

DATE: February 27, 2007

In Re:

SSN:-----

Applicant for Trustworthiness Determination

ADP Case No. 04-10249

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) proposed to deny or revoke access to automated information systems in ADP-I/II/III sensitivity positions for Applicant. On January 19, 2006, DOHA issued a statement of reasons (SOR) advising Applicant of the basis for that decision--trustworthiness concerns raised under Guideline G (Alcohol Consumption), Guideline J (Criminal Conduct), and Guideline E (Personal Conduct), of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested the case be decided on the written record. On June 30, 2006, after considering the record, Administrative Judge Shari Dam denied Applicant's request for a trustworthiness designation. Applicant timely appealed pursuant to the Directive ¶¶ E3.1.28 and E3.1.30. [\(1\)](#)

Applicant raised the following issue on appeal: whether the Judge's unfavorable trustworthiness determination under Guidelines G and J is arbitrary, capricious, or contrary to law.

Applicant argues that the Judge's adverse trustworthiness determination should be reversed because many of Applicant's alcohol-related criminal incidents are not recent or were ultimately dismissed. Applicant also argues that the determination should be reversed because his last alcohol-related criminal offense occurred in 1999, he stopped drinking in May 2004, and he has completed an alcohol treatment program. Given the record of this case, the Board does not find Applicant's arguments persuasive.

A Judge can find an applicant has engaged in criminal conduct even if the criminal charges against the applicant were dropped or dismissed. *See* ISCR Case No. 03-11906 at 3 (App. Bd. July 19, 2005); ISCR Case No. 03-21761 at 5 (App. Bd. Nov. 28, 2005). The ultimate state court dispositions of Applicant's criminal incidents did not preclude the Judge from finding that those incidents were alcohol-related. *See* ISCR Case No. 02-01181 at 3-4 (App. Bd. Jan. 30, 2004). Considering the record as a whole, the Judge's material findings with respect to Applicant's alcohol-related conduct reflect a plausible interpretation of the record evidence. *See, e.g.*, ISCR Case No. 03-21933 at 2 (App. Bd. Aug. 18, 2006).

The application of disqualifying and mitigating conditions does not turn simply on a finding that one or more of them applies to the particular facts of a case. Rather, their application requires the exercise of sound discretion in light of the record evidence as a whole. *See, e.g.*, ISCR Case No. 01-14740 at 7 (App. Bd. Jan. 15, 2003). Thus, the presence of some mitigating evidence does not alone compel the Judge to make a favorable security clearance 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*. An applicant'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.

In this case, the Judge properly considered the significance of Applicant's pattern of conduct as a whole, rather than analyzing each separate alcohol-related incident in a piecemeal fashion. *See, e.g.*, ISCR Case No. 04-12648 at 3-4 (App. Bd. Oct. 20, 2006) citing *Raffone v. Adams*, 468 F. 2d 860 (2nd Cir. 1972)(taken together, separate events may have a significance that is missing when each event is viewed in isolation). The Judge based her adverse decision, in part, on the fact that Applicant had not offered any independent evidence to corroborate his assertion of rehabilitation and positive changes in behavior supportive of sobriety. It was not unreasonable for the Judge to expect the Applicant to have documentation or other evidence to establish mitigation in that regard, particularly in light of the fact that Applicant had elected to have his case decided on the written record--a situation that deprived the Judge of the opportunity to evaluate the credibility of Applicant's assertions in the context of a hearing. The Board has previously noted that there may be circumstances where a Judge has sound reasons not to rely on an applicant's uncorroborated testimony for findings of fact. *See, e.g.*, ISCR Case No. 02-25499 at 2 (App. Bd. June 5, 2006); ISCR Case No. 03-10955 at 2 (App. Bd. May 30, 2006).

In her decision, the Judge made sustainable findings that Applicant had a lengthy and serious history of excessive alcohol consumption that included 12 alcohol-related criminal or civil incidents between 1985 and 1999. She also found Applicant had received treatment for a condition diagnosed as Alcohol Dependence in 1999, but had continued to consume alcohol until at least May 2004. 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 mitigating conditions. She reasonably explained why the evidence which Applicant had presented in mitigation was insufficient to overcome the government's security concerns. The Board does not review a case *de novo*. Given the record that was before her, the Judge's ultimate unfavorable clearance decision under Guidelines G and J is not arbitrary, capricious, or contrary to law.

Order

The decision of the Administrative Judge denying Applicant access to automated information systems in ADP I/II/II sensitivity positions is AFFIRMED.

Signed: Jeffrey D. Billett

Jeffrey D. Billett

Administrative Judge

Member, Appeal Board

Signed: Jean E. Smallin

Jean E. Smallin

Administrative Judge

Member, Appeal Board

Signed: William S. Fields

William S. Fields

Administrative Judge

Member, Appeal Board

1. The Judge found in favor of Applicant with respect to ¶¶ 1.c and 2.b, and under Guideline E. Those favorable findings are not at issue on appeal.