

KEYWORD: Guideline G

DIGEST: Applicant was advised by letter of his right to obtain counsel. There is no basis to conclude that he was denied his due process rights. Adverse decision affirmed.

CASENO: 08-11034

DATE: 08/11/2010

DATE: August 11, 2010

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In Re:)	
)	
-----)	ISCR Case No. 08-11034
)	
)	
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 August 5, 2009, 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 that the case be decided on the written record. On May 12, 2010, after considering the record, Administrative Judge Juan J. Rivera denied Applicant's request for a security clearance. Applicant appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raised the following issues on appeal: whether certain of the Judge's findings of fact were supported by substantial record evidence and whether the Judge erred in his application of the pertinent mitigating conditions. Consistent with the following discussion, we affirm the Judge's decision.

The Judge made the following pertinent findings of fact: Applicant is a software engineer for a Defense contractor. He holds a B.S. degree, having graduated from college with honors. Divorced, he remarried in 2008.

Applicant began consuming alcoholic beverages as a teenager. He has consumed alcohol to the point of memory loss and blackouts. In addition, his alcohol use has contributed to criminal conduct. At age 17, while drinking with friends, Applicant stole carpet from a home construction site. He was convicted of larceny, serving nine months in jail and paying restitution.

In 1981 he operated a motorcycle while intoxicated and had a serious accident. He was convicted of DUI and was required to attend meetings of Alcoholics Anonymous (AA). From 1984 until 1991 Applicant abstained from the use of alcohol due to the effect it was having on his life. He underwent treatment for bipolar disorder and alcohol consumption from 1995 until 2004. He received treatment for alcohol dependence from 2005 to 2006.

In 2006 Applicant drank until he was impaired and ran his vehicle off the road. He began walking and was arrested for public intoxication. He was given pretrial diversion and participated in an alcohol rehabilitation program.

In June 2007, he was convicted of DWI. He received a suspended jail sentence, was ordered to pay a fine and court fees, placed on probation, or directed to attend an alcohol rehabilitation program. Additionally, his driver's license was suspended for one year.

The following September, Applicant drank to excess, blacked out, and was arrested for public nudity and public intoxication. Convicted of the latter charge, he was given a suspended jail sentence, ordered to pay a fine and court fees, and placed on probation. He attended an alcohol rehabilitation program from late 2007 until mid 2008. He cooperated fully with the counselors. His diagnosis included alcohol dependence and bipolar disorder.

In 2008 Applicant experienced a relapse into alcohol consumption. He disclosed this fact to his counselors. He successfully completed the treatment program, with a good prognosis. He has been sober since 2008 and participates in AA.

Applicant experienced difficulties in his early life, due to abuse he suffered in foster homes and by adopted parents after he was abandoned by his mother. His AA sponsor considers Applicant to be trustworthy and reliable.

Applicant contends that the Judge erred in some of his findings. Among other things, he denies that he has a history of alcohol abuse or that he has ever had symptoms of bipolar disorder; he states that he has been abstinent from alcohol since 2007 rather than the Judge's finding of 2008; he disagrees with the Judge's finding that his alcohol consumption contributed to criminal activity; and he takes issue with the Judge's finding that his return to drinking in 1991 after seven years abstinence was due to an inability to control his impulses.

After reviewing the record, the Board concludes that the Judge's material findings are based on substantial evidence, or constitute reasonable characterizations or inferences that could be drawn from the record. Applicant has not identified any harmful error likely to change the outcome of the case. Considering the record evidence as a whole, the Judge's material findings of security concern are sustainable. *See, e.g.*, ISCR Case No. 08-11564 at 2 (App. Bd. Jun. 21, 2009).

Applicant states, "[d]ue to my inability to retain counsel . . . I have been denied proper legal representation throughout this entire process." Applicant Brief at 2. We construe this as a claim that he did not receive due process. However, the record demonstrates that Applicant was provided a copy of the Directive and advised of his right to submit written matters in mitigation and extenuation, as well as his right to be represented by counsel. Letter to Applicant, Oct. 26, 2009; File of Relevant Material (FORM) at 8-9. Applicant submitted a response to the FORM in which he addressed what he considered to be pertinent mitigating conditions. There is no basis to conclude that Applicant was denied his due process rights.

Applicant contends that the Judge did not consider record evidence, such as his favorable psychological evaluation. However, a Judge is presumed to have considered all of the evidence in the record. *See* ISCR Case No. 09-05830 at 2 (App. Bd. Jun. 25, 2010). In this case, the Judge discussed Applicant's having availed himself of professional help and his good prognosis, among other things. However, he also explained why he concluded that Applicant's evidence was not sufficient to mitigate the Government's security concerns. He stated that:

In the past, Applicant stopped drinking several times for long periods after alcohol rehabilitation treatment and medication. He . . . resumed his alcohol consumption which led to additional misconduct. Not enough time has passed since his last relapse to justify a finding that his alcohol-related behavior is not likely to recur. Decision at 7.

Applicant's brief does not rebut the presumption that the Judge considered the entire record. Neither does it demonstrate that the Judge weighed the evidence in the record in an arbitrary or capricious manner. *See, e.g.*, ISCR Case No. 06-21819 at 2 (App. Bd. Aug. 13, 2009).

Applicant claims that the Judge demonstrated an unfair bias against him by repeating what Department Counsel said and disregarding any part of Applicant's evidence containing information that was contrary to the representations of Department Counsel. Applicant's claim of bias lacks specificity and therefore prevents the Board from meaningfully evaluating this claim. Moreover, there is a rebuttable presumption that a Judge is impartial and unbiased, and a party seeking to overcome that presumption has a heavy burden of persuasion. *See, e.g.*, ISCR Case No. 07-02253 at 3 (App. Bd. Mar. 28, 2008); ISCR Case No. 02-08032 at 4 (App. Bd. May 14, 2004). Applicant has not overcome the presumption in this case.

After reviewing the record, the Board concludes 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 adverse decision is sustainable on this record. "The general standard is that a clearance may be granted only when 'clearly consistent with the interests of the national security.'" *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).

Order

The Judge's adverse security clearance decision is AFFIRMED.

Signed: Jeffery D. Billett
Jeffrey D. Billett
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