

KEYWORD: Guideline G; Guideline J; Guideline E; Guideline H

DIGEST: The challenged findings are at most harmless error. The Judge was not bound as a matter of law to accept or reject Applicant's explanation for his failure to disclose adverse information on his standard form 85P. On this record the Judge's finding of deliberate falsification is sustainable. The Board may not consider new evidence on appeal. The favorable evidence cited by Applicant is not sufficient to demonstrate the Judge's decision is arbitrary, capricious or contrary to law. Adverse decision is affirmed.

CASENO: 06-08653.a1

DATE: 05/14/2007



Applicant raised the following issues on appeal: whether the Judge erred with respect to her findings; whether the Judge erred in concluding Applicant's falsification of his Standard Form 85P was deliberate; whether the Judge erred by concluding that the trustworthiness concerns raised under Guidelines G, J, E, and H had not been mitigated.

(1) Applicant argues that the Judge made several errors with respect to her findings. Specifically, Applicant contends he had only been arrested on four criminal charges rather than six. The Board concludes that Applicant has not demonstrated harmful error on the part of the Judge.

The findings which Applicant challenges are at most harmless error, in that they would not be reasonably likely to change the outcome of the case. Applicant has not met his burden of demonstrating that the Judge's material findings with respect Applicant's circumstances of trustworthiness concern do not reflect a reasonable or plausible interpretation of the record evidence. Considering the record evidence as a whole, the Judge's material findings of trustworthiness concern are supported by substantial evidence and are sustainable.

(2) Applicant argues that he did not deliberately falsify his Standard Form 85P by failing to disclose adverse information about his prior arrests and convictions. It is Applicant's contention that the omission of the information in question was unintentional—the result of Applicant having prepared his Standard Form 85P based upon information “recited off the top of [his] head” without a copy of his records before him. The Board does not find this argument persuasive.

The Judge had the opportunity to consider Applicant's explanation for why he failed to disclose the information in question. The Judge was not bound, as a matter of law, to accept or reject Applicant's explanation. The Judge considered Applicant's explanation in light of the record evidence as a whole, and concluded there was a sufficient basis to find that Applicant's omission was deliberate and intentional. On this record, the Judge's finding of deliberate falsification is sustainable. *See* Directive ¶ E3.1.32.1. Applicant has not demonstrated that the Judge's conclusion in that regard is arbitrary, capricious, or contrary to law.

(3) Applicant contends that the Judge erred in concluding that the trustworthiness concerns raised under Guidelines G, J, E, and H had not been mitigated. In that regard, Applicant essentially restates the facts of his case and argues that the Judge misweighed the evidence by failing to give adequate consideration to the favorable evidence. In particular, Applicant asserts that he has never consumed alcohol before or during his work shift, that he has promised not to use illegal drugs in the future, and that there is no relation between his prior disqualifying conduct and his current trustworthiness. Applicant also submits new evidence in the form of three character reference letters, a copy of his criminal record, and a Wisconsin Department of Workforce Development document referencing Wisconsin Statutes 111.31-111.395 which prohibit employers from denying employment to an individual with a criminal conviction unless they can show that the conviction was substantially related to the particular job. Applicant's arguments do not demonstrate error on the part of the Judge.

The Board may not consider Applicant's new evidence on appeal. *See* Directive ¶ E3.1.29. Its submission does not demonstrate error on the part of the Judge. *See, e.g.*, ISCR Case No. 02-12789 at 3 (App. Bd. May 13, 2005). Moreover, compliance with state law is not required because trustworthiness adjudications are conducted by the Department of Defense pursuant to federal law.

See U.S. Constitution, Art. VI, Cl. 2 (Supremacy Clause). See, e.g., ISCR Case No. 00-0423 at 3 (App. Bd. June 8, 2001); ISCR Case No. 03-17708 at 2, n. 5 (App. Bd. June 9, 2006).

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. 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 the Judge weighed the evidence or reached conclusions in a manner that is arbitrary, capricious, or contrary to law.

In this case, the Judge reasonably weighed the mitigating evidence against the seriousness of the disqualifying conduct, and considered the possible application of relevant mitigating conditions. She reasonably explained why there was insufficient mitigating evidence to overcome the government's trustworthiness concerns. The Board does not review a case *de novo*. The favorable evidence cited by the Applicant is not sufficient to demonstrate the Judge's decision is arbitrary, capricious, or contrary to law. See, e.g., ISCR Case No. 02-28041 at 4 (App. Bd. June 29, 2005).

The Directive presumes there is a nexus or rational connection between proven conduct under any of the Guidelines and an applicant's trustworthiness eligibility. See, e.g., ISCR Case No. 02-22325 at 3-4 (App. Bd. July 30, 2004). The federal government need not wait until an applicant actually mishandles or fails to properly handle or safeguard classified information before it can deny or revoke access to such information. See *Adams v. Laird*, 420 F.2d 230, 238-239 (D.C. Cir. 1969). In this case, Applicant's excessive alcohol consumption, illegal drug use, criminal conduct, and multiple falsifications provide a sufficient rational basis for the Judge's unfavorable trustworthiness determination. See, e.g., ISCR Case No. 04-12548 at 2-3 (App. Bd. Sept. 18, 2006). Given the record that was before her, the Judge's ultimate unfavorable trustworthiness determination under Guidelines G, J, E and H is sustainable.

### **Order**

The decision of the Judge denying Applicant a trustworthiness designation 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  
James E. Moody  
Administrative Judge  
Member, Appeal Board