

KEYWORD: Guideline F

DIGEST: The Judge found that Applicant's financial difficulties started in 2003.. He also found that Applicant's January 2009 bankruptcy filing shows in excess of \$250,000 of unsecured debt. There is a rational connection between the facts found and the Judge's adverse decision. Adverse decision affirmed.

CASENO: 07-12305.a1

DATE: 04/23/2009

DATE: April 23, 2009

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 July 15, 2008, 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 January 29, 2009, after the hearing, Administrative Judge Edward W. Loughran denied Applicant’s request for a trustworthiness determination. Applicant appealed pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raises the following issue on appeal: whether the Judge’s decision is arbitrary, capricious, or contrary to law.

Specifically, Applicant contends that the Judge did not give adequate weight to the mitigating evidence which he presented.

The Judge made the following pertinent findings of fact: Applicant’s financial difficulties started in about 2003. He was unemployed for three months and then accepted a position in another city 200 miles away. His wife was working on her doctorate and was unable to go with him. The couple purchased a recreational vehicle for Applicant to live in at his job location while his wife remained in their home. The cost of maintaining two households had an adverse impact on their finances. Added to this burden were the facts that his wife had medical problems that prevented her from working, the couple had two elderly parents who became ill and passed away, and they had damage to their house from a natural disaster.

Applicant’s finances were further damaged by his wife’s spending habits. Applicant stated that he is personally responsible for only about 5% of their debt. Applicant’s wife was working on attaining a doctorate degree, and she spent money on the prospect of higher future income. She never earned the doctorate and never obtained the higher-paying job. One of Applicant’s wife’s current expenditures is the leasing of a 2008 luxury automobile at the rate of \$656 per month. Applicant testified that the lease arrangement was made without his knowledge.

Applicant and his wife filed a Chapter 13 bankruptcy on January 3, 2009. On Schedule D of the filing, the couple listed the following creditors holding secured claims: the mortgage on his house, the loans for his car and recreational vehicle, and the leased car. On Schedule F, listing creditors holding unsecured nonpriority claims, the couple listed 24 creditors and debts totaling \$271,029. The Chapter 13 repayment plan called for 60 monthly payments of \$1,000 beginning in February 2009. The plan has not been approved by the bankruptcy court. Applicant and his wife received counseling by internet and telephone pursuant to his bankruptcy.

Once the government presents evidence raising trustworthiness concerns, the burden shifts to the applicant to establish mitigation. 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*. See, e.g., ISCR Case No. 07-06553 at 2 (App. Bd. April 30,

2008). 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 that is arbitrary, capricious, or contrary to law. *See, e.g.,* ISCR Case No. 06-17409 at 3 (App. Bd. Oct. 12, 2007).

In this case, Applicant contends that the Judge should have found his financial situation to be mitigated because his wife was responsible for the accrual of 95 per cent of their debt. He also maintains that the debt is no longer a security concern since he has filed for bankruptcy. In considering the application of the relevant mitigating conditions, the Judge discussed Applicant's financial situation. The Judge stated that Applicant was aware of his financial difficulties when he spoke to an investigator in March 2007. At that time, Applicant told the investigator that he intended to resolve his delinquent debts either by entering into a debt consolidation plan or by filing for Chapter 13 bankruptcy. The Judge noted that the 2008 luxury car lease was undertaken on behalf of Applicant's wife after that time.<sup>1</sup> Moreover, the Judge indicated that the bankruptcy plan proposed by Applicant had not been approved at the time of the hearing.<sup>2</sup> Thus, the Judge concluded it was "still far too early in the bankruptcy process to alleviate concerns about his finances." Decision at 7.

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)). Given the extent of Applicant's financial problems and the relative paucity of mitigation evidence, the Judge's unfavorable trustworthiness determination is sustainable.

### Order

The Judge's unfavorable trustworthiness determination is AFFIRMED.

Signed: Jean E. Smallin

Jean E. Smallin

Administrative Judge

Member, Appeal Board

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<sup>1</sup>Even though the lease was undertaken without Applicant's knowledge, it demonstrated that Applicant's finances were not under control.

<sup>2</sup>On April 15, 2009, the Appeal Board received a fax from Applicant indicating that his bankruptcy petition has now been approved. The Board is unable to consider this new evidence. *See* Directive ¶ E3.1.29. Even if the Board were to consider it, it would not change the fact that Applicant has not established a track record of payments under the plan.

