

KEYWORD: Guideline H; Guideline J; Guideline G

DIGEST: The Directive’s guidelines set forth a variety of examples of off-duty conduct and circumstances which os trustworthiness concern to the government. Adverse decision affirmed.

CASENO: 06-11792.a1

DATE: 06/15/200

DATE: June 15, 2007

In Re: ----- SSN: ----- Applicant for Trustworthiness Designation)))))))	ADP Case No. 06-11792
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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 August 10, 2006, DOHA issued a statement of reasons (SOR) advising Applicant of the basis for that decision—trustworthiness concerns raised under Guideline H (Drug Involvement), Guideline E (Personal Conduct), Guideline G (Alcohol Consumption), and Guideline J (Criminal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested the case be decided upon the written record. The SOR

was amended on the motion of the government without objection by the Applicant to delete the allegation under Guideline E and in paragraph 4.c.¹ On November 30, 2006, after considering the record, Administrative Judge Noreen A. Lynch 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 issue on appeal: whether the Judge's unfavorable trustworthiness determination under Guidelines H, G and J is arbitrary, capricious, or contrary to law.

Applicant asks that the Judge's adverse trustworthiness determination be reversed, or in the alternative that she be granted a probationary or condition trustworthiness designation with the proviso that she submit to random drug and alcohol testing. In support of her request, Applicant states that "everyone makes mistakes," and that "I no longer drink alcohol nor use marijuana and I have no intention of doing so in the future."² She also argues that she has been a good employee, and that there is no connection between her prior drug and alcohol problems and her ability to perform her job and protect sensitive information. Finally, Applicant argues that she erred in telling the government that she had used marijuana from 1990 to 2005, when in fact she had only used it from 1998 to 2005. Applicant's arguments do not demonstrate that the Judge erred.

The federal government need not wait until an applicant actually mishandles or fails to properly handle sensitive 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), *cert. denied*, 397 U.S. 1039 (1970). An applicant with good or exemplary job performance may engage in conduct that has negative trustworthiness implications. *See, e.g.*, ISCR Case No. 99-0123 at 3 (App. Bd. Jan. 11, 2000). The Directive's Guidelines set forth a variety of examples of off-duty conduct and circumstances which are of trustworthiness concern to the government and mandate a whole person analysis to determine an applicant's trustworthiness eligibility. A whole-person analysis is not confined to the workplace. *See ISCR Case No. 03-11231 at 3* (June 4, 2004).

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 marijuana use reflect a plausible interpretation of the record evidence and are sustainable. Moreover, even if it were assumed that Applicant's revised statement as to her prior marijuana use was correct, it would not have materially affected the outcome of the case.

¹Accordingly, the Board need not address Applicant's argument on appeal that she did not intentionally falsify her Public Trust Positions (Standard Form 85P).

²Applicant's Brief at 2-3.

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 her 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, she has not established that those conclusions are arbitrary, capricious, or contrary to law. *See* Directive ¶ E3.1.32.3.

In this case, the Judge found that Applicant had a lengthy and serious history of illegal marijuana use and excessive alcohol consumption. That history included arrests on drug and/or alcohol-related charges in 1998, 2004 and 2005. The favorable record evidence cited by 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 Judge weighed the mitigating evidence offered by Applicant against the length and seriousness of the disqualifying conduct, and considered the possible application of relevant mitigating conditions. She reasonably explained why the evidence Applicant had presented in mitigation was insufficient to overcome the government's trustworthiness concerns. As noted above, the Board does not review a case *de novo*. Given the record that was before her, the Judge's ultimate unfavorable trustworthiness determination under Guidelines H, G, and J is sustainable. There is no authority to grant a trustworthiness designation on a conditional or probationary basis. *See, e.g.*, ISCR Case No. 04-04302 at 5 (App. Bd. June 30, 2005). 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: 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