

KEYWORD: Guideline F; Guideline J

DIGEST: The Judge found that Applicant has not sought financial counseling or initiated constructive steps to discharge or otherwise resolve her debts. The Judge noted that Applicant cannot identify a number of her debts by name. As to a \$9,362 hospital debt, the Judge found that Applicant has not been able to make any headway in eliciting debt details with the collection agency and her most recent e-mail and telephone exchanges with the creditor have yielded no results, and the status of the debt remains unclear. With respect to two other debts the Judge found Applicant had no success in obtaining financial information from listed creditors. The Judge found that Applicant is barely able to pay her current bills with her current take home pay and living expenses and is considering bankruptcy. As a result, the Judge concluded that she has had difficulty making individual or collective progress on her debt. Given the record the Board concludes the Judge's overall favorable determination is not sustainable. Favorable decision reversed.

CASENO: 06-18900.a1

DATE: 06/06/2008

DATE: June 6, 2008

_____)	
In Re:)	
)	
)	
-----)	ADP Case No. 06-18900
)	
)	
Applicant for Public Trust Position)	
_____)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Julie R. Edmunds, Esq., Department Counsel

FOR APPLICANT

Pro Se

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a trustworthiness designation. On March 30, 2007, 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 hearing. The SOR was subsequently amended to add allegations under Guideline J (Criminal Conduct). On December 31, 2007, after the hearing, Administrative Judge Roger C. Wesley granted Applicant’s request for a trustworthiness designation. Department Counsel filed a timely appeal pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Department Counsel raised the following issue on appeal: whether the Judge’s favorable trustworthiness determination is sustainable. Finding error, we reverse.

Whether the Record Supports the Judge’s Factual Findings

A. Facts

The Judge made the following findings of fact: Applicant is a 40-year-old office assistant for a defense contractor. She has approximately two years of college training and has worked for her current employer since September 2004, save for an extended period of disability that included multiple hospital admissions. She estimates to have received disability payments of around 50 per cent of her salary while out of work on disability in 2007.

Since 2000, Applicant has accumulated a number of debts, most of them health-related. She has encountered difficulties in tracking down some of the medical debts with credit reporting agencies and medical providers and cannot identify them by name. One of her larger medical bills is the \$9,362.00 hospital debt at SOR paragraph 1(b). Believing this hospital debt was covered by insurance, she has not been able to make any headway in eliciting debt details with the collection agency holding this debt. Her most recent e-mail and telephone exchanges with the creditor have yielded no results, and the status of this debt remains unclear. Considering that she was employed by this hospital at the time of her hospitalization, her understanding that her hospital stay was insurance covered is plausible. Her dispute of this debt is entitled to an inference of good faith questioning of the debt.

Applicant questions two of the other medical debts listed in the SOR. They are relatively small in amounts and may very well represent missed co-pays. She has had no success in obtaining

financial information from these listed creditors with health-related debts. Without information about these debts, she cannot affirm whether they are legitimate or not.

Besides her medical debts, Applicant is indebted to a landlord on an apartment she rented in 1999 from a co-worker on a month-to-month basis for about two months time. This landlord obtained a judgment against her in October 1999 in the sum of \$1,411.00. Applicant is certain she paid some of the judgment in 2001 through a garnishment, but can provide no documentation. She estimates to owe maybe half of the judgment, but has received no correspondence of any kind from the judgment holder.

Applicant's largest debt, by far, is a deficiency balance on a car she purchased in 1999 for about \$24,000.00. She made monthly payments of around \$500.00 on the car for about six months before defaulting on her payments. The car was repossessed in 2001 and reportedly sold at a public auction. After being advised by the creditor of a \$17,000.00 deficiency balance, she made payment arrangements with the creditor and made one payment before suspending payments. She does not know whether the \$16,000.00 figure listed in her credit report is correct or not. Without more information about the condition of the car and sale documentation from the lender, it is not possible to assess whether or not Applicant was adequately credited by the lender.

