

KEYWORD: Guideline F

DIGEST: There is a rebuttable presumption that a judge is impartial and unbiased and a party seeking to rebut that presumption has a heavy burden of persuasion. The Judge's material findings are sustainable. Adverse decision affirmed.

CASENO: 06-09401.a1

DATE: 04/16/2007

DATE: April 16, 2007

In Re:)	
)	
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SSN: -----)	ADP Case No. 06-09401
)	
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 July 13, 2006, DOHA issued a statement of reasons (SOR) advising Applicant of the basis for that decision—trustworthiness concerns raised under Guideline F (Financial Considerations) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested the case be decided on the written record. On October 25, 2006, after considering the

record, Administrative Judge Mark W. Harvey denied Applicant's request for a trustworthiness designation.¹ Applicant timely appealed pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raised the following issues on appeal: whether the Judge was prejudiced; and whether the Judge erred by concluding the trustworthiness concerns under Guideline F had not been mitigated.

(1) Applicant makes the general argument that the Judge was prejudiced. The Board does not find this argument persuasive.

There is a rebuttable presumption that a Judge is impartial and unbiased, and a party seeking to rebut that presumption has a heavy burden of persuasion. *See, e.g.*, ISCR Case No. 02-08032 at 4 (App. Bd. May 14, 2004). The issue is not whether Applicant personally believes the Judge was biased or prejudiced against Applicant. Rather, the issue is whether the record contains any indication the Judge acted in a manner that would lead a reasonable person to question the fairness and impartiality of the Judge. *See, e.g.*, ISCR Case No. 01-04713 at 3 (App. Bd. Mar. 27, 2003). Bias or prejudice is not demonstrated merely because the Judge made adverse findings or reached unfavorable conclusions. *See, e.g.*, ISCR Case No. 94-0954 at 4 (App. Bd. Oct. 16, 1995). Moreover, even if an appealing party demonstrates error by the Judge, proof of such error, standing alone, does not demonstrate the Judge was biased or prejudiced. *See, e.g.*, ISCR Case No. 98-0515 at 5 (App. Bd. Mar. 23, 1999). Applicant has not met her heavy burden of persuasion, in that she fails to identify anything in the record below that indicates or suggests a basis for a reasonable person to conclude that the Judge was prejudiced.

(2) Applicant contends that the Judge erred in concluding that the trustworthiness concerns raised by her history of financial difficulties had not been mitigated, because her indebtedness was due to loss of employment and an injury, and she had stated she would pay off the debts. Applicant contends that the Judge mis-characterized the evidence in his findings. The Board does not find Applicant's contentions persuasive.

The findings which Applicant challenges are permissible characterizations by the Judge. Applicant has not met her burden of demonstrating that the Judge's material findings with respect to her conduct of trustworthiness concern do not reflect a reasonable or plausible interpretation of the record evidence. Considering the record evidence as a whole, the Judge's material findings of trustworthiness concern are sustainable.

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.*, ADP Case No. 05-03939 at 2 (App. Bd. Sept. 1, 2006). 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,

¹The Judge found in favor of Applicant with respect to SOR paragraphs 1.b, 1.c, 1.d, 1.h, 1.i, 1.k, and 1.m. Those favorable findings are not at issue on appeal.

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 factors. The Judge found in Applicant's favor with respect to seven of the SOR factual allegations. However, the Judge reasonably explained why the evidence which the Applicant had presented in mitigation was insufficient to overcome the government's trustworthiness concerns. 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.*, ADP Case No. 03-14873 at 2 (App. Bd. Sept. 28, 2006). The Board does not review a case *de novo*. Given the record that was before him, the Judge's ultimate unfavorable trustworthiness determination is sustainable. Thus, the Administrative Judge did not err in denying Applicant access to automated information systems in ADP-I/II/III sensitivity positions.

Order

The decision of the Judge denying Applicant access to automated information systems in ADP-I/II/III 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