

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD**

73 M.S.P.R. 159

Docket Number SF-0731-95-0750-I-2

KEITH A. HANKER, Appellant,

v.

DEPARTMENT OF THE TREASURY, Agency.

Date: January 13, 1997

Raymond Laing, Esquire, San Rafael, California, for the appellant.

Stephanie Dick, Esquire, Long Beach California, for the agency.

BEFORE

Ben L. Erdreich, Chairman
Beth S. Slavet, Vice Chair
Antonio C. Amador, Member

OPINION AND ORDER

The agency has petitioned for review of an initial decision issued on March 19, 1996, that did not sustain its negative suitability determination. For the reasons below, we GRANT the agency's petition, REVERSE the initial decision, and SUSTAIN the negative suitability determination. See 5 C.F.R. § 1201.115.

BACKGROUND

By letter dated July 10, 1995, the agency advised the appellant that it had found him unsuitable for the position of Customs Inspector, GS-5/7, an advanced trainee position, and that it was rescinding its tentative offer of employment, based upon charges of falsification of standard forms (SFs) 171 and 86, false statements made during a personal interview with the investigator, and a charge that he lacks honesty and integrity. See Initial Appeal File (IAF), MSPB Docket No. SF-0731-95-0750-I-1 (Initial Decision, Oct. 31, 1995), dismissing appeal without prejudice, Tab 6, Subtabs 2b, 2m (position description).¹

¹ The agency has delegated authority from the Office of Personnel Management to make suitability determinations. See IAF, Tab 6, Subtab 2n.

The appellant completed his SF-171, Application for Federal Employment, on October 29, 1994, and his SF-86, Questionnaire for Sensitive Position, on October 25, 1994; thus, such forms were treated by the administrative judge as having been contemporaneously completed for purposes of his adjudication. See *id.*, Subtabs 2k-2l.

The agency levied four charges against the appellant that are as follows:² Charge one, alleged falsification of the SF-86, contained four specifications. Specification A alleged that the appellant falsified his SF-86 in failing to disclose, in answer to question 11, requiring disclosure of places of employment for the last 15 years, that he had been employed with the Army and Air Force Exchange Service (AAFES), Edwards Air Force Base, California, during the month of October 1993. Specification B alleged falsification in answer to SF-86, question 11, by failing to disclose that he had been employed with Flight Research Inc., Mojave, California, in August 1993. Specification C is that he falsely replied "no" to SF-86, question 22, in failing to disclose that he was terminated under adverse conditions from the U.S. Border Patrol on August 3, 1994, after he failed to meet academic requirements. Specification D is that he falsely replied "no" to SF-86, question 22, in failing to disclose that he was terminated on August 30, 1993, from Flight Research Inc. for performance reasons, after he allegedly misrepresented his qualifications at the time he was hired there. (The agency stated that the appellant misrepresented his qualifications because he claimed that he was an Electronics Engineer; yet he was fired because he did not possess the necessary skills to perform assigned tasks.) See *id.*, Subtab 2f.

Charge two, alleged falsification of the SF-171, contained two specifications. Specification A is that the appellant falsified his answer to SF-171, question 38, when he failed to disclose his termination under adverse conditions from the Border Patrol; specification B alleged falsification of SF-171, question 38, with respect to his termination under adverse circumstances from Flight Research Inc.

Charge three, specifications A and B, respectively, alleged that the appellant failed to disclose his termination from the U.S. Border Patrol and from Flight Research to the investigator during his personal interview on January 12, 1995.

Charge four is that the appellant lacked honesty and integrity for the above falsifications, and additionally, for misrepresenting his qualifications in order to obtain the position with Flight Research Inc.³ See *id.* at 2.

On appeal, the administrative judge sustained only some of the instances of falsification. He did not state whether the charges were sustained. He concluded that the negative suitability determination did not promote the efficiency of the service. See 5 C.F.R. §§ 731.201, .202.

² The agency merely listed the charges and specifications without numbers or letters; we have delineated them for clarity and ease of reference and discussion.

³ Although other charges were mentioned by the agency, either they were not sustained by it in its final negative suitability determination, after reviewing the appellant's response, or they were abandoned at the hearing.

In its petition for review, the agency disputes most of the administrative judge's findings and conclusions in failing to sustain specifications and in determining that the appellant was suitable for government employment. The appellant has not cross petitioned; thus, we need not review the instances of falsification sustained by the administrative judge, although we note them here.

