

KEYWORD: Guideline B

DIGEST: The Board does not have jurisdiction or authority to review determination as to whether an applicant’s position requires a trustworthiness designation. A close reading of the Judge’s decision indicates that he considered the whole-person factors, albeit briefly. Adverse decision affirmed.

CASENO: 06-14978.a2

DATE: 01/18/Y200

DATE: January 18, 2008

In Re:	)	
	)	
-----	)	ADP Case No. 06-14978
	)	
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) declined to grant Applicant a trustworthiness designation. On August 31, 2006, DOHA issued a statement of reasons (SOR) advising Applicant of the basis for that decision—trustworthiness concerns raised under Guideline B (Foreign Influence) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended)

(Directive). Applicant requested the case be decided on the written record. On May 9, 2007, after considering the record, Administrative Judge Joseph Testan denied Applicant's request for a trustworthiness designation. On October 11, 2007, the Board remanded the case to the Administrative Judge. On October 31, 2007, the Administrative Judge issued a new decision again denying Applicant's request for a trustworthiness designation. Applicant submitted a timely appeal pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raised the following issue on appeal: whether the Judge's decision is arbitrary, capricious or contrary to law. Finding no error, the Board affirms the Judge's remand decision.

In his second appeal, Applicant argues that the Judge's adverse trustworthiness determination should be reversed because he does not have access to sensitive information and his position should not require a trustworthiness designation. He also argues that because of his lengthy and significant ties to the United States, his family located in Morocco present no trustworthiness concerns. As part of his brief, Applicant attaches new evidence, a character reference letter, signed by 14 colleagues, which attests to Applicant's trustworthiness, honesty and loyalty. Applicant's arguments and submission do not demonstrate error on the part of the Judge.

The Board may not consider Applicant's new evidence on appeal. *See* Directive ¶ E3.1.29. Its submission does not demonstrate error on the part of the Judge. *See, e.g.*, ADP Case No. 06-11364 at 2 (App. Bd. Oct. 3, 2007).

The Board's jurisdiction and authority in this case is limited to reviewing the Judge's trustworthiness determination as set forth in Directive ¶¶ E3.1.28 through E3.1.35. The Board does not have jurisdiction or authority to review determinations as to whether an applicant's position requires a trustworthiness designation.

Applicant alleges that the Judge failed to perform a whole-person analysis, as instructed by the Board in its remand decision. A close reading of the Judge's decision indicates that he considered the whole-person factors, albeit briefly.<sup>1</sup>

Once the government presents evidence raising trustworthiness concerns, the burden shifts to the applicant to establish mitigation. Directive ¶ E3.1.15. The application of Adjudicative Guidelines 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). 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*. Applicant's disagreement with the Judge's weighing of the record evidence, or an ability to argue for a different interpretation of the evidence, is not sufficient to demonstrate the Judge weighed the evidence in a manner that is arbitrary, capricious, or contrary to law.

Applicant had the burden of presenting evidence to rebut, explain, extenuate or mitigate facts that the Department Counsel proved or that Applicant admitted regarding his foreign family ties. Applicant also had the ultimate burden of persuasion as to obtaining a favorable trustworthiness

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<sup>1</sup>Decision at 4-5.

determination. Directive ¶ E3.1.15. The Judge had to evaluate the facts and circumstances of Applicant's situation in light of pertinent provisions of the Directive, and decide whether Applicant had met his burden of persuasion under Directive ¶ E3.1.15. The fact that Applicant's explanations and his mitigating evidence did not lead the Judge to the decision desired by Applicant does not establish error. The presence of some mitigating evidence does not alone compel the Judge to make a favorable trustworthiness determination.

Applicant elected to have his case decided on the written administrative record. As a result, the Judge did not have an opportunity to question him about his family ties and evaluate his credibility in the context of a hearing. A review of the Judge's decision indicates that the Judge weighed the mitigating evidence offered by Applicant against the seriousness of the disqualifying circumstances, and considered the possible application of relevant mitigating conditions and factors. He adequately explained why the evidence which Applicant had presented in mitigation was insufficient to overcome the government's trustworthiness concerns and why Applicant's circumstances could potentially make him vulnerable to coercion, exploitation or pressure. That concern is based on close family ties in Morocco, considered in the context of the overall political/security profile of that country *vis-a-vis* the United States. Applicant offers an alternative interpretation of the record evidence. However, that alternative interpretation of the record evidence is insufficient to render the Judge's interpretation arbitrary, capricious or contrary to law. *See, e.g.*, ISCR Case No. 06-04371 at 3 (App. Bd. Oct. 18, 2007). The Judge has articulated a rational explanation for his unfavorable determination under the disqualifying and mitigating factors and the whole-person concept, and there is sufficient evidence to support that determination, given the limited record in this case.

### **Order**

The decision of the Judge denying Applicant a trustworthiness designation 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