KEYWORD: Guideline G; Guideline E; Guideline F

DIGEST: The Judge's material findings were supported by substantial record evidence. The standard applicable to DOHA adjudications is whether it is clearly consistent with national security for Applicant to have a clearance. Applicant failed to rebut the presumption that the Judge considered all of the evidence. Adverse decision affirmed.

CASE NO: 11-02311.a1

DATE: 11/26/2012

DATE: November 26, 2012

In Re:	)	
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Applicant for Security Clearance	)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT
James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT
Joseph R. Price, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On April 11, 2012, DOHA issued a statement of reasons (SOR) advising Applicant of the basis for that decision–security concerns raised under Guideline G (Alcohol Consumption), Guideline E (Personal Conduct), and Guideline F (Financial Considerations) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On August 30, 2012, after the hearing, Administrative Judge LeRoy F. Foreman 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 findings were supported by substantial evidence; whether the Judge applied the wrong standard to the Guideline G concerns; whether the Judge considered all of the evidence; and whether the Judge's adverse decision was arbitrary, capricious, or contrary to law. Consistent with the following, we affirm the Judge's decision.

The Judge made the following findings of fact pertinent to the issues raised on appeal: In 1997, Applicant was convicted of public drunkenness. Later that year he was convicted of driving while intoxicated. From January 2006 until September 2008, Applicant voluntarily received counseling for alcohol and marital problems.[1] He was discharged with a diagnosis of alcohol dependence and major depressive disorder, in full remission. In August 2009, Applicant was charged with DUI. Convicted of impaired driving, he was required to attend an alcohol safety awareness (ASAP) program, pay court costs, and perform community service. He successfully completed these requirements.

Applicant continues to consume alcohol weekly, and to the point of intoxication on a monthly basis. He testified that his answers to DOHA interrogatories to that effect were "fairly accurate," but that his drinking to intoxication was becoming less frequent and that he could not recall when it last occurred.[2] Decision at 4. Applicant does not believe that he is alcohol dependent.[3] Applicant's security clearance application (SCA) inquired whether, within the previous seven years, he had received counseling or treatment for the use of alcohol. Applicant disclosed his court-ordered ASAP counseling but did not mention the counseling he received from January 2006 until September 2008.

Applicant and his wife divorced in 2008. At the time of their separation, Applicant was making about $90,000 a year. He had spousal and child support obligations from the divorce, in the amount of $3,000 a month. These obligations terminated in 2009. Applicant had two credit cards, one of which had a limit of $34,200, which he had exceeded. He negotiated a reduction in his minimum payment. Applicant filed for Chapter 7 bankruptcy protection and was discharged in 2011. His credit card debts were covered by this discharge. As of the close of the record, Applicant was making about $110,000 a year. He is current with his financial obligations.

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[1]In 2005, Applicant had been charged with assault on a family member. He had also resigned from a job after having been found to have committed misconduct in the workplace. The Judge found in Applicant's favor regarding SOR allegations based on these matters.

[2]The Judge's finding on this point cited to Tr. at 101: "Q: You said in your interrogatory responses . . . occasionally, two to four beers . . . [I]s that two to four beers a week? . . . A: It–it–it can be. I don't–yeah. It's not–it's –that–that is an accurate statement on the entire–you said it. I can't say the word. That is accurate. But no, it's not daily. It's–sometimes it's not weekly . Q: Do you ever drink to the point of intoxication? A: I have. Q: Do you know how often that occurs? A: It's become less and less. I don't recall the last time I was."

[3]"I didn't think–I don't today, nor do I, back then, that this determination of alcohol-dependence in full remission . . . was a true depiction." Tr. at 108.

In evaluating the Guideline G concerns, the Judge noted evidence that Applicant continues to consume alcohol, sometimes to the point of intoxication. Because of this evidence, the Judge concluded that Applicant had not established the three mitigating conditions possibly raised by his circumstances. The Judge concluded that Applicant's having failed to disclose his earlier alcohol counseling was deliberate, citing to record evidence that Applicant had received treatment for alcohol abuse during this counseling. In the whole-person analysis, the Judge stated that Applicant's testimony that the counseling had been primarily related to non-alcohol matters was not convincing. Regarding Guideline F, the Judge stated that Applicant had provided only minimal evidence concerning how he accumulated substantial credit card debt and about his financial history in general. The Judge concluded that Applicant had not provided enough information to establish any of the Guideline F mitigating conditions.