The administrative judge sustained specification B of charge one, relating to SF-86, question 11, failing to disclose employment as an Air Frame and Power Plant Mechanic at Flight Research Inc., because, even though it was listed on a previous SF-86 the appellant had submitted to the Border Patrol in February 1994, it was not listed on his current SF-86 and SF-171. The administrative judge found that the appellant had a motive to conceal it and to deceive the government because it was "much more substantive" than the AAFES employment and because he was terminated for poor performance. See I.D. at 5. He sustained a portion of specification D of charge one, alleging falsification when the appellant omitted his employment with Flight Research Inc., question 22 on the SF-86, because he found that that question requires a disclosure of firing. See I.D. at 6. The administrative judge did not sustain that portion of specification D alleging that the appellant misrepresented his qualifications to Flight Research Inc.

The administrative judge sustained specification B of charge two, that the appellant falsified his answer to SF-171, question 38, when he failed to disclose his termination under adverse conditions from Flight Research Inc. He sustained specification B of charge three, that the appellant made false statements when he failed to disclose, in the January 12, 1995, personal interview, his termination under adverse circumstances from the U.S. Border Patrol and from Flight Research Inc.

ANALYSIS

Three of the four charges are sustained.

The agency seeks review of certain specifications the administrative judge failed to sustain, and of his finding that the negative suitability determination does not promote the efficiency of the service. Inasmuch as its petition for review is fact specific and does not rest upon credibility determinations, we grant review. See, e.g., *Jackson v. Veterans Administration*, 768 F.2d 1325, 1330-31 (Fed. Cir. 1985) (there is no question that the Board has the power to reject an administrative judge's decision and to substitute its own decision; the Board is not free merely to disagree, but must articulate sound reasons, based upon the record, for its contrary evaluation of evidence, including testimonial evidence).

In order to sustain a falsification charge, the agency must prove by preponderant evidence that the employee knowingly supplied incorrect information with the intention of defrauding the agency. See, e.g., *Naekel v. Department of Transportation*, 782 F.2d 975, 977 (Fed. Cir. 1986).

The administrative judge did not sustain charge one, specification A, relating to the appellant's failure to disclose his employment with the AAFES on question 11 of the SF-86, because the appellant, even assuming he knowingly had omitted such employment from his form, had no motive to conceal it. Further, the appellant was employed as a

Janitor at the base theater for no more than 20 hours, his supervisor had stated that he had done a good job and that he left because of a sore back. Moreover, the appellant had disclosed this employment on a previous SF-86 he submitted to the Border Patrol, see current IAF, Tab 6, Agency Ex. 1, SF-86, February 24, 1994 at item 11; and, the administrative judge found, the appellant would have no motive to deceive the government because the Border Patrol job for which he was hired was perhaps even more physically demanding than the Customs Inspector position, and, in any event, any physical limitations were a prominent part of various public records.

The agency argues, petition for review (PfR) at 5, that the administrative judge erred in concluding that the appellant did not intend to deceive the government in omitting his AAFES service from his SF-86, because neither the SF-86 nor the SF-171 permits any discretion to omit employment of short duration. In addition, the agency asserts that the appellant gave conflicting answers as to his reason for the omission; i.e., that he forgot about the employment, that it was of short duration, and that he was told by a military counselor not to list short, irrelevant periods of employment on his applications for employment; and such reasons were false because he included this service on his Border Patrol SF-86 some eight months earlier. According to the agency, he did have a motive to conceal because of his back problem.

We agree. It is undisputed that the appellant omitted this employment on his SF-86, despite the fact that he was required to list every period of employment for the previous 15 years and had done so on his application to the Border Patrol. Moreover, as the agency asserts, the appellant's testimony at the hearing was somewhat inconsistent with his previous explanations. He mentioned there for the first time that his military counselor told him not to list irrelevant or short periods of employment. He also noted that he considered the experience at AAFES irrelevant and too short to list. See Hearing Tape (H.T.) One, Side B; H.T. Two, Side A. The appellant's first explanation to the investigator was that he "forgot" to list this employment. IAF, Tab 6, Subtab 2h at 4-5. In response to the notice of negative suitability determination, he said such employment was too short in duration to list. See *id.*, Subtab 2e at 1. Whether or not the appellant's motive for omitting this employment from his SF-86 was to conceal any disability is not established in the record. However, in the absence of any plausible explanation for his failure to include it on his SF-86, we infer an intent to deceive under the circumstances described above. See, e.g., *Scott v. Department of Justice*, 69 M.S.P.R. 211, 226 (1995) (incorrect information without any credible explanation can constitute circumstantial evidence of an intent to deceive) (citations omitted).⁴ Thus, charge one, specification A is sustained.

