

KEYWORD: Guideline F

DIGEST: The legality of an applicant's conduct and circumstances does not preclude a Judge from considering whether they raise trustworthiness concern. The Directive presumes there is a nexus or rational connection between proven conduct under any guideline and an applicant's trustworthiness eligibility. Adverse decision affirmed.

CASENO: 06-16376.a1

DATE: 08/28/2007

DATE: August 28, 2007

In Re:	)	
	)	
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	)	
Applicant for Public Trust 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 November 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) 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 is arbitrary, capricious, or contrary to law.

Applicant argues that the Judge erred in concluding that the Applicant’s financial problems raised trustworthiness concerns raised under Guidelines F. She also argues that the Judge gave insufficient weight to the favorable evidence in the record, particularly her outstanding job performance and the fact that she has no criminal record.<sup>1</sup> Applicant’s arguments do not demonstrate that the Judge erred.

The legality of an applicant’s conduct and circumstance does not preclude a Judge from considering whether they raise trustworthiness concerns. *Cf.*, ISCR Case No. 04-08623 at 5 (App. Bd. July 29, 2005). 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. June 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. 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. 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

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<sup>1</sup>In 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.

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 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 Guideline F 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: Jean E. Smallin  
Jean E. Smallin  
Administrative Judge  
Member, Appeal Board

Signed: William S. Fields  
William S. Fields  
Administrative Judge  
Member, Appeal Board