

KEYWORD: Guideline E; Guideline M; Guideline G

DIGEST: A Judge is presumed to have considered all of the evidence in the record. A party's disagreement with a Judge's weighing of the evidence is not sufficient to demonstrate that the Judge weighed the evidence in a manner that is arbitrary, capricious, or contrary to law. Adverse decision affirmed.

CASE NO: 10-02010.a1

DATE: 12/15/2011

DATE: December 15, 2011

In Re:)	
)	
-----)	ADP Case No. 10-02010
)	
Applicant for a Public Trust Position)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

Alan V. Edmunds, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant eligibility for a public trust position. On March 1, 2011, DOHA issued a statement of reasons (SOR) advising Applicant of the basis for that decision—trustworthiness concerns raised under Guideline E (Personal Conduct) and Guideline M (Use of Information Technology Systems) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). The SOR was amended on April 11, 2011 to add trustworthiness concerns allegations under Guideline G (Alcohol Consumption) and additional allegations under Guideline E. Applicant requested a hearing. On September 21, 2011,

after the hearing, Administrative Judge Robert E. Coacher declined to grant Applicant eligibility for a public trust position. 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 adverse trustworthiness determination is arbitrary, capricious, and contrary to law because he failed to consider important facts and aspects of the case under Guidelines E, M, and G. For the following reasons, the Board affirms the Judge's unfavorable trustworthiness determination.

The Judge made the following findings of fact: Applicant is 52 years old and has been married for four years. This is his second marriage, and he has two adult step-children. He holds a bachelor's degree and a master's of business administration. Applicant first tried alcohol when he was 16. Eventually, he was drinking as much as a half bottle of bourbon every day from 1997 through 2007. In 1994 Applicant was arrested and charged with DUI. The charge was later reduced to reckless driving. In 1994 or 1995 he saw a medical professional, who diagnosed him as alcohol dependent. Later in 1995, Applicant was seen by another medical professional who diagnosed him with alcoholism. He attended group and individual counseling sessions until 1996 and continued psychiatric counseling for alcohol through 2007. In 1997, Applicant was arrested and charged with DUI. He pled guilty to driving with ability impaired.¹ In August 2003, Applicant was sent home from work for having excessive alcohol in his system. In September 2005, Applicant's access to the special access program on which he was working was revoked, in part because of previous alcohol incidents, and in part because of his failure to report his 1997 DUI arrest to his company's security officer.

From January to October 2005, Applicant accessed over 2000 unauthorized web sites using his company computer. Many of the sites contained pornographic content. Applicant was terminated because of his actions. Applicant completed a security clearance application on March 25, 2004. In that application, he failed to list his 1994 DUI arrest and conviction. Applicant admitted providing false information to an interviewer during an interview for another government agency in May 2004. The false information concerned the date on which he stopped drinking. Applicant also admitted providing false information in a October 30, 2009 affidavit to a defense investigator about when he stopped drinking alcohol. He admitted in his hearing testimony that he continued to drink alcohol to excess beyond 2007, the date he claimed in the affidavit that he completely stopped drinking alcohol. Applicant admitted in his testimony that he was drinking alcohol up through March 27, 2011. He also admitted that when he drinks, he does so to the point of intoxication. Applicant's treating psychologist testified that any granting of a trustworthiness determination in this case should be conditioned upon a close monitoring of Applicant's alcohol abstinence for one year.

¹The Judge's decision contains a finding of fact that references a September 2007 DUI arrest. While it is not an issue raised on appeal, the Board notes that there is no record evidence of any DUI arrest in 2007. There is evidence of a 1997 DUI arrest, and it is a 1997 DUI arrest and conviction (for Driving While Ability Impaired) that the Judge discusses in the Analysis portion of his decision. There is no mention in the Analysis of a 2007 DUI arrest. Thus, the Board concludes that the finding of fact reference is an inadvertent error, and is harmless. For the purpose of clarity, the Board chooses to reference the 1997 DUI date in its summary of the Judge's findings.

