

DATE: December 12, 2006

In Re:

SSN:-----

Applicant for Security Clearance

ADP Case No. 05-08820

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Peregrine D. Russell-Hunter, 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 and ADP-II sensitivity positions for Applicant. On November 21, 2005, DOHA issued a statement of reasons (SOR) advising Applicant of the basis for that decision--security concerns raised under Guideline J (Criminal Conduct), Guideline E (Personal Conduct) and Guideline F (Financial Considerations) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On May 31, 2006, after the

hearing, Administrative Judge Marc E. Curry denied Applicant's request for a trustworthiness designation. [\(1\)](#) Applicant timely appealed pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raised the following issues on appeal: whether the Administrative Judge erred in concluding that Applicant had deliberately falsified material facts on her public trust position application; and whether the Administrative Judge's unfavorable decision under Guidelines J, E and F is arbitrary, capricious, or contrary to law.

Applicant contends that she did not deliberately falsify material facts on her public trust position application. In support of that contention, Applicant argues that the omission of material information was due to confusion or mistake. Applicant also contends the Administrative Judge should have concluded that the trustworthiness concerns raised under Guidelines J, E and F were mitigated because the disqualifying conduct was not recent and Applicant has an excellent record. In support of that contention, Applicant encloses three additional character reference letters attesting to her trustworthiness and dedication. The Board does not find Applicant's contentions persuasive.

The Board may not consider new evidence on appeal. *See* Directive ¶ E3.1.29. Accordingly, we may not consider Applicant's additional character reference letters, and they do not demonstrate error on the part of the Judge.

The Applicant has not met her burden of demonstrating that the Administrative Judge erred in concluding that the trustworthiness concerns presented by her disqualifying conduct 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.

Applicant's statements about her intent and state of mind when she executed her trust position application were relevant

evidence, but they were not binding on the Administrative Judge. *See, e.g.*, ADP Case No. 03-14873 at 2 (App. Bd. Sept. 28, 2006). As the trier of fact, the Judge had to consider Applicant's statements in light of the record evidence as a whole, and Applicant's denial of any intent to falsify material facts did not preclude the Judge from weighing the record evidence and making findings that contradicted Applicant's denials.

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. 05-03939 at 2 (App. Bd. Sept. 1, 2006). 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 seriousness of the disqualifying conduct, and considered the possible application of relevant mitigating factors. The Judge found in Applicant's favor with respect to one of the SOR factual allegations. However, the Judge reasonably explained why the evidence which the Applicant had presented in mitigation was insufficient to overcome the government's trustworthiness concerns. Given the record that was before him, the Judge's ultimate unfavorable trustworthiness determination under Guidelines J, E, and F is not arbitrary, capricious or contrary to law.

Finally, the favorable record evidence cited by Applicant is not sufficient to demonstrate the Administrative Judge's decision is arbitrary, capricious, or contrary to law. *See, e.g.*, ADP Case No. 03-14873 at 2 (App. Bd. Sept. 28, 2006). The Board does not review a case *de novo*. Given the record that was before him, the Judge's ultimate unfavorable trustworthiness determination is sustainable. Thus, the Administrative Judge did not err in denying Applicant access to automated information systems in ADP-I and ADP-II sensitivity positions.

Order

The decision of the Administrative Judge denying Applicant access to automated information systems in ADP-I and ADP-II sensitivity positions is AFFIRMED.

Signed: Jean E. Smallin

Jean E. Smallin

Administrative Judge

Member, Appeal Board

Signed: William S. Fields

William S. Fields

Administrative Judge

Member, Appeal Board

Signed: James E. Moody

James E. Moody

Administrative Judge

Member, Appeal Board

1. The Administrative Judge found in favor of Applicant with respect to SOR paragraph 2.a. That favorable finding is not at issue on appeal.