

KEYWORD: Guideline F

DIGEST: Applicant failed to demonstrate that the Judge mis-weighed the record evidence. The presence of some mitigating evidence does not alone compel a favorable decision. Adverse decision affirmed.

CASE NO: 09-04275.a1

DATE: 04/18/2011

DATE: April 18, 2011

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| In Re: ----- Applicant for Public Trust Position |))))))) | ADP Case No. 09-04275 |
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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 December 23, 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 31, 2011, after the hearing, Administrative Judge John Grattan Metz, Jr. denied Applicant’s request for a trustworthiness designation. Applicant appealed pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raised the following issue on appeal: whether the Judge’s adverse trustworthiness decision is arbitrary, capricious, or contrary to law.

Applicant contends that the Judge's adverse decision should be reversed because the Judge mis-weighed the evidence. Specifically, he argues that the Judge's decision focused almost exclusively on the government's adverse evidence and did not give enough consideration to the mitigating evidence presented by Applicant. Applicant has not demonstrated that the Judge's ultimate adverse decision is arbitrary, capricious, or contrary to law.

A review of the decision indicates that the Judge reasonably considered evidence favorable to the Applicant including such things as: his history of serious medical problems; his favorable character and employment references; and his post-hearing resolution of several small debts. Decision at 2-4. A Judge is presumed to have considered all the evidence in the record. *See, e.g.*, ADP Case No. 08-07882 at 2 (App. Bd. Apr. 16, 2010). There is nothing in the Applicant's presentation on appeal or in the decision to rebut the presumption that the Judge fairly considered all of the evidence including evidence favorable to the Applicant.

Once the government presents evidence raising trustworthiness concerns, the burden shifts to the applicant to establish mitigation. Directive ¶ E3.1.15. The presence of some mitigating evidence does not alone compel the Judge to make a favorable trustworthiness decision. As the trier of fact, the Judge has to weigh the evidence as a whole and decide whether the favorable evidence outweighs the unfavorable evidence, or *vice versa*. A party's disagreement with the Judge's weighing of the evidence, or an ability to argue for a different interpretation of the evidence, is not sufficient to demonstrate the Judge weighed the evidence or reached conclusions in a manner that is arbitrary, capricious, or contrary to law. *See, e.g.*, ADP Case No. 07-06039 at 4 (App. Bd. Jul. 8, 2008).

In this case, the Judge found that Applicant had a lengthy history of not meeting financial obligations, which included 24 debts totaling nearly \$64,000 that had fallen delinquent after Applicant had received a Chapter 7 discharge in bankruptcy in July 2000. Decision at 2. At the time the case was submitted for decision, Applicant still had significant outstanding debts, and was still trying to resolve his financial problems. He had submitted no budget or evidence that he was able to live within his means, and there was no evidence that he had sought credit counseling or had otherwise brought his financial problems under control. Decision at 4. In light of the foregoing, the Judge could reasonably conclude that Applicant's financial problems were still ongoing. The Judge weighed the mitigating evidence offered by Applicant against the length and seriousness of the disqualifying conduct and considered the possible application of relevant conditions and factors. He found in favor of Applicant with respect to four of the SOR factual allegations. However, he reasonably explained why the mitigating evidence was insufficient to overcome the government's trustworthiness concerns. The Board does not review a case *de novo*. After reviewing the record, the Board concludes 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)). The Judge's unfavorable trustworthiness determination is sustainable.

Order

The decision of the Judge denying Applicant a trustworthiness designation is AFFIRMED.

Signed: Jean E. Smallin _____

Jean E. Smallin
Administrative Judge
Member, Appeal Board

Signed: James E. Moody _____

James E. Moody
Administrative Judge
Member, Appeal Board

Signed: William S. Fields _____

William S. Fields
Administrative Judge
Member, Appeal Board