

KEYWORD: Guideline J

DIGEST: Once the government presents evidence raising trustworthiness concerns, the burden shifts to the applicant to establish mitigation. The favorable evidence cited by Applicant is not sufficient to demonstrate that the judge erred. Adverse decision affirmed.

CASENO: 06-22121.a1

DATE: 12/12/2007

DATE: December 12, 2007

In Re: ----- Applicant for Public Trust Position)))))))	ADP Case No. 06-22121
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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) proposed to deny or revoke access to automated information systems in ADP-I/II/III sensitivity positions for Applicant. On February 1, 2007, DOHA issued a statement of reasons (SOR) advising Applicant of the basis for that

decision—trustworthiness concerns raised under Guideline J (Criminal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested the case be decided on the written record. On July 30, 2007, after considering the record, Administrative Judge Thomas M. Crean, 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 adverse trustworthiness determination is arbitrary, capricious, or contrary to law.

Applicant argues that the Judge’s adverse trustworthiness determination should be reversed because Applicant’s last criminal offense occurred more than five years ago and he has completed a substance abuse program. The Board does not find Applicant’s argument persuasive.

In support of his argument, Applicant offers new evidence—a copy of his certificate of completion of an alcohol and substance abuse program.¹ The Board may not consider this 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. 06-00184 at 2 (App. Bd. Jul. 24, 2007).

Once the government presents evidence raising trustworthiness concerns, the burden shifts to the applicant to establish mitigation. 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, 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 decision. 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.

Applicant elected to have his case decided upon the written record—a circumstance under which the Judge did not question the Applicant about his concerns and evaluate his credibility in the context of a hearing. In response to the government’s File of Relevant Material (FORM), Applicant declined to submit any evidence. Applicant has not met his burden of demonstrating that the Judge erred in concluding that the Guideline J allegations had not been mitigated—given the record in this case. Although Applicant disagrees with the Judge’s decision, he has not established that it is arbitrary, capricious, or contrary to law. *See* Directive ¶ E3.1.32.3.

In his decision, the Judge weighed the available mitigating evidence against the seriousness of the disqualifying circumstances, and considered the possible application of relevant mitigating factors. He reasonably explained why the available mitigating evidence was insufficient to overcome the government’s trustworthiness concerns. The favorable record evidence cited by Applicant is not

¹The Judge’s adverse determination was predicated in large part on the fact that “[Applicant] presented no evidence of attendance at any counseling or rehabilitation programs” and “there is only limited information on rehabilitation.” Determination at 5.

sufficient to demonstrate the Judge's decision is arbitrary, capricious, or contrary to law. *See, e.g.*, ISCR Case No. 06-17714 at 3 (App. Bd. Jul. 3, 2007). The Board does not review a case *de novo*. Given the limited record that was before him, the Judge's ultimate unfavorable trustworthiness determination is sustainable.

Order

The determination of the Judge denying Applicant access to automated information systems in ADP I/II/III sensitivity positions is AFFIRMED.

Signed: Michael Y. Ra'anan

Michael Y. Ra'anan
Administrative Judge
Member, Appeal Board

Signed: Jeffrey D. Billett

Jeffrey D. Billett
Administrative Judge
Member, Appeal Board

Signed: William S. Fields

William S. Fields
Administrative Judge
Member, Appeal Board