

KEYWORD: Guideline F; Guideline E

DIGEST: The presence of some mitigating evidence does not alone compel the Judge to issue a favorable trustworthiness determination. The Judge had to weigh the evidence as a whole. Adverse decision affirmed.

CASENO: 07-11090.a1

DATE: 12/05/2008

DATE: December 5, 2008

In Re:	)	
	)	
-----	)	ADP Case No. 07-11090
	)	
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 February 20, 2008, 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 the case be decided upon the written record. On September 16, 2008, after considering the record, Administrative Judge Henry Lazzaro denied Applicant’s request for a trustworthiness designation. Applicant timely appealed pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.

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

The Judge made the following relevant findings of fact: Of the debts alleged in the SOR, Applicant admitted responsibility for four, totaling \$15,301, although she provided proof of payment for one of the debts, in the amount of \$576. Applicant claimed to have paid another of those debts, amounting to \$202, but did not provide proof of payment. Applicant denied knowledge of five other debts totaling \$2,859. Applicant also denied that she falsified her public trust position application when she stated that she did not have any debts more than 180 days delinquent.

Under Guideline F, the Judge found in Applicant’s favor as to the debt for which she submitted proof of payment. He found against Applicant as to the other debts. Under Guideline E, the Judge found that Applicant did not falsify her application, because she was unaware that she had debts more than 180 days delinquent.

In her appeal, Applicant restates some information which was in the record before the Judge. She objects to the Judge’s conclusions and contends that the Judge should have found her financial situation to be mitigated by her personal circumstances. Applicant also submits new information which was not in the record at the time the Judge made his trustworthiness determination. This includes recent steps Applicant has taken to improve her financial situation, *e.g.*, contesting some of the debts on her credit reports and paying a delinquent debt. Because this information constitutes new evidence, the Board cannot consider it. Directive ¶ E3.1. 29.

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.*, ADP Case No. 05-12037 at 3 (App. Bd. May 10, 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*. *See, e.g.*, ISCR Case No. 06-12130 at 2 (App. Bd. Sep. 21, 2007). 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. Applicant chose to have her case decided on the written record, with the result that her credibility could not be evaluated in the context of a hearing. The Judge’s decision is sustainable.

**Order**

The Judge's decision denying Applicant a trustworthiness designation 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