

KEYWORD: Guideline I

DIGEST: Evidence regarding Applicant’s psychological condition, offered by a Government expert and by two employed by Applicant, were not consistent. The record did not provide a basis for resolving the inconsistencies. Accordingly, the Judge concluded that Applicant had not met her burden of persuasion as to mitigation. Adverse decision affirmed.

CASE NO: 08-06228.a1

DATE: 06/13/2011

DATE: June 13, 2011

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In Re:)	
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-----)	ADP Case No. 08-06228
)	
Applicant for Public Trust Position)	
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APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Eric H. Borgstrom, Esq., Department Counsel

FOR APPLICANT

Jonathan Bell, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a trustworthiness designation. On September 29, 2010, DOHA issued a statement of reasons (SOR) advising Applicant of the basis for that decision—trustworthiness concerns raised under Guideline I (Psychological Conditions) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On February 25, 2011, after the hearing, Administrative Judge LeRoy F. Foreman 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 the Judge erred in his application

of the mitigating conditions; whether the Judge erred in his whole-person analysis; and whether the Judge's adverse decision was arbitrary, capricious, or contrary to law. Consistent with the following, we affirm the Judge's decision.

Applicant is a 26-year-old project coordinator for a Federal contractor. Despite a normal childhood, in her preteen years Applicant began feeling depressed, suffering from headaches, and withdrawing from friends and family. Additionally, she began acting out, setting small fires 10 to 15 times, in trash cans, construction sites, etc. She also spray-painted a police car and stole a key to a police gun cabinet. At age 14, while working as a hospital volunteer, she set fire to a mattress in a stairwell. She was arrested and served juvenile detention from June 1999 to March 2001. While undergoing detention, she received psychological counseling and attended anger management classes and group therapy. She was diagnosed with depression and treated with medication.

Upon release, Applicant continued psychological counseling, from March 2001 to August 2001. Upon completing the court-ordered counseling, Applicant decided, along with her parents, to pursue counseling no further. Although her psychologist died in 2006, the psychologist's spouse, who is also a psychologist, reviewed the treatment notes and gave it as her opinion that her husband would have diagnosed Applicant with pyromania, a disorder of impulse control. The psychologist said that Applicant's prognosis would have been "guarded" as of August 2001, but that more recent evaluation could modify the prognosis.

As part of the investigation of her request for a trustworthiness designation, Applicant submitted to a psychological evaluation from a DOHA-selected psychologist (A). Among other things, A stated that Applicant

attempts to present a social[ly] acceptable appearance, particularly to those in positions of authority . . . [She] tends to minimize or cloak her psychological issues . . . I have questions regarding her current psychological status . . . The data suggest that her affect states may not be stable, but rather superficial and charged with rapidly changing feelings . . . I would have reservations putting [Applicant] in a delicate position of trust. Decision at 3, quoting Government Exhibit 5.

He diagnosed Applicant as having a "histrionic personality disorder with narcissistic personality features."

Applicant obtained two psychological assessments of her own, one by a psychologist (B) and another by a psychiatrist (C). The former concluded that Applicant showed an absence of histrionic features and no symptoms of narcissism. The Judge stated that B did not indicate whether she considered the treatment notes regarding Applicant's court-required counseling.

C has experience in evaluating applicants for security clearances and assignment to sensitive positions. He reviewed the 2001 treatment notes and the assessment of those notes by the psychologist's wife, described above. There is no indication that he considered the assessment by the DOHA-selected psychologist. C concluded that Applicant is not suffering from a personality disorder that would affect her ability to perform in a position of trust. He stated that evidence of Applicant's rehabilitation is "strong." Decision at 5, quoting Applicant Exhibit B.

Applicant has received numerous accolades for the quality of her work performance. Her supervisor testified that Applicant has not exhibited any behavior on the job consistent with the personality disorder found by the DOHA-selected psychologist. She enjoys a good reputation for dependability, efficiency, self-reliance, and for her work ethic.

In examining the mitigating conditions, the Judge stated that Applicant has no ongoing treatment plan,¹ that she has never voluntarily sought counseling,² that the only mental health professional engaged by the U.S. Government expressed doubts about placing Applicant in a position of trust,³ and that Applicant's problems were not a temporary condition and it is not clear whether they have been resolved.⁴ On the issue of whether "there is no indication of a current problem,"⁵ the Judge stated the evidence is conflicting. He noted that none of the professionals involved testified in person and, therefore, they were not subject to cross-examination, "making it impossible to ask them which diagnostic criteria, if any, they found applicable to Applicant and what they relied on to conclude that each of the criteria was or was not applicable." Decision at 9. In his whole-person analysis, the Judge stated, among other things, that "the psychological evidence that she has overcome her earlier psychological problems is conclusory and untested by cross-examination. The inconclusive state of the evidence requires me to resolve the doubt in favor of national security." Decision at 10

Applicant challenges the following statement in the Analysis portion of the decision: "None of the medical professionals except the DOHA-selected psychologist [A] appear to have considered Applicant's entire medical record." Applicant points to the following, in Government Exhibit 5, which is the report by A: "This examiner did not receive a complete set of records." On its face this statement contradicts the challenged statement by the Judge. However, his overall decision appears to be that, because none of the professionals were subject to cross-examination, and neither B nor C state that they actually read A's report, the record evidence is not sufficient to resolve doubts raised by the conflicting evidence, doubts which must be resolved in favor of the national interest. We conclude that, even if he had not make the error in question, the Judge would have decided the case in the same way. Therefore, the error is harmless.

Reading the Judge's decision in light of the record as a whole, we are not able to conclude

¹Directive, Enclosure 2 ¶ 29(a): "the identified condition is readily controllable with treatment, and the individual has demonstrated ongoing and consistent compliance with the treatment plan[.]"

²Directive, Enclosure 2 ¶ 29(b): "the individual has voluntarily entered a counseling or treatment program for a condition that is amenable to treatment, and the individual is currently receiving counseling or treatment with a favorable prognosis by a duly qualified mental health professional[.]"

³Directive, Enclosure 2 ¶ 29(c): "recent opinion by a duly qualified mental health professional employed by, or acceptable to and approved by the U.S. Government that an individual's previous condition is under control or in remission, and has a low probability of recurrence or exacerbation[.]"

⁴Directive, Enclosure 2 ¶ 29(d): "the past emotional instability was a temporary condition (e.g., one caused by death, illness, or marital breakup), the situation has been resolved, and the individual no longer shows indications of emotional instability[.]"

⁵Directive, Enclosure 2 ¶ 29(e).

that the Judge erred in his denial to Applicant of a trustworthiness designation. It is clear that the reports of the two professionals engaged by Applicant disagree with that of the DOHA-selected professional. However, neither B nor C provide any insight into what deficiencies, if any, may have been present in A's examination. There is no record evidence addressing possible errors in A's analysis or in the manner in which he tested Applicant and interviewed her. Insofar as Applicant has the burden of persuasion as to mitigation, the Judge's adverse decision is consistent with the state of the record that was before him.

After reviewing the record, we conclude that the Judge examined the relevant data and articulated a satisfactory explanation for the 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)). The Judge's unfavorable trustworthiness determination is sustainable.

Order

The Judge's adverse trustworthiness determination is **AFFIRMED**.

Signed: Jean E. Smallin

Jean E. Smallin
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