

KEYWORD: Guideline F

DIGEST: The Judge reasonably concluded that Applicant was making a knowing and intelligent waiver of the 15 days notice requirement. Applicant has not established the Judge's conclusions are arbitrary or contrary to law. Adverse decision affirmed.

CASENO: 05-12037.a1

DATE: 05/10/2007

DATE: May 10, 2007

In Re:)	
)	
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SSN:-----)	ADP Case No. 05-12037
)	
Applicant for Trustworthiness Designation)	

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 9, 2006, 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 October 31, 2006, after the hearing, Administrative Judge Paul J. Mason

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 issues on appeal: whether Applicant was denied due process; whether the Judge's adverse trustworthiness determination is arbitrary, capricious, or contrary to law.

(1) Applicant argues that she was denied due process because she did not receive 15 days advance notice of the time and place of the hearing, and that she felt pressured to go ahead with the hearing anyway. In support of this argument, she contends that she was unaware of the 15 day notice requirement prior to arriving at the hearing, and had she known about it, "[she] could have done more for [her] case."¹

Directive ¶ E3.1.8 states that an "applicant shall be notified at least 15 days in advance of the time and place of the hearing . . ." The Directive does not specify the form that notice must take. Although the 15 day notice requirement is important, the Board has previously noted that an applicant may waive that requirement. *See* ISCR Case No. 04-12732 at 8 (App. Bd. Nov. 2, 2006).

In this case, the date on the Notice of Hearing was August 14, 2006, and the hearing was held on August 30, 2006. At the beginning of the hearing, Department Counsel brought those facts to the attention of the Judge, and acknowledged that as a practical matter Applicant could not have received the Notice of Hearing more than 15 days in advance of the hearing. However, Department Counsel also informed the Judge that he had verbally advised Applicant of the hearing date in late July or early August of 2006, suggesting that Applicant had more than 15 days of actual notice as to the hearing date.² At that point, the Judge examined the relevant documents, gave the Applicant an extensive explanation of the 15 day notice requirement, and concluded that insofar as the written Notice of Hearing was concerned, it was in "technical violation" of ¶ E3.1.8.³

The Judge then asked Applicant if she recalled being verbally advised of the hearing date by Department Counsel. Applicant answered that she did, and confirmed that the conversation took place "towards the last part of July." In response to further questioning by the Judge, Applicant acknowledged she had been "informed" of and was "aware" of the "upcoming hearing more than 15 days in advance of [the date]."⁴ At that juncture, the Judge asked Applicant if she was willing to waive the 15 day notice requirement and proceed with the hearing. Applicant answered in the affirmative. The relevant portion of the transcript is as follows:

JUDGE: Okay. So my question is, do you waive - which means do you give up - to you relinquish your right to have a hearing 15 days out from when you're told of when the hearing is to occur?

¹Applicant's Brief at 1.

²Transcript at 5.

³Transcript at 5-8.

⁴Transcript at 8.

APPLICANT: Yes, sir, I waive that.

JUDGE: Okay. Now, do you understand what I've said?

APPLICANT: Yes, sir.

JUDGE: All right. Well, that means we're going to go forward with the hearing today. And you don't have a problem, even though technically you didn't receive the Notice of Hearing on time?

APPLICANT: Yes, sir.

JUDGE: Okay. I am satisfied that you understand the basis of your waiver and that you have waived you right to a 15-day period.⁵

After reviewing the record in this case, the Board concludes that Applicant was reasonably provided with the procedural rights set forth in Executive Order 10865 and the Directive, and that the Judge conducted the hearing in a professional manner, consistent with his role as an impartial presiding official. The Judge diligently inquired into the issues of notice and waiver. Based upon the representations he received from Applicant, he reasonably concluded that Applicant was making a knowing and intelligent waiver of the 15 days notice requirement, and was ready and willing to proceed with the hearing. *See, e.g.*, ISCR Case No. 02-17574 at 2 (App. Bd. July 24, 2006); *Compare* ISCR Case No. 04-12732 at 8 (App. Bd. Nov. 2, 2006).

Although *pro se* applicants cannot be expected to act like a lawyer, they are expected to take timely, reasonable steps to protect their rights under the Directive. *See, e.g.*, ISCR Case No. 00-0593 at 4 (App. Bd. May 14, 2001). If they fail to take timely, reasonable steps to protect their rights, that failure to act does not constitute a denial of their rights. *See, e.g.*, ISCR Case No. 02-19896 at 6 (App. Bd. Dec. 29, 2001). Because Applicant did not object to proceeding or otherwise request a continuance of her case, she was not denied due process under the Directive or Executive Order.

(2) Applicant also argues that the Judge's adverse trustworthiness determination should be reversed because Applicant has acknowledged responsibility for her debts, taken responsible action to prevent a recurrence of her debt problems in the future, and will keep looking into credit agencies that she can afford.⁶ Applicant's argument does not demonstrate error on the part of the Judge.

Applicant has not met her burden of demonstrating that the Judge erred in concluding that the financial considerations allegations had not been mitigated. Although Applicant strongly disagrees with the Judge's conclusions, she 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

⁵Transcript at 9.

⁶The Judge found in favor of Applicant with respect to SOR paragraph 1.a. That favorable finding is not at issue on appeal.

that one or more of them applies 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 found that Applicant had a lengthy and serious history of not meeting financial obligations. At the time the case was submitted for decision, Applicant still had significant unpaid debts. In light of the foregoing, the Judge could reasonably conclude that Applicant's financial problems were still ongoing. The Judge weighed the mitigating evidence offered by Applicant against the length and seriousness of the disqualifying conduct and considered the possible application of relevant mitigating conditions. The Judge found in favor of Applicant with respect to one of the allegations in the SOR. However, the Judge articulated a rational basis for not fully applying any mitigating conditions in this case, and 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. June 29, 2005). Given the record that was before him, the Judge's ultimate unfavorable trustworthiness determination under Guidelines F is sustainable. Thus, the Judge did not err in denying Applicant a trustworthiness designation.

Order

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

Signed: Michael Y. Ra'anan

Michael Y. Ra'anan
Administrative Judge
Chairman, 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