⁴ The agency alleges, PfR at 8-9, that the appellant lied at the hearing because he testified that he disclosed his AAFES and Flight Research Inc. positions to the investigator and stated that the investigator had advised him to omit references to short, irrelevant experiences; however, the investigator denied that he would say that. The agency's assertion is only partially correct. The appellant claimed that he did divulge his employment at AAFES and Flight Research Inc. to the investigator in a "conversation" sometime after the personal interview and that the investigator agreed with him that it was not necessary to list irrelevant employment of short duration. See H.T. One, Side B, H.T. Two, Side A. The investigator denied he would say

The administrative judge found that the appellant did not misrepresent his qualifications to Nadia Roberts, the President of Flight Research Inc., in order to obtain employment and thus did not sustain that portion of charge one, specification D. See I.D. at 8. The agency argues that the appellant did misrepresent his qualifications and that this specification should be sustained.

In our view, the administrative judge correctly analyzed this matter. Namely, while the investigator's notes reflected that Ms. Roberts said that the appellant was an Electronics Engineer, she, in fact, testified at the hearing that the appellant had not said this; he only indicated that he had some experience in electronics. See H.T. One, Side A. Moreover, the appellant's Flight Research Inc. application does not indicate such experience. See current IAF, Tab 7, Agency Ex. 2. Ms. Roberts testified that she has unique aircraft used for test flights and that she has some difficulty finding anyone who can repair them. The appellant testified that he did not realize how unique her aircraft were and that he did lack the kind of experience required to repair such aircraft, although he had some expertise in repairing aircraft and he did expect on-the-job training. In any event, Ms. Roberts hired the appellant after only a 10-minute conversation, and there simply is no showing anywhere in the record that the appellant's lack of success was attributable to anything more than a misunderstanding between him and Ms. Roberts of what would be expected of him.⁵ Accordingly, this specification is not sustained.

Thus, a majority of the specifications are sustained.⁶ The administrative judge made no specific findings on which of the charges are sustained, and we do so here.

such a thing. See H.T. Two, Side A. While the testimony of the appellant and that of the investigator do conflict, it is not necessary to resolve the truth of the matter here and, indeed it would be difficult to do so in the absence of further testimony and without an evaluation of credibility. Because we are sustaining the suitability determination on other grounds, this matter, even assuming the appellant lied, is not of sufficient weight to have any material bearing on the outcome of this appeal; nor would it change the outcome even if we assume that he was telling the truth--even if the investigator believed short periods of employment could be omitted, the forms themselves do not allow for any omission, and there is no evidence that the appellant divulged his employment during the personal interview. Thus, this matter is unrelated to the charges at issue. While it might be related to the appellant's overall suitability, as described below, we base our determination on other factors of greater weight. We, therefore, find it unnecessary to definitively decide whether the appellant lied.

⁵ The agency alleges that the appellant lied to the investigator because the investigator testified that the appellant told him in a telephone conversation that he had spoken to Ms. Roberts, who said she did not tell the investigator that the appellant represented himself to be an engineer. See PfR at 11. The investigator did so testify. See H.T. One, Side B. Ms. Roberts denied speaking to the appellant after he was fired. See H.T. One, Side A. The appellant himself was not examined on this matter. In the absence of testimony from the appellant, we will not draw an inference of deliberate lying. Therefore, we will not further address this matter.

⁶ The administrative judge did not sustain charge one, specification C, alleged falsification in answer to SF-86, question 22, in omitting the Border Patrol termination under adverse

Specifications A and B and a portion of specification D of charge one, concerning alleged falsification of the SF-86, have been sustained. The sustained specifications support the conclusion that the appellant falsified his SF-86 (omission of AAFES employment, omission of Flight Research Inc. employment, omission of firing from Flight Research Inc.). Charge two, concerning falsification of the SF-171, contained two specifications, one of which has been sustained, specification B (omission of leaving Flight Research Inc. under adverse circumstances). The sustained specification is sufficient to support the charge of SF-171 falsification. Since the specification that the appellant did not disclose his termination under adverse circumstances from Flight Research Inc. to the investigator during his January 12, 1995 personal interview, specification B of charge three, is sustained, we find that it too is sufficient to support the charge of false statements made during a personal interview.

Having reviewed the charges, we now determine whether the negative suitability determination promotes the efficiency of the service.

The negative suitability determination promotes the efficiency of the service.

