

KEYWORD: Guideline J; Guideline G; Guideline G

DIGEST: Disposition of a criminal case in a favorable or somewhat favorable fashion does not preclude a Judge from finding that the applicant engaged in the underlying conduct. Adverse decision affirmed.

CASENO: 10-05039.a1

DATE: 10/17/2011

DATE: October 17, 2011

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In Re:)	
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-----)	ISCR Case No. 10-05039
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Applicant for Security Clearance)	
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APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

Ronald C. Sykstus, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On December 7, 2010, DOHA issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline J (Criminal Conduct), Guideline D (Sexual Behavior), and Guideline G (Alcohol Consumption) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On July 28, 2011, after the hearing, Administrative Judge Thomas M. Crean 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 the Judge’s decision ran contrary to the greater weight of the record evidence and whether the Judge’s adverse security clearance decision was arbitrary, capricious, or contrary to law. Consistent with the following, we affirm the Judge’s decision.

The Judge made the following pertinent findings of fact: Applicant is an electrical and optical engineer. He holds bachelor’s and master’s degrees in engineering. He also has a master’s degree in business administration. While in college, he would consume five to ten drinks containing vodka about one night during weekends. He did not typically drink during the week because he did not want to impair his academic work. He currently is general manager of a local restaurant. He is also a “business development specialist” for a university. Decision at 3. This position requires him to have a security clearance.

In 2006 Applicant began working for a Defense contractor, receiving a security clearance in 2007. However, his access to classified information was challenged in 2009, due to an incident that occurred while he was on a business trip in another state. Applicant had been staying in a condo during the trip. At the trip’s conclusion, after he had completed his assigned duties, he consumed six or seven beers and five or six drinks containing vodka, over a three-hour period. He sat on the deck of the condo. A family of three—husband, wife, and five-year-old daughter—were on the deck immediately adjacent to Applicant. The parents subsequently reported to the police that Applicant had exposed himself to them and to their daughter. When he did so, they went into their condo but noticed Applicant looking in at them through a window.¹

Authorities charged Applicant with indecent exposure to a person under 16. He pled *nolo contendere* to the lesser offense of indecent exposure. The court sentenced him to probation and ordered him to undergo drug, alcohol, and psychological evaluation and treatment if necessary. He does not have to register as a sex offender.

¹See Government Exhibit (GE) 4, Sheriff’s Report, dated June 24, 2009. This document contains affidavits by the husband and wife, as well as a summary by the reporting officer. The summary states that the three family members noticed Applicant expose himself while standing on an adjoining deck. When they went inside to report the incident, the wife “noticed the man peeking around the corner into the windows as they called the Sheriff’s Office. While they were waiting for law enforcement to arrive, [husband and wife] noticed the man walk by their patio and stop[.] He looked in the window and was staring at [wife] and the five year old daughter. [Wife] then closed the blinds so the man would go away.”

An alcohol abuse evaluation concluded that he did not have an alcohol-related problem, though it did recommend that Applicant take an “alcohol-awareness” class, which he did. His psychological evaluation recommended no further treatment, though the psychologist stated that Applicant “would consistently rank in the mild risk category, particularly if he is alcohol free or at least mindful of his use of an intoxicant for any reason.” Decision at 4. Applicant has eased off on his use of alcohol since the incident. He now consumes five to eight drinks a month, though he continued drinking heavily following the incident in question, until April 2010.

Friends and co-workers believe that Applicant is trustworthy, moderate in his consumption of alcohol, and a good employee. A fellow employee who had been with Applicant on the trip in question stated at the hearing that the allegations were not believable.

In his analysis, the Judge noted that Applicant’s security significant conduct was related to his consumption of alcohol. However, Applicant was continuing to drink, sometimes to excess, at the close of the record. “[T]here is nothing in the record to establish a pattern of responsible use of alcohol.” Decision at 8. He stated that the circumstances did not preclude a recurrence of the security significant conduct.

In the whole-person analysis the Judge stated:

Applicant drank to excess and exposed his genitals in the presence of a five year old girl resulting in a criminal conviction for indecent exposure. His consumption of alcohol was reckless and irresponsible and showed poor judgment and a failure to control impulses. The failure to control impulses led to the inappropriate sexual behavior and criminal conviction. His continued consumption of alcohol could again lead to a failure to control his impulses. This raises questions concerning his judgment, reliability, and trustworthiness. Decision at 9.

Applicant contends that the Judge did not properly weigh the record evidence. He calls attention to Applicant’s testimony denying guilt and to other evidence that he believes to be exculpatory. He contends that the evidence against Applicant, particularly affidavits prepared by the husband and wife witnesses, were not consistent or believable. He also notes Applicant’s good academic and work record and the positive opinions of his character witnesses. We have examined the affidavits, in light of the record as a whole. They are detailed, internally consistent, and, on the whole, consistent with each other. The inconsistencies cited by Applicant are not so substantial as to undermine the Judge’s weighing of the record evidence. Applicant’s brief is not sufficient to demonstrate that the Judge weighed the evidence in a manner that is arbitrary, capricious, or contrary to law.

Applicant also contends that evidence of his plea of *nolo contendere* to a lesser offense suggests that he is factually innocent. He argues that, if he had been guilty, prosecutors would have proved up the greater offense charged. However, prosecutors might agree to a defendant’s plea to a lesser offense for any number of reasons other than the defendant’s factual innocence. Disposition of a criminal case that is in some way favorable to an applicant, such as dropped charges or an

acquittal, does not preclude a Judge from finding that the applicant engaged in the underlying conduct. *See, e.g.*, ISCR Case No. 08-02299 at 4 (App. Bd. Nov. 12, 2010). Additionally, Applicant made inconsistent statements himself concerning the incident² and has provided no possible motivation for the witnesses to have fabricated the evidence against him. To the extent that Applicant is challenging the factual sufficiency of the Judge's findings, the record demonstrates that the Judge's material findings of security concern are supported by substantial record evidence. *See, e.g.*, ISCR Case No. 09-05399 at 3 (App. Bd. Jan. 11, 2011).

Applicant states that, in the alternative to an outright reversal of the Judge's decision, he "would be amenable to a three year probationary period where he would agree not to contest any security clearance revocation during the probationary period for any reason" in order to demonstrate his security worthiness. Applicant Brief at 5. The Appeal Board has no authority to grant a conditional or probationary clearance. *See, e.g.*, ISCR Case No. 08-04492 at 3 (App. Bd. May 20, 2011).

The record supports a conclusion 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). *See also* Directive, Enclosure 2 ¶ 2(b): "Any doubt concerning personnel being considered for access to classified information will be resolved in favor of the national security."

Order

The Judge's adverse security clearance decision is AFFIRMED.

Signed: Jeffrey D. Billett _____

Jeffrey D. Billett
Administrative Judge
Member, Appeal Board

²GE 4 cites two instances in which Applicant made inconsistent statements to the investigating officers. One instance concerned the possible reasons for Applicant's having experienced a sexual arousal. The other instance concerned Applicant's conduct immediately following the incident. He initially corroborated the family's statements that he had looked through their window at them after they went inside. Later on in the interview, however, he advised that he had immediately gone inside his own condo.

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

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