

KEYWORD: Guideline F

DIGEST: The ultimate burden of persuasion to obtain a favorable trustworthiness determination rests with the Applicant. There is a rebuttable presumption that quasi-judicial officials are unbiased and impartial. A party seeking to rebut that presumption has a heavy burden on appeal. The Adjudicative Guidelines apply to all adjudications and other determinations made under DOD Directive 5220.6. Adverse decision affirmed.

CASENO: 06-25545.a1

DATE: 11/02/2007

DATE: November 2, 2007

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In Re:)	
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-----)	ADP Case No. 06-25545
)	
Applicant for Trustworthiness Determination)	
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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 February 1,

2007, DOHA issued a statement of reasons (SOR) advising Applicant of the basis for that decision—trustworthiness concerns raised under Guideline F (Financial Considerations) of Department of Defense Directive 5220.6 (Jan. 2, 1992), as amended (Directive). Applicant requested the case be decided on the written record. On May 31, 2007, after considering the record, Administrative Judge Carol G. Ricciardello denied Applicant’s request for a trustworthiness determination. Applicant timely appealed pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raises the following issue on appeal: whether the Administrative Judge’s decision is arbitrary, capricious, or contrary to law.

In his appeal brief, Applicant explains the causes of his financial situation and his attempts to improve it. Applicant argues that the Judge should have found that his financial situation was mitigated. He alleges bias on the part of the Judge, and he cites a factual error on the part of the Judge. Applicant states that because of a comment by someone in the security office, he misjudged the seriousness of the trustworthiness determination process and therefore did not hire an attorney or submit documentary evidence. He believes that some financial information he submitted to an interviewer may not have reached the interviewer. Applicant notes that the Judge’s decision does not mention an interviewer’s report. He nevertheless believes that the interviewer’s report may have influenced the Judge’s decision, and he believes that he should have been able to review the report and rebut its contents. Applicant also points out that he has no access to classified information. In light of the above, Applicant requests remand of his case to the Judge.

As stated above, Applicant’s appeal brief contains an explanation of the source of his financial difficulties and his attempts to improve his financial record. To the extent that the explanation contains information not presented before the Judge reviewed the record, it cannot be considered on appeal, since the Board is not allowed to consider new evidence. *See* Directive ¶ E3.1.29.

In his response to the government’s SOR, Applicant admitted the alleged debts. His admissions established the government’s case. The burden then shifted to Applicant to rebut, explain, extenuate, or mitigate the facts he admitted. The ultimate burden of persuasion to obtain a favorable trustworthiness determination rested with Applicant. *See* Directive ¶ E3.1.15. Applicant provided some information about the origin of his financial difficulties in his responses to the SOR and to the file of relevant material (FORM). In her decision, the Judge referred to the information Applicant provided. The Judge stated she was not able to conclude that Applicant’s financial situation was mitigated because Applicant provided neither sufficient information nor corroboration for his assertions. Applicant contends that the Judge did not give sufficient weight to Applicant’s mitigating evidence. As the trier of fact, the Judge had to weigh the evidence as a whole and decide whether the favorable evidence outweighed 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. *See, e.g.*, ADP Case No. 06-13629 at 3 (Sep. 4, 2007).

Applicant’s assertion of factual error as to the age of Applicant’s debts is not entirely clear. Even if we accept Applicant’s argument on this point, the error would be harmless. Considering the decision as a whole, it is unlikely that clarification of the point in question would lead to a different result. *See, e.g.*, ISCR Case No. 02-29143 at 3 (App. Bd. Jan. 12, 2005).

With regard to Applicant's allegation of bias, there is a rebuttable presumption that quasi-judicial officials are unbiased and impartial, and a party seeking to rebut that presumption has a heavy burden on appeal. When the Board considers a claim of bias, the standard is not whether the appealing party personally believed that the Judge was biased. Rather, the standard is whether the record contains any indication that the Judge acted in a manner that would lead a disinterested person to question the fairness or impartiality of the judge. *See, e.g.*, ISCR Case No. 03-12361 at 3 (App. Bd. Oct. 31, 2005). In this case, Applicant offers no explanation for his claim of bias other than the Judge's failure to apply mitigating factors as he believes they should be applied. The Board finds no indication of bias.

Applicant received explanations of DOHA's procedures and a copy of the Directive. He was advised that an unfavorable decision could result in loss of his job and that he could hire an attorney if he wanted one. Applicant states that an employee in the Defense Manpower Data Center security office told him that she had "never seen anything come of these." If Applicant chose, as he suggests, to limit his responses based on that comment, he cannot ascribe error to the Judge for his failure to participate fully.

Applicant refers to contact he had with an interviewer. He states that he slipped information under the interviewer's door and is not sure whether the interviewer received the information. Although the Judge's decision does not reference a report from the interviewer, Applicant believes the Judge may have been negatively influenced by such a report and argues that he should have been allowed to read the report and rebut its contents. Applicant requested that his case be determined on the written record. Therefore, the Judge based her trustworthiness decision on the FORM and Applicant's response to it. The FORM does not contain an interviewer's report. Applicant was given the opportunity to respond to the FORM before it was delivered to the Judge, and he did submit a response. Any information Applicant wanted the Judge to consider, he should have submitted as part of his response. Applicant's arguments about an interviewer's report are speculative and without merit.

Finally, Applicant points out that he has no access to classified information. In accordance with the memorandum of the Deputy Under Secretary of Defense dated August 30, 2006, the Adjudicative Guidelines "apply to all adjudications and other determinations made under DoD Directive 5220.6."

None of Applicant's arguments constitutes harmful error. The Judge's unfavorable trustworthiness determination is sustainable.

ORDER

The determination of the Judge denying Applicant access to automated information systems in ADP I/II/III 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