

KEYWORD: Guideline G; Guideline J

DIGEST: A Judge has no authority to serve as an investigator in a case. Adverse decision affirmed.

CASENO: 14-03956.a1

DATE: 08/25/2015

DATE: August 25, 2015

In Re:	)	
	)	
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	)	
Applicant for Public Trust Position	)	
	)	

**APPEAL BOARD DECISION**

**APPEARANCES**

**FOR GOVERNMENT**

James B. Norman, Esq. , Chief Department Counsel

**FOR APPLICANT**

*Pro se*

The Department of Defense (DoD) declined to grant Applicant a trustworthiness designation. On December 2, 2014, DoD issued a statement of reasons (SOR) advising Applicant of the basis for that decision—trustworthiness concerns raised under Guideline G (Alcohol Consumption) and

Guideline J (Criminal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a decision on the written record. On June 12, 2015, after considering the record, Defense Office of Hearings and Appeals (DOHA) 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 raised the following issue on appeal: whether the Judge failed to consider all of the relevant evidence, thereby rendering her adverse decision arbitrary, capricious, or contrary to law. Consistent with the following, we affirm.

### **The Judge's Findings of Fact**

Applicant has a history of alcohol abuse. In 1996 and again 1997 he was found guilty of underage drinking. In 2007, he was convicted of DWI, fined, and placed on probation for two years. In 2012, he was again charged with DWI, fined, and placed on probation until 2017. He did not present evidence that he had participated in a substance abuse evaluation or treatment program.

### **The Judge's Analysis**

The Judge noted that the record contained no evidence that would mitigate the concerns raised by Applicant's misconduct, for example participation in a treatment program, favorable prognosis from a health care provider, or that his misconduct was committed under duress, etc. She also noted that Applicant had not provided character or employment references.

### **Discussion**

Applicant argues that the Judge did not include or consider information obtained by the investigator in his case, which, he argues, would demonstrate mitigation.<sup>1</sup> However, the Directive provides that an applicant is responsible for presenting evidence to rebut, explain, extenuate, or mitigate the concerns raised by admitted or proven facts and that the applicant has the ultimate burden of persuasion as to obtaining a favorable trustworthiness decision. Directive ¶ E3.1.15. In this case, Applicant admitted each of the allegations under both Guidelines, and Department Counsel provided evidence in the form of his trustworthiness application and a printout of his state criminal history. Taken together, these admissions and documents constitute substantial evidence of trustworthiness concerns, thereby giving rise to Applicant's burden of persuasion as to mitigation. *See* ISCR Case No. 11-03500 at 3 (App. Bd. Feb. 28, 2012) for explanation of substantial evidence.

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<sup>1</sup>The record in this case does not include a written report of investigation produced by the Government investigator who interviewed Applicant. Other than the Applicant's security clearance application, the only other document in the record was a criminal history printout from the state of Applicant's residence. Applicant is arguing that the Judge erred by not seeking out and considering documents that were not made part of the record, including a police report.

The record shows that Applicant was given a copy of the Directive, which describes his right to submit written matters in response to the File of Relevant Material (FORM) within 30 days of receiving it. These documents may contain objections, rebuttal, extenuation, mitigation, or explanation as appropriate. Directive ¶ E3.1.7. Department Counsel sent him copies of the evidence upon which the Government was relying, along with notice that he had 30 days from receipt to submit documents as set forth in the Directive. FORM at 2. The FORM and attached evidence were accompanied by a cover letter from DOHA, which also notified Applicant of his right to submit “any material you wish the Administrative Judge to consider” before making her decision. Cover Letter, dated February 23, 2015. Applicant did not submit any documents in reply to the FORM. Decision at 2.

Insofar as he was given adequate notice of his right to submit evidence, a right he did not exercise, Applicant cannot fairly complain that the Judge did not seek out evidence on her own. A Judge is an impartial fact-finder and has no authority to serve as an investigator in a case. *See, e.g.*, ISCR Case No. 14-01925 at 3 (App. Bd. Jun. 26, 2015). *See also* ADP Case No. 05-01237 at 3 (App. Bd. May 10, 2007) (A Judge in a DOHA proceeding is “an impartial presiding official”). We resolve this assignment of error adversely to Applicant.

Applicant’s brief asserts matters from outside the record. We are not permitted to consider new evidence on appeal. Directive ¶ E3.1.29. The Judge examined the relevant data and articulated a satisfactory explanation for the decision. Given the paucity of mitigating evidence in the record, the decision is sustainable. The standard applicable to trustworthiness cases is that set forth in *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988) regarding security clearances: such a determination “may be granted only when ‘clearly consistent with the interests of the national security.’” *See, e.g.*, ADP Case No. 12-04343 at 3 (App. Bd. May 21, 2013). *See also Kaplan v. Conyers*, 733 F.3d 1148 (Fed. Cir. 2013), *cert. denied*.

### Order

The Decision is **AFFIRMED**.

Signed: Michael Ra’anan  
Michael Ra’anan  
Administrative Judge  
Chairperson, Appeal Board

Signed: Jeffrey D. Billett  
Jeffrey D. Billett  
Administrative Judge  
Member, Appeal Board

Signed: James E. Moody \_\_\_\_\_

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Administrative Judge  
Member, Appeal Board