

KEYWORD: Guideline F

DIGEST: Applicant’s appeal presented matters not contained in the record. A Judge cannot reasonably be expected to consider facts and circumstances that were not presented to him or her and made part of the record. Adverse decision affirmed.

CASENO: 08-03721

DATE: 10/28/2009

DATE: October 28, 2009

In Re:)	
)	
-----)	ADP Case No. 08-03721
)	
Applicant for Public Trust Position)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

Jonathan M. Andes, Esq., Personal Representative

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 February 27, 2009, 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 August 24, 2009, after the hearing, Administrative Judge Robert J. Tuider denied Applicant’s request for a trustworthiness designation. Applicant appealed pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raises the following issue on appeal: whether the Judge erroneously failed to apply mitigating condition ¶ 20(d)¹ in Applicant's favor. For the following reasons, the Board affirms the Judge's adverse trustworthiness determination.

Large portions of Applicant's appeal brief discuss matters that were not part of the record below. The main thrust of Applicant's argument is that the Judge relied on outdated credit reports and did not take into consideration the fact that an outstanding, delinquent mortgage debt of \$314,753 was discharged during early 2009, prior to the hearing, and that other debts in the amount of \$39,753 have since been discharged in bankruptcy. Included in Applicant's appeal is a more recent credit report, prepared after the hearing, which indicates that Applicant's debt has been greatly reduced.

Applicant's brief introduces new evidence, which the Board cannot consider on appeal. Directive, ¶ E3.1.29. Moreover, the Judge cannot reasonably be expected to consider facts and circumstances that were not presented to him and made part of the record. There is no record evidence of a discharge in bankruptcy for Applicant. Likewise there is no record evidence of any "discharge" of the delinquent mortgage debt.² Applicant represents that the resolution of the mortgage debt took place prior to the hearing. However, there is no mention of this in the record; and when discussing the mortgage debt during the hearing, Applicant indicated only that her house had been foreclosed upon and that she saw a "for sale" sign on the property when she drove by one day.³ Had additional or updated facts been available at the time of the hearing, it was up to Applicant to get those facts into the record. The Judge is under no obligation to obtain evidence to update the record. Applicant has failed to establish error.

¹"[T]he individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts."

²It is not made clear in Applicant's brief whether the "discharge" of the mortgage debt was a part of the bankruptcy proceedings.

³Hearing Transcript at p. 32.

Order

The Judge's unfavorable trustworthiness determination is AFFIRMED.

Signed: Jeffrey D. Billett

Jeffrey D. Billett
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