The agency challenges the administrative judge's determination that the appellant is suitable for federal employment. See PfR at 12-15. It also objects to the administrative judge's statement that if the appellant is employed as a Customs Inspector, he will serve a probationary period and any problems can be addressed at that time, see I.D. at n.4, claiming that it should not have to take that risk.

In reversing the negative suitability determination, the administrative judge relied on his belief that the appellant's concealment regarding Flight Research Inc. was a "relatively minor matter," I.D. at 9, and the appellant's honorable 14-year military career, which included his becoming a Chief Warrant Officer and a helicopter pilot, his receipt of high efficiency ratings during most of his career, and his receipt of the Army Commendation Medal in 1991 for saving a diver's life. He also noted the appellant's satisfactory service with three security agencies since leaving the Border Patrol. He weighed the factors that the appellant's last Army assignment was less successful as expressed by his last commander, and the denial of reinstatement to the Border Patrol Academy. Ultimately, however, he found that the decision finding the appellant unsuitable for federal service did not promote the efficiency of the service because of the appellant's many significant and satisfactory jobs in his military service and his recent satisfactory employment in his private security jobs.

In a negative suitability determination, an agency must demonstrate a pattern of conduct that is either inconsistent with successful performance in the position at issue or that would interfere with or prevent the employing agency from effectively performing its duties and responsibilities. See, e.g., *Richardson v. Resolution Trust Corporation*, 66

conditions; or charge two, specification A, alleged falsification in response to SF-171, question 38, by answering "no" regarding termination from the Border Patrol under adverse circumstances. Nor did he sustain charge four, the charge that the appellant lacked honesty and integrity. The agency does not seek review of these findings, and we find no reason to disagree with the administrative judge's factual findings and legal conclusions on these matters. We, therefore, will not disturb them.

M.S.P.R. 302, 311, *appeal dismissed*, 52 F.3d 342 (Fed. Cir. 1995) (Table). Here, the agency contends that it has met its burden. We agree.

There is no dispute that the appellant is applying for a position "designated" as a "High Risk Public Trust" position. See Declaration of Joyce A. Wood, Supervisory Personnel Specialist, IAF, Tab 6, Subtab 2a. The position has law enforcement duties and requires a high degree of public trust and confidence. See *id.* The Board has held that such positions require a higher standard of conduct and degree of trust. See, e.g., *Padilla v. Department of Justice*, 64 M.S.P.R. 416, 423 (1994), *aff'd*, 64 F.3d 676 (Fed. Cir. 1995) (Table). Moreover, the offense of falsification is serious and here it is recent, repeated and by its nature, deliberate. The appellant's success in the military does not outweigh these concerns, especially as he was not rated highly in his last military assignment. Moreover, he was not recommended for reinstatement to the Border Patrol Academy. Whether or not the appellant is currently successfully working for private security agencies is not relevant to his suitability for the "High Risk Public Trust" position at issue here. There is no showing that the nature of the duties and responsibilities of such positions are in any way equal to those of the Customs Inspector position; nor is there any showing that the criteria for employment, in terms of suitability factors, are the same. Moreover, as the agency asserts, whether or not the appellant is required to serve a probationary period is not a factor in a suitability determination. The point of such determination is to exclude those who are not suitable for the type of federal service for which they apply; there is nothing in law or regulation requiring an agency to take an employment risk.

The Board has upheld several negative suitability determinations based upon falsification of employment documents. See, e.g., *Devitto v. Office of Personnel Management*, 61 M.S.P.R. 297 (1994) (failure to include prior arrest and conviction for public intoxication on SF-86, SF-171 and an FAA form, rendered the appellant unsuitable for employment as an Air Traffic Controller); *Morderosian v. Office of Personnel Management*, 42 M.S.P.R. 371 (1989) (negative suitability determination sustained where appellant falsified SF-171 regarding previous firing from job); *Katchmeric v. Office of Personnel Management*, 33 M.S.P.R. 118 (1987) (where falsification of SF-171 was one of two charges sustained, it alone was sufficient to sustain negative suitability determination).

Accordingly, we sustain the negative suitability determination at issue here.

ORDER

This is the final order of the Merit Systems Protection Board in this appeal.
5 C.F.R. § 1201.113(c).

NOTICE TO APPELLANT

You have the right to request the United States Court of Appeals for the Federal Circuit to review the Board's final decision in your appeal if the court has jurisdiction. See 5 U.S.C. § 7703(a)(1). You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place,
Washington, DC 20439

The court must receive your request for review no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. See 5 U.S.C. § 7703(b)(1).

For the Board
Robert E. Taylor, Clerk
Washington, D.C.