

KEYWORD: Guideline F

DIGEST: Applicant failed to show that the Judge mis-weighed the evidence or that he failed to consider all of the evidence. The Judge’s reference to a Government database was not based upon anything in the record and was speculative. This was harmless error, however. Adverse decision affirmed.

CASE NO: 13-01074.a1

DATE: 08/25/2014

DATE: August 25, 2014

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In Re:)	
)	
-----)	ADP Case No. 13-01074
)	
Applicant for Position of Trust)	
)	

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 a trustworthiness designation. On November 19, 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 hearing. On June 16, 2014, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Robert Robinson Gales 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 decision was arbitrary, capricious, or contrary to law. Consistent with the following, we affirm.

The Judge's Findings of Fact

Applicant works for a Defense contractor. She received a bachelor of applied science degree in 2012. Applicant began experiencing financial problems in 2007, when she was dismissed from her job for calling in sick too often and for habitual lateness. At that time, she was living at the limit of, or possibly exceeding, her income. Due to her unemployment, her accounts became delinquent. Although she got a job at a domestic violence shelter, it did not pay enough even to cover her monthly accounts. She worked longer hours, went back to college to improve her resume, and moved back in with her parents in order to save money. Nevertheless, her accounts remained delinquent and were placed for collection, charged off, or turned over to debt purchasers.

In February 2011, she filed for Chapter 7 bankruptcy protection and was discharged later that year. Her financial situation thereby improved, although she was still liable for her student loans. She also incurred several medical bills, which she is in the process of resolving. Concerning her delinquent student loans, the Judge found that three of these loans had been acquired by a debt purchaser. The creditors for the other two could not be clearly identified. The Judge found that Applicant had made no effort to determine the status of her loans, nor had she sought forbearance or deferment. Her delinquent student loan accounts have not been resolved.

The Judge found that Applicant's claim to be current on all of her monthly expenses, except for the loans, was not entirely accurate due to her remaining delinquent medical bills. He also found her 2013 financial statement to be confusing. It reflected no debt payments despite an annual remainder of over \$9,000. In May 2014 Applicant prepared another one, this one showing over \$500 a month in debt payment, with a monthly remainder of nearly \$470. Applicant stated that she intended to move back in with her parents when her current lease expires.

The Judge's Analysis

The Judge stated that Applicant failed to explain why she had not acted more aggressively to resolve her delinquent loans, given her evidence of an annual income remainder over \$9,000. Insofar as her debts are ongoing, the Judge stated that he could not conclude that Applicant's financial problems are in the past. Aside from counseling she received in connection with her bankruptcy action, Applicant has not received financial counseling, and there are no indications that her problems are being resolved. He also stated that Applicant had demonstrated little evidence of a "good-faith effort" to pay her debts, having chosen simply to ignore them.

Even allowing for some confusion regarding the identity of some of her student loan creditors, Applicant has taken no steps to resolve the debts. Despite having money left over each month from which Applicant had promised to begin paying her student loans, she had not actually done so by the end of the record. The Judge stated that Applicant had failed to seek guidance from

the Department of Education or from her school financial counselor, instead ignoring her creditors even after having been questioned by an OPM investigator in 2013. He said that Applicant's circumstances, viewed as a whole, show an absence of meaningful efforts to address her student loan debt. This, in turn, presents ongoing, unresolved trustworthiness concerns.

Discussion

Applicant's brief recounts in detail evidence from the record, including her job loss, the circumstances underlying her debts, that she has never compromised sensitive or private information, etc. She contends that she has been working to resolve her debts and that the Judge erred in concluding that she is a risk. Applicant's appeal argument consists largely of a disagreement with the Judge's weighing of the record evidence. However, his analysis is consistent with the record that was before him. Applicant's arguments are not sufficient to show that the Judge mis-weighed the evidence or that he failed to consider all of the evidence in the record. *See, e.g.*, ADP Case No. 12-01023 at 4 (App. Bd. Jan. 17, 2014).

In explaining his decision to deny Applicant a trustworthiness designation, the Judge stated that she had failed to search a Department of Education data base "or other official records of the DOE" to ascertain the status of her loans. He did so in support of his conclusion that she had not taken sufficient measures to resolve her debts. Applicant challenges the Judge's reference to this data base, and we find her argument persuasive. The record contains no evidence describing the data base, its capabilities or reach. It does not contain evidence about the extent of DOE record keeping, if any, that goes beyond the scope of its on line data base. Neither is there sufficient evidence about the nature of Applicant's debts from which to conclude that they would be referenced in any DOE files. Although a Judge can take official notice of Government web sites (*see, e.g.*, ISCR Case No. 99-0452 at 4, n. 7 and 8, n. 11 (App. Bd. Mar. 21, 2000)), in this case his comment was not supported by anything in the record.¹ In an appropriate case, a Judge may legitimately note an applicant's failure to avail himself of reasonable opportunities to inquire about the extent of his debts and the means at his disposal for resolving them. Here, on the other hand, the Judge's comments were speculative and went beyond the evidence that was before him. Accordingly, they were erroneous. However, given the totality of the evidence, there is little likelihood that he would have made a different decision had he not made this error. Therefore, the error is harmless. *See, e.g.*, ISCR Case No. 12-00678 at 2 (App. Bd. Jun. 13, 2014).

The Judge examined the relevant data and articulated a satisfactory explanation for the decision. The decision is sustainable on this record. The standard applicable to trustworthiness cases is that set forth in *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988) regarding security clearances: such a determination "may be granted only when 'clearly consistent with the

¹During the hearing, the Judge advised Applicant that she could contact the Department of Education and obtain "a complete list of your loans and status of loans, amounts paid out, paid to [whom], who the servicing company was, et cetera, et cetera. Any monies that they received." Tr. at 62.

interests of the national security.’’ See, e.g., ADP Case No. 12-04343 at 3 (App. Bd. May 21, 2013).
See also Kaplan v. Conyers, 733 F.3d 1148 (Fed. Cir. 2013), *cert denied*.

Order

The Decision is **AFFIRMED**.

Signed: Michael Ra’anan
Michael 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