

KEYWORD: Guideline F; Guideline E

DIGEST: There is no presumption of error by a Judge, and a party's ability to argument for a different interpretation of the evidence is not sufficient to demonstrate error. Adverse decision affirmed.

CASE NO: 10-00354.a1

DATE: 02/09/2012

DATE: February 9, 2012

In Re:)	
)	
-----)	ADP Case No. 10-00354
)	
Applicant for a 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) declined to grant Applicant eligibility for a public trust position. On December 9, 2010, DOHA issued a statement of reasons (SOR) advising Applicant of the basis for that decision—trustworthiness concerns raised under Guideline F (Financial Considerations) and Guideline E (Personal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On November 30, 2011, after the hearing, Administrative Judge Thomas M. Crean declined to grant

Applicant eligibility for a public trust position.¹ Applicant timely appealed pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raises the following issue on appeal: whether the Judge's adverse trustworthiness determination is arbitrary, capricious, and contrary to law. For the following reasons, the Board affirms the Judge's unfavorable trustworthiness determination.

The Judge made the following findings of fact: Applicant is 40 years old and is a high school graduate. He is separated from his wife and has four teenage children. Two of the children are out of the house and on their own. Applicant provides support for the other children and helps support two grandchildren. Depending on the amount of overtime, Applicant's discretionary income each month runs between \$500 and \$1,400. A credit report dated June 2010 shows 20 unpaid medical debts, an unpaid phone debt, and two debts remaining from car repossessions. The face amount of the 20 medical debts is approximately \$30,000, but some of the debts are duplicates. Two car repossessions resulted from delinquencies that arose when the amount of overtime he was earning was cut. Since the repossessions, Applicant has not inquired about the amount of the debt or made any payments or arrangements to pay the loans. Applicant acknowledges the telephone debt, but believes the debt has been paid. However, he has not made any inquiries of the creditor to determine if it has been paid. Applicant intends to pay his medical debts, but he has not made any payments on the debts. His daughter recently broke her back and paying the bills not covered by insurance has kept him from paying his past-due medical bills. Applicant has not checked with the medical providers to determine the amount of debt he may owe. A review of the debts show that some of the delinquent debts were incurred in the last few years before the SOR was issued.

The Judge reached the following conclusions: Applicant's delinquent debts, as established by a credit report and admitted by Applicant are a security concern. The delinquent debts show a history of not meeting financial obligations because of an inability, and not an unwillingness, to satisfy debt. Applicant did not have health insurance to cover his family medical expenses when he incurred the majority of the delinquent medical debts. The medical debts are ongoing since they have not been paid. The medical debts were incurred by conditions beyond his control since he did not have medical insurance to cover his medical expenses. He now has adequate health insurance so medical debts are unlikely to recur. However, he has not mitigated the public trust concerns since he has not adequately inquired about or made any payments on the debts. He has not acted responsibly under the circumstances. Applicant was making good pay because of overtime when he contracted for the purchase of two cars. He overextended himself because he was receiving overtime pay. Overtime is not a guaranteed salary and can provide a false impression of income. The conditions leading to the car loans were not beyond his control. Also, he has not acted reasonably or responsibly toward his remaining delinquent telephone debt. He has not made any payments toward the debts and has not inquired of the lenders or providers of services of the amount of the debts and means to pay them. These failures do not show good faith. Applicant has not shown a "meaningful track record" of debt payment since he is not paying his debts and there is no

¹The Judge's adverse decision is based solely on findings and conclusions under Guideline F. The Judge found in Applicant's favor regarding the allegations under Guideline E. Those favorable findings and conclusions are not at issue on appeal.

systematic method of debt payment. His management of his past financial obligations does not show reasonableness, prudence, and a good-faith effort to repay his creditors and resolve debts. He has not mitigated public trust concerns based on financial considerations.

Applicant argues that he has been doing his best to rectify his outstanding indebtedness, including obtaining health insurance and paying diligently on the bills resulting from his daughter's accident. He states that he has refrained from taking on new debt, has taken a course on financial management, and is up to date on his current bills. Applicant denies that he has walked away from his debts, and that he enjoys a reputation for hard work, honesty, reliability and trustworthiness. He asserts that under the whole person concept, the financial misfortunes he has suffered should not dictate against his eligibility for a position of trust. Applicant has failed to establish error on the part of the Judge.

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*. See, e.g., ADP Case No. 09-04275 at 2 (App. Bd. Apr. 18, 2011). A party'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 that is arbitrary, capricious, or contrary to law. See, e.g., ADP Case No. 10-01100 at 2 (App. Bd. Jun. 13, 2011). There is no presumption of error below. The Judge's findings and conclusions regarding Applicant's financial difficulties and the absence of mitigation sufficient to overcome the Government's concerns provide a reasonable basis for his ultimate unfavorable trustworthiness determination.

The Board does not review a case *de novo*. The favorable 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. 10-02010 at 4 (App. Bd. Dec. 15, 2011). After reviewing the record, the Board concludes that the Judge examined the relevant data and articulated a satisfactory explanation for his decision, "including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n of the United States v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)).

Order

The decision of the Judge declining to grant Applicant eligibility for a public trust position

is AFFIRMED.

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

Signed: Jeffrey D. Billett
Jeffrey D. Billett
Administrative Judge
Member, Appeal Board

Signed: Jean E. Smallin
Jean E. Smallin
Administrative Judge
Member, Appeal Board