KEYWORD: Guideline J; Guideline G

DIGEST: Applicant's admissions to the SOR and the evidence contained in the file establish Guideline J security concerns. Applicant failed to rebut the presumption that the Judge considered all of the record evidence. Adverse decision affirmed.

CASE NO: 09-05995.a1

DATE: 02/10/2011

DATE: February 10, 2011

| | | |
|---|---|---|
| In Re: | ) | |
| | ) | |
| ---------- | ) | ISCR Case No. 09-05995 |
| | ) | |
| | ) | |
| Applicant for Security Clearance | ) | |
| | ) | |

## APPEAL BOARD DECISION

## APPEARANCES

**FOR GOVERNMENT**
Gregg A. Cervi, Esq., Department Counsel

**FOR APPLICANT**
Conrad F. Mallek, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On February 24, 2010, DOHA issued a statement of reasons (SOR) advising Applicant of the basis for that decision–security concerns raised under Guideline J (Criminal Conduct) and Guideline G (Alcohol Consumption) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On October 27, 2010, after the hearing, Administrative Judge Noreen A. Lynch denied Applicant's request for a security clearance. Applicant appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raised the following issues on appeal: whether the Government had failed to meet its burden of production; whether the Judge failed to consider all of the record evidence; whether the Judge erred in her application of the mitigating conditions; and whether the Judge's whole-

person analysis was erroneous. The Judge's favorable findings under Guideline G are not at issue. Consistent with the following discussion, we affirm the decision of the Judge.

The Judge made the following pertinent findings of fact: Applicant is an employee of a Defense contractor. He is engaged to be married and has no children. As a 17-year-old, Applicant drank beer on weekends. He would consume six to seven at a sitting and was intoxicated five to six times a month. He has never been diagnosed with an alcohol problem.

In July 2005 Applicant attended a party where he consumed six to seven beers. Eighteen at the time, he was charged with under-age consumption of alcohol. He pled "no contest" and paid a fine.

In August 2007, Applicant was at a bar with friends. As he was leaving, he felt threatened by some persons standing by his truck. He hit one of them over the head with a glass bottle. The person fell to the ground, and Applicant hit him a "couple more times." Decision at 2. He was charged with aggravated assault with a deadly weapon. Police detected an odor of alcohol about Applicant. The person whom Applicant struck was hospitalized with injuries to his head and ear. As a consequence of this offense, Applicant was sentenced to community service, completion of an anger management class, and 36 months probation. The probation required him to pay restitution and not to consume alcohol.

In March 2009, Applicant was charged with three counts of disorderly conduct and one of assault. At the time of incident, he was still on probation from the previous offense. He was at a bar, but he has denied consuming alcohol. He was involved in a fight. He has pled not guilty to the offense, and the case was ongoing at the close of the record. As a consequence of this incident, his probation was modified to include a prohibition against entering any bar or place that has the primary purpose of selling alcohol.

Applicant enjoys an excellent reputation for the quality of his work, his trustworthiness, and his dedication to his family.

Applicant contends that the Government did not meet its burden of production regarding the 2009 incident, in that he believes the evidence shows that he committed no offense. The Government is responsible for producing evidence to establish controverted SOR allegations. Directive ¶ E3.1.14. In this case, the SOR alleged that Applicant was "arrested in . . . March 2009 by the [County Police Department], and charged with three counts of disorderly conduct and one count of assault. This case is still pending." Applicant admitted to this allegation in his Response to the SOR, dated April 4, 2010, with the exception that he was not arrested. Accordingly, this allegation was not controverted by Applicant. Nevertheless, the record contains a copy of the police report that described the incident. Although local prosecutorial authorities declined to treat the assault as a felony, the case was proceeding as a misdemeanor at the close of the record. Applicant's admissions, along with the record evidence, are sufficient to demonstrate Guideline J security concerns, thereby shifting the burden of persuasion to Applicant. *See* Directive ¶ E3.1.15.

Applicant contends that the Judge did not consider all of the record evidence. He states that the Judge did not consider a witness statement to the effect that Applicant did not participate in the

March 2009 affray. He also states that the Judge did not consider evidence that his probation was not revoked following this incident. A Judge is presumed to have considered all the evidence in the record. *See, e.g.*, ISCR Case No. 09-01735 at 2 (App. Bd. Aug. 31, 2010). The Judge's decision acknowledges receipt of the witness statement, which was submitted after the hearing. There is nothing in the Judge's findings or in her analysis to support a conclusion that she did not consider it. Furthermore, she made an explicit finding concerning the modification of Applicant's probation. Applicant has not rebutted the presumption that the Judge considered all of the record evidence.

The record supports a conclusion that the Judge examined the relevant data and articulated a satisfactory explanation for the decision, "including a 'rational connection between the facts found and the choice made,'" both as to the mitigating conditions and the whole-person factors. *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 adverse decision is sustainable on this record. "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).

## Order

The Judge's adverse security clearance decision is AFFIRMED.

Signed: Jean E. Smallin
Jean E. Smallin
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