The Judge reached the following conclusions: Applicant's conduct of reporting to work under the influence of alcohol, having his access to sensitive information revoked by another government agency, and viewing pornographic material on a company computer all support a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, and an unwillingness to comply with rules and regulations. Applicant admits intentionally withholding truthful information about his past driving offenses, his alcohol-related treatment, and the true date when he stopped consuming alcohol. Because Applicant received erroneous advice from an attorney concerning whether he had to report his 1994 DUI arrest on his security clearance application, that omission is mitigated. However, Applicant's other falsification conduct, particularly his false statements to an investigator and in answering interrogatories, is not mitigated. His viewing of pornographic images on his company's computer is recent enough to be of concern. Although Applicant sought assistance for his alcohol abuse, he remains a work-in-progress since he consumed alcohol to excess as recently as March 2011. He received alcohol treatment from 1994 through 1996 and again in 2007, but relapsed after each occasion. There is evidence that Applicant is currently undergoing counseling or treatment, but no clear pattern of abstinence or modified consumption was demonstrated. Applicant's favorable prognosis from his psychologist was conditioned upon monitoring his abstinence for one year. Overall, the record evidence creates questions and doubts about Applicant's eligibility for a position of public trust.

Applicant argues that the Judge should have concluded that the case against him was mitigated under Guidelines E, M, and G. He asserts that the Judge failed to consider his significant decrease in alcohol consumption during the past four years, his compliance with a treatment program, and the fact that there have been no alcohol-related incidents since he began treatment. Applicant also asserts that the Judge failed to consider the fact that his misuse of information technology occurred over six years ago, has not been repeated, and was related to his problems with alcohol. Applicant states that the Judge's findings and conclusions do not reflect a thorough consideration of relevant factors and important aspects of the case. Applicant has failed to establish error on the part of the Judge.

A Judge is presumed to have considered all the evidence in the record unless he or she specifically states otherwise. *See, e.g.*, ADP Case No. 08-00826 at 2 (App. Bd. Mar. 19, 2010). Applicant has not overcome the presumption. In this case, the Judge listed and discussed in some detail the mitigating factors contained in each of three relevant Guidelines, and also discussed at some length the record evidence that was favorable to Applicant. The Judge's ultimate conclusion that the mitigating evidence presented was insufficient to overcome the government's concern over Applicant's eligibility for a position of trust is sustainable.

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.*, ADP Case No. 09-04275 at 2 (App. Bd. Apr. 18, 2011). 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.*, ADP Case No. 10-01100 at 2 (App. Bd. Jun. 13, 2011). Moreover, on appeal, Applicant does not specifically address the Judge's findings and conclusions regarding his falsifications. He makes only the general assertion that "[a]ll concerns arising under Guideline E were related to [his] alcoholism." Applicant does not provide specifics as to how his

alcoholism contributed to his lack of truthfulness or how the Judge erred in reaching a conclusion that Applicant's deliberate falsifications, which he has admitted to, were not mitigated.² There is no presumption of error below. The Judge's findings and conclusions regarding Applicant's falsifications provide a sufficient basis, standing alone, for his ultimate unfavorable trustworthiness determination, and Applicant has not proffered a specific argument against those findings and conclusions.

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)).

Order

² With the exception of SOR subparagraph 1(f), under which the Judge made a formal finding in Applicant's favor, Applicant has admitted his falsifications in his answer to the SOR and in his hearing testimony (Tr. p. 93, 96-97). Also, Applicant's treating psychologist testified about Applicant's alcoholism. When asked her opinion about the fact that Applicant lied to the government about the extent of his alcoholism, the psychologist stated, "I think it's part of the nature of fear of being caught." (Tr. p. 78). At no time did the psychologist draw a connection between Applicant's clinical condition and the fact that he had not been truthful with the government.

The decision of the Judge declining to grant Applicant eligibility for a public trust position is AFFIRMED.

Signed: Michael Y. Ra'an

Michael Y. Ra'an
Administrative Judge
Chairperson, Appeal Board

Signed: Jeffrey D. Billett

Jeffrey D. Billett
Administrative Judge
Member, Appeal Board

Signed: Jean E. Smallin

Jean E. Smallin
Administrative Judge
Member, Appeal Board