemeanor convictions was intentional. Appellant also contends that the presiding official erred in not giving due consideration to factors such as appellant's potential for rehabilitation and his job performance.

The record reflects that appellant submitted applications dated October 1, 1982, for the positions of Supply-General and Supply Warehouse Worker. He also applied on January 17, 1983, for the position of Supply Management Officer, and was ultimately selected. Each SF-171 was completed in detail, signed, and certified by appellant as being "true and correct to the best of [his] knowledge and belief" See Ag. file, Tabs 1, 2, 3. In response to Question 30b, which asked if he had been convicted of a misdemeanor within the last seven years, appellant answered "yes" and described in the space provided an April 30, 1982, "conviction for assault on spouse.[1/]" An examination of court records revealed that appellant had also been convicted on September 8, 1981, of resisting arrest and on November 8, 1981, of reckless driving.

In response to OPM's inquiry about these omissions, appellant indicated that he had not listed the resisting-arrest conviction because it "was not true" and that he had not listed the reckless-driving conviction because he did

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1/ In fact, appellant was convicted on March 30, 1982, of inflicting corporal injury on spouse.

not think it was "important". He acknowledged, however, that omitting the convictions "was not the right thing to do," and that the omissions had been an "error in judgment." At the hearing, however, appellant testified that he had not intended to conceal his criminal record, but that the resisting-arrest and reckless-driving convictions never "ran across" his mind. The presiding official found appellant's contentions both incredible and inconsistent. In so finding, the presiding official considered that Question 30b was straight-forward and easy to understand, that appellant was an intelligent man, that he had certified the answers as true, that the SF-171 itself warns that a false answer may be grounds for not employing or dismissing from employment, and that the omitted convictions were recent, significant, and not likely to have been forgotten.

Implicit in the charge of falsification of an SF-171 is the allegation that appellant falsified the records intentionally and with purpose to deceive or mislead. See Tucker v. United States, 624 F.2d 1029, 1033 (Ct. Cl. 1980); Cadena v. Department of Justice, 3 MSPB 390, 393 (1980); Allen v. U.S. Postal Service, 2 MSPB 582, 584 (1980). Intent is a state of mind which is generally proven by circumstantial evidence. Tucker, supra at 1033; Filson v. Department of Transportation, 7 MSPB 50, 54 (1981). Specific intent to make a false or fraudulent statement may be inferred when the alleged misrepresentation is made with reckless disregard for truth. Riggin v. Department of Health and Human Services, 11 MSPB 331, 332 (1982).

Appellant argues that since he acknowledged that he had a criminal record by admitting the most serious of his misdemeanor convictions, he would have had no motive for concealing the two lesser convictions. Moreover,he testified

that he knew OPM's investigators had access to his complete criminal record so that it was virtually impossible to hide a conviction, suggesting again that he would have had no motive to conceal. These arguments, speculative in nature, are not persuasive when considered with the overwhelming circumstantial evidence upon which the presiding official relied. The conclusion that appellant completed the applications as he did, with reckless disregard for their truth, is further buttressed by his inconsistent explanations for the omissions. See Walker v. U.S. Postal Service, 9 MSPB 576, 577 (1982). Upon review, we agree with the presiding official's finding that appellant intentionally omitted the two misdemeanor convictions from his applications.

Appellant also argues that the presiding official should have afforded more weight to factors such as his job performance and potential for rehabilitation in determining whether OPM's actions, based on the omissions, promote the efficiency of the service. While appellant's job performance was praised by his supervisors (see Ag. file, Tab 7, testimonies of Col. George Taylor and Lt. David Mitchell), the presiding official properly stated the Board's consistent holding that performance in a position to which an employee has been appointed as a result of falsification has no relevance to a falsification charge and consequent removal. Dunbar v. Department of the Treasury, 6 MSPB 96 (1981); Cadena, supra, at 392. Moreover, appellant's suggestion that he has the potential to be rehabilitated is contradicted by his having offered two inconsistent explanations for the omissions. In short, we find that the presiding official did consider all the appropriate factors in making his determination. The Board has held that removal for falsification of government documents promotes the efficiency of the

service since such falsification raises serious doubts as to the employee's honesty and fitness for employment.[2] Wilcox v. U.S. Postal Service, 9 MSPB 128, 129 (1982).

Accordingly, the petition for review is hereby DENIED for failing to meet the criteria set forth at 5 C.F.R. § 1201.115.

This is the final order of the Merit Systems Protection Board in this appeal. The initial decision shall become final five (5) days from the date of this order. 5 C.F.R. § 1201.113(b).

The appellant is hereby notified of the right under 5 U.S.C. § 7703 to seek judicial review, if the Court has jurisdiction, of the Board's action by filing a petition for review in the United States Court of Appeals for the Federal Circuit, 717 Madison Place, N.W., Washington, D.C. 20439. The petition for judicial review must be received by the court no later than thirty (30) days after the appellant's receipt of this order.

FOR THE BOARD:

Robert E. Taylor
Clerk of the Board

Washington, D.C.

2/ Appellant relies heavily on the Board's decision in In re Spielman, 1 MSPB 50, 50 (1979), as supporting his position that factors such as job performance and rehabilitation can overcome a falsification charge. Spielman was a pre-Reform Act case which was decided pursuant to 5 U.S.C. § 7521 and 5 C.F.R. § 930.221-234 (1979) inasmuch as the appellant was an administrative law judge. Further, in that case, the Board sustained the agency's suspension action which did not involve a suitability determination by OPM. We thus find that Spielman is inapposite to this case.