

KEYWORD: Guideline F; Guideline E

DIGEST: The Judge’s application of financial considerations mitigating condition 3 is not supported by the record evidence in that Applicant’s financial problems are longstanding and began before the illness in question. There is a relative paucity of evidence to support the application of Financial Considerations Mitigating Condition 6. There are several reasons not to sustain the Judge’s finding that Applicant had no intention to deceive. Favorable decision reversed.

CASENO: 06-19856.a1

DATE: 11/28/2007

DATE: November 28, 2007

In Re:	)	
	)	
-----	)	ADP Case No. 06-19856
	)	
Applicant for Trustworthiness Designation	)	

**APPEAL BOARD DECISION**

**APPEARANCES**

**FOR GOVERNMENT**

Fahryn Hoffman, Esq., Department Counsel

**FOR APPLICANT**

*Pro Se*

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a trustworthiness designation.<sup>1</sup> On August 29, 2006, DOHA 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 hearing. On May 31, 2007, after the hearing, Administrative Judge Jacqueline T. Williams 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 raises the following issues on appeal: whether the Judge’s application of the Financial Consideration Mitigating Conditions (FCMC) is error; whether the Judge’s conclusion that the government had not met its burden of production under Guideline E is arbitrary, capricious, or contrary to law; and whether the Judge’s whole person-analysis is supported by record evidence. Finding error we reverse.

### **Whether the Record Supports the Judge’s Factual Findings**

#### **A. Facts**

Applicant is a budget analyst for a defense contractor. She currently holds a secret clearance. In 1996 Applicant filed for Chapter 7 bankruptcy protection, being discharged later that year. Since that time she has amassed \$48,039.00 in delinquent debts, of which \$33,263 remained unpaid as of the date of the decision.

Applicant married in 1989, but divorced in 1993. Her ex-husband did not make child support payments. She remarried in 2004, but shortly thereafter her husband suffered a stroke, with resulting kidney failure, requiring a transplant. He is now on disability. Additionally, Applicant was unemployed between September and November 2006. Her net income from her job is \$4,100 a month, and her husband’s disability pay is \$1,300 a month.

Question 20 on the Public Trust Position Application asks if Applicant has any debts over 180 days old. Applicant replied no to this question. In fact, she failed to list 11 debts which were over 180 days in age. The Judge stated that Applicant contended she had rushed through the application and had misunderstood the question.

#### **B. Discussion**

---

<sup>1</sup>Although Applicant submitted a Public Trust Position Application (SF 85P), the SOR designated the case number with an “ISCR” prefix. The Judge properly concluded that this was an administrative error. Tr. at 7-8. She treated the case as an application for a trustworthiness designation, and her decision styles the case number with an ADP prefix.

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 such 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 findings 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.

In the course of arguing the issues raised on appeal, Department Counsel has challenged some of the Judge’s findings of fact. The Board will address these challenges below.

### **Whether the Record Supports the Judge’s Ultimate Conclusions**

The Appeal Board may reverse the Judge’s decision to grant, deny, or revoke a trustworthiness determination if it is arbitrary, capricious, or contrary to law. *See* Directive ¶¶ E3.1.32.3 and E3.1.33.3. Once the government presents evidence raising trustworthiness concerns, the burden shifts to the applicant to establish any appropriate mitigating conditions. *See* Directive ¶ E3.1.15. “The application of disqualifying and mitigating conditions and whole person factors does not turn simply on a finding that one or more of them apply to the particular facts of a case. Rather, their application requires the exercise of sound discretion in light of the record evidence as a whole.” *See* ADP Case No. 05-12037 at 3 (App. Bd. May 10, 2007). A trustworthiness determination must be guided by common sense in light of the record as a whole. *See* Directive ¶ E2.2.3.

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 Executive Order 10865, the Directive, or other applicable federal law. *See* ADP Case No. 06-12901 at 4 (App. Bd. Jul. 31, 2007).

On appeal, Department Counsel takes issue with a finding of the Judge to the effect that, of Applicant’s \$48,039 of post-bankruptcy debt, “approximately \$14,737 has either been paid or deleted from the 2007 credit report. The unpaid delinquent debts now total \$33,263.” Decision at 4. Department Counsel argues that the absence of certain debts from Applicant’s credit report is

attributable to their age rather than to their having been paid off.<sup>2</sup> We have examined the record. We note that at least some of the debts which the Judge identified as not being on the credit report were nevertheless acknowledged by Applicant during the hearing as being both legitimate and unsatisfied, thereby undermining the Judge's conclusion. On the other hand, we also note that Applicant testified that some of the debts, including two substantial ones, were listed on the SOR twice. We find nothing in the record that necessarily discredits that testimony. Therefore, we are not able to say that the Judge's conclusion as to the amount of Applicant's unpaid debt is error. In evaluating the Judge's analysis, therefore, we will assume that the amount of debt at issue here is \$33,263.

