

KEYWORD: Guideline G; Guideline J; Guideline H

DIGEST: There is a substantial amount of record evidence which undercuts the Judge's conclusions regarding mitigation. The Judge's ultimate conclusion that Applicant has met his burden of persuasion is not sustainable on this record. Favorable decision reversed

CASENO: 06-12901

DATE: 07/31/2007

DATE: July 31, 2007

In Re:)	
)	
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SSN: -----)	ADP Case No. 06-12901
)	
Applicant for ADP I/II/III Position)	
)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Julie R. Edmunds, Esq., Department Counsel

FOR APPLICANT

Pro Se

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a trustworthiness determination. On August 17, 2006, DOHA issued a statement of reasons (SOR) advising Applicant of the basis for that decision—trustworthiness concerns raised under Guideline G (Alcohol Consumption), Guideline J (Criminal Conduct), and Guideline H (Drug Involvement)

of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On December 29, 2006, after the hearing, Administrative Judge Shari Dam granted Applicant's request for a trustworthiness determination. Department Counsel filed a timely appeal pursuant to Directive ¶¶ E3.1.28 and E3.1.30

Department Counsel asserted the following issues on appeal: whether the Judge's conclusion that Applicant had mitigated the Guidelines G, J, and H trustworthiness concerns is arbitrary, capricious, and contrary to law; and whether the Judge's favorable decision is erroneous in that she failed to analyze the case in light of the evidence viewed as a whole. Finding error, we reverse the decision of the Judge.

Whether the Record Supports the Judge's Factual Findings

A. Facts

The Judge made the following relevant findings:

Applicant is 22 years old with two years of college. He and his girlfriend have a five-month-old daughter. He and his younger brother live with their parents.

Applicant's criminal history began in 1998, when he was 14 years old and was charged with making Annoying Phone Calls to a classmate. He subsequently began consuming alcohol and marijuana, which lead to ten separate arrests for related criminal conduct.

In July 2000, he was arrested and charged with having consumed alcohol after having been stopped for speeding. He pled No Contest to the misdemeanor, was fined \$113, and ordered to undergo an alcohol assessment. His driver's license was suspended for three months. He was 16 years old.

In May 2002, he was arrested and charged with Underage Drinking and Possession of Marijuana after being stopped by the police who found liquor in the car. He was found guilty and fined.

In July 2002, he was arrested and charged with Underage Drinking and Possession of Alcohol. He was found guilty and fined \$286.

In August 2002, he and some friends were arrested and charged with Underage Drinking at a campground. He pled No Contest and was fined \$349. A month later he was charged with Disorderly Conduct and Underage Drinking, after being involved in a physical altercation. He was fined a total of \$324 on both charges. He was 18 years old at the time of those arrests in 2002.

In July 2003, he and his friends were arrested for Underage Drinking at a birthday party. He was found guilty and paid a \$102 fine.

Pursuant to a court order, Applicant entered an outpatient substance abuse program in October 2003. While in treatment for two months, he participated in classes and individual therapy,

and was prohibited from consuming alcohol. He received a diagnosis of Alcohol Abuse and a recommendation to abstain from alcohol consumption while in treatment.

In January 2004, one month after leaving treatment, he and his friends left a restaurant without paying their bill. The police were called and he was charged with Theft-Defraud Innkeeper and fined \$305. He had been drinking before the incident.

In February 2004, he consumed alcohol and was involved in another fight. He was arrested and charged with Underage Alcohol Possession and Disorderly Conduct. He paid a \$452 fine.

In April 2004, he was fined \$705 after he pled guilty to Operating Motor Vehicle While Intoxicated, Operating with a Prohibited Blood Alcohol Content (BAC), and Speeding. His BAC was .19. He had been drinking to celebrate his 20th birthday when the police stopped him in the early morning. His license was suspended for nine months.

