

KEYWORD: Guideline F

DIGEST: Applicant submitted documents which she states were provided to the Judge. However, at least one document post-dates the Judge's decision. We cannot consider new evidence on appeal. Adverse decision affirmed.

CASENO: 15-00020.a1

DATE: 03/04/2016

DATE: March 4, 2016

In Re:)
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-----) ADP Case No. 15-00020
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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 Department of Defense (DoD) declined to grant Applicant a trustworthiness designation. On July 27, 2015, DoD issued a statement of reasons (SOR) advising Applicant of the basis for that

decision–trustworthiness concerns raised under Guideline F (Financial Considerations) and Guideline E (Personal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a decision on the written record. On November 21, 2015, after considering the record, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Robert E. Coacher 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 the Judge erred in finding that her omissions from the trustworthiness application were deliberate and 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 has worked for a Federal Contractor since 2014. She was unemployed from October 2010 until October 2011 and again in 2013. She held a security clearance during her employment by a Federal agency from 1988 to 1997.

Applicant’s SOR lists several delinquent debts, most of which are in collection status. Two of the allegations addressed the same debt, so the Judge resolved one of them in her favor. Applicant did not provide supporting documentation to corroborate her disputes of several of the debts or otherwise to show that she had resolved them.

Applicant’s questionnaire asked several questions about the status of her finances, such as whether (1) she had ever had property repossessed; (2) any of her debts had been turned over to collection agencies within the prior seven years; (3) she had defaulted on any loans in the prior seven years; and/or (4) any account or credit card had been suspended, charged-off, or cancelled due to failure to pay. She answered “no” to each of the questions, when she should have answered affirmatively.

Applicant enjoys a good reputation for her work ethic, loyalty, and trustworthiness.

The Judge’s Analysis

The Judge concluded that Applicant’s debts are recent and unresolved. He stated that she did not submit enough evidence to show that her financial problems are unlikely to recur. Though noting evidence that Applicant’s problems were affected by circumstances outside her control, the Judge stated that she had failed to show responsible action. He also stated that she had not demonstrated any action to resolve her debts, that she had received financial counseling, or that she had a basis to dispute her debts.

Regarding Guideline E, the Judge found that Applicant’s omissions were deliberate. Though noting her claim not to have understood the questions, he found that they were neither confusing nor misleading. He also concluded that Applicant had not mitigated the concerns arising from these deliberate omissions.

Discussion

Applicant challenges the finding that her omissions from the application were deliberate. When evaluating the deliberate nature of an applicant's omissions or false statements, a Judge should consider the applicant's *mens rea* in light of the entirety of the record evidence. *See, e.g.*, ADP Case No. 11-06549 at 3 (App. Bd. Sep. 18, 2013). The Judge's characterization of the clarity of the questions at issue is consistent with the record and supports the challenged finding. The finding of deliberate omission is sustainable.¹

Applicant cites to evidence that her finances were affected by unemployment, and she notes that her record is clean of criminal or disciplinary actions. She also states that she submitted evidence of debt resolution that the Judge did not take into account. The Judge noted that he received the evidence that Applicant submitted in response to the File of Relevant Material (FORM). Decision at 2. One of these documents was an offer for a settlement agreement from one of Applicant's creditors, included in the record as Applicant Exhibit (AE) B. The Judge made findings about this offer but noted that Applicant had provided no evidence of payments under the proposed settlement plan. This finding was consistent with the record that was before him. Applicant has not rebutted the presumption that the Judge considered all of the evidence in the record. ADP Case No. 14-03541 at 3 (App. Bd. Aug. 3, 2015).

Applicant submitted documents which she states were provided to the Judge. However, at least one document (a credit report) post-dates the Judge's decision. We cannot consider new evidence on appeal. Directive ¶ E3.1.29.

Applicant states that she believed that once she submitted evidence of debt resolution DOHA officials would obtain a new credit report and conclude that she was taking care of her financial problems. However, in a DOHA proceeding, the applicant is responsible for submitting evidence in mitigation and bears the burden of persuasion that he or she should have a clearance. Directive ¶ E3.1.15. If Applicant believed that a more recent credit report would strengthen her case, it was her responsibility to provide it. *See, e.g.*, ISCR Case No. 14-03030 at 3 (App. Bd. Sep. 2, 2015). In addition, Applicant was advised of her right to present documentary evidence in response to the FORM. This guidance was contained in the FORM itself, the DOHA cover letter that accompanied it, and in the Directive and was sufficient to apprise a reasonable person of his or her rights and responsibilities. *See* ADP Case No. 10-07047 at 2 (App. Bd. Oct. 12, 2011). To the extent that Applicant is contending that she did not understand the procedures that would apply to her adjudication, we conclude that any misunderstanding was not the result of the quality of guidance that she received.

¹The multiple nature of the omissions also could persuade a reasonable person that they were deliberate. *See, e.g.*, ISCR Case No. 13-12407 at 3-4 (App. Bd. Aug. 18, 2014). In addition, we note her interview summary: "[Applicant] answered 'No' to the delinquency involving routine accounts question in the financial record section of the case papers; however, [Applicant] provided the answer is actually 'Yes.'" Item 3, Interview Summary, at 5. Applicant then went on to discuss a loan upon which she defaulted and which had been turned over to a collection agency. This summary could raise in a reasonable mind the conclusion that at the time she completed the application she knew that her negative answers were not truthful, at least as regards the loan.

Applicant notes that her continued employment is contingent upon her receipt of a trustworthiness designation. However, the Directive does not permit us to consider the impact of an adverse decision. *See, e.g.*, ADP Case No. 14-02496 at 3 (App. Bd. May 14, 2015). Applicant requests to meet in person with the Appeal Board in order to present her appeal. Our scope of responsibility is set forth in Directive ¶¶ E3.1.29 - 34. We decide appeals based upon the record and the briefs of the parties. The Directive does not authorize us to conduct *in personam* hearings.

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*.

Order

The Decision is **AFFIRMED**.

Signed: Michael Y. Ra’anan
Michael Y. 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