Signed: James E. Moody

James E. Moody  
Administrative Judge  
Member, Appeal Board

### **Separate Opinion of Administrative Judge Jeffrey D. Billett, Dissenting**

I would remand this case to the Judge below. I perceive a significant disconnect between the Judge's findings of fact and his conclusions, and it is my judgment that he has not addressed an important aspect of the case. My detailed reasons follow.

Applicant complains that in the Judge's decision there is no distinction between the actions of his wife in incurring debt and his own actions in incurring debt, and that the Judge has wrongly attributed to him the financial actions and behaviors of his wife. While Applicant acknowledges that attribution of his wife's debts to him may be appropriate in a strictly legal sense, he asserts that in evaluating him for a trustworthiness position, the government should be concerned with his actions (or absence thereof) concerning the generation of those debts. In support of his position, Applicant points to the following items in the record: (i) a letter from Applicant's wife, dated January 12, 2009 in which she states that it was her actions and her medical problems that caused the couple's financial situation; (ii) his wife leased a 2008 luxury car during the same period Applicant was driving a 1994 Chevy Cavalier, which evidenced his commitment to responsible spending on items he could control; and (iii) Applicant lived in a recreational vehicle while working in a city away from his home to spend as little as practical on duplicate living expenses. I find Applicant's argument meritorious.

In his findings of fact, the Judge appears to recognize that the spending habits of Applicant's wife were a significant contributing factor to Applicant's financial predicament. Indeed, the Judge notes that Applicant stated that he is personally responsible for only about 5% of the total debt.<sup>1</sup> The Judge also referenced Applicant's wife's practice of spending in anticipation of future income. In his conclusions section, however, the Judge does not comment upon the portion of the debt that is attributable to Applicant's wife, nor does he comment upon the wife's role in the debt accumulation. He merely states that Applicant accumulated a number of delinquent debts and was unwilling or unable to satisfy them for a period of time. The Judge also asserted that Applicant's financial problems were extensive. While the Judge does make a single, general reference to the joint debt accrued by Applicant and his wife, every other reference in the conclusions section is to Applicant

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<sup>1</sup>The Judge's mentioning of the statement of Applicant is problematic in that the Judge is merely referencing the testimony of Applicant, but stops short of making a specific finding of fact concerning the percentage of overall debt that may be attributed to Applicant's wife. Notwithstanding this, there is nothing in the decision to suggest the Judge rejected Applicant's characterization of the apportionment of responsibility of debt between him and his wife. The referencing of Applicant's statement at least indicates the Judge's awareness, in his findings of fact, that the actions of Applicant's wife—as opposed to Applicant—were a significant factor in the case.

and Applicant's debt alone.<sup>2</sup> An overall reading of the Judge's conclusions section indicates to me that the Judge is laying the responsibility for the overall amount of debt upon Applicant without any detailed comments or analysis as to why Applicant is responsible for a sizable amount of debt that he did not personally acquire. Because there is no discussion in the conclusions section regarding the damage to Applicant's finances attributable to his wife and how this factor impacts upon Applicant's trustworthiness, there is a significant disconnect between the findings of fact and the conclusions portions of the Judge's decision.

A Judge is not required to discuss every piece of evidence in the record before him. Nevertheless, it is error to fail to discuss and/or analyze an important aspect of the case. Faced with evidence (Applicant's hearing testimony that only about 5% of the outstanding debt is attributable his actions coupled with a written statement of the wife stating her role in running up the couple's debt) that Applicant's debt problems may be largely attributable to his wife, it was incumbent upon the Judge to specifically address and analyze the issue of Applicant's wife's actions in the conclusions section of his decision and to indicate the effect, if any, of the wife's actions on the ultimate trustworthiness determination in the case.

I would remand the case to the Judge for correction of these errors.

Signed: Jeffrey D. Billett

Jeffrey D. Billett

Administrative Judge

Member, Appeal Board

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<sup>2</sup>There is an additional reference to the leasing of the 2008 car on behalf of the wife, but no indication from the Judge as to who was responsible for the lease. Record evidence indicates that the lease was arranged by the couple's son, and the evidence raises the possibility that Applicant was unaware, at least initially, of the arrangement.