

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

74 M.S.P.R. 616

Docket Number DA-0731-96-0233-I-1

**HAYWOOD C. REED, Appellant,**

**v.**

**OFFICE OF PERSONNEL MANAGEMENT, Agency.**

Date: MAY 22, 1997

Haywood C. Reed, Garland, Texas, pro se.

Joseph E. McCann, Esquire, Washington, D.C., for the agency.

**BEFORE**

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

Chairman Erdreich issues a dissenting opinion.

**OPINION AND ORDER**

The Office of Personnel Management (OPM) has filed a timely petition for review of a June 21, 1996 initial decision reversing its negative suitability determination. For the reasons set forth below, the Board GRANTS OPM's petition under 5 C.F.R. § 1201.115, REVERSES the initial decision, and SUSTAINS OPM's negative suitability determination.

**BACKGROUND**

By notice dated August 24, 1995, OPM advised the appellant that it had conducted a background investigation in connection with his March 19, 1995 appointment to the GS-9 position of Space Management Specialist with the Immigration and Naturalization Service (INS). OPM stated that its investigation raised a serious question about the appellant's suitability for competitive federal employment. It set forth five items at issue and provided the appellant with an opportunity to respond to the issues. Initial Appeal File (IAF), Tab 5, subtab 2b. The appellant did not respond.

On December 20, 1995, OPM found the appellant unsuitable for federal employment. It directed INS to separate him from his position,<sup>1</sup> canceled any eligibilities he had on competitive registers and any applications for positions he had pending, and debarred him from competitive federal service until December 20, 1998. *Id.*, subtab 2a. The appellant timely filed a petition for appeal. IAF, Tab 1.

After holding the appellant's requested hearing, the administrative judge reversed OPM's negative suitability determination. She found that OPM had not shown that the appellant engaged in criminal or dishonest conduct that was inconsistent with his duties as a Space Management Specialist by writing bad checks or by accepting a position with INS while he was working for Focus Point, a contractor doing work for INS. Initial Decision (I.D.) at 4. She further found that OPM did not show that the appellant intentionally provided false answers on three SF-171s by responding "no" to questions 41 and 42. *Id.* at 5-7.

Similarly, the administrative judge found that OPM did not show that the appellant intentionally provided false answers on his May 2, 1994 and December 15, 1994 SF-85Ps (Questionnaire for Public Trust Positions) by initially responding "no" to question 18 and on his December 15, 1994 SF-85P by responding "no" to question 20b. *Id.* at 7-8. She also found that OPM did not show that the appellant intentionally failed to disclose on his December 15, 1994 SF-171 and SF-85P that his employment with INS was on a contract basis through Focus Point. *Id.* at 8-9.

The administrative judge further found that OPM did not show that the appellant made intentional false statements during a February 21, 1995 interview with an OPM investigator when he incorrectly stated that he had been financially responsible until December 1993, misstated the number of bad checks he had written as seven to ten during a two- or three-month period, and stated that he had been arrested twice instead of four times. *Id.* at 9-10. The administrative judge concluded that OPM had failed to show a pattern of conduct that was incompatible with the appellant's successful performance in his position or that would interfere with or prevent INS from effectively performing its duties and responsibilities. *Id.* at 10.

OPM has filed a petition for review of the initial decision. Petition For Review File, Tab 3; *see also id.*, Tab 1. The appellant has filed a timely response opposing OPM's petition for review. *Id.*, Tab 4.

## ANALYSIS

We find that several of OPM's arguments constitute mere disagreement with the administrative judge's explained factual findings and credibility determinations and thus do not warrant a full review of the record by the Board. *Weaver v. Department of the Navy*, 2 M.S.P.R. 129, 133-34 (1980), *review denied*, 669 F.2d 613 (9th Cir. 1982) (*per curiam*). Thus, we have not specifically addressed them in this Opinion and Order. As

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<sup>1</sup> On November 26, 1995, the appellant had been converted to the position of Mechanical Engineering Technician, GS-11. Petition For Review File, Tab 3, Attachment 4.

explained below, however, we find that OPM's other arguments show that the administrative judge erred in reversing OPM's negative suitability determination.

