

KEYWORD: Guideline C; Guideline B

DIGEST: Favorable record evidence cited by Applicant is not sufficient to demonstrate that the Judge adverse decision is erroneous. Adverse decision affirmed.

CASENO: 04-12255.a1

DATE: 09/10/2007

DATE: September 10, 2007

In Re: ----- Applicant for Public Trust Position)))))))	ADP Case No. 04-12255
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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) declined to grant Applicant a trustworthiness designation. On October 5, 2006, DOHA issued a statement of reasons (SOR) advising Applicant of the basis for that decision—trustworthiness concerns raised under Guideline

C (Foreign Preference) and Guideline B (Foreign Influence) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested that the case be decided upon the written record. On March 20, 2007, after considering the record, Administrative Judge Elizabeth M. Matchinski 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 under Guidelines C and B is arbitrary, capricious or contrary to law.¹

Applicant argues that the Judge erred in concluding that he had not mitigated the trustworthiness concerns raised under Guidelines C and B. In support of this argument, Applicant summarizes the favorable evidence he presented below. The Board does not find Applicant's argument persuasive.

The Applicant has not met his burden of demonstrating that the Judge erred in concluding that the trustworthiness concerns raised by his possession of a Yemeni passport, and his family ties and property interests in Yemen, had not been mitigated. Although Applicant strongly disagrees with the Judge's conclusions, he has not established that those conclusions are arbitrary, capricious, or contrary to law. *See* Directive ¶ E3.1.32.3.

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.*, ISCR Case No. 01-14740 at 7 (App. Bd. Jan.15, 2003). 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 nature and seriousness of the disqualifying circumstances, and considered the possible application of relevant mitigating conditions. The Judge reasonably explained why the evidence which the 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. 02-28041 at 4 (App. Bd. Jun. 29, 2005). Given the record that was before her, the Judge's ultimate unfavorable trustworthiness determination under Guidelines C and B is sustainable.

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

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