

KEYWORD: Guideline G

DIGEST: The Judge's application of alcohol consumption mitigating condition 23(d) did not take into account significant contrary record evidence specifically Applicant's continued consumption of alcohol against the advise of his rehabilitation program and his failure to follow their recommendations regarding alcoholic anonymous participation and aftercare. Favorable decision reversed.

CASENO: 06-25684.a1

DATE: 03/21/2008

DATE: March 21, 2008

In Re:)	
)	
-----)	ISCR Case No. 06-25684
)	
Applicant for Security Clearance)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Eric Borgstrom, Esq., Department Counsel

FOR APPLICANT

Douglas J. Monaghan, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On February 15, 2007, 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 September 28, 2007, after the hearing, Administrative Judge Jacqueline T. Williams 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 raised the following issues on appeal: whether the Judge’s application of Alcohol Consumption Mitigating Condition (ACMC) 23(d)¹ is arbitrary and capricious in that it is not supported by record evidence; and whether the Judge’s whole-person analysis is arbitrary, capricious, and contrary to law. Finding error, we reverse.

Whether the Record Supports the Judge’s Factual Findings

A. Facts

The Judge made the following pertinent findings of fact: Applicant is 53 years old and has worked as a senior mechanical designer for a defense contractor since 1994. He is divorced and has two adult children.

On several occasions between 1971 to at least July 2006, Applicant consumed alcohol, at times to excess and to the point of intoxication. He first began drinking alcohol at age 17. At times he has consumed as much as a quart of rum a day.

On February 16, 1999, Applicant was arrested and charged with operating a motor vehicle under the influence of liquor. After consuming about four ounces of brandy, he was driving home and was stopped by the police because the car was swerving. He pled no contest and was fined \$500, placed on unsupervised probation, and ordered to attend alcohol counseling. His driver’s license was suspended for eight months. His alcohol consumption increased during 1999 because of marital difficulties, which included his wife suffering from a serious mental illness. In June 2004, after separating from his wife, Applicant was arrested and charged with assault on his girlfriend. He had been drinking prior to this arrest. This charge was dismissed.

After the death of his girlfriend in 2004, for about two weeks, Applicant drank excessively, consuming alcohol to numb his pain and grief. He was treated for depression after her death. Applicant sought help from the Employee Assistance Office at worked and they suggested that he enroll in an alcohol treatment program.

¹Directive ¶ E2.23(d).

Applicant attended alcohol treatment at an institute from December 27, 2004, until January 24, 2005. He was diagnosed with alcohol dependence and depression. These diagnoses were made by a licensed clinical social worker who is a staff member of a recognized alcohol treatment program. He attended both individual and group counseling, which included education groups, therapy groups, and AA/NA meetings every night. At the time of his discharge, his prognosis was positive if he followed through with his discharge plans, including returning to his apartment and returning to his employment, which he accomplished. At least four weeks after rehabilitation, he continued to attend meetings to talk about his alcohol problems.

A witness at the hearing, a retired Army chaplain and Brigadier General with a Ph.D. in clinical psychology, testified about post-traumatic stress syndrome as it related to the events of Applicant's loss of his girlfriend. Applicant is one of his parishioners, and he has been counseling him for about six months about the loss of his girlfriend, which led to his excessive consumption of alcohol. The witness stated that Applicant's depression, which he had self-medicated with alcohol, was consistent with post traumatic stress disorder.

During the six months preceding the decision, Applicant sought counseling from his pastor and obtained a better understanding of why he spun out of control after the death of his girlfriend. Although he did not cease drinking alcohol, he modified his behavior to a glass or two of wine a month. He does not believe he will drink and drive again.

Applicant's supervisor wrote a character letter. The witness indicated that once Applicant's drinking got out of control, he sought help from the Employee Assistance Office and entered rehabilitation. He stated that since completing the rehabilitation program Applicant's physical and mental health have improved, as have his attendance at work and the quality of his work performance.

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 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 finding 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 has not expressly challenged the Judge's findings. His argument that the Judge's decision is not supported by record evidence will be addressed below.

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 the 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.

Once a concern arises regarding an Applicant’s security clearance eligibility, there is a strong presumption against the grant or maintenance of a security clearance. *See Dorfmont v. Brown*, 913 F.2d 1399, 1401 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991). After 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, e.g., ISCR Case No. 05-03635* at 3 (App. Bd. Dec. 20, 2006).

