

KEYWORD: Guideline D; Guideline J

DIGEST: The Judge found that Applicant was tried in 2004 for forcible sodomy upon a minor. At his trial, Applicant gave false testimony. He was convicted of consensual sodomy. At sentencing, he revealed that he lied. The court sentenced him to 12 months incarceration, two years of post-release supervision, to be registered as a sex offender, and a \$2,500 fine. In 2005, Applicant entered an *Alford* plea to perjury. He was sentenced to be incarcerated for five years with two and a half years suspended. He also received two years of probation. Adverse decision affirmed.

CASENO: 08-00969

DATE: 05/28/2009

DATE: May 28, 2009

In Re:	)	
	)	
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	)	
Applicant for Public Trust Position	)	

**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 November 19, 2008, DOHA issued a statement of reasons (SOR) advising Applicant of the basis for that decision—trustworthiness concerns raised under Guideline D (Sexual Behavior) and Guideline J (Criminal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On March 17, 2009, after the hearing, Administrative Judge Mark W. Harvey denied Applicant’s request for a trustworthiness determination. Applicant 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. For the following reasons, the Board affirms the Judge’s adverse trustworthiness determination.<sup>1</sup>

Specifically, Applicant challenges the Judge’s conclusion that none of the Guideline J mitigating conditions fully apply.

The Judge found that Applicant was tried in 2004 for committing forcible sodomy upon a minor. At his trial, Applicant provided false testimony concerning the details and the severity of the offense. Applicant was convicted of consensual sodomy. At his sentencing proceeding, Applicant revealed that he lied during the trial on the merits. The court sentenced him to be incarcerated for 12 months, to two years of post-release supervision, to be registered as a sex offender, and to a \$2,500 fine. In 2005, Applicant entered an *Alford* plea to perjury. He was sentenced to be incarcerated for five years with two and a half years suspended, to run concurrently with his previous sentence. He also received two years of probation.

Applicant asserts that trustworthiness concerns have been mitigated because: (i) he was sexually abused many times by his older brother during his youth, and this experience made it difficult for him to come to terms with his own acts of sodomy upon a minor; (ii) this difficulty in coming to terms with his past led to his commission of perjury during his trial; (iii) his ultimate truthfulness in fully disclosing his illegal acts is evidence of his rehabilitation; and (iv) his active participation in therapy and the dedication he has shown toward it establish that four and a half years is sufficient time since the offenses to mitigate any trustworthiness concerns. These assertions do not establish error on the part of the Judge.

The presence of some mitigating evidence does not alone compel the Judge to make a

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<sup>1</sup>The Judge found in favor of Applicant regarding the allegations brought under Guideline D and also subparagraph 2.a. of Guideline J. Those favorable findings are not at issue on appeal.

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*. See, e.g., ISCR Case No. 06-10320 at 2 (App. Bd. Nov. 7, 2007). A party'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. See, e.g., ISCR Case No. 06-17409 at 3 (App. Bd. Oct. 12, 2007).

In this case, the Judge weighed the mitigating evidence offered by Applicant against the seriousness of the disqualifying conduct and considered the possible application of relevant conditions and factors. He applied applicable mitigating conditions and found in Applicant's favor regarding the allegations under Guideline D and the sodomy conviction under Guideline J. However, the Judge concluded that there was insufficient evidence to mitigate the perjury conviction under Guideline J. The Judge's conclusion regarding the perjury conviction is sustainable. The Judge considered Applicant's past history with his older brother and its effects, his efforts at rehabilitation, and his solid employment record in his whole person analysis.

The Board does not review a case *de novo*. The favorable 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. 06-11172 at 3 (App. Bd. Sep. 4, 2007). After reviewing the record, the Board concludes that the Judge examined the relevant data and articulated a satisfactory explanation for his decision, "including a 'rational connection between the facts found and the choice 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)). Therefore, the Judge's unfavorable trustworthiness determination is sustainable.

### **Order**

The Judge's unfavorable trustworthiness determination is AFFIRMED.

Signed: Jeffrey D. Billett

Jeffrey D. Billett  
Administrative Judge  
Member, Appeal Board

Signed: Jean E. Smallin

Jean E. Smallin  
Administrative Judge  
Member, Appeal Board

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