Applicant attributes most of her debts to a rough period between 2000 and 2004 when she was unhappy at work, drinking a lot, and experiencing medical issues requiring hospitalization. Her work and medical problems were compounded by a January 2000 accident she was involved in while driving a rental car. She had been drinking prior to her accident, and hit a pole beside the highway. An ambulance arrived at the scene and transported her to a local hospital. While in the hospital, a sheriff's officer came to the hospital and took a blood sample. She was subsequently charged with one count of driving under the influence (DUI) and three counts of endangerment (a class 6 felony). In court, she was convicted of all the charges and sentenced to probation and ordered to pay \$9,362.00 in restitution for the damage caused to the rental car (not insured) and \$2,342.50 in fees.

Applicant did not initially report to her probation department as ordered by the court, and she was arrested (in March 2004) for failing complete all of the terms of her probation. At hearing, the court reinstated and extended her probationary period by three years and ordered her to complete a community service requirement, pay restitution, and attend an alcohol class. Because of a remaining restitution balance in April 2007 (estimated to be about \$9,000.00), the court extended her probation for an additional three years. Applicant's probation officer describes her as compliant with her probation conditions. She credits her with making restitution payments and maintaining full-time employment and a stable residence. Applicant currently sends her probation department something every month on her restitution balance. She does not know what will happen if, at the end of the remaining three years of her probation, she has still not discharged the remaining restitution balance.

Applicant disputes each of the listed medical debts, which she believes should have been discharged long ago by her medical insurance. She is barely able to pay her current bills with her

current take home pay (estimated to be around \$1,700.00) and living expenses, and is considering bankruptcy.

Not much is known about Applicant's work performance or trust and confidence in which she is held by her supervisors and coworkers. She did not provide any documentation of her performance evaluations, character references, or achievement certificates.

B. Discussion

The Appeal Board's review of the Judge's findings of facts is limited to determining if they are supported by substantial evidence—"such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the record." Directive ¶ E3.1.32.1. "This is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620-21 (1966). In evaluating the Judge's findings, we are required to give deference to the Judge's credibility determinations. Directive ¶ E3.1.32.1.

To the extent that the Judge's findings are relevant to the assigned error, they will be discussed below.

Whether the Record Supports the Judge's Ultimate Conclusions

A Judge is required to "examine the relevant data and articulate a satisfactory explanation for" the decision, "including a 'rational connection between the facts found and the choices 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)). The Appeal Board may reverse the Judge's trustworthiness determination if it is arbitrary, capricious, or contrary to law. Directive ¶¶ E3.1.32.3 and E3.1.33.3.

In deciding whether the Judge's rulings or conclusions are arbitrary or capricious, the Board will review the Judge's decision to determine whether: it does not examine relevant evidence; it fails to articulate a satisfactory explanation for its conclusions, including a rational connection between the facts found and the choice made; it does not consider relevant factors; it reflects a clear error of judgment; it fails to consider an important aspect of the case; it offers an explanation for the decision that runs contrary to the record evidence; or it is so implausible that it cannot be ascribed to a mere difference of opinion. In deciding whether the Judge's rulings or conclusions are contrary to law, the Board will consider whether they are contrary to provisions of the Directive or other applicable federal law. *See* ADP Case No. 06-12901 at 4 (App. Bd. Jul. 31, 2007).

Department Counsel argues that the Judge's favorable trustworthiness determination under Guideline F should be reversed because it fails to articulate satisfactory explanations for material

conclusions, offers explanations that run contrary to the record evidence, and fails to consider important aspects of the case. The Board finds Department Counsel's arguments persuasive.

In evaluating Guideline F cases, the Board has previously noted that an applicant is not required, as a matter of law, to establish that she has paid off each and every debt listed in the SOR. *See, e.g.*, ISCR Case No. 02-25499 at 2 (App. Bd. Jun. 5, 2006). All that is required is that an applicant demonstrate that she has “. . . established a plan to resolve [her] financial problems and taken significant actions to implement that plan.” *See, e.g.*, ISCR Case No. 04-09684 at 2 (App. Bd. Jul. 6, 2006). The Judge can reasonably consider the entirety of an applicant's financial situation and her actions in evaluating the extent to which that applicant's plan for the reduction of her outstanding indebtedness is credible and realistic. *See* Directive ¶ E2.2(a).

