

KEYWORD: Guideline E; Guideline G; Guideline D; Guideline J

DIGEST: The Judge did not treat the Guideline E allegations as mere redundancies but, rather, analyzed them in view of the concerns pertinent to that Guideline. The Board declined to require strict scrutiny of an applicant’s dismissal from the military. The Board finds no reason to disturb the Judge’s treatment of the mitigating conditions. Favorable decision affirmed.

CASE NO: 11-12202.a1

DATE: 06/23/2014

DATE: June 23, 2014

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In Re:)	
-----)	ISCR Case No. 11-12202
)	
Applicant for Security Clearance)	
)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

Corey R. Williams, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On May 29, 2013, DoD issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline E (Personal Conduct), Guideline G (Alcohol Consumption), Guideline D (Sexual Behavior), and Guideline J (Criminal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On February 21, 2014, after the hearing, Defense Office of Hearings and Appeals (DOHA)

Administrative Judge Martin H. Mogul granted Applicant's request for a security clearance. Department Counsel appealed, pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.¹

Department Counsel raises the following issues on appeal: (1) whether the Judge failed to consider an important aspect of the case, and (2) whether the Judge improperly applied various mitigating conditions. For the following reasons, the Board affirms the Judge's decision.

The Judge found: Applicant is 46 years old. In 2005, he was a warrant officer in the Army. He was brought to trial by general court-martial. Under various articles of the Uniform Code of Military Justice, he was charged with rape, fraternizing with enlisted persons, wrongful sex with a person not his spouse, wrongful indecent acts, violating a lawful general order by consuming alcohol, mixing drinks at a party for enlisted soldiers, and having sex with an enlisted soldier. He pled not guilty to the rape and was found not guilty. He pled guilty to the other specifications and charges and was found guilty of same. On April 7, 2006, Applicant was sentenced to dismissal from the military, and to confinement for two years. Applicant was released after serving 10 months of confinement. The early release was a result of a clemency letter he had received from his supervisor, as well as a result of meeting other release guidelines, including having possible employment available when he was let out, and attending all alcohol and sexual behavior courses while he was incarcerated. Applicant was released from parole in January 2008.

The court-martial charges involved a party thrown by Applicant and a fellow soldier, a lieutenant, in the ninth month of Applicant's overseas deployment. Prior to the party, Applicant debated with himself as to whether he should get involved with the party because of his awareness of a general order prohibiting alcohol consumption in a combat zone. Against his better judgment, he agreed to help put on the party. During the party, during which alcohol was served, Applicant consumed six or seven vodka and Red Bull drinks. He spent a good part of the evening speaking to an enlisted woman. As the party was breaking up, the lieutenant gave Applicant some indication that the woman was interested in him. Applicant and the woman began "making out" and then attempted to have intercourse, although, because of his intoxicated state, Applicant did not know if any sexual activity actually occurred. There was no question in his mind, however, that the enlisted woman was a willing participant with him. Applicant claimed that the woman had a history of drug and alcohol blackouts, and that she had blacked out on the date of this incident. Applicant and the woman were just laying together on the bed, and then he fell asleep and passed out. When he awoke, the woman was no longer in the bed with him, and he went back to his barracks.

In 1990 Applicant was arrested and charged with DWI. He was fined, received alcohol counseling, license restriction, and was ordered to serve one year probation. In 1989, Applicant was charged with public intoxication. Applicant testified that he had only consumed one mixed drink that day, and the charges were ultimately dismissed. In 1988 Applicant was arrested for furnishing alcohol to minors. He and his college roommates threw a party for some friends from a different

¹The Judge made formal findings in favor of Applicant under Guideline D and the underlying Guideline D allegation that was cross-referenced under Guideline E. The Judge also made formal findings in favor of Applicant under Guidelines J and G. Those findings are not at issue on appeal.

college and the party got out of hand. The case was processed as a deferred prosecution. Applicant had no further arrests during the next six months, and the charge was dismissed.

Applicant was evaluated in 1993 by an Army Ph.D. for a condition diagnosed, in part, as alcohol abuse. Applicant has not consumed any alcohol since April, 2005, and intends never to consume alcohol again. He attended addictions counseling for eleven months in 2007 after being referred by federal probation. During that time, he responded well to the individual counseling, attended AA once a week, and maintained abstinence and a commitment to stay sober.