Two months later, in August 2004, he consumed alcohol to the point of intoxication and became embroiled in a serious physical altercation. He was stabbed several times, resulting in a period of hospitalization. He subsequently pled guilty to Disorderly Conduct and received a deferred prosecution sentence. He was ordered to perform 50 hours of community service and undergo another alcohol and drug assessment. He was 20 years old. Applicant believes that the incident altered his life and is the reason he no longer consumes alcohol. While recovering in the hospital, he realized he needed to change his life or he would die.

In accordance with his plea agreement, Applicant entered another substance abuse program in May 2005. While in treatment, he participated in eight individual psychotherapy sessions, attended classes and had three consecutive negative urine drug screens. In November 2005, he was discharged with a diagnosis of alcohol dependence and cannabis abuse (both in early full remission).

According to the Discharge Summary, Applicant admitted that he used marijuana three times in the early months of treatment, but also "reported two months of abstinence from marijuana at his last individual session." The Summary noted that "he appeared internally committed to long term abstinence from alcohol due to the problems alcohol has caused in his life in the past." It indicated the successful completion of the treatment plan goals and a good prognosis. The program counselor recommended that he "continue his abstinence from alcohol and to follow his harm reduction plan regarding marijuana . . . and continue to increase his sober support system."

Applicant no longer associates with his previous friends. Since leaving treatment, he has not participated in any form of a program supportive of sobriety, such as Alcoholics Anonymous. Applicant credits such events as the stabbing incident and the birth of his daughter with his change

of attitude in favor of sobriety. Applicant has received good performance evaluations from his place of employment.

B. Discussion

The Appeal Board’s review of the Judge’s findings of fact 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 findings from being supported by substantial evidence.” *Consolo v. Federal Maritime Comm’n*, 383 U.S. 607, 620-21 (1966). In evaluating the Judge’s findings, we are required to give deference to the Judge’s credibility determinations. Directive ¶ E3.1.32.1.

Department Counsel does not challenge the Judge’s findings. Therefore, they are not at issue in this appeal.

Whether the Record Supports the Judge’s Ultimate Conclusions

A Judge is required to “examine the relevant data and articulate a satisfactory explanation for” the decision, “including a ‘rational connection between the facts found and the choices 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 Appeal Board may reverse the Judge’s decision to grant, deny, or revoke a trustworthiness determination if it is arbitrary, capricious, or contrary to law. See Directive ¶¶ E3.1.32.3 and E3.1.33.3. Once the government presents evidence raising trustworthiness concerns, the burden shifts to the applicant to establish any appropriate mitigating conditions. See Directive ¶ E3.1.15. “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 ISCR Case No. 05-03635 at 3 (App. Bd. Dec. 20, 2006).

In deciding whether the Judge's rulings or conclusions are arbitrary or capricious, the Board will review the Judge's decision to determine whether: it does not examine relevant evidence; it fails to articulate a satisfactory explanation for its conclusions, including a rational connection between the facts found and the choice made; it does not consider relevant factors; it reflects a clear error of judgment; it fails to consider an important aspect of the case; it offers an explanation for the decision that runs contrary to the record evidence; or it is so implausible that it cannot be ascribed to a mere difference of opinion. In deciding whether the Judge's rulings or conclusions are contrary to law, the Board will consider whether they are contrary to provisions of Executive Order 10865, the Directive, or other applicable federal law. See ISCR Case No. 03-22861 at 2-3 (App. Bd. Jun. 2, 2006).

In resolving the case in Applicant's favor, the Judge found several conditions that she concluded mitigated the trustworthiness concerns raised by the Government's evidence: that Applicant's alcohol troubles are not recent¹ and that Applicant has evidenced changes in behavior that are "supportive of sobriety"² (Guideline G); that Applicant has demonstrated an "intent not to abuse any drugs in the future" (Guideline H); and "clear evidence of successful rehabilitation"³ (Guideline J). In her whole person analysis, the Judge noted Applicant's youth at the time of his misconduct, the "life altering" quality of the stabbing incident and her evaluation of Applicant's maturity. Additionally, she considered "[Applicant's] candid testimony about his irresponsible alcohol consumption and marijuana use for approximately five years, and his abstinence from marijuana over the last year and alcohol consumption over the past two years." Decision at 6.

