

KEYWORD: Guideline F; Guideline E

DIGEST: The Directive states, “[t]he applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven by Department Counsel, and has the ultimate burden of persuasion as to obtaining a favorable . . . decision.” Directive ¶ E3.1.15. Additionally, Department Counsel’s discovery letter also informed Applicant that he “was responsible for providing [his] own witnesses and/or documents at the hearing” and “the Government will not create or provide evidence for you.” The Judge advised Applicant that he was in possession of the SOR and his SOR Response and, if Applicant wanted him to consider any other evidence in reaching his decision, Applicant must present it during the hearing or after the hearing while the record remained open. From our review of the record, Applicant has failed to establish that he was misled in any manner about his responsibility to present mitigating evidence. He also failed to establish that he was denied the due process afforded him under the Directive or that Department Counsel engaged in any misconduct. Adverse decision affirmed.

CASE NO: 18-02261.a1

DATE: 11/18/2020

DATE: November 18, 2020

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In Re: )  
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Applicant for Public Trust Position )  
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ADP Case No. 18-02261

## **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 5, 2019, 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). Department Counsel requested a hearing. On August 31, 2020, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge David M. White denied Applicant’s request for a trustworthiness designation. Applicant appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raised the following issues on appeal: whether he was denied due process and whether the Judge’s decision was arbitrary, capricious, or contrary to law. Consistent with the following, we affirm.

The Judge found against Applicant on four alleged delinquent debts and on a falsification allegation. The Judge summarized the case as follows:

Applicant incurred more than \$90,000 in delinquent consumer debt since 2016, most of which remains unresolved. He denied, and attempted to conceal, his financial issues when applying for a trustworthiness determination. Based upon evaluation of the testimony, pleadings, and exhibits, national security eligibility to occupy a designated sensitive position is denied. [Decision at 1.]

In his appeal brief, Applicant requests that his Notice of Appeal, which contains various arguments, be incorporated into his brief. Each page of his NOA has a header that reads, “[Employer’s name] Proprietary.” From our review of the NOA, we see nothing that would likely constitute corporate propriety information. It appears this header was placed on the NOA in error. We also note that some pages in Applicant’s SOR Response contain the same header and one page contains a footer that reads, “The information in this document is proprietary to [Employer’s name]. It may not be used, reproduced, disclosed, or exported without the written approval of [Employer’s name].” Likewise, these markings were apparently placed on the SOR Response in error.

Applicant's appeal brief/NOA contains information that was not presented at the hearing. This includes, among other matters, an update on the status of Applicant's debt resolution program. We cannot consider new evidence on appeal. Directive ¶ E3.1.29.

Applicant contends that Department Counsel "did not bring up or failed to fully document" facts and she made "false and misleading statements." Appeal Brief at 1. These contentions lack merit. Applicant's arguments reflect that he has the mistaken impression that Department Counsel had an obligation to present evidence favorable to him at the hearing. When Applicant received the SOR, he was provided a copy of the Directive, which states, "[t]he applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven by Department Counsel, and has the ultimate burden of persuasion as to obtaining a favorable . . . decision." Directive ¶ E3.1.15. Additionally, Department Counsel's discovery letter also informed Applicant that he "was responsible for providing [his] own witnesses and/or documents at the hearing" and "the Government will not create or provide evidence for you." Discovery letter of June 3, 2019, at 2-3. At the hearing, the Judge advised Applicant that he was in possession of the SOR and his SOR Response and, if Applicant wanted him to consider any other evidence in reaching his decision, Applicant must present it during the hearing or after the hearing while the record remained open. Tr. 15-16. From our review of the record, Applicant has failed to establish that he was misled in any manner about his responsibility to present mitigating evidence. He also failed to establish that he was denied the due process afforded him under the Directive or that Department Counsel engaged in any misconduct.

Applicant contends that Judge erred in some of his findings of fact. The purported errors include the date he was awarded an associates degree and the date he started his current job. Even if the Judge made the alleged errors, they were harmless because they did not likely affect the outcome of the case. *See, e.g.*, ADP Case No. 13-01074 at 3 (App. Bd. Aug. 25, 2014). Applicant also argues that he did not falsify his security clearance application (SCA), claims he was not aware of the delinquent debts at the time he completed his SCA, and notes he incurred a head injury that has affected his memory. After reviewing the record, the Board concludes that the Judge's material findings and conclusions of security concern are based on substantial evidence or constitute reasonable inferences that could be drawn from the record. *See, e.g.* ADP Case No. 15-02400 at 2-3 (App. Bd. Sep. 12, 2016).

Applicant asserts that the investigator conducted his background interview in an unprofessional manner. The Appeal Board, however, has no authority to rule on the manner in which officials conduct trustworthiness investigations. *See, e.g.*, ISCR Case No. 14-05290 at 2 (App. Bd. Jun. 21, 2017). He further contends the denial of his request for a public trust position will have negative repercussions for him and his family. On this latter point, the Directive does not permit us to consider the impact of an unfavorable decision. *See, e.g.*, ADP Case No. 14-02496 at 3 (App. Bd. May 14, 2015).

Applicant's remaining arguments amount to a disagreement with the Judge's weighing of the evidence. Some of these arguments are based on new evidence that, as noted above, we cannot consider. None of his arguments are sufficient to demonstrate the Judge weighed the evidence in

a manner that was arbitrary, capricious, or contrary to law. *See, e.g.*, ADP Case No. 19-02087 at 3 (App. Bd. Feb. 12, 2020).

Applicant has not identified any harmful errors. 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.’” *See, e.g.*, ADP Case No. 19-02087 at 3. *See also Kaplan v. Conyers*, 733 F.3d 1148 (Fed. Cir. 2013), *cert. denied*.

**Order**

The Decision is **AFFIRMED**.

Signed: Michael Ra'anan  
Michael Ra'anan  
Administrative Judge  
Chairperson, Appeal Board

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

Signed: James F. Duffy  
James F. Duffy  
Administrative Judge  
Member, Appeal Board