

KEYWORD: Guideline F; Guideline E

DIGEST: The federal government need not wait for an applicant to mishandle sensitive information before denying access to such information. A whole-person analysis is not confined to the work-place. The presence of some mitigating information does not compel a favorable trustworthiness determination. Adverse decision affirmed.

CASENO: 06-12130.a1

DATE: 09/21/2007

DATE: September 21, 2007

In Re:)	
)	
-----)	ADP Case No. 06-12130
)	
Applicant for ADP I/II/III Position)	
)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

Pro Se

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a trustworthiness designation. On August 30, 2006, DOHA issued a statement of reasons 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 the case be decided upon the written record. On March 19, 2007, after considering the record, Administrative Judge Erin C. Hogan denied Applicant's request for a trustworthiness designation. Applicant timely appealed pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raised the following issue on appeal: whether the Judge's unfavorable trustworthiness determination under Guidelines F and E is arbitrary, capricious, or contrary to law.

In her brief, Applicant discusses her financial situation and lists steps she has taken to improve her financial situation and plans she has made for further financial improvement in the future. To the extent that this information is new evidence, the Board cannot consider it on appeal. *See* Directive ¶ E3.1.29. Applicant also repeats her explanation for her failure to list debts over 180 days past due. She points out that she has performed her duties faithfully and without compromise for two years and eight months.

Prior to the compilation of the File of Relevant Material, Applicant submitted information concerning her financial situation and her failure to list her financial delinquencies. This information was part of the record evidence which was before the Judge when she reached a trustworthiness determination in Applicant's case. There is a rebuttable presumption that the Judge considered all the record evidence, and in this case the Judge discussed the information Applicant provided and explained why it was insufficient to overcome the government's trustworthiness concerns.

The federal government need not wait until an applicant actually mishandles or fails to properly handle sensitive information before it can deny or revoke access to such information. *See Adams v. Laird*, 420 F. 2d 230, 238-239 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 1039 (1970). An applicant with good or exemplary job performance may engage in conduct that has negative trustworthiness implications. *See, e.g.*, ISCR Case No. 99-0123 at 3 (App. Bd. Jan. 11, 2000). The Directive's Guidelines set forth a variety of examples of off-duty conduct and circumstances which are of trustworthiness concern to the government and mandate a whole-person analysis to determine an applicant's trustworthiness eligibility. A whole-person analysis is not confined to the workplace. *See* ISCR Case No. 03-11231 at 3 (Jun. 4, 2004).

The application of disqualifying and mitigating conditions does not turn simply on a finding that one or more of them apply to the particular facts of a case. Rather, their application requires the exercise of sound discretion in light of the record evidence as a whole. *See, e.g.*, ISCR Case No. 01-14740 at 7 (App. Bd. Jan. 15, 2003). Thus, the presence of some mitigating evidence does not alone compel the Judge to make a favorable trustworthiness determination. 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*. Here, the Judge found some mitigation, but explained why it was insufficient to overcome the government's trustworthiness concerns. An applicant'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 that the Judge weighed the evidence or reached conclusions in a manner that is arbitrary, capricious, or contrary to law.

The Applicant has not met her burden of demonstrating that the Judge erred in concluding that the financial considerations and personal conduct allegations had not been mitigated. Although

Applicant strongly disagrees with the Judge's conclusions, she has not established that those conclusions are arbitrary, capricious, or contrary to law. *See* Directive ¶ E3.1.32.3.

In this case, the Judge found that Applicant had a history of not meeting financial obligations which extended over many years and had deliberately failed to disclose adverse information about her indebtedness on his Questionnaire for Public Trust Positions (SF-85P). At the time the case was submitted for decision, she still had significant outstanding debts. In light of the foregoing, the Judge could reasonably conclude that Applicant's financial problems were still ongoing. The favorable record evidence cited by Applicant is not sufficient to demonstrate the Judge's decision is arbitrary, capricious, or contrary to law. *See, e.g.,* ISCR Case No. 02-28041 at 4 (App. Bd. Jun. 29, 2005). The Judge weighed the mitigating evidence offered by Applicant against the length and seriousness of the disqualifying conduct, and considered the possible application of relevant mitigating conditions. She reasonably explained why the evidence Applicant had presented in mitigation was insufficient to overcome the government's trustworthiness concerns. The Board does not review a case *de novo*. Given the record that was before her, the Judge's ultimate unfavorable trustworthiness determination under Guidelines F and E is sustainable. Thus, the Judge did not err in denying Applicant a trustworthiness designation.

Order

The decision of the Judge denying Applicant a trustworthiness designation is AFFIRMED.

Signed: Michael Y. Ra'anan

Michael Y. Ra'anan
Administrative Judge
Chairman, Appeal Board

Signed: Jean E. Smallin

Jean E. Smallin
Administrative Judge
Member, Appeal Board

Signed: William S. Fields

William S. Fields
Administrative Judge
Member, Appeal Board