On the other hand, we note a substantial amount of record evidence which undermines the Judge's conclusions regarding mitigation. For example, Applicant was convicted of defrauding an innkeeper by failing to pay his bill, yet the Judge's analysis does not discuss this aspect of the case.⁴ Although she is presumed to have considered all the evidence,⁵ a theft conviction, which entails moral turpitude, is sufficiently relevant to Applicant's trustworthiness as to merit explicit examination, and failure to do so impairs the reasonableness of the Judge's decision. Likewise the extent of Applicant's alcohol consumption is troublesome. For example, on one incident of alcohol-induced fighting Applicant had consumed "six to ten beers;"⁶ he had consumed alcohol on the occasion when he failed to pay his restaurant bill;⁷ and when he operated a vehicle while intoxicated he had drunk "over ten . . . Jack and cokes."⁸ That Applicant consumed alcohol in substantial amounts, that the latter two incidents mentioned above occurred *after* he had completed his first alcohol rehabilitation program, that alcohol resulted in ten arrests, and that Applicant has not followed up his second rehabilitation program through AA attendance weakens his case that his commitment to sobriety is permanent.

The Judge's conclusions regarding mitigation are also undermined by the fact that Applicant continued to use marijuana even while undergoing his second rehabilitation program. Applicant Exhibit B, the discharge summary from this program, mentions three "relapses" into marijuana use during the course of his treatment and observes that Applicant "still had a pro cannabis belief system which supported continued marijuana use after counseling." AE B at 1.

¹Directive ¶ E2.A7.1.3.2.

²Directive ¶ E2.A7.1.3.3.

³Directive ¶ E2.A10.1.3.6.

⁴See Tr. at 26. "I was 20 at the time. This was again after use of alcohol. Late at night we went to a...restaurant, ate our food and ditched, didn't pay."

⁵See, e.g., ISCR Case No. 02-29373 at 4 (App. Bd. Mar. 2, 2005).

⁶Tr. at 32.

⁷Tr. at 26.

⁸Tr. at 33.

The Board notes that the transcript contains following colloquy between Applicant and the Judge:

Q: And your date of sobriety is what...?

A: ...August 22nd of '04.

Q: How did I know you're not still drinking or using marijuana?

A: I – I'm—I'm not. I don't know...I've changed my life a lot since then. Tr. at 27.

In this testimony Applicant appears to assert that he has refrained from using alcohol or marijuana since August 22, 2004, the date upon which he was stabbed in an alcohol fueled altercation. However, this statement is contradicted by *Applicant's own evidence* that he used marijuana during the rehabilitation program in 2005. This apparent contradiction casts serious doubt as to whether Applicant was truthful during his testimony, which clearly goes to the essence of a trustworthiness determination. The Judge does not discuss it in her analysis of the case, although she alludes to it when she cites his having abstained from marijuana only “during his later phase of his outpatient program.” Decision at 6.

After considering the Judge's decision, the briefs of the parties, and the record as a whole we conclude that, as regards Guidelines H and J, the decision fails to consider relevant evidence in its application of the mitigating conditions as well as in the whole person analysis. *See* ISCR Case No. 03-22861 at 2-3(App. Bd. June 2, 2006). Therefore, as regards these guidelines, the decision is arbitrary, capricious, and contrary to law. Given the extent of Applicant's misconduct, the statement in AE B to the effect that Applicant was favorably disposed toward marijuana use (his “pro cannabis belief system”) even after his second rehabilitation program, and the absence of record evidence explaining the apparent contradiction between Applicant's testimony and AE B, the Judge's holding that Applicant had met his burden of persuasion is not sustainable on this record. Therefore, remand is not an appropriate remedy.

Order

The Judge's decision granting Applicant a trustworthiness determination is REVERSED.

Signed: Michael Y. Ra'anan
Michael Y. Ra'anan
Administrative Judge
Chairman, Appeal Board

Signed: Michael D. Hipple
Michael D. Hipple
Administrative Judge
Member, Appeal Board

Signed: James E. Moody
James E. Moody
Administrative Judge
Member, Appeal Board