In deciding the case favorably to Applicant, the Judge applied two mitigating conditions, FCMC 3 and FCMC 6. The former mitigates bad debt trustworthiness concerns when an applicant's financial problems result from "conditions that . . . were largely beyond the person's control (*e.g.* loss of employment, a business downturn, unexpected medical emergency, or a death, divorce or separation)." The Judge noted that Applicant had divorced in 1993 and her former husband subsequently failed to pay child support. She also noted that Applicant remarried in 2004, but that her new husband suffered medical problems for which he currently receives disability payments. While such matters can result in financial difficulties, there appears to be no correlation between these life-altering events and the financial problems alleged in the SOR. For example, few of the alleged debts concern medical bills and those that do are in relatively small amounts. Indeed, Applicant's bad debts appear to be long standing and ongoing, with many of the larger debts pre-dating her second husband's illness. Viewed in its entirety, the record does not support the conclusion that Applicant has met her burden of persuasion under this mitigating condition.

FCMC 6 mitigates security concerns when "[t]he individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts." Applicant provided receipts and other documentation to corroborate her testimony that she had paid off certain of her debts, or was in the process of doing so. However, most of these payments occurred after the issuance of the SOR, many only within weeks of the hearing. The debts for which Applicant has provided corroborating evidence comprise a small fraction of her total amount of unpaid debt. Furthermore, Applicant has claimed to have paid off certain debts for which she supplied no corroboration, despite the Judge having given her an opportunity to do so following the close of the hearing. Tr. at 117. Given the extent of Applicant's debt problem, and the relative paucity of evidence corroborating her having made good faith efforts to pay them, the record does not support a conclusion that Applicant has met her burden of persuasion under this mitigating condition.

Department Counsel has challenged the Judge's finding that Applicant did not intend to deceive when she denied having any debts over 180 days old. Applicant contends that she filled out her application in haste and did not understand the question, an explanation which the Judge found to be plausible. After examining the record, however, the Board notes significant evidence inconsistent with this finding. Aside from the fact that the question is clear on its face, we note that Applicant attended college for a year, a level of education which would make it less likely that she would misunderstand the question at issue. Similarly, her position as a budget analyst suggests a

---

<sup>2</sup>See 15 U.S.C. 1681(c).

level of sophistication at odds with her claim of having not understood the matters which the question sought to elicit. Furthermore, she has previously filled out a security clearance application, thereby demonstrating general familiarity with the kind of matters covered in adjudications of this sort. Additionally, in her response to the SOR, her answer to interrogatories, and in her testimony at the hearing, Applicant provided inconsistent explanations for her having given an incorrect response to this question.<sup>3</sup> Applicant's testimony under cross examination failed to resolve these inconsistencies, and the Judge did not address them. *See* Tr. at 94-100; Decision at 7. When combined with her apparent awareness of her lengthy debt problems, we conclude that the Judge did not evaluate Applicant's explanation in light of all the contrary record evidence and that her finding that the Government failed to meet its burden of production is error. Furthermore, the Board's examination of the record evidence provides no basis to conclude that Applicant had met her burden of persuasion as to mitigating the Guideline E trustworthiness concerns.

The Board has examined the Judge's whole person analysis. The Judge stated that Applicant is "eager to resolve her financial problems" and could benefit from financial counseling. Decision at 7. She also noted Applicant's husband's medical problems. Although these are matters which can properly be taken into account in a whole person analysis, the Board concludes that, read in light of the contrary record evidence, they are insufficient to sustain the Judge's favorable decision. Given the extent of Applicant's bad debt, the relative lack of corroboration for those debts she claims to have paid off, her failure seriously to pursue financial counseling, and her inconsistent statements concerning the Guideline E trustworthiness concern, we hold that the Judge's application of the mitigating conditions and her whole person analysis are arbitrary and capricious.

---

<sup>3</sup>*See* Response to SOR: "Not taking time to read the question how it was presented, I rushed through the question causing me to read the question wrong and answer incorrectly." Compare with Gov. Ex. 2, Response to Interrogatories, at 6: "I did not receive any paperwork that would allow me to list debt. My clearance was supposed to transfer from my last employer who had a list of all debt." Compare also with Tr. at 99: ". . . I had no idea of days at the time, but at the time looking at 180 days, I'm thinking to myself there's no way I can have anything that high, as far as the days are concerned. And I was thinking I'm sure at the time I'm thinking 120 days at the most, a couple of months, because I knew before I had had debt."

**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