

KEYWORD: Guideline F

DIGEST: Applicant contends that the Judge erred in finding she was submitting her first application for a public trust position. In her argument, she cites her personal subject interview that reflects she started the process of obtaining a public trust position while working for a prior employer in 2017 and 2018 but was laid off before completing the process. On the other hand, her Electronic Questionnaires for Investigations Processing (e-QIP) of January 2019 lists that she was investigated for a security clearance in 2004 and that she was not processed for any other investigations. . Even if the Judge erred in making this challenged finding, it was a harmless error because it did not likely affect the outcome of the case. Adverse decision affirmed.

CASE NO: 19-03678.a1

DATE: 03/17/2021

DATE: March 17, 2021

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 Department of Defense (DoD) declined to grant Applicant a trustworthiness designation. On March 17, 2020, DoD 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 decision on the written record. On October 27, 2020, after considering the record, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Gina L. Marine denied Applicant’s request for a trustworthiness designation. Applicant appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raised the following issues on appeal: whether she was denied due process, whether the Judge erred in her findings of fact, and whether the Judge’s decision was arbitrary, capricious, or contrary to law. Consistent with the following, we affirm.

### **The Judge’s Findings of Fact and Analysis**

Applicant, who is in her 50s, has two adult children. She earned a bachelor’s degree in the late 80s. She was granted a security clearance in the mid-2000s and has submitted her first application for a public trust position. Although currently unemployed, her public trust position application is being sponsored by a prospective employer.

Applicant admitted the 12 delinquent debts totaling about \$58,900 that are alleged in the SOR. These debts include Federal taxes totaling about \$10,600, nine credit card accounts totaling about \$45,700, a vehicle loan, and a utility bill. The debts remain unresolved. In 2015, Applicant consulted with an attorney about filing bankruptcy but declined to do so. She plans to “chip away” at the debts once she becomes gainfully employed and expects the debts will be resolved “in no time.” Decision at 2.

Applicant has experienced periods of unemployment and underemployment. She was unemployed for about two months in 2012, about 11 months between 2013 and 2014, and about ten months between 2018 and 2019. Her salary significantly decreased in some of her subsequent jobs. She has been unemployed since late 2019. During her periods of employments, she withdrew funds from her retirement account and used credit cards to pay bills. While unemployed, she also relied on unemployment benefits and loans from family members.

Since 2017, Applicant has not incurred any new debts or opened new accounts. She is managing her current finances responsibly. She owns a home with first and second mortgages that are in good standing. She has student loans totaling about \$21,500 that are in a deferment status. She has a vehicle loan that is in good standing. Applicant resolved a Federal tax debt for 2012, but still owes past-due taxes for tax years 2014 through 2016. She has established installment agreements for her past-due taxes that have lapsed and has had her tax refunds withheld. For a period, a portion of her Federal tax debt was “not collectable.” Decision at 4. She filed late her Federal income tax returns for 2016 through 2018, filing her 2016 and 2018 returns in late 2019. Her tax filing deficiencies were not alleged in the SOR and will only be considered in evaluating her

mitigation and whole-person evidence. She has had Federal tax liens filed against her and a state has garnished her pay for delinquent taxes. Her state tax debt has been resolved.

None of the mitigating conditions were fully established. “However sincere [Applicant] may be in her determination to resolve her delinquent debts without filing bankruptcy,” insufficient evidence has been presented to show that she will be able to follow through on her plan to repay the SOR debts once she is gainfully employed or to establish her indebtedness is unlikely to recur. Decision at 7-8.

## **Discussion**

Directive ¶ E3.1.29 provides that the Appeal Board is prohibited from considering new evidence on appeal. In her appeal brief, Applicant acknowledges that she cannot submit new evidence. Yet, her brief contains new evidence.

Regarding the new evidence prohibition, two matters merit noting. First, Applicant makes factual assertions in her brief that go beyond the record evidence. For example, she details reasons that are not in the record for why she did not file bankruptcy. Such factual assertions constitute new evidence. The Board will only consider arguments in Applicant’s appeal brief that are based on record evidence. Second, Applicant’s brief highlights comments the Judge made in the decision about the lack of documentation corroborating her claims, and she indicates she could provide such documentation. The new evidence prohibition extends to Applicant’s proffer to submit additional documentation to the Board.

