

KEYWORD: Guideline F; Guideline J; Guideline E

DIGEST: Trustworthiness determinations are not limited to considerations of on-the-job performance or conduct during duty hours. Adverse decision affirmed.

CASENO: 06-14707.a1

DATE: 09/10/2007

DATE: September 10, 2007

In Re:)	
)	
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)	ADP Case No. 06-14707
)	
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 July 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), Guideline J (Criminal Conduct) and Guideline E (Personal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On February 28, 2007, after the hearing, Administrative Judge Marc E. Curry 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’s adverse trustworthiness determination under Guidelines J and E is arbitrary, capricious, or contrary to law.¹

Applicant argues that the Judge’s adverse trustworthiness determination should be reversed because her prior criminal conduct and falsifications have no bearing upon her current trustworthiness and ability to do her job. She also argues that the Judge gave insufficient weight under the whole-person factors to the favorable evidence in the record, particularly her 10 years of outstanding job performance and the fact that she has acknowledged her prior mistakes. Applicant’s arguments do not demonstrate that the Judge erred.

The Directive presumes there is a nexus or rational connection between proven conduct under any of its Guidelines and an applicant’s trustworthiness eligibility. *Cf.*, ISCR Case No. 02-28935 at 3-4 (App. Bd. Jun. 28, 2005). 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. Jun. 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. 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. Jun. 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

¹The Judge found in favor of Applicant under Guideline F. That finding is not at issue on appeal.

length and seriousness of the disqualifying conduct, and considered the possible application of relevant mitigating conditions and whole-person factors. He reasonably explained why the evidence which the Applicant had presented in mitigation was insufficient to overcome all of 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 him, the Judge's ultimate unfavorable trustworthiness determination under Guidelines J 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: Michael Y. Ra'anan

Michael Y. Ra'anan
Administrative Judge
Chairman, Appeal Board

Signed: Michael D. Hipple

Michael D. Hipple
Administrative Judge
Member, Appeal Board

Signed: William S. Fields

William S. Fields
Administrative Judge
Member, Appeal Board