KEYWORD: Guideline G

DIGEST: The Judge's opinion that Applicant has a made a decisive change in favor of sobriety is based for the most part on promises about the future, prompted by receipt of the SOR. Promises to take action in th future, however, sincere, are not a substitute for a documented track record of remedial action. The Judge's favorable decision was without adequate evidentiary basis and without due consideration of contrary record evidence. Favorable decision reversed.

CASENO: 05-16753

DATE: 08/02/2007

DATE: August 2, 2007

In Re:	)	
	)	
---------	)	ISCR Case No. 05-16753
	)	
	)	
Applicant for Security Clearance	)	
	)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT
Braden M. Murphy, Esq., Department Counsel

FOR APPLICANT
Pro Se

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On June 22, 2006, DOHA issued a statement of reasons 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 December 29, 2006, after the hearing, Administrative Judge Kathryn Moen Braeman granted Applicant's request for a security clearance. Department Counsel filed a timely appeal pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Department Counsel has raised the following issues on appeal: whether the Judge's application both of Alcohol Consumption Mitigating Condition (ACMC) 3[1] and the whole person concept was arbitrary, capricious, or contrary to law. Finding error, we reverse the decision of the Judge.

Whether the Record Supports the Judge's Factual Findings

A. Facts

Applicant was 25 years old at the time the record closed. He holds a B.S. degree. He began drinking while in high school and in college drank two or three times a week. He would become intoxicated once or twice a week after consuming six to twelve beers. While in college Applicant was arrested and charged with underage drinking. He was sentenced to a fine and to perform 15 to 25 hours of community service. He also received two years probation with a requirement not to have any alcohol related violations.

In August 2004, Applicant was charged with Driving While Intoxicated (DWI) after having consumed between 12 and 24 cans of beer at a social function. His breathalyzer results were .223, the legal limit for alcohol being .08. He pled guilty and was sentenced to a fine and to perform community service. He was required to attend a "substance abuse traffic offender program." Applicant's dates of attendance were January through February 2005. Additionally, he was placed on probation for two years, which was set to expire in December 2006. Applicant has continued drinking after completion of this program. He became intoxicated on Memorial Day 2006 and again the following July, when he consumed 12 to 18 beers. Applicant stated at the hearing that he intends to continue drinking but will avoid becoming intoxicated.

B. Discussion

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. Department Counsel challenges the Judge's statement, contained in the Conclusions section of her decision, that Applicant's "two arrests and drinking at times to excess occurred while he was in college and shortly after he graduated." Decision at 5. We will discuss this factual challenge in our analysis below.

[1]Directive ¶ E2.A7.1.3.3. Positive changes in behavior supportive of sobriety.

Whether the Record Supports the Judge's Ultimate Conclusions

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).

The Judge concluded that Applicant's case raises two disqualifying conditions: "Alcohol related incidents away from work, such as driving under the influence . . . or other criminal incidents related to alcohol use"[2] and "Habitual or binge consumption of alcohol to the point of impaired judgement."[3] The Judge further concluded, however, that MC 3 mitigated these security concerns. In support of this, she stated that much of Applicant's alcohol problems occurred in college or soon thereafter; that Applicant has never been diagnosed with alcohol dependence; and that he has a stable work record. She also observed that "Applicant has confronted these alcohol concerns by making a decision to curtail his drinking and not to drink anymore to the point of intoxication."[4]

Department Counsel disagrees with the Judge's analysis, arguing that it minimizes Applicant's more recent conduct; ignores significant record evidence such as the fact that Applicant was advised to cut back on his drinking during the alcohol education program he attended; and gives too much weight to Applicant's work record, which Department Counsel argues is less relevant to Applicant's security concerns than his drinking history.

We find Department Counsel's argument persuasive. While it is not erroneous that much of Applicant's drinking incidents occurred during or soon after college, it is of limited weight in light of record evidence that Applicant continued to drink heavily up until at least a month before the hearing. Indeed, Applicant himself characterized the July 2006 incident "binge drinking."[5] That Applicant continued to drink even after his second alcohol related arrest vitiates the Judge's

[2]Directive ¶ E2.A7.1.2.1.

[3]Directive E2.A7.1.2.5.

[4]Decision at 5.

