

KEYWORD: Guideline G; Guideline E

DIGEST: The Judge's adverse conclusions are supported by such record evidence as Applicant's drinking to the point of blacking out 30 times in a four year period and his driving under the influence of alcohol 17 times. Adverse decision affirmed.

CASENO: 12-05850.a1

DATE: 04/12/2013

DATE: April 12, 2013

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In Re:)	
)	
-----)	ISCR Case No. 12-05850
)	
)	
Applicant for Security Clearance)	
_____)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

Pro se

The Department of Defense (DoD) declined to grant Applicant a security clearance. On August 31, 2012, DoD issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline G (Alcohol Consumption) and Guideline E (Personal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). The case was set for a hearing.¹ On January 31, 2013, after the close of the record, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Marc E. Curry denied Applicant’s request for a security clearance. Applicant appealed, pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raises the following issues on appeal: (1) whether the Judge’s findings of fact and conclusions are sustainable; (2) whether the Judge’s analysis of Guideline G mitigating conditions was in error; and (3) whether the Judge’s whole-person analysis was in error. For the following reasons, the Board affirms the Judge’s unfavorable security clearance decision.

The Judge found: Applicant is 28 years old and began drinking alcohol when he was 17. For the next four years he drank approximately once or twice a week. On four occasions during this period he drank until he blacked out. His drinking increased after 2005. Although he continued to drink once or twice a week, he became intoxicated each time. Between 2007 and 2011, he blacked out from alcohol consumption approximately 30 times. Applicant admitted driving while intoxicated approximately 17 times between 2007 and 2011. Applicant’s alcohol consumption was heaviest in early 2009. During this period, he was getting intoxicated nearly every other day.

On one occasion in early 2010, Applicant took two prescription pain pills with a beer to get high. Later that year, he drank one-fourth to one-third of a bottle of prescription strength cough medicine together with a beer. Applicant has not abused prescription drugs since.

In 2010, a federal agency initiated a security clearance investigation of Applicant. After an interview, Applicant was referred to a psychologist. Applicant met with the psychologist, and he was evaluated and diagnosed with alcohol abuse. After meeting with the psychologist, Applicant decreased his alcohol consumption. Since approximately May 2011, Applicant has maintained a detailed log of his drinking. According to the log, he has consumed alcohol slightly more than every other day, and has consumed five or more drinks on 23 percent of the occasions where he has drunk alcohol. Applicant has not undergone any substance abuse treatment or attended counseling. Applicant sees himself as an analytical person who can get a handle on such things himself. While socializing with friends two days before the hearing, Applicant drank six alcoholic beverages over a six-hour period.

In 2012, Applicant completed a sworn affidavit. In it, Applicant stated that he had never been officially diagnosed as abusing alcohol or being alcohol dependent. The psychologist made a diagnosis of alcohol abuse. When asked why he did not include the diagnosis of alcohol abuse on

¹In his answer to the SOR, Applicant requested a decision on the written record. The record is silent as to which party requested a hearing.

the affidavit, Applicant stated that he honestly didn't realize that the diagnosis of the clearance process psychologist counted as an official diagnosis.

The Judge concluded: Given Applicant's history of blackouts (30 times between 2007 and 2011) and his consumption of six alcoholic beverages during an evening two days before his hearing, Applicant is oblivious to the seriousness of his alcohol problem. He has never sought counseling to address it. Under these circumstances, his current alcohol consumption remains too high. His nonchalant attitude regarding both his past and current consumption of alcohol makes him a continued security risk. No mitigating factors apply. Applicant was evaluated and diagnosed by a psychologist from the agency that was investigating him for a security clearance. Under these circumstances, his contention that he did not know that the diagnosis was official is not credible. Applicant's abuse of prescription medications was not frequent or severe enough to constitute a security concern under the drug involvement or criminal conduct security concerns. However, when considered together with his alcohol abuse, his episodes of drunk driving, and his falsification of the affidavit, it triggers Guideline E concerns. These concerns are not mitigated. An evaluation of the case under the whole-person factors does not merit a favorable conclusion.

Applicant argues that the Judge's conclusion that he is oblivious to the seriousness of his alcohol problem runs counter to the evidence, specifically Applicant's Exhibit A, which is the detailed log Applicant kept beginning in 2011 that charts his alcohol consumption. Applicant's assertion has mixed merit. The keeping of the log establishes that Applicant was not unmindful of his drinking habit, and engaged in a significant degree of self-monitoring of his alcohol consumption. Thus, the Judge's conclusion is inaccurate to the extent it implies that Applicant had no knowledge as to the extent of his actual alcohol use. However, the Judge's conclusion speaks most directly to Applicant's appreciation of the *seriousness* of his alcohol problem. When reviewing a Judge's decision, the Board does not review individual sentences in isolation, but rather considers the Judge's decision in its entirety to determine what findings the Judge made and what conclusions the Judge reached. *See, e.g.*, ISCR Case No. 01-22311 at 4 (App. Bd. Apr. 4, 2003). Central to the Judge's decision is his analysis of the whole of Applicant's alcohol consumption, which includes (i) his drinking to the point of blacking out 30 times in a four-year period, with two of the blackouts occurring while he was driving home; (ii) his driving while under the influence approximately 17 times between 2007 and 2011; (iii) his consumption of alcohol slightly more than every other day since he began keeping the monitoring chart, and his consumption of five or more drinks on 23 percent of the occasions when he has drunk alcohol during the period of the chart; (iv) the conclusion of a psychologist that there was an increased risk that Applicant would continue to engage in high risk behavior in the future; (v) his consumption of six alcoholic beverages during an evening two days before the hearing; and (vi) the fact that Applicant has never sought counseling to address his alcohol consumption. Any error committed by the Judge in concluding that Applicant is oblivious to his alcohol problem does not significantly undercut his larger conclusion that Applicant's history with alcohol presents a security concern. That conclusion is reasonably supported by the record evidence and the Judge's decision when viewed as a whole.

