

KEYWORD: Guideline F

DIGEST: Applicant’s disagreement with the Judge’s weighing of the evidence is not enough to show that the Judge weighed the evidence in a manner that was arbitrary, capricious, or contrary to law. Adverse decision affirmed.

CASE NO: 15-01270.a1

DATE: 06/16/2016

DATE: June 16, 2016

In Re:)	
)	
-----)	ADP Case No. 15-01270
)	
Applicant for Public Trust Position)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

Pro se

The Department of Defense (DoD) declined to grant Applicant a trustworthiness designation. On August 21, 2015, DoD 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 decision of the written record. On March 30, 2016, after considering the record, Administrative Judge John Grattan Metz, Jr. denied Applicant’s request for a trustworthiness designation. Applicant 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 decision is arbitrary, capricious, or contrary to law.

Applicant argues that the Judge's adverse decision should be reversed because she had filed all of her overdue Federal and state income tax returns prior to the decision in her case. In support of her argument she asserts that there are no factors in her work record or other matters in her personal life to support a finding of untrustworthiness and she was candid about her failure to file her tax returns in a timely manner during the application process. Applicant's argument does not demonstrate that the Judge's ultimate adverse decision is arbitrary, capricious, or contrary to law.

Applicant's August 21, 2015 SOR alleged that she had failed to file her Federal and state income tax returns, and pay any taxes due thereon, for tax years 2007 through 2011. Applicant elected to have her case decided on the written record and the government sent her its File of Relevant Material (FORM) on October 28, 2015. In her November 25, 2015 response to the government's FORM, Applicant documented that she had filed her back Federal and state tax returns on September 22, 2015, and paid any back taxes that were due on November 21 and 23, 2015—several days before her response to the FORM was due. In reaching his adverse decision, the Judge gave particular weight to the fact that “the situation reported by Applicant's accountant [was] vastly different from Applicant's account.” Decision at 2. He also noted that she had “provided no budget or personal financial statement indicating her family's financial situation,” had “not documented any credit or financial counseling,” and had “provided no work or character references, or evidence of civic or community involvement.” *Id.*

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 decision. 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*. A party'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. 07-06039 at 4 (App. Bd. Jul. 8, 2008).

The Judge weighed the available mitigating evidence offered by Applicant against the length and seriousness of the disqualifying circumstances and considered the possible application of relevant conditions and factors. He reasonably explained why the mitigating evidence was insufficient to overcome the government's trustworthiness concerns. *Id.* at 3-5.

The Board does not review a case *de novo*. The Judge's unfavorable trustworthiness determination is sustainable. The standard applicable to trustworthiness cases is that set forth in *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988) regarding security clearances: such a determination “. . . may be granted only when ‘clearly consistent with the interests of the national security.’” *See, e.g.*, ADP Case No. 14-03541 at 3 (App. Bd. Aug. 3, 2015). *See also Kaplan v. Conyers*, 733 F.3d 1148 (Fed. Cir. 2013), *cert. denied*.

Order

The decision of the Judge is AFFIRMED.

Signed: Michael Ra'anan
Michael Ra'anan
Administrative Judge
Chairperson, Appeal Board

Signed: James F. Duffy
James F. Duffy
Administrative Judge
Member, Appeal Board

Signed: William S. Fields
William S. Fields
Administrative Judge
Member, Appeal Board