

KEYWORD: Guideline H; Guideline J

DIGEST: Although *pro se* Applicants cannot be expected to act like lawyers they are expected to take timely reasonable steps to protect their rights under the Directive. Adverse decision affirmed.

CASENO: 06-07674.a1

DATE: 06/18/2007

DATE: June 18, 2007

In Re:	)	
	)	
-----	)	
SSN: -----	)	ADP Case No. 06-07674
	)	
Applicant for Trustworthiness Designation	)	
	)	

**APPEAL BOARD DECISION**

**APPEARANCES**

**FOR GOVERNMENT**

Julie R. Edmunds, Esq., Department Counsel

**FOR APPLICANT**

John D. Hyland, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a trustworthiness designation. On May 17, 2006, DOHA issued a statement of reasons (SOR) advising Applicant of the basis for that decision—trustworthiness concerns raised under Guideline J (Criminal Conduct) and Guideline H (Drug Involvement) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested the case be decided upon the written record.

On November 27, 2006, after considering the record, Administrative Judge Marc E. Curry denied Applicant's request for a trustworthiness designation. Applicant timely appealed pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raised the following issues on appeal: whether the Applicant was denied due process; and whether the Judge's unfavorable trustworthiness determination under Guidelines J and H is arbitrary, capricious, or contrary to law.

Applicant's counsel on appeal asks that the case be remanded so that Applicant can introduce "detailed information regarding successful completion of drug treatment, probation, and general employment and lifestyle issues which were not made available to the Judge due to the appellant's decision to represent himself during the proceeding below." The Board construes Applicant's request as raising the issue of whether Applicant was denied due process. In that regard, Applicant's counsel has not demonstrated error by the Judge.

A review of the record indicates Applicant was provided with the procedural rights set forth in Executive Order 10865 and the Directive. Applicant requested that his case be decided on the written record. He was provided with a copy of the government's file of relevant material (FORM), which contained the evidentiary exhibits upon which the Judge based his decision. He was given an opportunity to object to those exhibits and provide his own evidence to rebut the government's allegations. Applicant failed to object to the exhibits in the government's FORM or offer any evidence in his own behalf. *See, e.g.*, ISCR Case No. 05-03143 at 2-3 (App. Bd. Dec. 20, 2006).

Although *pro se* applicants cannot be expected to act like lawyers, they are expected to take timely, reasonable steps to protect their rights under the Directive. *See, e.g.*, ISCR Case No. 00-0593 at 4 (App. Bd. May 14, 2001). If they fail to take timely, reasonable steps to protect their rights, that failure to act does not constitute a denial of their rights. *See, e.g.*, ISCR Case No. 02-19896 at 6 (App. Bd. Dec. 29, 2003). Because Applicant did not object to the government's exhibits or provide his own evidence with respect to the matters at issue, he has no valid claim for denial of due process under the Directive or Executive Order, and is not entitled to a second opportunity to present evidence on his behalf.

(2) Applicant's counsel also contends that the Judge erred in concluding that the security concerns raised under Guidelines J and H had not been mitigated. In support of that contention, he argues that the Judge's findings overstate the seriousness of the disqualifying conduct by characterizing two of the four Guideline J allegations as criminal "charges" for which Applicant paid a "fine" rather than as "ordinance violations" involving the "forfeiture of money" as provided for under Wisconsin law. Applicant's counsel also argues that Applicant "has been drug free for at least two years, if not longer" so that his drug use is "not recent." Finally, Applicant's counsel restates the other favorable evidence of record and argues that it was sufficient to support a favorable determination under the whole person concept. In regard to that argument, he cites to several DOHA hearing decisions in which applicants with ostensibly similar circumstances received a favorable decision. These arguments do not demonstrate that the Judge erred.

The decision in another DOHA Hearing Office case does not demonstrate error by the Judge in this case. A decision by a Hearing Office Judge is not legally binding precedent on DOHA Judges or the Board. *See* ISCR Case No. 01-22606 at 3-5 (App. Bd. June 30, 2003).

The Board's review of a Judge's findings is limited to determining if they are supported by substantial evidence—such relevant evidence as a reasonable mind might accept as adequate to support such a conclusion in light of all the contrary evidence in the record. Directive ¶ E3.1.32.1. “This is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence.” *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620, (1966). The Board does not review a case *de novo*. Considering the record evidence as a whole, the Judge's material findings with respect to Applicant's conduct of security concern reflect a plausible interpretation of the record evidence and are sustainable. Moreover, even if it were assumed for the purposes of this appeal that Applicant's characterization of two out of the four criminal incidents was correct, it would not have materially affected the outcome of the case.

The application of disqualifying and mitigating conditions does not turn simply on a finding that one or more of them apply 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 trustworthiness determination. 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 that the Judge weighed the evidence or reached conclusions in a manner that is arbitrary, capricious, or contrary to law.

The Applicant has not met his burden of demonstrating that the Judge erred in concluding that the trustworthiness concerns presented by Applicant's prior conduct and circumstances had not been mitigated. Although Applicant strongly disagrees with the Judge's conclusions, he has not established that those conclusions are arbitrary, capricious, or contrary to law. *See* Directive ¶ E3.1.32.3.

In this case, the Judge specifically considered the recency of Applicant's drug abuse and the extent of his rehabilitation. He made sustainable findings as to a serious history of improper or illegal drug and criminal conduct. That history included: illegal marijuana use, sometimes on a daily basis, from 1998 to at least 2003; illegal use of cocaine, sometimes on a daily basis, between February and July 2003; illegal use of ecstasy and crack; the purchase of marijuana; and instances of criminal conduct in 2000, 2003, and 2004. The Directive does not define “recent,” and there is no “bright-line” definition of what constitutes “recent” conduct. ISCR Case No. 03- 02374 at 5 (App. Bd. Jan. 26, 2006). The Judge is required to evaluate the record evidence as a whole and reach a reasonable conclusion as to the recency of an applicant's conduct. ISCR Case No. 03- 02374 at 5 (App. Bd. Jan. 26, 2006). Given the record in this case, it was not arbitrary, capricious or unlawful for the Judge to conclude that Applicant's illegal drug use and criminal conduct were recent. In that regard, the Judge considered the totality of Applicant's circumstances. The Judge weighed the mitigating evidence against other record evidence including the length and seriousness of the disqualifying conduct and considered the possible application of relevant mitigating conditions and whole person factors. The Judge reasonably explained why there was insufficient mitigating evidence to overcome the government's trustworthiness concerns. Given the record that was before him, the Judge's ultimate unfavorable clearance decision under Guidelines J and H is not arbitrary,

capricious or contrary to law. Thus, the Judge did not err in denying Applicant a trustworthiness designation.

**Order**

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

Signed: Michael D. Hipple  
Michael D. Hipple  
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