

KEYWORD: Guideline H; Guideline G; Guideline E

DIGEST: Applicant presented some evidence of of reform but the Judge’s adverse findings and conclusion were sustainable in light of the record as a whole. Adverse decision affirmed.

CASENO: 06-14629.a1

DATE: 04/11/2008

DATE: April 11, 2008

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| In Re:<br><br>-----<br><br>Applicant for ADP I/II/III Position | )<br>)<br>)<br>)<br>)<br>)<br>) | ADP Case No. 06-14629 |
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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 for an ADP I/II/III position. On August 17, 2006, DOHA issued a statement of reasons advising Applicant of the basis for that decision—trustworthiness concerns

raised under Guideline H (Drug Involvement), Guideline G (Alcohol Consumption), Guideline E (Personal Conduct), and Guideline J (Criminal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992), as amended (Directive). Applicant requested a hearing. On November 19, 2007, after the hearing, Administrative Judge Philip S. Howe denied Applicant's request for a trustworthiness designation. Applicant timely appealed pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raises the following issue on appeal: whether the Judge's decision is arbitrary, capricious, or contrary to law because the Judge failed to consider all of Applicant's mitigating evidence or failed to give proper weight to that evidence.

The following are relevant findings of the Judge in this matter.

Applicant is 24 years old and attends college part-time while working for a defense contractor. He started smoking marijuana while in high school, using it once or twice a month from 1998 to August 2001, and several times a week from August 2001 to August 2004. He continued to use marijuana until March 2005. In February 2005, Applicant plead guilty to misdemeanor possession of THC, the active ingredient in marijuana, and authorities declined prosecution of the felony aspects of the marijuana-related arrest of September 2004 that preceded it. In March 2005, Applicant tested positive in a monthly urinalysis test, while still on probation following the THC possession conviction, and after having completed his Questionnaire for Public Trust Positions (Standard Form 85). Applicant contributed money into a pool of funds that a friend used to buy the marijuana used by Applicant and his friends.

Applicant also consumed alcohol, primarily beer, from age 16. He drank in college and continued to do so regularly until about September 2005, sometimes to the point of intoxication. In July 2002, Applicant was charged with disorderly conduct, and he admitted that he was intoxicated at that time. Applicant was charged and convicted of underage drinking. He was arrested and convicted of operating a vehicle with a prohibited alcohol content. In September 2004, Applicant was arrested and later pled guilty to a second offense of operating a motor vehicle while intoxicated. By the time of the hearing, Applicant claimed to be drinking only a few beers each month with friends in bars while watching athletic games.

Finally, Applicant falsified his Standard Form 85, executed by him on November 15, 2004, by replying "no" when asked whether in the past year he had illegally used any controlled substance including marijuana.

In his appeal brief, Applicant asks for leniency. In support of this request, Applicant essentially argues that his misconduct was not recent and that he has reformed his lifestyle. We construe his position to be that he has mitigated any trustworthiness concerns that might exist under the four guidelines and that the Judge either did not consider or give adequate weight to his evidence of mitigation. Among other things, Applicant points out that he paid all fines, completed all terms of his probation, and attended all alcohol assessment classes. He now associates with different friends who are "goal-oriented, driven . . . model citizens." He claims that he ceased using marijuana in March 2005, and cut his alcohol consumption to a manageable level. He says that he is now able to pursue a bachelor degree in two disciplines, which he says he would not be able to do if he had

continued living the life style he lived four years ago. His grades have improved. He argues that he will not be able to continue to make improvements as quickly if he is not allowed to continue in his position. A job loss, he argues, will prevent him from pursuing a college education, and he would be set back for things that happened three or four years in the past.

There is a rebuttable presumption that the Judge considered all the record evidence, unless the Judge specifically states otherwise; and there is no requirement that the Judge mention or discuss every piece of record evidence when reaching a decision. *See, e.g.*, ISCR Case No. 03-09915 at 3 (App. Bd. Dec. 16, 2004). Applicant admitted the SOR allegations against him. The burden then shifted to Applicant to extenuate or mitigate the trustworthiness concerns raised by those allegations. Directive ¶ E3.1.15. The Judge reviewed the possible mitigating conditions for each guideline and specifically explained why none of the possible mitigating conditions applied to Applicant's circumstances, and how Applicant had not presented evidence sufficient to overcome the trustworthiness concerns raised by his conduct. The Judge also performed a whole-person analysis using the criteria in Directive ¶ E2.2, and specifically explained why Applicant's circumstances did not support a whole-person analysis in favor of Applicant.

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. 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. *See, e.g.*, ADP Case No. 06-11792 at 2-3 (App. Bd. Jun. 15, 2007). In this case, Applicant presented some evidence of reform, but the Judge's findings and conclusions against Applicant were sustainable, including those related to the recency and non-isolated nature of Applicant's conduct, the insufficiency of Applicant's evidence of reform including discontinued use of marijuana and positive changes in support of sobriety, and the failure of Applicant to admit the falsification of the Standard Form 85 until after he was confronted by an investigator.

Finally, an applicant for a trustworthiness designation is not made more or less suitable for a favorable determination based on how the determination might affect the applicant's job status or financial situation. *See, e.g.*, ADP Case No. 07-01610 at 3 (App. Bd. Mar. 7, 2008).

**Order**

The Judge's unfavorable 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