

KEYWORD: Guideline G

DIGEST: The Judge conclusion that concerns raised by Applicant's lengthy alcohol history have not been mitigated are sustainable on this record. Adverse decision affirmed.

CASENO: 09-07652.a1

DATE: 01/10/2011

DATE: January 10, 2011

In Re:)
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 -----) ISCR Case No. 09-07652
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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 April 9, 2010, 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 August 31, 2010, after the hearing, Administrative Judge Rita C. O'Brien denied Applicant's request for a security clearance. Applicant appealed pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raises the following issues on appeal: whether the Judge's adverse conclusions concerning the application of Guideline G mitigating conditions were error and whether the Judge's adverse conclusions under her whole-person analysis were error. For the following reasons, the Board affirms the Judge's unfavorable decision.

The Judge made the following findings of fact: Applicant started consuming alcohol in about 1990 when he was 14 years old. In 1995 he stopped drinking for two years but then resumed. In 2004, when he was 28 years old, he consumed six to eight 12 ounce beers once a week on weekends. In February 2004, Applicant was convicted of DUI and had his driver's license suspended for one year and was required to attend an ASAP program. In 2008, Applicant stopped drinking for two or three months but then relapsed. In September 2008, Applicant was again convicted of DUI. He spent 10 days in jail, had his license suspended for three months and then had the license placed in restricted status for three years. Applicant was also required to attend 20 sessions of an alcohol behavior program. Applicant began attending outpatient alcohol behavior counseling twice a week in April 2009. He had not attended Alcoholics Anonymous since 2004, but began attending meetings again as part of his 2009 program. He drank a wine cooler on June 4, 2009, and later in the month, he stayed out all night drinking after being asked not to by his wife. A report of security interview in May 2009 indicated that Applicant consumed 8 to 10 beers per week, mostly on weekends and that he had not stopped or reduced his drinking. Applicant reported to his counselor that he relapsed on December 24, 2009. He attended his last AA meeting in March 2010. Applicant was diagnosed as alcohol dependent. Applicant completed the counseling program in January 2010. His therapist indicated that Applicant's attendance in the program was somewhat regular, and his AA attendance was not as consistent as it had been earlier. He had not followed the recommendation to obtain a sponsor and had not participated in the 12-Step program. He had not put the relapse-prevention plan he had developed into action. Applicant's wife reported to the therapist that Applicant continues to put himself in positions where drinking is an issue. The therapist has serious concerns about Applicant's ability to remain abstinent from alcohol and recommends him for a higher level of care. When asked by the Judge if he believed he was an alcoholic, Applicant replied, "to an extent, yes." Applicant's manager describes Applicant as an outstanding person who is responsible, trustworthy, and dependable with a good work ethic.

The Judge concluded that: Applicant's consumption of alcohol over the past 20 years supports the application of the Guideline G disqualifying conditions. Although almost two years have passed since his last DUI, Applicant has not remained abstinent, which raises the question of whether or not he will be able to avoid alcohol use in the future. As of the date of the hearing, he had been abstinent only seven months, since December 2009. Although his efforts to abstain reflect well on his current judgment, his negative alcohol-related conduct was both frequent and recent, and is only partially mitigated. Applicant has relapsed three times during treatment. His acknowledgment of his alcohol problem at the hearing was unconvincing based on his response to

the question about whether or not he considered himself an alcoholic. His therapist's more recent evaluation in July 2010 did not provide a good prognosis, and she recommended him for a higher level of care. Taking all the facts and circumstances together, the mitigation available is insufficient to overcome the disqualifying conditions. The Judge's whole-person analysis expressed essentially the same concerns noted in her Guideline G analysis.

Applicant contends that some of the Judge's conclusions are contradictory and that the facts warranted applying two of the Guideline G mitigating conditions. He states the Judge's conclusion that his efforts at abstinence reflect well on his current judgment cannot be squared with the conclusion that, because of his negative alcohol-related conduct, only partial mitigation was available under Adjudicative Guideline ¶ 23(a).¹ Applicant also asserts that the Judge's conclusion not to apply the mitigating condition in his favor is at odds with the statement of his manager that he is an outstanding person and has taken many steps to resolve the issue and is moving forward to ensure that problems with alcohol never happen again. Applicant also argues that eleven months of sobriety belies the Judge's conclusion that his acknowledgment of his problem was unconvincing. Applicant states that Adjudicative Guideline ¶ 23(b)² as well as the whole-person factors should have been applied in his favor. Applicant's arguments do not establish error on the part of the Judge.

In concluding that Guideline G Mitigating Conditions ¶ 23(a) and ¶ 23(b) were partially applicable to the case, the Judge noted Applicant's attempts at sobriety. However, the Judge also noted the problems Applicant had with maintaining same, especially the lapses occurring in 2009 when Applicant was participating in a treatment program and was under the care of a therapist. The Judge also noted Applicant's earlier history of relapses and his less than complete recognition of his alcohol dependence. Given the record evidence in this case, the favorable evidence cited by the Judge did not require her to ultimately conclude that Applicant had mitigated the government's security concerns. The Judge's analysis under the whole-person concept was closely related to her analysis under Guideline G, and is sustainable on this record.

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*. *See, e.g.*, ISCR Case No. 06-10320 at 2 (App. Bd. Nov. 7, 2007). A party'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. 06-17409 at 3 (App. Bd. Oct. 12, 2007).

¹“[S]o much time has passed, or the behavior was so infrequent, or it happened under such unusual circumstances that it is unlikely to recur or does not cast doubt on the individual's current reliability, trustworthiness, or good judgment[.]”

²“[T]he individual acknowledges his or her alcoholism or issues of alcohol abuse, provides evidence of actions taken to overcome this problem, and has established a pattern of abstinence (if alcohol dependent) or responsible use (if an alcohol abuser)[.]”

In this case, the Judge weighed the mitigating evidence offered by Applicant against the seriousness of the disqualifying conduct and considered the possible application of relevant conditions and factors. She adequately discussed why the disqualifying conduct established under Guideline G was not completely mitigated.

The Board does not review a case *de novo*. The favorable 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). After reviewing the record, the Board concludes that the Judge examined the relevant data and articulated a satisfactory explanation for her 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). Therefore, the Judge's ultimate unfavorable security clearance decision is sustainable.

Order

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

Signed: Jeffrey D. Billett
Jeffrey D. Billett
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