

KEYWORD: Guideline F

DIGEST: The federal government need not wait until an applicant mishandles sensitive information before it denies or revokes access to such information. Trustworthiness determinations are not limited to consideration of job performance or on duty conduct. Adverse decision affirmed.

CASENO: 07-07799.a1

DATE: 12/05/2008

DATE: December 5, 2008

In Re:)
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 -----) ADP Case No. 07-07799
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 Applicant for Public Trust 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 January 28, 2008, 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 a hearing. On September 19, 2008, after the hearing, Administrative Judge Robert J. Tuider 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 adverse trustworthiness determination is arbitrary, capricious or contrary to law.

Applicant argues that the Judge’s adverse decision should be reversed because the Judge did not give sufficient weight to Applicant’s mitigating evidence which he contends showed that his financial problems arose from circumstances that were beyond his control, and that he has now paid off, or arranged to pay off, all his outstanding debts. Applicant also argues that a trustworthiness determination based on his personal credit history is not indicative of his ability to maintain confidentiality of sensitive information. Applicant’s arguments do not demonstrate that the Judge erred.

The Directive presumes there is a nexus or rational connection between proven conduct under any of its Guidelines and an applicant’s trustworthiness eligibility. *See, e.g.*, ADP Case No. 06-16376 at 2 (App. Bd. Aug. 28, 2007). 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 *supra* at 2. 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.*

In this case, the Judge based his adverse findings, in substantial part, on the fact that Applicant “did not provide any documentation” that he had paid off, or was making payments on, a number of the specific debts listed in the SOR. Decision at 3. He also noted that “Applicant did not provide any good character evidence” *Id.* at 4. As a result, the Judge concluded that Applicant had not “satisfied his ultimate burden of persuasion.” *Id.* at 6. The Board has previously noted that it is reasonable for a Judge to expect applicants to present documentation about the satisfaction of individual debts. *See, e.g.*, ISCR Case No. 07-10310 at 2 (App. Bd. Jul. 30, 2008); ISCR Case No. 06-17520 at 2 (App. Bd. Sep. 20, 2007).

Once the government presents evidence raising trustworthiness concerns, the burden shifts to the applicant to establish mitigation. Directive ¶ E3.1.15. 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*. See, e.g., ISCR Case No. 06-10320 at 2 (App. Bd. Nov. 7, 2007). 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., ISCR Case No. 06-17409 at 3 (App. Bd. Oct. 12, 2007).

In this case, the Judge found that Applicant had a lengthy history of not meeting financial obligations. The Judge weighed the limited mitigating evidence offered by Applicant against the length and seriousness of the disqualifying conduct and considered the possible application of relevant conditions and factors. He found in favor of Applicant with respect to two of the SOR factual allegations. However, he reasonably explained why the evidence which Applicant had presented in mitigation was insufficient to overcome 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., ISCR Case No. 06-11172 at 3 (App. Bd. Sep. 4, 2007). After reviewing the record, the Board concludes that the Judge examined the relevant data and articulated a satisfactory explanation for his decision, "including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n of the United States v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)). Therefore, the Judge's ultimate unfavorable trustworthiness determination under Guideline F is sustainable.

Order

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

Signed: Michael D. Hipple
Michael D. Hipple
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