

KEYWORD: Guideline F

DIGEST: Applicant's presentation on appeal is insufficient to overcome the presumption that a Judge considered all the record evidence. Adverse decision affirmed.

CASENO: 09-02388.a1

DATE: 04/21/2010

DATE: April 21, 2010

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In Re:)	
)	
-----)	ADP Case No. 09-02388
)	
)	
Applicant for Public Trust Position)	
_____)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

Pro se

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a trustworthiness designation. On August 27, 2009, 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. On January 28, 2010, after the hearing, Administrative Judge Mark Harvey 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 properly applied the pertinent mitigating conditions; whether the Judge’s whole-person analysis was erroneous; and whether the Judge’s adverse trustworthiness determination was arbitrary, capricious, or contrary to law. Finding no error, we affirm.

The Judge found that Applicant had two delinquent debts, both for credit cards, one in the amount of \$15,082 and the other in the amount of \$11,861. Applicant had entered into repayment plans for both of these debts. For the former one, she is to pay \$400 a month, beginning December 2009. This payment will only cover the interest cost rather than reduce principal. For the second she is to pay \$250 a month, beginning after the close of the record. Applicant also had a smaller debt owed to a credit union, which she had paid and which the Judge resolved in her favor.

Applicant’s youngest child was born prematurely and required medical assistance to survive. Another child also had serious medical problems. Additionally, Applicant herself suffered a fall and has pain in her back and hip, for which she cannot afford physical therapy. She also experienced unemployment in the recent past. She and her husband have around \$1,100 each month after expenses. She enjoys an excellent reputation at work for the quality of her job performance, integrity, professionalism, and contribution to her employer’s mission.

Applicant contends that the Judge did not extend the proper weight to her mitigating evidence, for example the medical and unemployment issues which impacted her financial situation. She also mentions the fact that her debts were not due to deliberate failure to pay and that she is making good on current expenses. We have examined these contentions in light of the record as a whole. A Judge is presumed to have considered all the evidence in the record. *See, e.g.*, ADP Case No. 08-06284 at 2 (App. Bd. Dec. 10, 2009). In this case, the Judge discussed Applicant’s financial and medical issues, as well as other circumstances underlying her financial problems. However, he also concluded that she had not demonstrated reasonable responses to the financial consequences of her misfortunes. “In the last 12 months, she and her husband were employed, yet they only paid about \$2,000 towards her SOR debts.” Decision at 10. He also noted that these debts have actually increased during the past 12 months by more than she has paid them down. Applicant’s presentation on appeal is not sufficient to rebut the presumption that the Judge has considered all of the evidence. The Judge has plausibly explained why he concluded that Applicant had failed to meet her burden of persuasion as to the mitigating conditions. *See, e.g.*, ADP Case No. 07-12305 at 2 (App. Bd. Apr. 23, 2009) (“Once the government presents evidence raising trustworthiness concerns, the burden shifts to the applicant to establish mitigation.”)

Concerning the whole-person analysis, we conclude that the Judge considered the totality of Applicant's conduct in reaching his decision. Directive ¶ E2.2. *See also* ISCR Case No. 08-02464 at 3 (App. Bd. Jul. 16, 2009). After reviewing the record, we conclude that the Judge examined the relevant data and articulated a satisfactory explanation for his decision, "including a 'rational connection between the facts found and the choice 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 Judge's unfavorable trustworthiness determination is sustainable.

Order

The Judge's adverse trustworthiness determination is AFFIRMED.

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