

KEYWORD: Guideline F; Guideline E

DIGEST: There is a rebuttable presumption that the Judge considered all the record evidence. The Judge specifically discussed the evidence cited by Applicant. Adverse decision affirmed.

CASENO: 06-02549.a1

DATE: 07/03/2007

DATE: July 3, 2007

In Re:	)	
	)	
	)	
-----	)	ADP Case No. 06-02549
SSN: -----	)	
	)	
Applicant for ADP I/II/III Position	)	
	)	

**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 May 18, 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 29, 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 the Judge erred in concluding Applicant's falsification of two public trust position questionnaires was deliberate; whether the

Judge erred by concluding that the trustworthiness concerns raised under Guideline E had not been mitigated.

(1) Applicant contends that she did not deliberately falsify two public trust positions questionnaires by failing to disclose her debts that were delinquent for over 180 days. In support of this contention, she argues that the omission of the information was due to a misunderstanding on her part, and she subsequently provided the correct information. Applicant has not demonstrated that the Judge erred.

The Judge had the opportunity to consider Applicant's explanation for why she 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 omissions were deliberate and intentional. Given the record, the Judge's findings of deliberate falsification are sustainable. *See* Directive ¶ E3.1.32.1; ISCR Case No. 04-03849 at 2-3 (App. Bd. Jan. 26, 2006). The trustworthiness concerns raised by Applicant's falsifications were not necessarily overcome by Applicant's subsequent disclosures to the government. *See* ISCR Case No. 01-19513 at 5 (App. Bd. Jan. 22, 2004).

(2) Applicant also argues that the Judge erred in concluding that the trustworthiness concerns raised under Guideline E had not been mitigated, in that he did not apply a whole person analysis, and gave insufficient weight to the favorable evidence concerning Applicant's work ethic, work history and credible character. Applicant has not demonstrated that the Judge erred.

There is a rebuttable presumption that the Judge considered all the record evidence unless he specifically states otherwise. *See, e.g.*, DOHA Case No. 96-0228 at 3 (App. Bd. Apr. 3, 1997). The Judge is not required to cite or discuss every piece of record evidence. *See, e.g.*, DISCR Case No. 90-1596 at 5 (App. Bd. Sept. 18, 1992). A review of the record indicates that the Judge's whole person analysis complies with the requirements of Directive ¶ E2.2.1, in that the Judge considered the totality of Applicant's conduct in reaching his decision. *See, e.g.*, ISCR Case No. 03-23829 at 4 (App. Bd. Apr. 27, 2007). The Judge specifically discussed the evidence to which Applicant refers in both his findings of fact and his conclusions.<sup>1</sup> He ultimately concluded that the evidence was insufficient to mitigate the government's trustworthiness concerns stating: "Applicant's character statements and job performance evaluations constitute strong evidence weighing in her favor, but it falls short of overcoming Applicant's pattern of dishonest conduct."<sup>2</sup>

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<sup>1</sup>Decision at 4 & 6.

<sup>2</sup>*Id* at 6.

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. 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 seriousness of the disqualifying conduct, and considered the possible application of relevant mitigating conditions. He found in favor of Applicant under Guideline F. However, the Judge reasonably explained why the evidence which the Applicant had presented in mitigation was insufficient to overcome all 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 Guideline E is sustainable.

### **Order**

The determination of the Judge denying Applicant access to automated information systems in ADP I/II/II sensitivity positions 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