

KEYWORD: Guideline F; Guideline E

DIGEST: The Board concludes Applicant was provided with the procedural rights set forth in the Executive Order and the Directive. The federal government need not wait until an applicant actually mishandles sensitive information before it can deny access to such information.

CASENO: 06-13629.a1

DATE: 09/04/2007

DATE: September 4, 2007

In Re:  -----  Applicant for Trustworthiness Determination	) ) ) ) ) ) )	ADP Case No. 06-13629
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**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) proposed to deny or revoke access to automated information systems in ADP-I/II/III sensitivity positions for Applicant. On August 30,

2006, DOHA 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). Applicant requested a hearing. On February 28, 2007, after the hearing, Administrative Judge Marc E. Curry 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 issues on appeal: whether Applicant was denied due process; whether the Judge erred by concluding that the trustworthiness concerns raised under Guideline F had not been mitigated.<sup>1</sup>

(1) On appeal, Applicant argues that at the hearing she was in tears and very nervous, and could have given more verbal information pertaining to some the questions that were asked of her. The Board construes Applicant’s argument as raising the issue of whether she received due process.

After reviewing the record in this case, the Board concludes that Applicant was reasonably provided with the procedural rights set forth in Executive Order 10865 and the Directive, and that the Judge conducted the hearing in a professional manner, consistent with his role as an impartial presiding official. Based upon the representations he received from the Applicant at the beginning of the hearing, the Judge reasonably concluded that Applicant was making a knowing and intelligent waiver of her right to counsel, and was ready and willing to proceed with the hearing. *See, e.g.*, ISCR Case No. 02-17574 at 2 (App. Bd. Jul. 24, 2006); *Compare* ISCR Case No. 04-12732 at 8 (App. Bd. Nov. 2, 2006). During the hearing Applicant gave reasonably detailed explanations with respect to the matters at issue in the case, appeared to understand what was transpiring, answered questions appropriately, and did not otherwise impose any objections to the proceedings.

Although *pro se* applicants cannot be expected to act like lawyers, they are expected to take timely, reasonable steps to protect their rights under the Directive. *See, e.g.*, ISCR Case No. 00-0593 at 4 (App. Bd. May 14, 2001). If they fail to take timely, reasonable steps to protect their rights, that failure to act does not constitute a denial of their rights. *See, e.g.*, ISCR Case No. 02-19896 at 6 (App. Bd. Dec. 29, 2001). Because Applicant did not object to proceeding or otherwise request a continuance of her case, she was not denied due process under the Directive or Executive Order.

(2) Applicant argues that the Judge erred in concluding that the trustworthiness concerns raised under Guideline F had not been mitigated, in that he gave insufficient weight to the favorable

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<sup>1</sup>The Judge’s favorable findings with respect to paragraphs 1.g, 1.i, 1.k, 1.m, 1.n, 1.o, 2.a, 2.b, and 2.c are not at issue on appeal. In her brief, Applicant also contends that she did not deliberately falsify two public trust positions questionnaires by failing to disclose seven debts that were delinquent for over 180 days and four prior criminal charges. In support of this contention, she argues that the omission of the information was due to a misinterpretation on her part, and she subsequently provided the correct information. Because the Judge found in favor of Applicant under Guideline E, the Board need not address this issue.

evidence in the record, particularly Applicant's outstanding job performance.<sup>2</sup> Applicant's argument does not demonstrate that the Judge erred.

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, e.g.*, ADP Case No. 06-09293 at 2 (App. Bd. Jun. 6, 2007). Trustworthiness determinations are not limited to consideration of an applicant's job performance or conduct during duty hours, and off-duty conduct can be relevant in assessing an applicant's trustworthiness eligibility. *See, e.g.*, ADP Case No. 06-07581 at 2 (App. Bd. May 17, 2007). An applicant with good or exemplary job performance may engage in conduct that has negative trustworthiness implications. *See, e.g.*, ADP Case No. 06-09293 at 2 (App. Bd. Jun. 6, 2007). 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. *Id.*

The application of disqualifying and mitigating conditions and whole-person factors 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.*, ADP Case No. 06-02549 at 2 (App. Bd. Jul. 3, 2007). 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*. 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 the Judge weighed the evidence or reached conclusions in a manner that is arbitrary, capricious, or contrary to law.

In this case, the Judge weighed the mitigating evidence offered by Applicant against the length and seriousness of her history of financial difficulties, and considered the possible application of relevant mitigating conditions. He reasonably explained why the evidence which the Applicant had presented in mitigation was insufficient to overcome all the government's trustworthiness concerns. The Board does not review a case *de novo*. 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.*, ADP Case No. 06-07581 at 2 (App. Bd. May 17, 2007). Given the record that was before him, the Judge's ultimate unfavorable trustworthiness determination under Guideline F is sustainable.

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<sup>2</sup>In her brief, Applicant also makes statements as to her ongoing efforts to resolve her financial problems. The Board may not consider new evidence on appeal. *See* Directive ¶ E3.1.29. Accordingly, we may not consider Applicant's additional explanations, and they do not demonstrate error on the part of the Judge.

**Order**

The determination of the Judge denying Applicant access to automated information systems in ADP I/II/II sensitivity positions is AFFIRMED.

Signed: Jeffrey D. Billett  
Jeffrey D. Billett  
Administrative Judge  
Member, 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