

KEYWORD: Guideline G

DIGEST: The Judge’s material findings of security concern are supported by substantial evidence. A Judge is not required to make an explicit credibility determination. It is not inconsistent for a Judge to find an applicant credible yet nevertheless conclude that he had not met his burden of persuasion as to mitigation. Adverse decision affirmed.

CASE NO: 11-04287.a1

DATE: 09/11/2012

DATE: September 11, 2012

In Re:)	
)	
-----)	ISCR Case No. 11-04287
)	
Applicant for Security Clearance)	
)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

Richard L. Morris, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On March 5, 2012, 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 June 26, 2012, after the hearing, Administrative Judge Francisco Mendez 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 erred in his application of the mitigating conditions and whether the Judge's whole-person analysis was erroneous. Consistent with the following, we affirm.

The Judge made the following pertinent findings of fact: Applicant served in the U.S. Navy from 1992 until 2007. He was first granted a clearance in 1997 and maintained one until his discharge from active duty.

Applicant began drinking alcohol in his early teens and had several alcohol-related incidents before joining the Navy, such as shoplifting beer, driving while impaired, and underage possession. He was sentenced to a 14 week "adolescent chemical user" course as a consequence of the shoplifting.

Applicant's duty performance while in the Navy was "exemplary." Decision at 2. However, he had some alcohol-related infractions during his service. He was arrested for, and convicted of, DUI, subsequently attending outpatient alcohol counseling from the Navy. He was diagnosed as alcohol dependent.

Even so, he continued to drink alcohol. While overseas, he got into an altercation with a fellow sailor after having consumed alcohol. He received non-judicial punishment and was required to attend inpatient alcohol treatment. He completed the program successfully, receiving a favorable prognosis along with advice to abstain from future alcohol consumption.

However, he began drinking again and consumed alcohol in an overseas location in which such conduct was prohibited. He received non-judicial punishment and was subsequently discharged from the Navy with a general discharge under honorable conditions "for a pattern of alcohol-related misconduct." *Id.* at 3.

After his discharge Applicant began working for his current employer. His supervisor finds him to be trustworthy. Applicant enjoys an excellent reputation for his duty performance. Applicant's wife is a military officer who holds a bachelor's degree in counseling. She describes Applicant as trustworthy and a dedicated father. She says that she has seen him drunk two or three times during the last six months. She defined drunk as "more than four or six beers, four or six drinks." *Id.* at 4.

Applicant has admitted to consuming alcohol to the point of intoxication two to four times a month. During a security clearance interview, he said that he consumed four to six beers and two to three shots twice a week on weekends. He also said that he will go out on his boat about once a month and have ten beers and five shots. At DOHA's request a clinical social worker evaluated Applicant, diagnosing him with "alcohol abuse." *Id.* At the hearing, Applicant testified that he drinks responsibly now, does not drink to the point at which he loses control, and stays away from situations that could lead to trouble. The Judge characterized this testimony as an attempt to "backtrack" from Applicant's previous admissions as to the extent of his alcohol consumption. *Id.*

In the Analysis, the Judge noted that Applicant's last alcohol-related incident occurred five years ago. However, he also noted Applicant's long history of alcohol abuse, his continued consumption of alcohol after having been diagnosed as alcohol dependent, and evidence that Applicant's military career was cut short due to his problems with drinking. He stated that Applicant was not currently participating in a treatment program or in Alcoholics Anonymous, and he concluded that Applicant "will not or cannot stop or moderate his use of alcohol, even when his career or clearance is at stake." *Id.* at 7.

Applicant contends that the Judge erred in finding that he was discharged from the Navy for a pattern of alcohol-related misconduct. He states that there is no such type of discharge and that Applicant was, in fact, discharged for minor disciplinary infractions. However, Applicant's response to the SOR and record evidence, such as his DD Form 214, Certificate of Release or Discharge From Active Duty, stated that Applicant was discharged for a "pattern of misconduct." Moreover, the record is replete with evidence that his misconduct was related to alcohol. The Judge was not citing the regulatory provision for Applicant's discharge; rather, he was describing the factual reasons for it. The Judge's material findings of security concern are based on substantial record evidence, or constitute reasonable characterizations or inferences that could be drawn from the evidence. *See, e.g.*, ISCR Case No. 11-00970 at 2 (App. Bd. Feb. 28, 2012).

Applicant cites to favorable evidence, such as his (and his wife's) testimony about his current drinking habits. He believes that the Judge did not consider this evidence or that he mis-weighted it. However, the Judge made findings on this evidence and discussed it in the Analysis. Applicant has failed to rebut the presumption that the Judge considered all of the record evidence. Neither has he demonstrated that the Judge mis-weighted the evidence. *See, e.g.*, ISCR Case No. 09-06775 at 3 (App. Bd. Aug. 30, 2011). Applicant also cites to his having held a clearance while in the Navy without incident or concern. This was evidence that the Judge was required to consider, along with all the other evidence in the record. However, prior favorable adjudications or a good security record are not dispositive of an applicant's security concerns. In this case, the Judge reasonably explained why Applicant's long history of security significant alcohol consumption and misconduct outweighed the positive aspects of the record. *See, e.g.*, ISCR Case No. 11-02087 at 3 (App. Bd. Mar. 20, 2012).

Applicant states that the Judge did not make a determination that Applicant was lacking in credibility. He argues that, as a consequence, the Judge should have extended more weight to Applicant's testimony and to that of his other witnesses to the effect that his drinking is under control and that he is trustworthy. However, the Directive does not require a Judge to make an explicit credibility determination. It is not inconsistent for a Judge to consider an applicant's presentation at the hearing to be believable as far as it goes, but nevertheless to find the presentation insufficient to meet the applicant's burden of persuasion as to mitigation. *See* ISCR Case No. 11-02087, *supra*, at 2. Moreover, the Judge's comment that Applicant's testimony appeared to backtrack from previous statements about his alcohol use implies a conclusion that the testimony was at least somewhat lacking in credibility. The Judge's detailed findings, considered alongside Applicant's admissions to the SOR, support his conclusion that Applicant had not demonstrated mitigation.

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,’” both as to the mitigating conditions and the whole-person factors. *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: Michael Y. Ra’anan
Michael Y. Ra’anan
Administrative Judge
Chairperson, 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