

KEYWORD: Guideline F

DIGEST: Applicant claimed on appeal that she submitted documents which were not included in the record. However, even if they had been included, the documents would not have affected the outcome of the case. Therefore, even if there were error, it was harmless. Adverse decision affirmed.

CASE NO: 09-02670.a1

DATE: 01/20/2011

DATE: January 20, 2011

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In Re:)	
)	
-----)	ADP Case No. 09-02670
)	
Applicant for Public Trust Position)	
)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Melvin A. Howry, Esq., Department Counsel

FOR APPLICANT

Pro se

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a trustworthiness designation. On August 21, 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 October 15, 2010, after the hearing, Administrative Judge Richard A. Cefola 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 Applicant was denied due process and whether the Judge's adverse trustworthiness determination was arbitrary, capricious, or contrary to law. Consistent with the following discussion, we affirm the decision of the Judge.

The Judge found that Applicant filed for Chapter 13 bankruptcy protection in 1997, but the petition was dismissed. In 2001, she filed for Chapter 7 bankruptcy. Her debts were discharged later that year. She has numerous delinquent debts, for such things as rent, utilities, telephone services, a repossessed car, etc. In the Analysis portion of the decision, the Judge stated that Applicant had "done nothing, other than her bare averments, to address the alleged past due indebtedness."¹ Decision at 5.

At the conclusion of the hearing, the Judge held the record open for 30 days for Applicant to submit additional evidence. The Decision states that Applicant submitted nothing. Applicant contends that she mailed documents to Department Counsel at the end of May 2010. She has attached several documents to her Appeal Brief and has requested that we consider them.

The documents submitted by Applicant consist of matters outside the record, which we cannot consider as substantive evidence. See Directive ¶ E3.1.29 ("No new evidence shall be received or considered by the Appeal Board"). See also ADP Case No. 08-03721 at 2 (App. Bd. Oct. 28, 2009); ADP Case No. 08-09058 at 2 (App. Bd. Dec. 18, 2009).

However, we have distinguished between new evidence as to the allegations in a SOR, which is outside the scope of our review, and statements in an appeal which raise threshold issues of due process or jurisdiction. See, e.g., ISCR Case No. 08-07664 at 2 (App. Bd. Dec. 29, 2009). The Directive does not prohibit us from considering, in an appropriate case, non-record statements for the limited purpose of deciding whether a party was wrongfully denied the opportunity to have evidence entered into the record for the Judge to consider. In some instances we have remanded the case to the Judge to consider evidence an applicant had submitted but which had not been received. See, e.g., ISCR Case No. 03-02994 (App. Bd. May 12, 2005). In the case before us now, however, the documents in question, even had they been received by the Judge, would not likely have "resulted in a different outcome." ISCR Case No. 05-04482 at 2 (App. Bd. May 21, 2007). Therefore, there is no reason to remand the case.

The record supports a conclusion that the Judge examined the relevant data and articulated a satisfactory explanation for the 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)). In light of the entirety of the record evidence, the Judge's decision not to grant Applicant a trustworthiness designation is sustainable.

¹See Government Exhibit 3, Answers to Interrogatories, dated May 6, 2009, which queried Applicant as to what she had done to resolve her delinquent debts. After each listed debt she responded "nothing yet."

Order

The Judge's adverse trustworthiness 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