

KEYWORD: Guideline G

DIGEST: The Judge's references to three DWI convictions rather than two DWI convictions and a third alcohol-related conviction do not establish an outcome determinative error. Adverse decision affirmed.

CASENO: 08-11325.a1

DATE: 10/22/2010

DATE: October 22, 2010

In Re:)
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)
 -----) ADP Case No. 08-11325
)
)
 Applicant for Trustworthiness Designation)
)

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 March 23, 2010, DOHA issued a statement of reasons (SOR) advising Applicant of the basis for that decision—trustworthiness concerns raised under Guideline G (Alcohol Consumption) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a decision on the written record. On August 3, 2010, after considering the record, Administrative Judge Shari Dam denied Applicant’s request for a trustworthiness designation. Applicant appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raises the following issues on appeal: whether the Judge’s findings of fact contain an error and whether the Judge erred in her application of the relevant mitigating conditions. Consistent with the following discussion, we affirm the Judge’s decision.

The Judge made the following pertinent findings of fact: Applicant is employed by a Defense contractor. She has a history of alcohol abuse, which includes convictions for three separate alcohol-related offenses. Two of these were for DWI, and the other was for underage drinking. The last of Applicant’s offenses, a DWI, occurred in 2006. Applicant’s driver’s license was suspended following each DWI. When interviewed during the investigation of her application, Applicant stated that she did not intend to drink alcohol in the future, because doing so was not in her best interest. However, she later admitted that, subsequent to that interview, she had drunk two beers in late December 2008.

In deciding the case adversely to Applicant, the Judge noted Applicant had not provided corroborating evidence for her claims to have consumed alcohol responsibly since her last DWI incident. The Judge stated that Applicant’s three convictions, her two driver’s license suspensions, and her three periods of probation following those convictions rendered her written statements insufficient to rebut the trustworthiness concerns raised by the File of Relevant Material.

Applicant notes that twice in the Analysis portion of the decision the Judge stated that Applicant had been convicted three times of DWI. Applicant contends that these two statements were erroneous. Applicant is correct, in that the record clearly demonstrates that she was convicted of DWI only twice. We note that the Findings of Fact section of the decision correctly describe only two incidents of DWI, and, in her whole-person analysis, the Judge properly cited to three “incidents involving alcohol,” rather than to three of DWI. We conclude that the Judge’s erroneous statements were not the result of her having misread the evidence, and they do not establish that she based her adverse decision on a mistaken understanding of the nature of Applicant’s convictions. Because there is no reason to conclude that the errors in question actually affected the outcome of the case, they are harmless. *See, e.g.*, ADP Case No. 08-00801 at 2 (App. Bd. Nov. 6, 2009).

In support of her appeal Applicant has submitted a letter of recommendation, which is new evidence not contained in the record. We cannot consider this letter. *See* Directive ¶ E3.1.29. (“No new evidence shall be received or considered by the Appeal Board.”). *See also, e.g.*, ADP Case No. 08-09058 at 2 (App. Bd. Dec. 18, 2009).

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. The Appeal Board need not agree with a Judge’s decision in order to sustain it. *See, e.g.*, ADP Case 06-23881 at 2 (App. Bd. Nov. 2, 2007).

Order

The Judge’s adverse trustworthiness decision is AFFIRMED.

Signed: Jeffrey D. Billett
Jeffrey D. Billett
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