OPM has shown that the administrative judge erred in finding that the appellant did not intentionally provide a false answer to question 18 on his December 15, 1994 SF-85P.

OPM asserts that the administrative judge erred in finding that the appellant did not intentionally falsify employment documents after he essentially admitted to falsifying his SF-85Ps. Petition For Review at 10-15.

We find that the evidence does not establish that the appellant falsified his May 2, 1994 SF-85P. Contrary to the administrative judge's finding, see I.D. at 7, the appellant did not answer "no" to question 18 on that SF-85P; rather, he simply did not answer it, see IAF, Tab 5, subtab 2n. Moreover, the question specifically stated: "Answer this question only if instructed to do so by the agency." *Id.* Because the evidence of record does not show that INS instructed the appellant to answer the question, and the appellant testified that INS did not instruct him to answer the question, see Transcript (Tr.) at 26-27, we find that the appellant's failure to do so cannot be considered falsification.

We agree with OPM, however, that the evidence shows that the appellant intentionally falsified his December 15, 1994 SF-85P. The administrative judge acknowledged that the appellant initially responded "no" to question 18 on his December 15, 1994 SF-85P, which asked, "In the last 5 years, have you been arrested for, charged with, or convicted for any offense(s)." She noted, however, that on January 9, 1995, the appellant voluntarily changed his response on that SF-85P to "yes" and indicated that in March 1994 he had missed a payment agreement deadline and that a warrant was issued for him by a Dallas County district judge. I.D. at 7; see *also* IAF, Tab 5, subtab 2l.

To sustain a falsification charge, an agency must prove by preponderant evidence that an employee knowingly supplied incorrect information with the intention of defrauding the agency. *Naekel v. Department of Transportation*, 782 F.2d 975, 977 (Fed. Cir. 1986). Here, the administrative judge did not find that the appellant thought his initial answer was correct; rather, she cited the appellant's testimony that he answered "no" because he knew the people who worked in the INS security office and he was embarrassed to check "yes." I.D. at 7-8; see *also* Tr. at 34-35. Indeed, the appellant testified that he had not forgotten about the arrest, that he should have reported it when he initially filled out the form, and that he withheld information because he was embarrassed to disclose it. Tr. at 33, 35. As OPM argues, the Board has not found that embarrassment constitutes a valid reason for falsifying an employment document.

The administrative judge essentially found that the appellant's voluntary correction of the response defeated the charge of falsification. I.D. at 7-8. We disagree. The fact that an employee later corrects false information on an employment document does not absolve him from previous false statements. See, e.g., *Kissner v. Office of Personnel Management*, 792 F.2d 133, 134 (Fed. Cir. 1986); *Beardsley v. Department of Defense*,

55 M.S.P.R. 504, 511 (1992), *aff'd*, 5 F.3d 1504 (Fed. Cir. 1993) (Table), *and overruled on other grounds*, *White v. U.S. Postal Service*, 71 M.S.P.R. 521, 528-29 (1996).

Moreover, the administrative judge did not explicitly address OPM's assertion below that the appellant's response was still false after he amended it on January 9, 1995, because he did not disclose the extent of his bad check charges and convictions. See I.D. at 8; IAF, Tab 5, subtab 2a (Summary of Issues, Item Number 3); IAF, Tab 10 at 2. We agree with OPM that the administrative judge erred in this regard. Even when the appellant amended his false answer to question 18 of his SF-85P on January 9, 1995, he did not fully disclose all of his arrests, criminal charges, and convictions in the last five years. Rather, in his amended answer, he admitted only to a single warrant for a missed payment agreement deadline in March 1994. See IAF, Tab 5, subtab 2l. Thus, as OPM correctly argues in its petition for review, see Petition For Review at 14, the appellant not only committed a falsification when he answered "no" to this question on December 15, 1994, but he committed *another* falsification when he listed only one arrest in his alleged attempt, on January 9, 1995, to correct his earlier false answer.

