

KEYWORD: Guideline F; Guideline E

DIGEST: The Directive’s guidelines set forth a variety of off-duty conduct and circumstances which are of trustworthiness concern to the government. A whole-person analysis is not confined to the workplace. Adverse decision affirmed.

CASENO: 05-16601.a1

DATE: 07/02/2007

DATE: July 2, 2007

In Re:)	
)	
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SSN: -----)	ADP Case No. 05-16601
)	
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) declined to grant Applicant a trustworthiness designation. On June 21, 2006, 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 a hearing. On December 7, 2006, after the hearing, Administrative Judge James A. Young 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 unfavorable trustworthiness determination under Guidelines F and E is arbitrary, capricious, or contrary to law.

Applicant argues that the Judge's adverse trustworthiness determination should be reversed because he has taken reasonable steps to resolved his outstanding debts.¹ He also argues that there is no connection between his prior financial problems and his ability to perform his job and protect sensitive information. Applicant's arguments do not demonstrate that the Judge erred.

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 Adams v. Laird*, 420 F. 2d 230, 238-239 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 1039 (1970). An applicant with good or exemplary job performance may engage in conduct that has negative trustworthiness implications. *See, e.g.*, ISCR Case No. 99-0123 at 3 (App. Bd. Jan. 11, 2000). 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. *See ISCR Case No. 03-11231 at 3 (June 4, 2004).*

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 that the Judge weighed the evidence or reached conclusions in a manner that is arbitrary, capricious, or contrary to law.

The Applicant has not met his burden of demonstrating that the Judge erred in concluding that the financial considerations and personal conduct allegations 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.*

In this case, the Judge found that Applicant had a history of not meeting financial obligations which extended over many years and had deliberately failed to disclose adverse information about his indebtedness on his Questionnaire for Public Trust Positions (SF-85P). At the date of the hearing

¹In his brief, Applicant essentially reasserts the same evidence and argument he presented below. In that regard, Applicant states that he contacted a financial planner who advised him not to pay off his old debts until he had purchased a home, because his credit score would be affected adversely. He was then told he could refinance the home in a year and use the equity to eliminate his old debts. Applicant further states that he is presently working with a realtor and a lender to implement this plan. Applicant's Brief at 1.

he still had significant outstanding debts. In light of the foregoing, the Judge could reasonably conclude that Applicant's financial problems were still ongoing. 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). 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. He reasonably explained why the evidence Applicant had presented in mitigation was insufficient to overcome the government's trustworthiness concerns. The Board does not review a case *de novo*. Given the record that was before him, the Judge's ultimate unfavorable trustworthiness determination under Guidelines F and E 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: 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