

KEYWORD: Guideline F; Guideline E; Guideline J

DIGEST: Applicant’s statements about his state of mind are relevant evidence but not binding on the Judge. The application of disqualifying and mitigating conditions requires the exercise of sound discretion in light of the record evidence as a whole. Adverse decision affirmed.

CASENO: 06-07172.a1

DATE: 04/12/2007

DATE: April 12, 2007

In Re:	)	
	)	
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SSN: -----	)	ADP Case No. 06-07172
	)	
Applicant for Trustworthiness Determination	)	
	)	

**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 3, 2006, DOHA issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security 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 the case be decided on the written record. On September 15, 2006, after considering the record, Administrative Judge LeRoy F. Forman 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 by concluding that Applicant deliberately made a false statement on her Security Clearance Application; whether the Judge's adverse trustworthiness determination under Guideline F is arbitrary, capricious or contrary to law.

(1) Applicant argues that the Judge erred by concluding that Applicant had deliberately made a false statement on her Security Clearance Applications. Applicant contends that she omitted the information about her unpaid debts because she knew the investigator would obtain a copy of her credit report. Applicant's argument does not demonstrate that the Judge erred.

Applicant's statements about her intent and state of mind when he executed the document in question were relevant evidence, but they were not binding on the Judge. *See, e.g.*, ISCR Case No. 01-19278 at 6-7 (App. Bd. Apr. 22, 2003). As the trier of fact, the Judge had to consider Applicant's statements in light of the record evidence as a whole, and Applicant's denial of any intent to provide false information did not preclude the Judge from weighing the record evidence and making findings that contradicted Applicant's denials. Given the record that was before him, the Judge's conclusion that Applicant's omission was deliberate is sustainable, and the Judge's ultimate unfavorable trustworthiness determination under Guidelines E and J is not arbitrary, capricious or contrary to law.

(2) The Board construes the balance of Applicant's brief as arguing that the Judge's adverse trustworthiness determination under Guideline F is arbitrary, capricious and contrary to law. In support of this argument, Applicant states that although she has not made any attempts to rectify her situation at this time, she plans to make payments on her outstanding debts in the future. Applicant's argument does not demonstrate that the Judge erred.

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 length and seriousness of the disqualifying conduct, and considered the possible application of relevant mitigating conditions. He 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 F 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