KEYWORD: Guideline G; Guideline J

DIGEST: The Judge's deviation from the plain language of the disqualifying condition is not arbitrary and capricious where he explained such deviation rationally and in detail. The Board has declined to set a bright line definition of what constitutes recent conduct. Adverse decision affirmed.

CASENO: 05-02802.a1

DATE:09/10/2007

DATE: September 10, 2007

In Re:	)	
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Applicant for Security Clearance	)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT
Nichole Noel, Esq., Department Counsel

FOR APPLICANT
Spencer M. Hecht, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On December 23, 2005, DOHA issued a statement of reasons advising Applicant of the basis for that decision–security concerns raised under Guideline G (Alcohol Consumption) and

Guideline J (Criminal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On February 16, 2007, after the hearing, Administrative Judge John Grattan Metz, Jr. denied Applicant's request for a security clearance. Applicant filed a timely appeal pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raised the following issues on appeal: whether the Judge's findings support his conclusion as to the application of certain Guideline G disqualifying conditions; whether the Judge erred in failing to mitigate Guideline G security concerns; and whether the Judge's conclusion under Guideline J is arbitrary, capricious, and contrary to law. Finding no harmful error, we affirm.

The Judge made the following pertinent findings of fact: Although Applicant began drinking in high school, "he did not begin to drink seriously until he entered college in 1991."[1] After graduation from college, Applicant drank in bars about twice a week, consuming 4 to 6 beers on each occasion, and then driving home.

Applicant has been arrested three times for DUI. The first time was in 1997, Applicant's blood alcohol content (BAC) being .11. Found guilty of the offense, Applicant was given probation, conditioned on abstaining from alcohol consumption, refraining from driving while consuming alcohol, enrolling in a treatment program, and attending a victim impact panel. After completion of probation Applicant resumed drinking. He testified that he would go out with co workers, consume 4-6 beers in two or two and a half hours, and drive home.

Applicant's second DUI arrest occurred in 2000. He was found asleep behind the wheel of his car with the engine running. Although he failed the field sobriety test (FST), he refused a test for BAC. He was convicted, sentenced to 60 days in jail (suspended) and 18 months probation, requiring abstention from alcohol, refraining from driving after consuming alcohol, completing a 26 week treatment program, and attended Alcoholics Anonymous (AA). In 2000, Applicant completed the treatment program, upon which he was entered into a 12-week aftercare program. Upon completion, the treatment coordinator advised Applicant's probation officer of the following: Applicant's "prognosis is excellent provided he continues regular AA/NA meeting attendance and abstains from all future use of psychoactive substances."[2]

Applicant continued to drink alcohol following successful completion of his probation. In January 2004, he was arrested for a third time fo DUI. Failing the FST, he again refused the BAC. Convicted, Applicant was sentenced to a year in jail (all but 30 days suspended), 2 years supervised probation, requiring completion of an alcohol counseling program and installing an ignition lock on his car.

The following May, Applicant was evaluated by a treatment program. The counselor concluded that Applicant was "guarded" and that he minimized his history of alcohol consumption. The counselor concluded that Applicant was in an early state of alcoholism and recommended a 26 week treatment program. Applicant completed such a program, but his discharge summary described

[1]Decision at 2.

[2]Decision at 3.

him as having been "minimally compliant." The counselor rendered a "diagnostic impression" of "alcohol dependence in denial" and recommended AA attendance and abstinence.[3]

In March 2006 Applicant was again evaluated, this time by a board certified forensic psychiatrist, who testified at the hearing. This expert stated that Applicant satisfied "most of the mitigating conditions and few of the potentially disqualifying conditions as provided in Guideline G . . ."[4] The expert opined that Applicant does not now, nor has he in the past, met the criteria for alcohol dependence, although he has at times in the past met the criteria for alcohol abuse. Applicant denied that he was ever told to abstain from alcohol permanently, only during his periods of probation. However, he acknowledged using alcohol during his last probation period.

The Appeal Board's review of the Judge's findings of facts is limited to determining if they are supported by substantial evidence–"such relevant evidence as a reasonable mind might accept as adequate to support such a conclusion in light of all the contrary evidence in the record." Directive ¶ E3.1.32.1. "This is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's findings from being supported by substantial evidence." *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620-21 (1966). In evaluating the Judge's findings, we are required to give deference to the Judge's credibility determinations. Directive ¶ E3.1.32.1. Applicant has not expressly challenged the accuracy of the Judge's findings, only whether those findings support his conclusions as to the application of certain Guideline G disqualifying and mitigating conditions. Therefore, the findings as such are not an issue in this appeal.

A Judge is required to "examine the relevant data and articulate a satisfactory explanation for" the decision, "including a 'rational connection between the facts found and the choices 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 national security.'" *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). The Appeal Board may reverse the Judge's decision to grant, deny, or revoke a security clearance if it is arbitrary, capricious, or contrary to law. Directive ¶¶ E3.1.32.3 and E3.1.33.3.

"[T]here is a strong presumption against granting a security clearance." *Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9th Cir. 1990), *cert. denied* 499 U.S. 905 (1991). Once the government presents evidence raising security concerns, the burden shifts to the applicant to establish any appropriate mitigating conditions. *See* Directive ¶ E3.1.15. "The application of disqualifying and mitigating conditions and whole person factors does not turn simply on a finding that one or more of them apply to the particular facts of a case. Rather, their application requires the exercise of sound discretion in light of the record evidence as a whole." *See* ISCR Case No. 05-03635 at 3 (App. Bd. Dec. 20, 2006).

[3]Decision at 5.

