

KEYWORD: Guideline H; Guideline G; Guideline E

DIGEST: Error in Judge’s findings was harmless. Applicant failed to demonstrate that the Judge mis-weighted the record evidence. Adverse decision affirmed.

CASE NO: 09-04905.a1

DATE: 01/19/2011

DATE: January 19, 2011

<p>In Re:</p> <p>-----</p> <p>Applicant for Public Trust Position</p>	<p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p>	<p>ADP Case No. 09-04905</p>
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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 May 24, 2010, DOHA issued a statement of reasons (SOR) advising Applicant of the basis for that decision—trustworthiness concerns raised under Guideline H (Drug Involvement), Guideline G (Alcohol Consumption), and Guideline E (Personal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On October 29, 2010, after the hearing, Administrative Judge Henry Lazzaro denied Applicant’s request for a trustworthiness designation. Applicant appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raised the following issues on appeal: whether certain of the Judge’s findings of fact were supported by substantial record evidence; whether the Judge mis-weighted the evidence;

and whether the Judge's adverse trustworthiness determination was arbitrary, capricious, or contrary to law. Consistent with the following discussion, we affirm the decision of the Judge.

Applicant is a registered nurse/quality assurance specialist for a Defense contractor. He served in the Navy from August 1991 until February 1992. He received a General Discharge. He married in June 2006 and was divorced in March 2010. He has a daughter and stepson from the marriage. Applicant's former wife has custody of the daughter, and Applicant has routine visitation rights.

He experimented with marijuana as a teenager. Much later, in 2004, he began taking prescription opiates following surgery. He consumed a total of about 240 Vicodin over the course of two months. In 2006 he suffered a back injury, for which he was prescribed Lortab and Oxycodone. In 2007 Applicant experienced stress. He began consuming dilaudid, a controlled substance. He obtained it from waste pumps that had been used for patients at the hospital where he was working. Although the vials were to be destroyed, he removed them from the storage refrigerator and consumed them, either at work or at home. His usage of this drug escalated to the point that he was consuming it a couple of times a day at work. He also experimented with morphine. In October 2008 Applicant's employer directed him to take a drug test, due to observed personality changes. The test came back positive for prescription drugs—fentanyl, hydrocodone, and hydromorphone (dilaudid). These drugs were not prescribed for Applicant.

Applicant enrolled in a residential substance abuse program. He was discharged after 28 days, with a diagnosis of opiate dependence. He was recommended for after care treatment in order to remain drug free. He attended a relapse prevention group meeting in November 2008. A clinical social worker diagnosed Applicant as being both alcohol dependent and opiate dependent. He met regularly with this group until August 2009, when he was forced to discontinue participation due to problems with his insurance coverage. His group sessions included discussions about problems within his marriage. His wife attended sessions with Applicant's counselor. Applicant attended Alcoholics Anonymous (AA) regularly until April 2010. He enjoys a good reputation for trustworthiness, for the quality of his work performance, and for his sincerity.

In the Analysis portion of the decision, the Judge noted positive aspects of Applicant's record, to include his successful completion of the substance abuse program. However, the Judge concluded that Applicant's belief that he has no problem with alcohol, despite his statements to the contrary during counseling sessions, is inconsistent with a claim of rehabilitation. The Judge also noted that, at the close of the record, Applicant was again experiencing stress. Accordingly, he concluded that Applicant had not met his burden of persuasion as to mitigation of the trustworthiness concerns in his case.

Applicant contends that the Judge erred in some of his findings. For example, the Judge found that Applicant's wife has custody of their daughter, whereas Applicant testified that the two have joint custody. Tr. at 82. However, in light of the totality of the record evidence, this error is harmless. Otherwise, the Judge's material findings are based on substantial evidence, or constitute reasonable characterizations or inferences that could be drawn from the record. Applicant has not identified any harmful error likely to change the outcome of the case. Considering the record evidence as a whole, the Judge's material findings of trustworthiness concern are sustainable. *See*

Directive ¶ E3.1.32.1 for the definition of “substantial evidence.” *See also* ADP Case No. 08-00826 at 2 (App. Bd. Mar. 19, 2010).

Applicant argues that the Judge did not properly weigh record evidence concerning his dependence on alcohol. In fact, the Judge noted Applicant’s testimony to the effect that he does not believe that he has an alcohol dependence problem, but he compared that with other evidence, particularly case notes from his counseling sessions, in which Applicant stated the opposite. Applicant’s argument on appeal is not sufficient to demonstrate that the Judge mis-weighed the evidence. *See* ADP Case No. 06-14978 at 2 (App. Bd. Jan. 18, 2008).

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)). The Judge made favorable formal findings for Applicant under SOR paragraphs 1(a) and 3, but, in light of the entirety of the record evidence, the Judge’s decision not to grant Applicant a trustworthiness designation is sustainable.

### **Order**

The Judge’s adverse trustworthiness determination is **AFFIRMED**.

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