

KEYWORD: Guideline F; Guideline E; Guideline J

DIGEST: The Judge considered applicant’s explanation for his failure to disclose pertinent information on a government form in light of the record as a whole and concluded there was a sufficient basis to find that the omission was deliberate. Adverse decision affirmed.

CASENO: 06-00672.a1

DATE: 07/03/2007

DATE: July 3, 2007

In Re:)	
)	
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SSN: -----)	ADP Case No. 06-00672
)	
Applicant for Trustworthiness Designation)	
)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

Van Kirk McCombs, II, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a trustworthiness designation. On February 23, 2006, DOHA issued a statement of reasons (SOR) advising Applicant of the basis for that decision—trustworthiness concerns raised under Guideline F (Financial Considerations), Guideline E (Personal Conduct) and Guideline J (Criminal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant

requested a hearing. On December 11, 2006, after the hearing, Administrative Judge Paul J. Mason, denied Applicant's request for a trustworthiness designation.¹ Applicant submitted a timely appeal pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raised the following issues on appeal: whether the Judge erred in concluding Applicant's falsification of his Standard Form 85P was deliberate and intentional; and whether the Judge's adverse trustworthiness determination is arbitrary, capricious or contrary to law.

Applicant argues that he did not deliberately and intentionally falsify his Standard Form 85P by failing to disclose two debts that had been outstanding for over 180 days. It is Applicant's contention that the omission of the information in question was due to an honest mistake and was at most careless. In support of that contention, Applicant states that he did not know that there were outstanding debts that were over 180 days past due, and that he made no inquiries concerning his debts and did not have access to any credit reports at the time.² Applicant's argument does not demonstrate error on the part of the Judge.

The Judge had the opportunity to consider Applicant's explanation for why he failed to disclose the information in question. The Judge was not bound, as a matter of law, to accept or reject Applicant's explanation. The Judge considered Applicant's explanation in light of the record evidence as a whole, and concluded there was a sufficient basis to find that Applicant's omission was deliberate and intentional. *See, e.g.*, ISCR Case No. 05-06602 at 3 (App. Bd. Feb. 6, 2007). On this record, the Judge's finding of deliberate falsification is sustainable. *See* Directive ¶ E3.1.32.1. Applicant has not demonstrated that the Judge's conclusion in that regard is arbitrary, capricious, or contrary to law.

The application of disqualifying and mitigating conditions and whole person factors does not turn simply on a finding that one or more of them apply to the particular facts of a case. *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. *See, e.g.*, ISCR Case No. 02-01181 at 3-4 (App. Bd. Jan. 30, 2004).

In this case, the Judge reasonably weighed the mitigating evidence against the seriousness of the disqualifying conduct, and considered the possible application of relevant mitigating conditions. The Judge found in Applicant's favor under one of the Guidelines. However, the Judge reasonably explained why there was insufficient mitigating evidence to overcome all of the government's trustworthiness concerns. The Board does not review a case *de novo*. The favorable evidence cited by the Applicant is not sufficient to demonstrate the Judge's overall decision is

¹The Judge found in favor of Applicant under Guideline F. That favorable formal finding is not at issue on appeal.

²Applicant's Brief at 3-4.

arbitrary, capricious, or contrary to law. *See, e.g.*, ADP Case No. 06-08653 at 2 (App. Bd. May 14, 2007). Given the record that was before him, the Judge's ultimate unfavorable trustworthiness determination under Guidelines E and J is sustainable.

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