

KEYWORD: Guideline F; Guideline E

DIGEST: There is a rebuttable presumption that the Judge considered all the record evidence. Trustworthiness determinations are not limited to consideration of an applicant's job performance or conduct during duty hours. Adverse decision affirmed.

CASENO: 06-07581.a1

DATE: 05/17/2007

DATE: May 17, 2007

In Re:)	
)	
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SSN: -----)	ADP Case No. 06-07581
)	
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 May 3, 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 October 10, 2006, after the hearing, Administrative Judge Joseph Testan 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 erred by concluding that the trustworthiness concerns raised under Guidelines F and E had not been mitigated.

Applicant argues that the Judge erred in concluding that the trustworthiness concerns raised under Guidelines F and E had not been mitigated, in that he gave insufficient weight to the fact that Applicant was a motivated, devoted, hard-working employee, who was an expert in her field, and who was not a threat to the Department of Defense. Applicant's argument does not demonstrate 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. Sep. 18, 1992). The federal government has a strong interest in protecting sensitive information and, pursuant to that interest, has to decide whether persons to be entrusted with access to such information are at risk of deliberately or inadvertently mishandling it. In making such decisions, the government must determine whether a given person possesses and exhibits the high degree of judgment, reliability, and trustworthiness required of persons granted access to that information. Trustworthiness determinations are not limited to consideration of an applicant's job performance or conduct during duty hours, and off-duty conduct can be relevant in assessing an applicant's security eligibility. An applicant's technical expertise (or lack thereof) is not a measure of whether the applicant is at risk of deliberately or inadvertently mishandling sensitive information, nor is it a measure of whether the applicant demonstrates the high degree of judgment, reliability, or trustworthiness required of persons granted access to such information. An applicant with technical expertise may through conduct or circumstances demonstrate that he or she poses a trustworthiness risk; an applicant without any technical expertise may through conduct or circumstances demonstrate that he or she is a good candidate for a favorable trustworthiness determination. The trustworthiness significance of the conduct alleged under Guidelines F and E does not turn on whether Applicant possesses a technical ability that could be useful to a DoD contact or project. *See, e.g.*, ISCR Case No. 02-06033 at 4-5 (App. Bd. Jan. 6, 2005).

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 Guidelines F and 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