

KEYWORD: Guideline F

DIGEST: Guideline F is not limited to concerns over the potential to engage in criminal conduct. Adverse decision affirmed.

CASENO: 11-11592.a1

DATE: 08/23/2012

DATE: August 23, 2012

In Re:)
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 -----) ADP Case No. 11-11592
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 Applicant for Public Trust Position)
)
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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 a trustworthiness designation. On December 1, 2011, 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 decision on the written record. On June 21, 2012, after considering the record, Administrative Judge Wilford H. Ross denied Applicant’s request for a trustworthiness designation. Applicant appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raised the following issue on appeal: whether the Judge’s adverse trustworthiness determination was arbitrary, capricious, or contrary to law. Consistent with the following, we affirm.

The Judge made the following pertinent findings of fact: Applicant has several delinquent debts, including first and second mortgages on a home that was the subject of a foreclosure action. Applicant’s total indebtedness was \$452,121. None of the debts alleged in the SOR had been satisfied as of the close of the record. Applicant attributed her financial problems to the effects the national recession had on her business. Applicant had been self-employed operating a janitorial business and lost clients. In addition, Applicant cited to a death in her family, medical expenses for her parents, and the birth of a child as having exerted an influence on her finances. In December 2011, Applicant filed for Chapter 7 bankruptcy protection, on the same day as her response to the SOR. She stated that she had delayed filing for bankruptcy because of the filing fee. She also cited to the family issues listed above as reasons she had not been able to save enough to file. A required meeting of creditors was scheduled for the middle of January 2012, although Applicant submitted no evidence as to whether the meeting was held, and if it was, who was in attendance, what transpired, etc. Applicant provided no evidence as to the quality of her job performance, nor did she provide character references or other evidence showing good judgment, trustworthiness, or reliability. The Judge noted that, because this was a decision on the written record, he was unable to evaluate Applicant’s demeanor.

In the Analysis, the Judge concluded that Applicant’s financial circumstances raised trustworthiness concerns. He also concluded that Applicant had failed to meet her burden of persuasion as to mitigation, noting a paucity of evidence concerning her response to her debts. The Judge discussed Applicant’s bankruptcy action, but he noted that the petition did not list all of her alleged debts. He also noted that there is nothing in the record from which to infer that Applicant will in fact be discharged in bankruptcy or when.

Applicant has provided information in her appeal brief concerning her bankruptcy action. Some of this is new evidence, which we cannot consider. *See, e.g.*, ADP Case No. 08-09058 at 2 (App. Bd. Dec. 18, 2009). Other assertions in her brief draw attention to matters contained in the record, such as the contents of her bankruptcy petition and her family circumstances that affected her debts. However, the Judge made findings on these matters and discussed them in his Analysis. To the extent that Applicant is claiming that he did not consider this evidence, she has not rebutted the presumption to the contrary. *See, e.g.*, ADP Case No. 08-06284 at 2 (App. Bd. Dec. 10, 2009). Applicant contends that she did not have sufficient time to submit more detailed information about her bankruptcy petition. However, there is no evidence in the record that she had sought more time. In any event, while the Judge stated that there was no information about certain aspects of the

bankruptcy action, he did not limit his decision to this. Rather, he appears to have based his decision, in large measure, on a paucity of evidence concerning the reasons for Applicant's debts¹ and concerning her response to them. We note his statement, in the whole-person analysis, that the record does not contain evidence of "permanent behavioral changes" by Applicant regarding financial matters and that her problems could foreseeably recur. Decision at 8.

Applicant takes issue with the Judge's citation to Directive, Enclosure 2 ¶ 18, to the effect that persons with financial problems may engage in illegal acts to cover their debts. She denies that she would do so. However, Guideline F is not limited to concern over possible criminal conduct. It also requires a Judge to evaluate an applicant's judgement and reliability, which the Judge essentially did in his decision.

The record supports a conclusion that the Judge examined the relevant data and articulated a satisfactory explanation for the 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)). In light of the entirety of the record evidence, the Judge's decision not to grant Applicant a trustworthiness designation is sustainable.

Order

The Judge's adverse 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

¹The Judge stated that there is "some evidence" of medical and family-related expenses. Decision at 7. He did not explicitly conclude that Applicant's problems arose from circumstances beyond her control. The File of Relevant Material notes that, despite Applicant's contention that her debts were rooted in a loss of clients for her personally owned business, many of her debts appeared to pre-date that business.

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