

KEYWORD: Guideline F

DIGEST: Applicant failed to demonstrate that the Judge erred in his findings of fact. The Appeal Board cannot consider evidence outside the record. Applicant failed to rebut the presumption that the Judge considered all of the evidence. Adverse decision affirmed.

CASE NO: 13-00584.a1

DATE: 04/24/2014

DATE: April 24, 2014

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In Re:)	
)	
-----)	ADP Case No. 13-00584
)	
Applicant for a 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 eligibility for a public trust position. On June 12, 2013, 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 disposition on the written record. On December 2, 2013, after the close of the record, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Paul J. Mason declined to grant Applicant eligibility for a public trust position. 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 57 years old. He admitted to owing on five delinquent debts in the aggregate exceeding \$85,000. His financial problems began in about 2008 when he moved overseas to run a business. After his departure, a \$14,285 equity line of credit was charged off. A mortgage deficiency balance of \$60,000 became delinquent in 2009. Two telecommunications accounts totaling over \$1,000 became delinquent in 2009 and 2010. Applicant told a government investigator in 2011 that he was unable to resolve the two telecommunications accounts before moving overseas. He stated to the investigator his intent to contact the two telecommunications creditors and pay the debts. At the time of the interview, Applicant still owned his business and was earning a good profit, even though he was working part-time. He also had a full-time job. Between 2008 and early 2013, Applicant submitted no documentation of action to address the delinquent debts alleged in the SOR. Since then, he has paid off the two telecommunications accounts, and the mortgage company verified that he owes nothing on their account.¹ Applicant claimed he had reached an agreement with the equity line of credit creditor to pay \$100 per month on the debt. No documentation of payments were furnished. The account remains unpaid. Applicant paid \$250 on a \$10,000 debt in 2013. The balance of the account remains unpaid. In July 2013, Applicant met with a financial counselor once for two hours.

The Judge reached the following conclusions: Applicant took no documented action to address his debts until early 2013. This late action took place despite his indicating in March 2011, that he was working full-time and earning a good profit from his secondary income as a part-time business owner. Applicant still owes more than \$24,000 of delinquent debt even after the debts that he has satisfied are subtracted. Applicant's move overseas did not relieve him of the duty to manage his financial obligations in a responsible manner. Rather than keeping the creditors informed in the intervening years of his inability to pay his debts, he did nothing until early 2013. There are no clear indications that Applicant's financial problems are being resolved or are under control. The limited mitigation Applicant receives for paying two telecommunications accounts and partially paying the collection account is undermined by Applicant's stated intention to resolve the two telecommunications accounts more than two years earlier and then failing to do so. Applicant has not mitigated the trustworthiness concerns arising under the financial considerations guideline.

Applicant appears to take issue with one of the Judge's factual findings by stating that he was not making a good profit at the business he was running at the time of his investigative interview in 2011. After a review of the record, the Board concludes that the Judge's finding that Applicant

¹A document from the mortgage company included in Applicant's response to the Government's File of Relevant Material (FORM) indicates that the unpaid balance on the loan is zero. There is no evidence in the record to indicate how the account was satisfied, although Applicant, in his response to the FORM, indicates that the property was sold.

was earning a good profit with the business in 2011 is directly supported by the evidence.² Applicant has failed to establish error on the part of the Judge.

Much of Applicant's brief contains recitations of the circumstances behind his decision to live abroad and his financial circumstances. Much of this material is not included in the record below. It therefore consists of new evidence, which the Board cannot consider on appeal. Directive, ¶ E3.1.29.

Applicant asserts that he understands that he has not been current on some obligations, but that this circumstance should not disqualify him from holding a trustworthiness position. His citation to favorable evidence could be construed as an argument that the Judge did not consider the evidence or that he mis-weighed the evidence. A Judge is presumed to have considered all the evidence in the record. *See, e.g.*, ADP Case No. 09-04275 at 2 (App. Bd. Apr. 18, 2011). Moreover, 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. *Id.* 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). The Board has considered the totality of Applicant's arguments on appeal and finds no error in the Judge's ultimate conclusions regarding mitigation and the whole-person analysis.

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.*, ISCR Case No. 06-11172 at 3 (App. Bd. Sep. 4, 2007). 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)).

²Personal Subject Interview, part of Item 8 of the Government's FORM.

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