In her appeal brief, Applicant raises 16 assignments of error. Ten of those assignments address the Judge’s findings of fact and the other six address her analysis and conclusions. We examine a challenge to the legal sufficiency of a Judge’s finding to see if it is supported by substantial evidence, that is, “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the same record.” Directive ¶ E3.1.32.1. *See also*, ADP Case No. 14-04509 at 2, n.1 (App. Bd. Feb. 12, 2016). We examine a challenge to a Judge’s analytical inferences or conclusions to determine whether they are arbitrary, capricious, or contrary to law. Directive ¶ E3.1.32.3.

Of Applicant’s 16 assignments of error, two of them can be considered a challenge to the legal sufficiency of the Judge’s findings of fact. As to these challenges, Applicant first contends that the Judge erred in finding she was submitting her first application for a public trust position. In her argument, she cites her personal subject interview that reflects she started the process of obtaining a public trust position while working for a prior employer in 2017 and 2018 but was laid off before completing the process. Item 4 at 9 of the File of Relevant Material (FORM). On the other hand, her Electronic Questionnaires for Investigations Processing (e-QIP) of January 2019 lists that she was investigated for a security clearance in 2004 and that she was not processed for any other investigations. Item 3 at 34 of the FORM. Even if the Judge erred in making this challenged finding, it was a harmless error because it did not likely affect the outcome of the case. *See, e.g.*, ADP Case No. 13-01074 at 3 (App. Bd. Aug. 25, 2014). Applicant also contends that the Judge

erred in finding she has not sought any financial counseling. She argues that her consultation with the bankruptcy attorney constituted financial counseling. Based on our review of the evidence, there is no reason to conclude the Judge erred in this challenged finding because the record contains no details of the substance of her discussions with the attorney. Furthermore, her personal subject interview reflects “[she] is not seeking credit counseling services.” Item 4 at 9 of the FORM.

Applicant speculates that she would have received a clearance had she filed for bankruptcy in 2015. Although the Board cannot possibly adjudicate a hypothetical case, we see no reason to concur with such speculation.

The remainder of Applicant’s assignments of error, including those addressing other findings of fact, amount to a disagreement with the Judge’s weighing of the evidence. In these arguments, Applicant essentially sets forth her views of how the evidence should be interpreted. A party’s ability to argue for a different interpretation of the evidence, however, is not sufficient to demonstrate the Judge weighed the evidence or reached conclusions in a manner that is arbitrary, capricious, or contrary to law. *See, e.g.*, ADP Case 19-02087 at 3 (App. Bd. Feb. 12, 2020).

In her appeal brief, Applicant states that she did not request a hearing due to the coronavirus pandemic and that she did not understand the need to provide documentation to support her mitigation claims. To the extent that she is claiming she was denied due process, we do not find that argument persuasive. Applicant had adequate notice of the adjudication procedures. She was provided a copy of the Directive when she received the SOR. Enclosure 3 of the Directive explains the differences between a hearing and a decision based on the written record. Directive ¶ E3.1.15 provides “[t]he applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven by Department Counsel, and has the ultimate burden of persuasion as to obtaining a favorable clearance decision.” Applicants, including *pro se* applicants, are responsible for the consequences of their decisions. *See, e.g.*, ADP Case No. 18-00679 at 4 (App. Bd. Oct. 17, 2019). The reason behind Applicant’s forum choice raises no appealable issue, and the Government bears no responsibility for Applicant’s failure to present mitigating evidence. Based on our review of the record, Applicant has failed to establish that she was denied the due process afforded her under the Directive.

Applicant has failed to establish the Judge committed any harmful error below. The Judge examined the relevant evidence and articulated a satisfactory explanation for the decision. The decision is sustainable on this record. The standard applicable to trustworthiness cases is that set forth in *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988) regarding security clearances: such a determination “. . . may be granted only when ‘clearly consistent with the interests of the national security.’” *See, e.g.*, ADP Case No. 19-02087 at 3. *See also Kaplan v. Conyers*, 733 F.3d 1148 (Fed. Cir. 2013), *cert. denied*.

**Order**

The Decision is **AFFIRMED**.

Signed: Michael Ra'anan  
Michael Ra'anan  
Administrative Judge  
Chairperson, Appeal Board

Signed: James E. Moody  
James E. Moody  
Administrative Judge  
Member, Appeal Board

Signed: James F. Duffy  
James F. Duffy  
Administrative Judge  
Member, Appeal Board