The record contains 23 extremely positive character letters submitted by an impressive group of individuals. All of these letters spoke in very laudatory terms as they described Applicant. The record also contains evidence of 21 medals, ribbons, and awards Applicant has earned, 10 certificates, and other awards Applicant has received.

The Judge reached the following conclusions: Regarding Guideline E, because so much time has passed since Applicant's conduct, almost nine years for the Army incident, and over 14 years for the other three alcohol related incidents, Mitigating Condition ¶ 17(c)² is applicable. Mitigating Condition ¶ 17(d)³ is applicable since Applicant has acknowledged the behavior and obtained counseling to change the behavior. Applicant has also taken other positive steps to insure that the behavior is unlikely to recur. Under Guideline G, Mitigating Conditions ¶ 23(a)⁴ and ¶ 23(b)⁵ are applicable because Applicant's last alcohol related incident occurred in 2005, and before that the second most recent alcohol related event happened in 1990. Mitigating Condition ¶ 23(d)⁶ applies in this case because of Applicant's long abstinence and successful completion of outpatient

²“[T]he offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment[.]”

³“[T]he individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that caused untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur[.]”

⁴“[S]o much time has passed, or the behavior was so infrequent, or it happened under such unusual circumstances that it is unlikely to recur or does not cast doubt on the individual's current reliability, trustworthiness, or good judgment[.]”

⁵“[T]he individual acknowledges his or her alcoholism or issues of alcohol abuse, provides evidence of actions taken to overcome this problem, and has established a pattern of abstinence (if alcohol dependent) or responsible use (if alcohol abuser)[.]”

⁶“[T]he individual has successfully completed inpatient r outpatient counseling or rehabilitation along with any required aftercare, has demonstrated a clear and established pattern of modified consumption or abstinence in accordance with treatment recommendations, such as participation in meetings of Alcohols Anonymous or a similar organization and has received a favorable prognosis by a duly qualified medical professional or a licensed clinical social worker who is a staff member of a recognized alcohol treatment program.”

counseling. Regarding Guideline D, Mitigating Condition ¶ 14(b)⁷ applies. Under Guideline J, because of the significant amount of time that has elapsed since the criminal conduct and evidence of successful rehabilitation based on the passage of time without recurrence and a sincere showing of remorse and a positive employment record, successful rehabilitation has been established. Mitigating Conditions ¶ 32(a)⁸ and ¶ 32(d)⁹ are applicable. Under the whole-person concept, all the evidence in mitigation removes any significant doubts as to Applicant's eligibility and suitability for a security clearance.

Department Counsel takes issue with the Judge's analysis under Guideline E. Emphasizing the independent security considerations involving judgment and trustworthiness inherent in a proper consideration of that Guideline, Department Counsel asserts that the Judge ignored the breach of trust element involved in Applicant's commission of offenses while serving in the military. Department Counsel argues that the Judge failed to consider Applicant's unwillingness to comply with rules and regulations as evidenced by his military offenses and also failed to consider the significance of Applicant's dismissal from the service, both important aspects of the case. Department Counsel states that the Judge treated Guideline E as if it were a mere redundancy of the Guideline D, G, and J allegations. After a review of the evidence and the Judge's decision, we conclude that there was no harmful error on his part.

Although the Judge's analysis of Applicant's lack of judgment and trustworthiness under Guideline E may not have been as detailed as Department Counsel would have liked, the Judge does specifically mention the questionable judgment, unreliability, and unwillingness to comply with rules and regulations components of the Guideline in his analysis. There is no presumption of error below. *See, e.g.*, ISCR Case No. 00-0339 at 3 (App. Bd. Mar. 22, 2001). The Board concludes that Department Counsel has not established that the Judge treated Guideline E as a mere redundancy of the security considerations contained in Guidelines D, G, and J. Department Counsel also takes issue with the Judge's failure to mention specifically Applicant's dismissal from the service in his analysis. A judge is not required to discuss each and every piece of evidence in his decision. *See, e.g.*, ISCR Case No. 05-03250 at 4 (App. Bd. Apr. 6, 2007). Also, decisions of administrative judges are not held to a standard of perfection. *See* ISCR Case No. 04-08749 at 2 (App. Bd. Jul. 23, 2007). Having included Applicant's receipt of a dismissal from the Army in his findings of fact, it would have been useful for the Judge to mention it in his analysis. However, the sentence of the court-martial was a *consequence* of Applicant's actions, and the failure to mention it in his analysis does not necessarily detract from the Judge's evaluation of the acts themselves, nor does it follow that the failure to

⁷“[T]he sexual behavior happened so long ago, so infrequently, or under such unusual circumstances, that it is unlikely to recur and does not cast doubt on the individual's current reliability, trustworthiness, or good judgment[.]”