Applicant asserts that the Judge erred by considering portions of the psychologist's evaluation selectively. He notes that the Judge recited the psychologist's conclusion that the risk

that Applicant will engage in behavior indicative of poor judgment, impulsivity, or irresponsibility in the future appears to be high, while failing to mention that, in another sentence in his report, the psychologist stated if Applicant would decrease the amount and frequency of his drinking, the level of risk would decrease. A Judge is not required to discuss each and every piece of record evidence in making a decision. *See, e.g.*, ISCR Case No. 05-03250 at 4 (App. Bd. Apr. 6, 2007). Applicant bases his argument on this point on a premise that he has decreased his drinking to the point where his consumption is no longer a significant risk. The Judge did find that Applicant decreased his alcohol consumption after meeting with the psychologist. However, the Judge also concluded that Applicant's current alcohol consumption remains too high. This conclusion is reasonably supported by the record. Given this conclusion, it was not error for the Judge to cite to the psychologist's report in the manner he did.

Applicant asserts that the Judge erred by finding he deliberately failed to disclose that he had received an official diagnosis of alcohol abuse from the psychologist. He states that he was unaware that the psychologist had provided an "official diagnosis." He states that he did not expect the psychologist to make a clinically objective evaluation that would rise to the level of an "official diagnosis" because the evaluation would err on the side of national security. Applicant challenges the Judge's conclusion that his contention that he did not know that the diagnosis was official is not credible. Applicant's representations concerning his state of mind and his intent when he completed the affidavit in 2012 are relevant and material evidence that the Judge was required to consider. However, those statements were not binding on the Judge; rather, the Judge had to consider Applicant's statements in light of his assessment of his credibility and the record evidence as a whole. *See, e.g.*, ISCR Case No. 01-08565 at 3 (App. Bd. Mar. 7, 2003). As a practical matter, when an applicant denies that he or she engaged in a falsification, proof of the applicant's intent or state of mind is rarely based on direct evidence, but rather often must rely on circumstantial evidence. *See, e.g.*, ISCR Case No. 02-15935 at 6 (App. Bd. Oct. 15, 2003). It is legally permissible for a Judge to make a finding of falsification based on circumstantial evidence of an applicant's intent or state of mind. *See, e.g.*, ISCR Case No. 00-0601 at 2-3 (App. Bd. Sep. 21, 2001).

In this case, Applicant testified that the psychologist was employed by a government agency (AGA) and the interview was conducted in a AGA facility, that he received a copy of the psychologist's report, that he had something in writing from the psychologist indicating that he had been diagnosed with alcohol abuse, that the diagnosis was made in accordance with the DSM-IV, and that the diagnosis and document were delivered to him as part of the psychologist's official duties at AGA.² Given this record evidence, the Board concludes the Judge's finding of falsification reflects a reasonable interpretation of the record evidence that is sustainable.

²Tr. At 64, 66-67.

Applicant argues that Guideline G mitigating conditions ¶23(a)³ and ¶23(b)⁴ should have been applied to mitigate the case in his favor. Applicant claims that his poor behavior with alcohol ended in May 2011, and he has exhibited 22 months of improved behavior. He cites to his steadily declining rate of drinking and mentions his chart, which he states was prepared for the specific purpose of improving his drinking behavior. Applicant's arguments are based on the premise that his current pattern of consumption is not of security significance. The Judge concluded otherwise, and, without specifically discussing the components of the two mitigating conditions in his analysis, elsewhere in his decision cited to record evidence in support of his conclusions and sufficiently articulated his reasons for concluding that Applicant is a continuing security risk.⁵ As the trier of fact, the Judge has to weigh the evidence as a whole and decide whether the favorable evidence outweighs the unfavorable evidence, or *vice versa*. See, e.g., ISCR Case No. 06-10320 at 2 (App. Bd. Nov. 7, 2007). A party's disagreement with the Judge's weighing of the evidence, or an ability to argue for a different interpretation of the evidence, is not sufficient to demonstrate the Judge weighed the evidence or reached conclusions in a manner that is arbitrary, capricious, or contrary to law. See, e.g., ISCR Case No. 06-17409 at 3 (App. Bd. Oct. 12, 2007). Applicant's assertions regarding the Guideline G mitigating conditions essentially argue for an alternate interpretation of the record evidence. They do not demonstrate error on the part of the Judge.

Applicant, in essence, repeats his earlier arguments in his assertions concerning the whole-person concept. The Board concludes that the Judge's analysis under the whole-person concept is sustainable.

The Board does not review a case *de novo*. The favorable evidence cited by Applicant is not sufficient to demonstrate the Judge's decision is arbitrary, capricious, or contrary to law. See, e.g., ISCR Case No. 06-11172 at 3 (App. Bd. Sep. 4, 2007). 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 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). Therefore, the Judge's ultimate unfavorable security clearance decision is sustainable.

³"[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[.]"

⁴"[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 an alcohol abuser)[.]"

⁵While a more detailed analysis of the cited mitigating conditions would have been preferable, the Board concludes, after a consideration of the Judge's decision as a whole, that the Judge reasonably explained why Applicant's drinking pattern remained a security concern. The Board does not review a Judge's decision against a standard of perfection. See, e.g., ISCR Case No. 00-0311 at 2 (App. Bd. Mar. 8, 2001).

Order

The decision of the Judge is AFFIRMED.

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

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

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