

KEYWORD: Guideline J

DIGEST: Applicant received a General Discharge from the Marine Corps in 2005. Applicant received non-judicial punishment for a minor offense. In 2003 he began an inappropriate relationship with a Lance Corporal. He was eventually convicted of violating a General Order and Adultery. Adverse decision affirmed.

CASENO: 06-12429.a1

DATE: 10/06/2008

DATE: October 6, 2008

In Re:)
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 -----) ADP Case No. 06-12429
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 Applicant for a Public Trust Position)
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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 21, 2007, 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 E (Personal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On June 19, 2008, after the hearing, Administrative Judge Edward W. Loughran denied Applicant’s request for a trustworthiness designation. Applicant filed a timely appeal pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raised the following issues on appeal: whether the Judge erred in his application of the pertinent mitigating conditions and whether the Judge’s adverse trustworthiness determination is arbitrary, capricious, or contrary to law.¹ Finding no error, we affirm.

The Judge made the following pertinent findings of fact: Applicant is a 33-year-old employee of a defense contractor. He holds an associates degree. He served in the U.S. Marine Corps from 1997 through 2005, when he was discharged with a General Discharge. In 1994, Applicant received non-judicial punishment under Article 15 of the Uniform Code of Military Justice for a minor offense.² He was promoted to Staff Sergeant (E-6) and was selected for promotion to Gunnery Sergeant (E-7). In 2003 he began to have an inappropriate relationship with a female Lance Corporal (E-3). She eventually reported Applicant and stated that he had assaulted her. Applicant’s commanding officer issued a Military Protection Order (MPO) to Applicant, directing him to have no further contact with the Lance Corporal. Upon expiration of that MPO, Applicant’s commander issued him another one with no set expiration date. Applicant repeatedly violated those orders.

When interviewed by an agent for the Defense Investigative Service (DIS), Applicant denied the sexual relationship and assault. He admitted, however, that he had spoken with the Lance Corporal after receiving the MPO. During a second interview, Applicant stated that he had a pending Special Court-Martial for assault, adultery, and violation of the MPO. Applicant admitted to the agent that he had contacted the Lance Corporal in violation of the MPO on “multiple occasions.” Decision at 3. At his trial, Applicant was charged with violating a general order; failure to obey the MPO; two specifications of assault; adultery; and wrongfully impeding an investigation. Pleading not guilty, he was convicted of violating a general order and adultery. He was found not guilty of the remaining charges.

“The application of disqualifying and mitigating conditions and whole person factors 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* ADP Case No. 05-12037 at 3 (App. Bd. May 10, 2007). A trustworthiness determination must be guided by common sense in light of the record as a whole. *See* Directive ¶ E2.2.3. The Board

¹The Judge’s favorable decision under Guideline E is not at issue in this appeal.

²10 U.S.C. § 815.

has examined Applicant's brief on appeal in light of the Judge's decision and the record as a whole. The Judge considered appropriate mitigating conditions, but he concluded that none served to mitigate the trustworthiness concerns arising from Applicant's military record as described above.³ Applicant disagrees with the weight that the Judge assigned various aspects of the case. However, "[m]ere disagreement with the weight assigned particular evidence by a Judge does not establish error." ADP No. 06-02549 at 3 (App. Bd. Jul. 3, 2007). *See also* Directive ¶ E3.1.15. ("The applicant . . . has the ultimate burden of persuasion as to obtaining a favorable . . . decision").

The Judge's explanation for his conclusion that Applicant had not overcome the trustworthiness concerns raised by the Government's evidence is reasonable. *See* ADP Case 04-08945 at 2 (App. Bd. Apr. 27, 2007). In light of the Judge's findings of fact and the record as a whole, we conclude that his adverse trustworthiness determination is not arbitrary, capricious, or contrary to law.

Order

The Judge's unfavorable trustworthiness determination is AFFIRMED.

Signed: Jean E. Smallin

Jean E. Smallin
Administrative Judge
Member, Appeal Board

Signed: William S. Fields

William S. Fields
Administrative Judge
Member, Appeal Board

Signed: James E. Moody

³"I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. Applicant committed criminal offenses which ultimately cost him his military career. He has been untruthful about his criminal acts throughout this process, including providing false testimony at his hearing. He has a favorable work record and served honorably for most of his career in the Marine Corps. Despite the positive evidence, Applicant's actions raise serious concerns about his judgment, reliability, and trustworthiness. Overall, the record evidence leaves me with questions or doubts as to Applicant's eligibility and suitability for a public trust position. For all these reasons, I conclude Applicant has not mitigated the trustworthiness concerns arising from his criminal conduct." Decision at 8.

James E. Moody
Administrative Judge
Member, Appeal Board