We further find that the evidence shows that the appellant intentionally falsified his answer. Question 18 asks, in part, have you been "arrested for" or "charged with" any offenses. In connection with his previous May 2, 1994 SF-85P, the appellant testified that he was aware at that time that he had been arrested at least twice and charged with a number of offenses and that he failed to disclose those arrests and charges. Tr. at 25-26. As previously noted, the appellant may have been justified in not responding to question 18 on the May 2, 1994 SF-85P. However, once the appellant chose, or was told, to respond to the question on the December 15, 1994 SF-85P, he was obligated to give correct, complete answers. See, e.g., *Haack v. U.S. Postal Service*, 68 M.S.P.R. 275, 280-81 (1995). Here, the appellant's own testimony shows that he intentionally did not. Thus, we find that the appellant knowingly submitted incorrect information on the December 15, 1994 SF-85P with the intention of deceiving INS.

The sustained falsification is sufficient to support OPM's negative suitability determination.

To sustain its burden of proof in a negative suitability determination case, OPM must show that the appellant's conduct may reasonably be expected to interfere with or prevent efficient service in his position or effective accomplishment by INS of its duties or responsibilities. 5 C.F.R. § 731.202(a). An intentional false statement or deception or fraud in the examination or appointment process may form a basis for finding an individual unsuitable. 5 C.F.R. § 731.202(b)(3).

We find that OPM has sustained its burden of proving that the appellant is currently unsuitable for federal employment and that its penalty promotes the efficiency of the service. The Board has specifically found that intentional falsification of government documents could reasonably be expected to interfere with or prevent effective performance in a federal position or prevent the effective performance by an employing agency of its duties and responsibilities. *Buhl v. Office of Personnel Management*, 37 M.S.P.R. 305, 313 (1988). Moreover, the Board has consistently found that appellants' intentional misrepresentations in application documents raise serious doubts as to the appellants' honesty and fitness for employment and are sufficient to support negative

suitability determinations. See, e.g., *Hanker v. Department of the Treasury*, MSPB Docket No. SF-0731-95-0750-I-2, slip op. at 14-15 (Jan. 13, 1997); *Devitto v. Office of Personnel Management*, 61 M.S.P.R. 297, 302 (1994); *Swift v. Office of Personnel Management*, 48 M.S.P.R. 441, 446 (1991). This is true even where only one incident of falsification is at issue. See, e.g., *Morderosian v. Office of Personnel Management*, 42 M.S.P.R. 371, 374-75 (1989); *Forsha v. Office of Personnel Management*, 33 M.S.P.R. 304, 308 (1987); see also *Harmon v. General Services Administration*, 61 M.S.P.R. 327, 335 (1994), *aff'd*, 47 F.3d 1181 (Fed. Cir. 1995) (Table).

In addition, the appellant's intentional representation was recent, and indicates a lack of the trustworthiness necessary for his position. Moreover, the appellant's performance in his position with INS is immaterial in evaluating a penalty imposed for pre-employment misconduct. See, e.g., *Swift*, 48 M.S.P.R. at 446; *Forsha*, 33 M.S.P.R. at 308; *DeAngelis v. Office of Personnel Management*, 28 M.S.P.R. 456, 458 (1985).

Thus, we find that OPM sustained its burden of proving the appellant's current unsuitability for federal employment.

### 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.

### DISSENTING OPINION OF BENJAMIN L. ERDREICH, CHAIRMAN

I **respectfully** dissent. Although Mr. Reed was not accurate in his initial response to a question on his public trust questionnaire, he corrected that answer within a short period of time on his own volition. His corrected answer may not have been as detailed as the Office of Personnel Management (OPM) might have liked, but it was truthful in

what was said, and neither appears to have been intended to mislead, nor does it appear to have been given in reckless disregard for the truth. Rather, the answer given by Mr. Reed is exactly the sort of terse response one might expect to be given to a very personal question on a standard form. Mr. Reed's prompt unilateral correction of an incorrect answer and his giving of truthful information which would have reasonably led to the information desired show that he did not have the intent to deceive the agency. Without the intent to deceive, there can be no falsification.- *Naskel v. Department of Transportation*, 782 F.2d 975 (Fed. Cir. 1986).

I would sustain the decision of the administrative judge and reverse the unsuitability determination.