[4]*Id.*

Applicant asserts that the Judge's formal findings under Guideline J are inconsistent with the analysis contained in the Conclusions section of his decision.[5] We agree. The Judge's decision reads in pertinent part: "Applicant's DUIs involve criminal conduct as well as manifest poor judgement. As long as alcohol appears to be a problem for Applicant, he is still prone to criminal conduct. The two other incidents alleged contain nothing of security significance. I resolve Guideline J against Applicant." However, when listing his formal findings, the Judge appeared to find *for* Applicant on the DUI and disobedience allegations and *against* him only on the Protective Order. These formal findings are clearly at variance with the text of the decision. Reading the Judge's decision as a whole, we conclude that this inconsistency is the result of a typographical error in the formal findings and that the Judge intended to find *for* Applicant on allegations (a) and (b) and *against* Applicant on allegation (c). We further conclude that this error is harmless. *See, e.g.*, ISCR Case No. 04-03795 at (App. Bd. Jan. 25, 2007)(inconsistency between formal findings and decretal paragraph is harmless typographical error); ISCR Case No. 91-1449 at n.2 (App. Bd. Apr. 26, 1993)("While we find the formal findings inconsistent [with the text of the decision], the inconsistency is not such error as requires remand. We read the decision in its entirety to discern the Judge's meaning, and it appears clear that the inconsistencies identified are the result of typographical error in the formal findings.")

We have considered Applicant's other arguments on appeal. He asserts that the evidence does not establish that Applicant has engaged in binge or habitual drinking, nor does it establish that Applicant was ever diagnosed for alcohol abuse or dependence by a credentialed medical professional or by a licensed clinical social worker on the staff of a recognized alcohol treatment program. Therefore, he argues that the Judge erred in concluding that Guideline G disqualifying condition 5[6] applies and that he erred in having "considered, in parts, [disqualifying conditions] 4 and 6."[7]

As to the first issue, we conclude that the phrase "habitual consumption . . . to the point of impaired judgement" is rationally connected with the Judge's findings and the record evidence that Applicant began drinking seriously in college; that after graduation he would drink twice a week at bars and then drive; and that he has been convicted of DUI three times between September 1997 and January 2004, the last occasion being after he had completed his security clearance application. *See Motor Vehicle Mfrs. Ass'n.*, 463 U.S. at 43; *see also* ISCR Case No. 03-22861 at 2-3 (App. Bd. Jun. 2, 2006).

Regarding the second issue, we note that the Judge merely stated that the had considered disqualifying conditions 4 and 6, not that the Government had established its case for them. Furthermore, while it is true that the official who evaluated Applicant in May 2004 is described

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[5]There are three allegations under Guideline J. Allegation (a) concerns a Protective Order issued against Applicant. Allegation (b) concerns Applicant's failure to obey an order by a Peace Officer. Allegation (c) incorporates the same three DUIs alleged under Guideline G.

[6]Directive ¶ E2.A7.1.2.5. ("Habitual or binge consumption of alcohol to the point of impaired judgement...")

[7]Directive ¶¶ E2.A7.1.2.4 ("Evaluation of alcohol abuse or alcohol dependence by a licensed clinical social worker who is a staff member of a recognized alcohol treatment program...") and E2.A7.1.2.6 ("Consumption of alcohol, subsequent to a diagnosis of alcoholism by a credentialed medical professional and following completion of an alcohol rehabilitation program.")

simply as an "addictions counselor," with no reference to licensure or credentials, his assessment is a matter which the Judge could properly consider as part of his whole person analysis. The Judge clearly articulated his awareness of the issue and explained rationally and in detail why he was deviating from the plain language of the Disqualifying Conditions. Decision at n. 22. We conclude that his deviation was neither arbitrary, capricious, nor contrary to law. *See* ISCR Case No. 95-0578 at 6 (App. Bd. Oct.2, 1996).

In any event, we conclude that his application of disqualifying condition 1 is sustainable.[8] Additionally, the record as a whole supports the Judge's conclusion that Applicant had failed to meet his burden of persuasion that the security concerns contained in the SOR have been mitigated.[9] *See, e. g.,* ISCR Case No. 03-15139 (App. Bd. Aug. 5, 2005) (three alcohol related incidents between 1991 and 2003 sufficient to constitute a pattern, thereby negating Guideline G mitigating condition 1); and ISCR Case No. 03-10302 (App. Bd. Feb. 15, 2006) (upholding a Judge's conclusion that Applicant's series of criminal incidents were recent, even though the latest of them occurred approximately five years before the issuance of the SOR. "The Board has declined to set a 'bright line' definition of what constitutes recent conduct. Rather, the Board has indicated the matter requires an Administrative Judge to evaluate the record evidence as a whole and reach a reasonable conclusion as to the recency of an applicant's conduct.") After considering Applicant's brief on appeal, Department Counsel's reply brief, and the record as a whole we conclude that the Judge's adverse security clearance decision is not arbitrary, capricious, or contrary to law.

[8]Directive E2.A7.1.2.1. "Alcohol-related incidents away from work, such as driving while under the influence, fighting, child or spouse abuse, or other criminal incidents related to alcohol use."

[9]Applicant contends that his DUIs do not constitute a pattern nor are they recent. *See* Directive ¶¶ E2.A7.1.3.1, 2. "Applicant failed to mitigate the security concerns. In reaching this conclusion, I have examined the facts of this case under all the mitigating conditions and conclude that none apply . . . Applicant's three DUIs in just over six years constitute a clear pattern of abuse. The problem is recent . . . with the most recent DUI just over two years ago and the most recent intoxication less than a year ago." Decision at 7.

Order

The Judge's adverse security clearance decision is AFFIRMED.

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

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

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