Applicant challenges the Judge's comment that his testimony about his drinking was vague. He contends that his testimony concerning his drinking was not vague, and that the Judge erred in concluding otherwise The sentence in question is found in the Analysis: "He admitted in response to DOHA interrogatories that he had become intoxicated around July 2011. At the hearing, he was vague about his current drinking habits, admitting that his estimate of drinking to intoxication every other month was 'fairly accurate' but testifying that he could not remember when it last occurred." Decision at 8. Given the Judge's finding about Applicant's current drinking, summarized above, and the record evidence upon which it was based, quoted in Note 2 *supra*, we find no error in the challenged sentence. This sentence is a fair characterization of Applicant's presentation. The Judge's material findings of security concern are supported by substantial evidence, or constitute reasonable characterizations or inferences that could be drawn from the evidence. *See, e.g.,* ISCR Case No. 11-04287 at 3 (App. Bd. Sep. 11, 2012).

Applicant contends that the Judge applied the wrong standard in his analysis of the Guideline G security concerns raised by the SOR. As stated above, the Judge relied in large measure upon evidence of Applicant's continued drinking, sometimes to intoxication, despite his history of alcohol-related offenses. Applicant contends that "drinking to intoxication" is not the standard proper to Guideline G. Rather, he argues that the proper standard is found in Directive, Enclosure 2 ¶ 21: "Excessive alcohol consumption often leads to the exercise of questionable judgement . . ." He contends that the evidence does not support a conclusion that his consumption of alcohol is excessive. He argues that the Judge should have found his evidence sufficient to establish mitigation.

The standard applicable to DOHA adjudications is that enunciated in *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988): "The general standard is that a clearance may be granted only when 'clearly consistent with the interests of the national security.'" There is no different standard applicable to Guideline G or to any of the other guidelines. The language quoted by Applicant is not a standard, in the sense of *Egan*. Rather, it is a concise statement of explanation as to why alcohol consumption can raise doubt as to an applicant's fitness for a clearance. What renders alcohol consumption excessive depends upon the circumstances of an individual case. *See* Directive, Enclosure 2 ¶ 2(a) for a discussion of the whole-person concept. Moreover, the Judge's reference to Applicant's drinking to intoxication was not the enunciation of a standard but a

statement of the evidence, one supported by the record. Under the facts of this case, evidence of Applicant's alcohol-related convictions (one of which was after he was discharged from his treatment program), his history of alcohol abuse, his diagnoses of alcohol dependence, and his continued drinking to intoxication despite that diagnosis support the Judge's conclusion that Applicant had failed to meet his burden of persuasion as to mitigation in light of the *Egan* standard.[4] There is no reason to conclude that the Judge did not properly apply that standard in his treatment of Applicant's case.

Applicant contends that the Judge failed to consider all of the record evidence, citing to the testimony of Applicant's security officer. However, Applicant's brief is not sufficient to rebut the presumption that the Judge considered all of the record evidence. *See, e.g.*, ISCR Case No. 10-04136 at 2 (App. Bd. May 1, 2012). Neither has he demonstrated that the Judge mis-weighed the evidence.

The record supports a conclusion that the Judge examined the relevant data and articulated a satisfactory explanation for the decision. The Judge's adverse decision is sustainable on this record. *See Egan*, 484 U.S. at 528, *supra*. *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 decision is **AFFIRMED**.

Signed: Michael Y. Ra'anan
Michael Y. Ra'anan
Administrative Judge
Chairperson, Appeal Board

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

Signed: James E. Moody

[4] *See* ISCR Case No. 11-04287 at 2 (App. Bd. Sep. 11, 2012)(Continued drinking to intoxication after a diagnosis of alcohol dependence undercut the applicant's efforts to establish mitigation).

James E. Moody
Administrative Judge
Member, Appeal Board