In this case, a review of the record indicates that although the debts in question have been in existence for a considerable period of time, Applicant has taken no effective action to resolve them, has no cogent plan to do so, and knows little about their actual status. The Judge found that Applicant “. . . has not sought financial counseling or initiated constructive steps . . . to discharge or otherwise resolve her debts.” Decision at 7. With respect to a number of her debts, the Judge noted that Applicant “. . . cannot identify them by name.” *Id.* at 3. As to her \$9,362 hospital debt, the Judge found that Applicant “. . . has not been able to make any headway in eliciting debt details with the collection agency” and “[h]er most recent e-mail and telephone exchanges with the creditor have yielded no results, and the status of the debt remains unclear.” *Id.* With respect to two other medically-related debts the Judge found Applicant “. . . had no success in obtaining financial information from [the] listed creditors” and “[w]ithout information about these debts she cannot affirm whether they are legitimate or not.” *Id.* As for her largest debt, a deficiency balance on a car purchased in 1999, the Judge found that Applicant “. . . does not know whether the \$16,000.00 figure listed in her credit report is incorrect or not” and “[w]ithout more information about the condition of the car and sale documentation from the lender, it is not possible to assess whether or not Applicant was adequately credited by the lender.” *Id.* at 3-4. With respect to a \$1,411 judgment obtained by a landlord on an apartment Applicant had rented, the Judge stated that Applicant “. . . can provide no documentation” and that “[s]he estimates to owe maybe half the judgment . . . but has received no correspondence of any kind . . .” *Id.* at 3.

Applicant had the burden of establishing mitigation of the trustworthiness concerns raised by her financial situation. Directive ¶ E3.1.15. Yet at the hearing she offered no independent witnesses and provided no documented proof which would substantiate the basis for her disputes or corroborate her actions to resolve the established concerns. Applicant's only documentary exhibit was a post-hearing submission—a single page e-mail exchange with a creditor that occurred five days after the hearing.

The fact that Applicant may be insulated from collection actions with respect to a number of her debts due to the running of her state's statute of limitations is of little mitigative value. The Board has previously noted that reliance on a statute of limitations does not constitute a good faith effort to resolve financial difficulties. *See, e.g.*, ISCR Case No. 03-04779 at 4 (App. Bd. Jul. 20, 2005); ISCR Case No. 01-09691 at 2-3 (App. Bd. Mar. 27, 2003).

Moreover, the record as to Applicant’s current circumstances does not suggest that she has successfully put her financial difficulties behind her. On the contrary, the Judge found that Applicant “. . . is barely able to pay her current bills with her current take home pay . . . and living expenses . . . and is considering bankruptcy. Decision at 4. As a result, the Judge concluded that “. . . she has had difficulty making individual or collective progress . . . on her listed debt.” *Id.* at 7.

Finally, the record is otherwise devoid of evidence to support a favorable assessment of Applicant’s trustworthiness in a whole-person context aside from her financial difficulties. As to that aspect of the case, the Judge noted in his decision: “Not much is known about Applicant’s work performance or trust and confidence in which she is held by her supervisors and coworkers. She did not provide any documentation of her performance evaluations, character references, or achievement certificates.” *Id.* at 4.

After reviewing the record, the Judge’s decision, and the briefs of the parties, the Board concludes that Department Counsel has met its burden of establishing that the Judge’s overall favorable trustworthiness determination under Guideline F is not sustainable and should be reversed. In light of the forgoing, the Board need not reach the issues raised by Department Counsel as to the Judge’s conclusions under Guideline J.

Order

The Judge’s favorable trustworthiness determination is REVERSED.

Signed: Jean E. Smallin

Jean E. Smallin
Administrative Judge
Member, 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