⁸“[S]o much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment[.]”

⁹“[T]here is evidence of successful rehabilitation; including but not limited to the passage of time without recurrence of criminal activity, remorse or restitution, job training or higher education, good employment record, or constructive community involvement[.]”

mention the court-martial sentence indicates that the Judge did not properly consider the case under Guideline E. The Board concludes that, under the facts of this case, the Judge's failure to mention Applicant's dismissal in his analysis was not harmful error.

Department Counsel argues that in cases involving applicants whose military service is tainted with a dismissal or dishonorable discharge, especially when the charges involve violation of military orders and regulations, applicants must be held to a very heavy burden when it comes to proving mitigation. He then analogizes to cases involving security violations. In essence, Department Counsel is asking the Board to rule that in the case before us, and all factually similar cases, a standard of heightened scrutiny for mitigation should be employed. On the facts of this case, the Board declines to do so.

Department Counsel's attempt to compare this case to security violation cases is misguided. Security violation cases are different because applicants in those cases are engaged directly in behavior that all of the other Adjudicative Guidelines are designed to *predict*. The prediction in non-security violation cases is made by identifying and then evaluating behaviors or circumstances that have an articulable nexus to the ability or willingness to safeguard classified information. The Applicant's case falls into this category. On the record before us, there is no reason to require a heightened standard for mitigation.¹⁰

Department Counsel also makes reference to the Smith Amendment (10 U.S.C. § 986) and the policy it expressed by prohibiting an individual who had been given a dishonorable discharge or dismissal from holding security clearance. This prohibition was repealed by 50 U.S.C. § 435(c), commonly known as the Bond Amendment, which nevertheless continued the prohibition for higher levels of access not involving collateral clearances. Department Counsel argues that, although it is no longer the policy of the Government to apply the prohibition to collateral clearances, the sentiments expressed in the Smith and Bond amendments provide a "benchmark for analysis." Therefore, mitigation evidence should be reviewed under the higher "very heavy burden" standard in cases involving dishonorable discharges or dismissals from the armed forces. Department Counsel's argument is not persuasive. To the extent that there might be any remaining persuasive authority to be derived from the Smith Act, it would be operative in the context of the Guideline that was affected by the legislation, namely Guideline J (Criminal Conduct). In this case, the favorable findings made under Guideline J are not appealed. The Board is not persuaded that there is wisdom in applying the policy behind a repealed law to a Guideline that was never governed by that law.

Portions of Department Counsel's brief are couched in conclusive language and at least suggest that a *per se* rule against granting a clearance should be employed in this case. In essence, Department Counsel seems to be arguing that the Judge misapplied the Guideline E mitigating conditions because Applicant's actions while a military member, together with his dismissal from the

¹⁰Department Counsel correctly points out another category of cases where a "very heavy burden" standard is used- namely Guideline B cases where an applicant has family members in a country hostile to the U.S. Again, on the facts of this case, the Board declines to require a heightened standard.

service, preclude any favorable application of the mitigating conditions. This argument does not satisfy Department Counsel's burden of establishing error. The Board is not dissuaded from the basic proposition that each case should be evaluated on its own merits. Furthermore, after a review of the record, the Board concludes that the Judge's overall favorable decision is supported by substantial evidence.

There is significant evidence in mitigation in this case. Applicant's transgressions while in the military arise out of a single incident. That incident resulted in large part from Applicant's use of alcohol, which had been a problem for him in the past. He did, however, receive professional help for the problem, and he had not experienced trouble with alcohol or the law for nearly nine years at the time of the close of the record. He has pledged a commitment to sobriety. Since his discharge from the military he has forged a successful career and has received high praise from numerous quarters. On this record, the Board concludes that the Judge's application of the mitigating conditions was not erroneous.

The Board does not review a case *de novo*. After reviewing the record, the Board concludes that 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 ultimate favorable security clearance decision is sustainable.

Order

The decision of the Judge is **AFFIRMED**.

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

Signed: Jeffrey D. Billett
Jeffrey D. Billett
Administrative Judge
Member, Appeal Board

Signed: James E. Moody

James E. Moody
Administrative Judge
Member, Appeal Board