KEYWORD: Guideline G

DIGEST: Applicant demonstrates that the Judge erred in several of his findings of fact. Nonetheless, the Judge's errors did not lead him to treat Applicant as having committed more alcohol-related conduct than the record would sustain. The Judge's analysis focused on several matters which are supported by substantial record evidence. Adverse decision affirmed.

CASENO: 07-10106.a1

DATE: 11/18/2008

DATE: November 18, 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
Pro Se

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On February 12, 2008, 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 August 26, 2008, after the hearing, Administrative Judge Roger C. Wesley 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 certain of the Judge's findings of fact were supported by substantial record evidence and whether the Judge's adverse security clearance decision is arbitrary, capricious, or contrary to law. Finding no error, we affirm.

The Judge made the following findings of fact: Applicant is a 50-year-old production manager for a defense contractor who served in the U.S. Air Force from 1975 until 1985. Following his discharge, he went to work for the Air Force in a civilian capacity for the next 12 years, after which he became employed in the private sector. In 1977 he was cited and charged with illegal possession of alcohol. "He had consumed a can of beer on the base in 1977 and was still holding the beer can in the driver's seat when he was stopped by local . . . police." Decision at 2. In 1984, Applicant was detained by base police for driving under the influence of alcohol following a golf competition, for which he received nonjudicial punishment. The punishment consisted of a fine. Applicant's installation commander ordered him not to operate a vehicle on base for a year. Applicant's commander also vacated a previously imposed suspended reduction in grade. As a consequence of this misconduct, Applicant was found ineligible to reenlist.

Applicant was charged with and convicted of two more incidents of driving under the influence of alcohol, once in 1998 and again in 2006. Applicant attends Alcoholics Anonymous (AA) meetings regularly but did not provide evidence of his progress, such as "attendance reports, chips commemorating his sustained abstinence, and endorsements from a sponsor and friends . . ." Decision at 5. Applicant has never sought a professional evaluation from a physician or therapist for any alcohol problems.

We have examined the Judge's decision in light of the record as a whole. Applicant challenges certain findings of the Judge. For example, Applicant argues that the Judge erred in his treatment of the nonjudicial punishment action taken against him. He states that he never attended a golf competition in 1984 and that there was no alcohol involved in the facts underlying the vacation of his suspended reduction in grade. Applicant's argument has merit. The Board notes the following record evidence: In 1984, Applicant attended a party following an Air Force maintenance squadron competition.[1] The party took place on base. Applicant drank beer at this party and, as he

[1]This appears to have been a competition among maintenance squadrons which tested their professional skills, rather than a golf tournament. *See* Tr. at 56.

was driving home, Air Force Security Police detained him on suspicion of drunk driving.[2] Tr. at 57. As a result, Applicant received nonjudicial punishment under Article 15 of the Uniform Code of Military Justice in May 1984. The punishment consisted of a reduction to the grade of Sergeant and forfeiture of $250.00 pay per month for two months. However, the reduction in grade was suspended for six months. Government Exhibit (GE) 6, Record of Vacation of Suspended Nonjudicial Punishment, September 10, 1984. In addition to the nonjudicial punishment, Applicant's installation commander ordered him not to operate his car on base for a period of one year. Tr. at 57. During the period of suspension, Applicant violated the installation commander's order not to operate his car on base. The record evidence does not support the Judge's apparent finding that alcohol was involved in this event. As a consequence of violating the installation commander's order, Applicant's squadron commander vacated the suspended reduction in grade, reducing him from Staff Sergeant to Sergeant in September 1984. As a further consequence of the original nonjudicial punishment action, Applicant was denied eligibility for reenlistment in the Air Force. GE 5, Reenlistment Ineligibility, May 31, 1984. Examined in light of the record, the Judge's decision appears to treat the Article 15 and the subsequent vacation proceeding as having arisen from the same set of facts, which is error.[3] Applicant also points to other findings which he believes to be erroneous. For example, the Judge stated that Applicant was introduced to alcohol while in high school, although the Board has not found record evidence in support of this assertion. He also persuasively argues that there is no record evidence for the Judge's finding that he was in the driver's seat of a car when he was cited for illegal possession of alcohol in 1977.[4]

Having concluded that the Judge's findings contain errors, the Board must now consider whether they are harmful. The Board notes that, despite his errors concerning the 1984 drunk driving incident and subsequent disciplinary action, the Judge correctly interpreted the record as establishing four incidents of alcohol-related misconduct between 1977 and 2006. That is, these errors did not lead him to treat Applicant as having committed more misconduct than the record would sustain. In examining the Analysis portion of the Judge's decision, the Board notes that the Judge focused his attention on (1) the recurrent nature of Applicant's alcohol-related offenses; (2) Applicant's relapses following periods of light to moderate alcohol consumption; (3) a paucity of record evidence corroborating the extent of his participation in AA; (4) and what the Judge concluded was a relatively short period of sustained abstinence following the most recent DUI. These matters are

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[2] *See* 10 U.S.C. ¶ 911, which prohibits any person subject to the Uniform Code of Military Justice from operating a vehicle "while drunk." "Drunk" means "any intoxication which is sufficient sensibly to impair the rational and full exercise of the mental and physical faculties[.]" *United States v. Bull*, 14 C.M.R. 53 at 56 (Court of Military Appeals 1954).

[3] The Board notes that the only documentary reference to the Article 15 for drunk driving is found on the vacation of suspended punishment form for the later offense of violating an order. This may have contributed to the Judge's apparent assumption that the two adverse actions addressed the same underlying misconduct.

[4] Applicant also claims that he had held a security clearance since 1976 rather than 1977, as the Judge found; that he attended a 1998 NCAA basketball game with a friend rather than with his wife; and that his 2006 arrest was for driving under the influence of alcohol rather than for driving while intoxicated. Any error in these findings is *de minimis*.

based upon substantial record evidence or are reasonable conclusions from such evidence.[5] The record evidence and the Judge's decision provide no basis to conclude that, had the Judge not made the errors about the 1984 incident, or the other errors described above, he would have evaluated Applicant's case in a different way or reached a different final decision. Therefore, we conclude that the errors in the Judge's findings are harmless. *See* ISCR Case No. 06-07247 at 2 (App. Bd. Feb. 13, 2008).

Turning to the second issue which Applicant has raised, the Judge has drawn a rational connection between the facts found and his ultimate adverse security clearance decision. *See* ISCR Case No. 03-22861 at 2-3 (App. Bd. Jun. 2, 2006). *See also 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 Judge's decision that "it is not clearly consistent with the national interest to grant or continue Applicant's security clearance" is sustainable on this record. Decision at 8. *See Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). Accordingly, the Judge's adverse security clearance decision is not arbitrary, capricious, or contrary to law.

Order

The Judge's adverse security clearance decision is AFFIRMED.

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

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

Signed: James E. Moody
James E. Moody
Administrative Judge

[5] *See* Directive ¶ E3.1.32.1. (Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the same record.")

Member, Appeal Board