

KEYWORD: Guideline F

DIGEST: The presence of some mitigating evidence does alone compel the Judge to make a favorable trustworthiness determination. Adverse decision affirmed.

CASENO: 06-22100.ind

DATE: 01/17/2008

DATE: January 17, 2008

In Re:)
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-----) ADP Case No. 06-22100
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Applicant for Public Trust Position)
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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 April 2, 2007, 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 September 26, 2007, after the hearing, Administrative Judge Matthew E. Malone denied Applicant’s request for a trustworthiness designation. Applicant timely appealed pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.¹

Applicant raised the following issue on appeal: whether the Judge erred by concluding that the trustworthiness concerns raised under Guideline F had not been mitigated.

Applicant argues that the Judge’s adverse decision should be reversed because the Judge did not give sufficient weight to Applicant’s mitigating evidence which showed that Applicant had paid 15 of her 22 debts in full, made payment arrangements with respect to another four, enrolled in a financial budgeting class, and as a result had reduced her outstanding indebtedness from \$15,000 to \$5,000. She also notes that she has been a good, dependable employee, who has never mishandled sensitive information. Applicant’s arguments do not demonstrate that the Judge erred.

In his decision, the Judge noted that Applicant’s work record had been impressive and that she had held a position of public trust without incident since 2002.² The Judge also found that Applicant had resolved certain debts and that in 2007 she attended a financial management class. However, such factors were not wholly dispositive of the case. The federal government need not wait until an applicant actually mishandles 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. *See, e.g.*, ADP Case No. 06-07581 at 2 (App. Bd. May 17, 2007). An applicant with 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. Such an analysis is not confined to the workplace. *See, e.g.*, ADP Case No. 06-13629 at 2-3 (App. Bd. Sep. 4, 2007).

Once the government presents evidence raising trustworthiness concerns, the burden shifts to the applicant to establish mitigation. 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. *See, e.g.*, ADP Case No. 05-03939 at 2 (App. Bd. Sep. 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, is not sufficient to demonstrate the Judge weighed the

¹The Judge found in favor of Applicant with respect to SOR paragraphs 1.a, 1.b, 1.d through 1.n, and 1.s. Those favorable findings are not at issue on appeal.

²Decision at 7.

evidence or reached conclusions in a manner that is arbitrary, capricious, or contrary to law. *See, e.g.*, ADP Case No. 06-23881 at 2 (App. Bd. Nov. 2, 2007).

In this case, the Judge found that Applicant had a lengthy and serious history of not meeting financial obligations, which arose from an over reliance on credit cards, poor financial practices, and procrastination.³ At the time of the hearing, Applicant still had significant delinquent debts and was still in the process of resolving her financial problems. Therefore, the Judge could reasonably conclude that Applicant's financial problems were still ongoing. *See, e.g.*, ADP Case No. 05-16601 at 2 (App. Bd. Jul. 2, 2007). 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 and whole person factors. He gave Applicant some credit for the fact that she had received guidance on financial management and had resolved many of her debts.⁴ As a result, he found in her favor with respect to most of the SOR allegations. However, the Judge reasonably explained why the evidence which the Applicant had presented in mitigation was insufficient to overcome all the government's trustworthiness concerns—noting in particular that Applicant had waited to resolve her outstanding indebtedness until after she had received the DOHA interrogatories and it was clear that her eligibility for access to sensitive information was in jeopardy.⁵ 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. 03-14873 at 2 (App. Bd. Sep. 28, 2006). Given the record that was before him, the Judge's ultimate unfavorable trustworthiness determination under Guidelines F is sustainable.

Order

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

³Decision at 6 and 7.

⁴Decision at 6-7.

⁵Decision at 6.

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