KEYWORD: Guideline G

DIGEST: Directive presumes a nexus or rational connection between proven conduct under any Guideline and an applicant's security eligibility. Security clearance determinations are not limited to consideration of work performance or conduct during duty hours. Adverse decision affirmed.

CASENO: 07-08113.a1

DATE: 07/15/2008

DATE: July 15, 2008

In Re:	)	
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	)	
	)	
Applicant for Security Clearance	)	
	)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT
James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT
Jerrilynn Hadley, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On October 29, 2007, DOHA issued a statement of reasons (SOR) 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 March 13, 2008, after the hearing, Administrative Judge Henry Lazzaro denied Applicant's request for a security clearance. Applicant timely appealed pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raised the following issues on appeal: whether the Judge's findings are based on substantial evidence; and whether the Judge's adverse security clearance decision under Guideline G is arbitrary, capricious, or contrary to law.

The Judge made the following relevant findings: Applicant had consumed alcohol, at times in excess and to the point of intoxication, from about 1976 to at least August 2007. He was a "heavy drinker" from the late-1970s to the mid-1980s. He attended Alcoholic Anonymous (AA) meetings during the 1994-95 time frame.

Applicant was arrested on suspicion of Driving a Vehicle While Under the Influence (DUI) in October 2004. He admitted to consuming about six beers prior to his arrest. The arrest resulted from him almost striking a police car. Applicant pled *nolo contendere* to a charge of reckless driving and was placed on probation, fined, and required to attend six alcohol awareness counseling sessions. Applicant was again arrested and charged with DUI in May 2006. He had attended a picnic where he consumed a large number of alcoholic beverages. At the time of the arrest, his blood alcohol concentration (BAC) was measured at 0.20. Applicant pled *nolo contendere* to that charge, was placed on probation, fined, required to attend an alcohol awareness program, had an ignition lock system installed on his vehicle, and attended 20 weeks of outpatient alcohol counseling from June to December 2006. He was told during his counseling sessions he had "a potential alcohol problem."

Applicant admitted to consuming small amounts of alcohol following his 2006 arrest, but asserted that he last consumed alcohol on August 24, 2007, which was about the date he received interrogatories from DOHA inquiring about his use of alcohol. He admitted his motivation for quitting drinking alcohol was due to a concern about his security clearance and a personal desire to abstain. Applicant attended 17 AA meetings between November 2007 and January 2008. He began attendance at an outpatient alcohol and drug abuse program in February 2008. His first meeting in that program was the night before the hearing in this case.

Applicant served in the U.S. Air Force from 1976 to 1996. He held a security clearance for approximately 30 years without incident.

(1) Applicant argues that the Judge's adverse clearance decision should be reversed because the Judge erred in finding that Applicant had seriously minimized his alcohol use and that his attendance in AA and outpatient treatment was solely motivated by the threatened loss of his security clearance. The Board does not find Applicant's argument persuasive.

The Board's review of a Judge's findings 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 finding from being supported by substantial evidence." *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620, (1966).

After reviewing the record, the Board concludes that the Judge's findings are based on substantial evidence, or constitute reasonable characterizations or inferences that could be drawn from the record. Applicant has not identified any harmful error likely to change the outcome of the case. Considering the record evidence as a whole, the Judge's material findings of security concern are sustainable. *See, e.g.,* ISCR Case No. 06-21025 at 2 (App. Bd. Oct. 9, 2007).

(2) Applicant also argues that the favorable evidence in the record was sufficient, as a matter of law, to overcome any security concerns presented by Applicant's conduct. Specifically, he contends that: (a) his 2004 and 2006 DUI charges were isolated incidents, that were not recent, and do not indicate a pattern; and (b) he has established a plan of abstinence, started appropriate treatment, and there are clear indications that his alcohol problem is being resolved and is under control. Finally, he notes that he has strong community ties and that he has held a security clearance without incident for 30 years. Applicant's argument does not demonstrate that the Judge's decision is arbitrary, capricious or contrary to law.

The Directive presumes there is a nexus or rational connection between proven conduct under any of the Guidelines and an applicant's security eligibility. *See, e.g.,* ISCR Case No. 02-22325 at 3-4 (App. Bd. July 30, 2004). Security clearance determinations are not limited to consideration of work performance or conduct during duty hours. *See, e.g.,* ISCR Case No. 04-08623 at 5 (App. Bd. July 29, 2005). The federal government need not wait until an applicant actually mishandles or fails to properly handle or safeguard classified information before it can deny or revoke access to such information. *See Adams v. Laird,* 420 F.2d 230, 238-239 (D.C. Cir. 1969). The absence of security violations does not bar or preclude an adverse security clearance decision. *See* ISCR Case No. 01-03357 at 4 (App. Bd. Dec. 13, 2005).

Once the government presents evidence raising security concerns, the burden shifts to the applicant to establish mitigation. Directive ¶ E3.1.15. The presence of some mitigating evidence does not alone compel the Judge to make a favorable clearance decision. 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*. An applicant'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. 07-05632 at 2 (App. Bd. May 13, 2008).

A review of the record indicates that the Judge weighed the mitigating evidence offered by Applicant against the length and seriousness of the disqualifying conduct and considered the possible

application of relevant conditions and factors. Decision at 4-5. He reasonably explained why the evidence which the Applicant had presented in mitigation was insufficient to overcome the government's security concerns. *Id.* at 5. The Board does not review a case *de novo*. The favorable record 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). 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). "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). Accordingly, the Judge's adverse decision is sustainable.

Order

The decision of the Judge denying Applicant a security clearance is AFFIRMED.

Signed: Michael D. Hipple
Michael D. Hipple
Administrative Judge
Member, Appeal Board

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

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