

KEYWORD: Guideline B

DIGEST: The Judge found that Applicant's mother, father brother and sister-in-law are citizens and residents of China Further the Judge found that Applicant had traveled to China for over a year in 2003-4. On appeal Applicant offers new evidence regarding her parents' status and her dates of travel. Applicant requests that the Board set aside the Judge's decision in light of the new evidence. The Board cannot grant the relief requested. Adverse decision affirmed.

CASENO: 06-22581.a1

DATE: 11/02/2007

DATE: November 2, 2007

In Re: ----- Applicant for Public Trust Position)))))))	ADP Case No. 06-22581
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APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Candace Le'i, Esq. 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 December 14, 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 22, 2007, after considering the record, Administrative Judge David M. White 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 Board can consider new evidence on appeal.

In this case, SOR paragraphs 1.a and 1.b alleged trustworthiness concerns based on the fact that Applicant’s mother, father, brother, and sister-in-law were citizens and residents of China.¹ SOR paragraph 1.c alleged trustworthiness concerns based on the fact that Applicant had traveled to China in 2003. Applicant admitted without explanation to all three allegations.²

In his decision, the Judge found that Applicant had “. . . reported and admitted that she traveled to China for pleasure from August 16, 2003 to September 7, 2004”—a period of over a year.³ The Judge based this finding on the dates provided by the Applicant in her Public Trust Position Application (SF-85P).⁴ On appeal, Applicant states that she mistakenly typed the wrong date on her application—2004 instead of 2003. In reality, she had only traveled to China from August 16, 2003 to September 7, 2003, a period of less than a month. In support of her statement, she attaches a copy of her Chinese Passport, showing the relevant entry and exit stamps. Applicant also states that her parents “. . . just immigrated to the US and received their green cards.” Both Applicant’s statements and her attachment are new evidence which was not considered by the Judge below. Applicant requests that the Board set aside the Judge’s adverse decision, based on this new evidence. However, her appeal brief articulates no legal basis in support of that request.

Applicant elected to have her case decided on the written record, and then declined to file a response to the government’s File of Relevant Material (FORM). Her request for relief as to the mistaken travel dates is not based on newly discovered evidence, unavailable to her prior to the Judge’s decision. Rather, it is based on evidence which was in her custody and control during the entire pendency of her case. While that evidence bears directly on the trustworthiness concern alleged in SOR paragraph 1.c, it would not substantially mitigate the trustworthiness concerns set forth in SOR paragraphs 1.a and 1.b. Moreover, a review of the Judge’s decision indicates that he questioned the accuracy of the dates at issue, suggesting that Applicant’s trip to China may actually have been of shorter duration: “The information concerning the dates of her travel to China, provided by Applicant in Gov X 4, may be in error. It appears inconsistent that she could have become a naturalized U.S. citizen in June 2004 if she was traveling in China from August 2003 through

¹People’s Republic of China.

²Applicant’s Answer at 1-2 (Government Exhibit 3).

³Decision at 3.

⁴*Id* at 3, n. 4; Government Exhibit 4.

September 2004.”⁵

The Appeal Board’s authority to review a case is limited to cases in which the appealing party has alleged the Judge committed harmful error. It does not review cases *de novo*. 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. 06-08653 at 3 (App. Bd. May 14, 2007). Accordingly, the Board cannot grant Applicant the relief she requests.

Order

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

Signed: Michael D. Hipple
Michael D. Hipple
Administrative Judge
Member, 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

⁵Decision at 3, n. 9. The Judge then went on to note that Applicant had provided no clarifying or corrective information in response to either the SOR or the FORM.