

KEYWORD: Guideline J; Guideline H; Guideline E

DIGEST: Judge’s discussion of inconsistent statements by Applicant was not a due process violation. Applicant failed to demonstrate bias by the Judge merely by showing that the Judge and Department Counsel had lunch together. Adverse decision affirmed.

CASE NO: 07-00966.a1

DATE: 08/24/2009

DATE: August 24, 2009

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In Re:	)	
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	)	
Applicant for a 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 October 17, 2008, DOHA issued a statement of reasons (SOR) advising Applicant of the basis for that decision—trustworthiness concerns raised under Guideline J (Criminal Conduct), Guideline H (Drug Involvement), and Guideline E (Personal Conduct) of

Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On June 5, 2009 after the hearing, Administrative Judge Robert Robinson Gales denied Applicant's request for a trustworthiness designation. Applicant appealed pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raises the following issues on appeal: (1) whether he was wrongfully prejudiced by a perception that he wasn't honest about his past; (2) whether the Judge made inaccurate findings of fact regarding some of the circumstances surrounding his criminal history; and (3) whether the Judge was biased. For the following reasons, the Board affirms the Judge's unfavorable decision.

The Judge found, *inter alia*, that Applicant had a history of drug involvement which commenced in 1997 and continued repeatedly until at least 2005 with few significant breaks between incidents. The Judge found that Applicant was involved in multiple incidents of purchase, possession, and use of drugs and drug paraphernalia. In deciding that the case against Applicant had not been mitigated, the Judge concluded that Applicant had not established a meaningful track record of drug abstinence or steadfast compliance with the law.

Applicant states that "[w]e are here today because the prosecution feels that I wasn't honest on the SOR that I received some time in November of 2008." Although this argument is not completely clear, Applicant appears to be arguing that, contrary to the evidence, Department Counsel claimed that Applicant was being less than candid when discussing the allegations contained in the SOR. This interpretation of Applicant's assertion is borne out by portions of the line of questioning of Applicant by Department Counsel during the hearing below.<sup>1</sup>

Absent actions that raise the issue of a denial of due process, the manner in which Department Counsel develops the government's case is not usually a relevant inquiry on appeal. Department Counsel's mere contention that Applicant was dishonest does not establish that the Judge erred. To the extent Applicant is asserting that the Judge committed harmful error by relying on Department Counsel's claim of Applicant's dishonesty for his unfavorable security clearance decision, Applicant has failed to establish error. First, there are no SOR allegations in this case dealing with Applicant's lack of honesty. Second, while the Judge does discuss his perception that Applicant gave vague and inconsistent answers to questions about his past drug and criminal history and that this affected his assessment of Applicant's credibility, he did so for the limited purpose of determining the applicability of two of the Guideline J mitigating conditions. Credibility determinations of Judges resulting from hearing testimony are entitled to deference on appeal. Directive ¶ E3.1.32.1. Applicant has failed to carry his burden of establishing that the Judge's findings and conclusions on this point are erroneous.

Applicant states that the Judge used evidence of a specific incident in the record<sup>2</sup> along with "a slew of other questionable charges" to form a basis for deciding against him in the case.

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<sup>1</sup>Tr. pp. 26, 30-31, 42, 45-46, 60-61, 72.

<sup>2</sup>This incident is the subject of SOR paragraph 1.k, which alleged: "On or about April 15, 2000, you were arrested and charged with Assault-Intent/Reckless/Injure and Criminal Damage-Deface."

Regarding the cited incident, Applicant does little more than offer his version of events. 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. 08-00969 at 2 (App. Bd. May 28, 2009).

Applicant indicates that he feels that it was impossible for the Judge to make a fair decision regarding his case, because, after the hearing, he witnessed the Judge and the Department Counsel walk down the street together and enter a nearby restaurant for lunch. Applicant asserts that this contact was inappropriate, and that because of the contact, the Judge could be coerced into making a decision.

Accepting Applicant's description of the contact as true, solely for purposes of deciding the appeal, Applicant's assertion that the Judge and Department Counsel walked to a restaurant together and had lunch is insufficient to raise a colorable claim of bias or improper conduct. Even if the facts are as Applicant indicates, one cannot reasonably infer that the Judge and Department Counsel discussed Applicant's case.

There is a rebuttable presumption that a Judge is impartial and unbiased, and a party seeking to rebut that presumption has a heavy burden of persuasion on appeal. *See, e.g.*, ADP Case No. 07-06039 at 3 (App. Bd. Jul. 8, 2008). Furthermore, there is a rebuttable presumption that agency officials carry out their duties in good faith, and a person seeking to rebut or overcome that presumption has the burden of presenting clear evidence to the contrary. *See* ISCR Case No. 02-17609 at 3 (App. Bd. May 19, 2004)(citing *National Archives and Records Administration v. Favish*, 541 U.S. 157, 174 (2004); *reh'g denied*, 541 U.S. 1057 (2004)). Applicant's speculation about the Judge and Department Counsel lacks sufficient substance to raise a colorable claim about the good faith of the Judge and Department Counsel. *See, e.g.*, ISCR Case No. 02-09220 at 4 (App. Bd. Sep. 28, 2004)(Applicant's claim that the Judge and Department Counsel arrived at the hearing location together and left that location together was insufficient to raise a colorable claim of lack of good faith or bias). Applicant has not demonstrated error.

After reviewing the record, the Board concludes 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 Board is also satisfied that Applicant's procedural rights under the Directive were adhered to. The Judge's ultimate unfavorable trustworthiness determination is sustainable.

**Order**

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

Signed: Jeffrey D. Billett \_\_\_\_\_

Jeffrey D. Billett  
Administrative Judge  
Member, Appeal Board

Signed: Michael D. Hipple \_\_\_\_\_

Michael D. Hipple  
Administrative Judge  
Member, Appeal Board

Signed: James E. Moody \_\_\_\_\_

James E. Moody  
Administrative Judge  
Member, Appeal Board