[5]Tr. at 53.

application of MC 3. *See* ISCR Case No. 03-07874 at 4 (App. Bd. Jul. 7, 2005). Indeed, the Judge's opinion that Applicant has made a decisive change in favor of sobriety is based for the most part on his promises about the future, prompted by his receipt of the SOR.[6] *See, e.g.*, ISCR Case No. 02-26826 at 5 (App. Bd. Nov. 12, 2003)("An applicant's stated intention about what he or she might do in the future . . . is merely a statement of intention that is not entitled to much weight . . ."); ISCR Case No. 99-0012 at 3 (App. Bd. Dec. 1, 1999)("Promises to take actions in the future, however sincere, are not a substitute for a documented track record of remedial actions").

The Judge's ultimate conclusion is made without an adequate evidentiary basis and without due consideration of the contrary record evidence. In addition to the substantial amounts which Applicant drank and the legal problems arising from his alcohol abuse, there is record evidence that Applicant failed to curtail his drinking even after having been advised to do so by the counselor at his alcohol education course,[7] that his incidents of binge drinking in 2006 occurred while he was undergoing probation for DWI,[8] and that he failed to advise his employer of his DWI until about a month prior to the hearing, which is a reflection of his judgement.[9]

Most significant, however, is record evidence that Applicant apparently violated the terms of his earlier probation following his conviction for underage drinking.

> Q: What were the requirements of your probation for that offense?
>
> A: Not to get into any more alcohol trouble for the two years.
>
> Q: . . And what does that mean? Not to get into more alcohol trouble? What does that mean?
>
> A: Driving under the influence, getting an [underage possession of alcohol], trying to get into a bar underage, whatever. Anything with a Minor in Possession of Alcohol...
>
> Q: Okay. Until you turned twenty-one, between when you were put on probation and until you turned twenty-one, did you consume any alcohol?
>
> A: Yes, I did.

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[6]"After he received the SOR he reevaluated his approach to alcohol and has decided to curtail his drinking . . . I believe he will [be] motivated to demonstrate his maturity with respect to alcohol as he has demonstrated in other areas of his life." Decision at 5.

[7]Tr. at 52.

[8]*Id*. "Q: Now in December 2004, you were placed on two years of probation? A: Yes. Q: So, it is fair to say that you're still on probation now [August 16, 2006, the date of the hearing]? A: Yes, until December."

[9]Applicant's employer has a policy that anyone with a clearance is supposed to notify the security manager of any incident of DWI, DUI, or a traffic fine in excess of $150.00. One of Applicant's witnesses, a supervisor, testified that this policy is not as well publicized as it should be. Tr. at 75.

Q: Even though you knew that was a violation of your probation?

A: I knew I couldn't get in trouble, so I drank at home, didn't go out, but yes I did drink.[10]

Although the SOR does not allege criminal conduct as a security concern, Applicant's continued underage consumption of alcohol, while on probation for a similar offense, undermines the credibility of his promises for future sobriety. Given the relevance of this testimony to the Judge's application of MC 3 and her whole person analysis, her failure to discuss it is clear error. *See* ISCR Case No. 99-0018 at 3-4 (App. Bd. Dec. 6, 1999)("A probation violation constitutes evidence that, as a matter of common sense, calls for explicit discussion in evaluating Applicant's claims of reform and rehabilitation. The failure of the Judge to discuss his reasoning as to the significance of Applicant's probation violation leaves the Board unable to discern whether the Judge engaged in reasoned decision-making when considering this aspect of the case").

While the matters cited by the Judge, such as Applicant's receipt of the SOR as constituting a wake up call and his good work performance, are entitled to due consideration, the record as a whole does not support the conclusion that they sufficiently outweigh the alcohol related criminal offenses, probation violation, and recent binge drinking so as to mitigate them. Given the facts of this case, the month elapsing between the Applicant's receipt of the SOR and the hearing is insufficient to establish "a tangible track record . . . of reform." *See* ISCR Case No. 94-0964 (App. Bd. Jul. 3, 1996), citing ISCR Case No. 89-1887 at 3-4 (App. Bd. Jan. 28, 1991)("[G]iven applicant's pattern of failing to file income tax returns over a period of five years, applicant's late filing of those returns after receipt of SOR provides no meaningful basis to conclude applicant has changed conduct sufficiently so [his] misconduct is not likely to recur"). The Judge's conclusion, therefore, that Applicant has met his burden of persuasion, either as to the application of MC 3 or under the whole-person concept, is not sustainable on this record. We conclude that her favorable clearance decision is arbitrary, capricious, and contrary to law.

[10]Tr. at 37-8.

Order

The Judge's decision granting Applicant a security clearance is REVERSED.

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

Signed: William S. Fields
Williams S. Fields
Administrative Judge
Member, Appeal Board

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