

KEYWORD: Guideline F

DIGEST: A Judge has no authority to act as an investigator in a case, as by seeking to contact witnesses, etc. To do so would be inconsistent with his or her position as an impartial fact-finder. We cannot consider new evidence on appeal. Applicant has not rebutted the presumption that the Judge considered all of the evidence in the record. Adverse decision affirmed.

CASE NO: 14-03541.a1

DATE: 08/03/2015

DATE: August 3, 2015

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In Re:)	
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)	ADP Case No. 14-03541
)	
Applicant for 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 a trustworthiness designation. On August 25, 2014, 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 decision on the written record. On May 20, 2015, after considering the record, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Carol G. Ricciardello denied Applicant’s request for a trustworthiness designation. Applicant appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raised the following issues on appeal: whether she was denied due process and whether the Judge's adverse decisions was arbitrary, capricious, or contrary to law. Consistent with the following, we affirm.

The Judge's Findings of Fact

Applicant married in the late 1980s and divorced in the mid-2000s. A high school graduate, she has two daughters, both adults. In the mid-2000s, Applicant and her then-husband received a discharge of their debts through Chapter 7 bankruptcy. One of the discharged debts was a mortgage, upon which they had stopped making payments. Applicant's SOR alleges other delinquent debts, including another past due mortgage, which she fell behind in paying due to unemployment. Applicant succeeded in modifying her loan. Applicant has other delinquent debts, three of which are for medical expenses incurred at a time when her health insurance was not sufficient. She made a payment of \$50 toward her medical debts but otherwise did not provide documents showing resolution or settlement of others. Applicant provided no information about her current income and expenses or about action she has taken to resolve her financial problems. She states that her three credit cards are current and that she is working with an attorney to consolidate her debts. Applicant took vacation cruises in 2011, 2012, and 2013.

The Judge's Analysis

The Judge noted circumstances outside Applicant's control, such as unemployment and her relationship with her husband, which Applicant described as abusive. The Judge noted Applicant's statement that her ex-husband had used her credit cards, although in an interview she admitted that she too used them. The Judge stated that Applicant did not explain how she could have afforded to take cruises while not addressing her debts. The Judge stated that Applicant had provided no information regarding actions she may have taken to resolve her debts, some of which the Judge noted were of relatively small amounts. The Judge's whole-person analysis reiterated some of her comments summarized above. The Judge stated that, despite evidence that Applicant has been working full time since early 2014, the status of her finances remains unknown. She stated that she could not conclude that Applicant's finances are under control. The Judge found for Applicant on two of the debts alleged in the SOR.

Discussion

Applicant notes the Judge's comment that she had provided no information about her income, expenses, or actions to resolve debts. She argues that no one ever asked her for this information. She also states that the Judge did not contact her attorney for information about debt consolidation. The Directive places the burden of persuasion on the applicant to show that the trustworthiness concerns in his or her case have been mitigated. We note that in the File of Relevant Material (FORM), Department Counsel advised Applicant of her right to submit "objections, rebuttal, extenuation, mitigation, or explanation, as appropriate." The letter accompanying the FORM also notified Applicant of her right to "submit any material you wish the Administrative Judge to consider[.]" Letter from DOHA, dated March 18, 2015. DOHA also provided Applicant

with a copy of the Directive, which contains information about her right to submit matters in response. Applicant submitted about 20 pages in response to the FORM. Considering the record as a whole, we conclude that Applicant received adequate notice of her rights and obligations. *See, e.g.*, ADP Case No. 10-07047 at 2 (App. Bd. Oct. 12, 2011). Concerning her argument that the Judge did not contact her attorney, a Judge has no authority to serve as an investigator in a DOHA case, which would conflict with his or her role as an impartial fact-finder. *See, e.g.*, ISCR Case No. 14-00434 at 3 (App. Bd. Jan. 20, 2015); ADP Case No. 05-04768 at 3 (App. Bd. Feb. 28, 2007).

Applicant's appeal brief cites to matters from outside the record, which we cannot consider. Directive ¶ E3.1.29.¹ Applicant also cites to her evidence in mitigation. To the extent that she is arguing that the Judge failed to consider this evidence, we note that a Judge is presumed to have considered all of the evidence in the record. *See, e.g.*, ADP Case No. 12-01023 at 4 (App. Bd. Jan. 17, 2014). Applicant's brief is not enough to rebut that presumption, nor is it sufficient to show that the Judge's decision ran contrary to the weight of the record evidence.

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 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*.

¹The Board also received a Chapter 13 Bankruptcy Court document. Although it is not clear why it was sent, one provision may have been the motivation: the text discussing stays of court actions against debtors. If that was the reason, it was misplaced: "[a] trustworthiness adjudication is not a debt collection procedure. It is a procedure designed to evaluate an applicant's judgment, reliability, and trustworthiness." ADP Case No. 12-01679 at 9 (A.J. Nov. 20, 2013), *citing* ISCR Case No. 09-02160 (App. Bd. Jun. 21, 2010). Therefore, it is not subject to the automatic stay of bankruptcy law.

Order

The Decision is **AFFIRMED**.

Signed: Michael Ra'anan
Michael Ra'anan
Administrative Judge
Chairperson, Appeal Board

Signed: William S. Fields
William S. Fields
Administrative Judge
Member, Appeal Board

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