KEYWORD: Guideline G

DIGEST: The Judge found that Applicant has been convicted twice of driving under the influence of alcohol, in 1999 and 2007. The Judge's findings of security significance are sustainable. Adverse decision affirmed.

CASENO: 07-06408.a1

DATE: 06/06/2008

DATE: June 6, 2008

In Re:	)	
	)	
--------	)	ISCR Case No. 07-06408
	)	
	)	
Applicant for Security Clearance	)	
	)	

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) declined to grant Applicant a security clearance. On October 1, 2007, DOHA issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline G (Alcohol Consumption) of

Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On February 26, 2008, after the hearing, Administrative Judge Matthew E. Malone denied Applicant's request for a security clearance. Applicant timely appealed pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raised the following issues on appeal: whether the Judge's findings are based on substantial evidence; and whether the Judge's adverse security clearance decision under Guideline G is arbitrary, capricious, or contrary to law.

The Judge found Applicant had consumed alcohol, at times in excess and to the point of intoxication, from at least 1999 to at least June 2007. In 1999 Applicant was charged with driving under the influence of alcohol with a blood alcohol content (BAC) of at least .10%. She was found guilty of the offense, fined, and her driving privileges were revoked for one year. In 2007 Applicant was charged with driving under the influence of alcohol with a BAC of .21%. She was convicted and sentenced to 33 days in jail, with 30 days suspended conditioned on five years good behavior, completion of the Alcohol Safety Action Program (ASAP), and payment of her fines and costs.[1]

Applicant argues that the Judge's adverse clearance decision should be reversed because the Judge's findings contain multiple errors. Applicant also argues that her alcohol consumption does not present a problem and that she would not have driven in an intoxicated state in 2007 had someone told her that it could result the revocation of her security clearance.[2] Applicant's arguments do not demonstrate that the Judge erred.

The Board's review of a Judge's findings is limited to determining if they are supported by substantial evidence—such relevant evidence as a reasonable mind might accept as adequate to support such a conclusion in light of all the contrary evidence in the record. Directive ¶ E3.1.32.1. "This is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620, (1966).

After reviewing the record, the Board concludes that the Judge's findings are based on substantial evidence, or constitute reasonable inferences that could be drawn from the record. To

[1]Decision at 2-3.

[2]Applicant makes other assertions of error based upon new evidence in the form of Applicant's statements in her brief as to aspects of her work situation. The Board may not consider this new evidence on appeal. 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).

the extent that there is error, it is harmless in that it would not change the outcome of the case.[3] Considering the record evidence as a whole, the Judge's material findings of security concern are sustainable. *See, e.g.,* ISCR Case No. 06-21025 at 2 (App. Bd. Oct. 9, 2007).

Once the government presents evidence raising security concerns, the burden shifts to the applicant to establish mitigation. Directive ¶ E3.1.15. The presence of some mitigating evidence does not alone compel the Judge to make a favorable clearance 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.

A review of the record indicates that the Judge weighed the mitigating evidence offered by Applicant against the length and seriousness of the disqualifying conduct and considered the possible application of relevant conditions and factors. He reasonably explained why the evidence which the Applicant had presented in mitigation was insufficient to overcome the government's security concerns. The Board does not review a case *de novo*. The favorable record 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 2 (App. Bd. Sep. 4, 2007). 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 conclusion that "it is not clearly consistent with the national interest to grant Applicant eligibility for a security clearance"[4] is sustainable. *See Department of the Navy v. Egan,* 484 U.S. 518 (1988).

Order

The decision of the Judge denying Applicant a security clearance is AFFIRMED.

Signed: Michael D. Hipple
Michael D. Hipple
Administrative Judge
Member, Appeal Board

[3]For example, Applicant argues that the Judge erred in finding that she was hired in 2004, when in fact she was hired in 2003, and erred in finding that she attended karaoke events weekly, when in fact she attends them once or twice a month.

[4]Decision at 6.

Signed: Jean E. Smallin
Jean E. Smallin
Administrative Judge
Member, Appeal Board

Signed: William S. Fields
William S. Fields
Administrative Judge
Member, Appeal Board