

KEYWORD: Guideline h; Guideline J and Guideline E

DIGEST: This record does not support a conclusion that Department Counsel induced Applicant to forego his right to counsel. Adverse decision affirmed.

CASENO: 14-01542.a1

DATE: 05/12/2015

DATE: May 12, 2015

In Re:)	
)	
-----)	ADP Case No. 14-01542
)	
Applicant for Public Trust Position)	
)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

Larry R. Pilgrim, Esq.

The Department of Defense (DoD) declined to grant Applicant a trustworthiness designation. On August 4, 2014, DoD issued a statement of reasons (SOR) advising Applicant of the basis for

that decision—trustworthiness concerns raised under Guideline H (Drug Involvement), Guideline J (Criminal Conduct), and Guideline E (Personal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On February 3, 2015, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Mary E. Henry denied Applicant’s request for a trustworthiness designation. Applicant appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raised the following issues on appeal: whether Applicant was denied his right to counsel and whether the Judge’s adverse decision was arbitrary, capricious, or contrary to law. The Judge’s favorable findings under Guideline J are not at issue in this appeal. Consistent with the following, we affirm.

The Judge’s Findings of Fact

Applicant works for a Defense contractor. He enjoys a good reputation for his duty performance, honesty, and concern for others. Previously, Applicant served in the U.S. military, retiring as an officer. He has an undergraduate degree.

In the late 1990s, Applicant suffered a back injury while performing his duties. He was prescribed Norco, a narcotic pain reliever, which made him feel euphoric and energetic. He suffered pain from surgery and from another injury, for which he was also prescribed this drug. However, he used it beyond the point that he needed it for pain relief. He would obtain pills from his father, who also used it to relieve pain.

In 2005, Applicant’s mother developed a serious illness. Applicant increased his use of Norco and began writing prescriptions for himself, realizing that this was illegal. A pharmacy notified Applicant’s employer about this, and he was placed on administrative leave. Applicant was arrested and charged with forgery of a prescription and with possession, both felonies. He completed his sentence and reported the arrest to the military, receiving a Letter of Reprimand. He was also recommended by his state licensing agency to attend a rehabilitation program. He received both in-patient and out-patient treatment. He also attended Narcotics Anonymous (NA), joined a support group, sought counseling, and participated in drug screening.

In early 2009, Applicant’s sister was diagnosed with a terminal illness, and his wife underwent surgery. Applicant’s wife was prescribed Norco. Applicant resumed using the drug after three and a half years of sobriety. In late 2010, he was discovered looking through a co-worker’s purse for the drug. The co-worker discovered him, and Applicant’s employer asked him to resign. Despite his job loss, Applicant continued using Norco. He did so until early 2013, obtaining it by simulating pain to a physician. He also obtained it from his father and from his wife. In February of that year, Applicant attempted to call in a prescription for himself to a pharmacy. The pharmacist recognized Applicant and notified his employer, who fired him. From 2009 through early 2013, Applicant had attended NA meetings. After this last incident Applicant consulted with a physician, who found that Applicant “had a poorly controlled narcotic addiction.” Decision at 5. In 2013, Applicant began outpatient treatment, completing the program in about six weeks. A licensed social

worker concluded that Applicant's prognosis was good, recommending that he receive individual therapy and attend NA four times a week.

Applicant stated that he has made lifestyle changes to prevent relapse. He has also changed the nature of his professional duties, although it is not clear whether this was voluntary or a requirement of his professional licensing agency. He has no access to prescription pads or drugs and advises his doctors and his dentist of his addiction. He also stated that he told his father never to let him have drugs again, despite anything he might say. He provided his father with a lockbox in which to keep his drugs. Applicant's father did not provide corroborating evidence.

Applicant's NA sponsor states that he attends numerous meetings every week and that he has made progress in achieving recovery milestones. Applicant signed a letter of intent to the effect that any violation or relapse in drug use will result in an automatic revocation of his trustworthiness designation. He is aware that he can never use the drug in question again or its equivalent. He has a support system and plans to continue working the recovery steps prescribed by NA. The Judge found that Applicant was honest and credible in his testimony.

The Judge's Analysis

The Judge found that Applicant's circumstances raised concerns under all of the Guidelines alleged in the SOR. She cleared him of the Guideline J allegations. However, for the remaining two, she found against Applicant. Regarding Guideline H, the Judge noted evidence of his successful completion of drug rehabilitation and of his participation in NA. She stated that, as result of counseling, Applicant had made changes in his life to assist him in preventing relapse. However, she noted that Applicant's testimony about the lockbox given his father has not been verified. She also stated that he has not provided verification that his physicians know of his addiction and that it not clear that his state licensing agency is aware of the 2013 incident and subsequent job loss.

Guideline E cross-alleged (with Guideline H) Applicant's illegal use of prescription medication until February 2013. It cross-alleged (with Guideline J) his forgery of his prescription and attempt to phone in a prescription, which resulted in his job loss. It also alleged his resignation from employment for having improperly searched a co-worker's purse for drugs. In addressing this Guideline, she cited to evidence of Applicant's counseling and participation in NA. However, she concluded that his searching through the purse and attempt to call in a prescription for himself were "serious" violations of the trust others had placed in him. She concluded that Applicant had not mitigated the concerns alleged under this Guideline.

In the whole-person analysis, the Judge restated her findings about Applicant's trustworthiness-significant conduct. She noted his participation in various rehabilitation programs and his life-style changes. However, she stated that too little time has elapsed since his last incident to establish that he has fully resolved his drug problem.