In deciding whether the Judge's rulings or conclusions are arbitrary or capricious, the Board will review the Judge's decision to determine whether: it does not examine relevant evidence; it fails to articulate a satisfactory explanation for its conclusions, including a rational connection between the facts found and the choice made; it does not consider relevant factors; it reflects a clear error of judgment; it fails to consider an important aspect of the case; it offers an explanation for the decision that runs contrary to the record evidence; or it is so implausible that it cannot be ascribed to a mere difference of opinion. In deciding whether the Judge's rulings or conclusions are contrary to law, the Board will consider whether they are contrary to provisions of Executive Order 10865, the Directive, or other applicable federal law. *See ISCR Case No. 03-22861* at 2-3 (App. Bd. Jun. 2, 2006).

The Judge based her favorable decision, in part, upon ACMC 23(d), which mitigates alcohol-related security concerns when “the individual has successfully completed inpatient or 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 Alcoholics Anonymous or a similar organization, and has received a favorable prognosis by a duly qualified medical professional or licensed clinical social worker who is a staff member of a recognized alcohol treatment program.” The Judge noted Applicant’s having completed an alcohol treatment program, the counseling he had received from his pastor, and his testimony that he had modified his drinking to a glass or two of wine a month. She also noted that Applicant testified that “he does not believe he will drink and

drive again.” In light of these matters, the Judge concluded that Applicant had “mitigated the government’s case.”

Department Counsel argues that the Judge’s conclusion did not take into account significant contrary record evidence. The Board finds this argument persuasive. The Board notes, for example, that Applicant’s rehabilitation program diagnosed him as alcohol dependent and advised him to abstain from the consumption of alcohol. However, as the Judge acknowledged, Applicant continued to drink. Testifying that he drank wine a couple of times a month, he acknowledged his prior statement to an interviewer in 2006 that he drank beer weekly.² Additionally, he testified that, about six months prior to the hearing, he consumed enough alcohol to render him unfit to operate a vehicle.³ Furthermore, Applicant’s discharge plan recommended that he continue to attend Alcoholics Anonymous, obtain a sponsor, and participate in aftercare, yet he has completed none of these recommendations.⁴ When viewed in light of his extensive history of alcohol abuse, his DUI, his lost work time due to drinking,⁵ and his diagnosis of alcohol dependence, Applicant’s evidence as to reduced drinking fails to establish even an appropriate pattern of modified consumption, much less the abstinence recommended by his alcohol treatment program. The Judge’s favorable application of ACOM 23(d) is not sustainable on this record.

For similar reasons, the Judge’s whole-person analysis fails to provide a reasonable basis to grant Applicant a clearance. The Judge noted Applicant’s grief over the death of his girlfriend and his remorse over his DUI. However, she does not explain why these matters mitigate Applicant’s lengthy history of security significant alcohol abuse, especially in light of his continued drinking and his reluctance to describe the extent of that drinking to the official conducting his subject interview.⁶ The record, viewed as a whole, does not sustain the Judge’s conclusion that Applicant has met his burden of persuasion that it is “clearly consistent with the interests of the national security” for him

²Government Exhibit (GE) 3, Personal Subject Interview, at 3. “Subject occasionally drinks, defined as a few beers per week, but stays away from hard liquor. Subject no longer gets intoxicated to the point where he did in the past, but just to where he feels mellow and sleepy but not violent. Subject stated that he no longer gets sloppy and has had no problems at work since. Subject declined to answer questions about exactly how many beers and how many nights per week, how much it takes to become intoxicated, and how often he is intoxicated.”

³Tr. at 32-33.

⁴GE 4, Medical Records, at 19. Applicant testified that he attended AA meetings for about four months after completing his treatment and that he does not have an AA sponsor. Tr. at 29-30. There is no evidence in the file that Applicant participated in the prescribed aftercare program. Applicant’s brief does not refute these matters, but argues that the recommendations are advisory rather than mandatory. Brief at 8.

⁵Applicant testified that he missed some work due to drinking and that upon two occasions reported to work under the influence of alcohol. Tr. at 25-26.

⁶See Note 2 above.

to have a security clearance. *See Egan*, 484 U.S. at 528. Accordingly, the Board holds that the Judge's decision is not supported by the record evidence.

Order

The Judge favorable security clearance decision is REVERSED.

Signed: Jeffrey D. Billett

Jeffrey D. Billett
Administrative Judge
Member, 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