

KEYWORD: Guideline F; Guideline E

DIGEST: Although pro se Applicants cannot be expected to act like a lawyer, they are expected to take timely reasonable steps to protect their rights. An applicant with good or exemplary job performance may engage in conduct that has negative trustworthiness implications. Adverse decision affirmed.

CASENO: 06-10890.a1

DATE: 08/28/2007

DATE: August 28, 2007

In Re:)	
)	
-----)	ADP Case No. 06-10890
)	
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 June 27, 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 January 24, 2007, after the hearing, Administrative Judge Erin C. Hogan 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 Applicant was denied due process; whether the Judge erred by concluding that the trustworthiness concerns raised under Guidelines F and E had not been mitigated.

(1) On appeal, Applicant argues that she did not understand most of the verbiage used by the Judge and Department Counsel at the hearing, and that she wasn’t really able to present her case well because of a medical disability. In support of this argument, she states that she was diagnosed with bipolar disorder in 2006, she has been hospitalized a number of times because of her mental condition, she is currently on medication, and she is seeing a psychiatrist on a monthly basis. The Board construes Applicant’s argument as raising the issue of whether she received due process.

After reviewing the record in this case, the Board concludes that Applicant was reasonably provided with the procedural rights set forth in Executive Order 10865 and the Directive, and that the Judge conducted the hearing in a professional manner, consistent with her role as an impartial presiding official. At the beginning of the hearing, the Judge diligently inquired into Applicant’s understanding of her right to retain an attorney, and her willingness and ability to represent herself. She gave Applicant a detailed overview of the process and told her: “If at any point you’re confused about any terms or words used during the proceedings, or about any procedural aspect of the proceeding, please let me know and I will try to answer any questions that you may have.”¹ Based upon the representations she received from the Applicant, she reasonably concluded that Applicant was making a knowing and intelligent waiver of her right to counsel, and was ready and willing to proceed with the hearing. *See, e.g.*, ISCR Case No. 02-17574 at 2 (App. Bd. July 24, 2006); *Compare* ICR Case No. 04-12732 at 8 (App. Bd. Nov. 2, 2006). During the hearing, Applicant gave reasonably detailed explanations as to her financial and medical circumstances, appeared to understand what was transpiring, answered questions appropriately, and did not otherwise impose any objections to the proceedings. Although Applicant states on appeal that she was confused by the legal language used at the hearing, the transcript appears to contain very little specialized language or jargon.

Although *pro se* applicants cannot be expected to act like a lawyer, they are expected to take timely, reasonable steps to protect their rights under the Directive. *See, e.g.*, ISCR Case No. 00-0593 at 4 (App. Bd. May 14, 2001). If they fail to take timely, reasonable steps to protect their rights, that failure to act does not constitute a denial of their rights. *See, e.g.*, ISCR Case No. 02-19896 at 6 (App. Bd. Dec. 29, 2001). Because Applicant did not object to proceeding or otherwise request a continuance of her case, she was not denied due process under the Directive or Executive Order.

(2) Applicant argues that the Judge erred in concluding that the trustworthiness concerns

¹Transcript at 6-8.

raised under Guidelines F and E had not been mitigated, in that she gave insufficient weight to the favorable evidence in the record, particularly Applicant's outstanding job performance.² Applicant's argument does not demonstrate that the Judge erred.

The federal government need not wait until an applicant actually mishandles or fails to properly handle sensitive information before it can deny or revoke access to such information. *See, e.g.*, ADP Case No. 06-09293 at 2 (App. Bd. June 6, 2007). 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 trustworthiness eligibility. *See, e.g.*, ADP Case No. 06-07581 at 2 (App. Bd. May 17, 2007). An applicant with good or exemplary job performance may engage in conduct that has negative trustworthiness implications. *See, e.g.*, ADP Case No. 06-09293 at 2 (App. Bd. June 6, 2007). The Directive's Guidelines set forth a variety of examples of off-duty conduct and circumstances which are of trustworthiness concern to the government and mandate a whole-person analysis to determine an applicant's trustworthiness eligibility. A whole-person analysis is not confined to the workplace. *Id.*

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. She 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.*, ADP Case No. 06-07581 at 2 (App. Bd. May 17, 2007). Given the record that was before her, the Judge's ultimate unfavorable trustworthiness determination under Guidelines F and E is sustainable.

²In her brief, Applicant also makes statements as to her ongoing efforts to resolve her financial problems. The Board may not consider new evidence on appeal. *See* Directive ¶ E3.1.29. Accordingly, we may not consider Applicant's additional explanations, and they do not demonstrate error on the part of the Judge.

Order

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

Signed: Michael Y. Ra'anan
Michael Y. Ra'anan
Administrative Judge
Chairman, 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