Discussion

Applicant contends that he was denied due process, in that Department Counsel implicitly advised him that he did not need an attorney. In making this assignment of error, he asserts matters from outside the record. Normally, we cannot consider new evidence on appeal. Directive ¶ E3.1.29. However, we will consider such evidence insofar as it pertains to threshold issues such as due process, jurisdiction, etc. *See, e.g.*, ADP Case No. 09-02670 at 2 (App. Bd. Jan. 20, 2011).

Applicant states that, prior to the hearing, he was worried that he might need a lawyer to represent him. He states that he called Department Counsel, who said, “these are very simple hearings. The proceeding is very informal. Most people don’t have an attorney.” Appeal Brief at 4. Applicant also contends that Department Counsel told him that the most important thing he could do was testify truthfully. He argues that, based on this conversation, he concluded that he did not need a lawyer to represent him. He believes that he was harmed by this, in that he did not provide enough evidence to allay all of the Judge’s concerns, a deficiency that might have been avoided if he had secured professional assistance in presenting his case.

Department Counsel, on the other hand, denies that he made the statements in question. Reply Brief at 6. We do not have fact-finding authority. *See, e.g.*, ISCR Case No. 04-11414 at 3 (App. Bd. Mar. 5, 2007). Therefore, we cannot resolve the factual discrepancy between Applicant’s and Department Counsel’s arguments. However, we do not need to, because, even assuming that Applicant’s version is correct, we conclude that no reasonable person in Applicant’s circumstances would have understood Department Counsel to have meant that there was no advantage to Applicant in hiring counsel and that he would be just as well off representing himself. Moreover, Applicant received pre-hearing guidance that advised him of his right to counsel, and the Judge addressed it at the beginning of the hearing. Applicant stated to the Judge that he understood his right to counsel and that he would represent himself. Tr. at 4. He neither stated nor intimated that he was acting in accordance with purported advice from Department Counsel. The record itself does not support a conclusion that Department Counsel induced Applicant to forego his right to counsel.¹

Applicant challenges the Judge’s adverse findings under Guideline E, contending that she did not properly evaluate the mitigating conditions. However, a reasonable person could conclude that Applicant’s having (1) forged prescriptions for Norco, (2) attempted illegally to phone in a prescription for the drug in his own behalf, and (3) resigned from a job after having been discovered rummaging through a co-worker’s purse in search of Norco impugn his reliability beyond the persuasive effect of his mitigating evidence. We find no error in the Judge’s adverse findings under the Personal Conduct Guideline.

Applicant also challenges the Judge’s mitigation analysis of Guideline H. He notes that, at the end of the hearing, after closing arguments, the Judge *sua sponte* sought additional evidence

¹Although on this record we do not conclude that Department Counsel impaired Applicant’s rights, we believe that the better course of action in situations such as this would be for Department Counsel not to go beyond the language of the Directive and the current Prehearing Guidance in responding to questions about an applicant’s rights. Counsel should make it explicit that DOHA personnel have no authority to provide advice on how an applicant should exercise those rights.

from him. She sought a letter from his sponsor verifying his attendance at NA, a copy of his medical records, and a signed statement of intent that he would not use Norco or a similar drug in the future and that if he did he would lose his trustworthiness designation. Tr. at 46-47. Applicant provided the evidence that the Judge requested. Nevertheless, she entered adverse findings under Guideline H, citing, among other things, to a lack of corroborating evidence from his father about the lockbox, a lack of corroborating evidence that his physicians know about his addiction, and a lack of evidence that his state licensing board is aware of the 2013 incident and job loss. Applicant contends that this was harmful error by the Judge, in that he could have provided this evidence if she had advised him that he needed to. He also argues that there is no basis in the record to believe that he has a requirement to notify his state agency of arrests that did not result in conviction.

We agree with Applicant that the Judge erred. A Judge has no authority to promise an applicant a favorable decision. *See, e.g.*, ISCR Case No. 09-06602 at 2 (App. Bd. Jan. 28, 2011). A reasonable person in Applicant’s circumstances could have understood the Judge’s request for five specific pieces of evidence that she enumerated to imply that if he complied she would give him a trustworthiness designation. In prior decisions we have remanded cases to the Judge to correct similar errors. *See, e.g.*, ISCR Case No. 14-00156 (App. Bd. Oct. 16, 2014). However, as stated above, the Judge’s decision is sustainable under Guideline E, and remand to take in the Guideline H mitigating evidence described in Applicant’s brief would not likely produce a different overall result. Therefore, the errors raised under Guideline H are, under the facts of this case, harmless.

The Judge examined the relevant data and articulated a satisfactory explanation for the decision. Applicant has cited to no harmful error in the decision, which is sustainable on this record. The standard applicable to trustworthiness cases is that set forth in *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988) regarding security clearances: such a determination “may be granted only when ‘clearly consistent with the interests of the national security.’” *See, e.g.*, ADP Case No. 12-04343 at 3 (App. Bd. May 21, 2013). *See also Kaplan v. Conyers*, 733 F.3d 1148 (Fed. Cir. 2013), *cert. denied*.

Order

The Decision is **AFFIRMED**.

Signed: Michael Y. Ra’anan
Michael Y. Ra’anan
Administrative Judge
Chairperson, Appeal Board

Signed: Jeffrey D. Billett
Jeffrey D. Billett

Administrative Judge
Member, Appeal Board

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