

KEYWORD: Guideline G

DIGEST: Applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the Applicant or proven by Department Counsel. Adverse decision affirmed.

CASENO: 11-04520.a1

DATE: 04/12/2013

DATE: April 12, 2013

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In Re:)	
)	
-----)	ISCR Case No. 11-04520
)	
)	
Applicant for Security Clearance)	
_____)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

Pro se

The Department of Defense (DoD) declined to grant Applicant a security clearance. On August 31, 2012, DoD 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 February 22, 2013, after the close of the record, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Darlene D. Lokey Anderson 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: (1) whether the Judge failed to consider record evidence; (2) whether the Judge did not properly consider the case under the whole-person concept; and (3) whether the Judge or the decision process was biased. For the following reasons, the Board affirms the Judge’s unfavorable security clearance decision.

The Judge found: Applicant is 50 years old, married, and has two children. He served honorably in the military for twenty-two years. Applicant began consuming alcohol at the age of sixteen. In the beginning, he consumed only beer. When he joined the military at age seventeen, his alcohol consumption increased and he drank on weekends. When he retired from the military, his drinking decreased. At that point, he usually consumed alcohol about one weekend per month and drank four or five beers or a couple of mixed drinks.

In September 2004, Applicant was arrested for DUI. He pled no contest and received a suspended sentence for 88 days and four days with a tracking device. He was required to attend a DWI driving school and was placed on probation for one year. He successfully completed his court sentencing requirements. After the DUI, Applicant abstained from alcohol use for one year. He then resumed drinking. In October 2010, Applicant was arrested a second time for for DUI. He was found guilty and fined \$800 plus court fees. He was required to attend a first offender alcohol education program that included Alcoholic Anonymous (AA) meetings. His driving privileges were revoked for six months and he was placed on three years probation. He is currently on probation, and has satisfied all other court ordered sentencing requirements. Following this arrest, Applicant stopped drinking again for about a year. He then resumed his drinking.

Applicant does not feel he has a problem with alcohol. He believes he is a social drinker who can control his drinking. He initially testified that the only two times he consumed alcohol and drove were the two times he was arrested for DUI. After further reflection, he testified that since 2004 he would estimate that he drank and drove on an average of twice a month. He now states that he only drinks about once a month and has between two to four beers. Applicant indicated that he has decided to voluntarily re-enter AA, as he is motivated to completely abstain from alcohol.

The Judge concluded: Applicant has a long history of alcohol abuse. Although he has never been formally diagnosed as an alcoholic nor has he received treatment for alcohol addiction, he shows signs of a serious alcohol problem. Recently, he has decided to address his problem and has started attending AA meetings for a second time. More time in sobriety is necessary to prove to the Government that he can be trusted with the nations secrets. Under the whole-person concept, the Applicant is a troubled drinker who has only recently come to realize the seriousness of his

condition and its ramifications. Applicant has failed to overcome the Government's case opposing his request for a security clearance.

Applicant makes numerous references to facts about his case that he claims were not considered by the Judge. He states that during the hearing, he testified that "it was not my intent to drink that day" on the date he was arrested a second time for DUI. Applicant asserts that this was not considered or even mentioned in the Judge's findings of fact. Applicant also states that he was formally interviewed after his first DUI conviction and was determined to have no signs of alcohol addiction or abuse and needed no additional treatment beyond that ordered by the court. He states that these matters "were not asked about" and were not provided in the Judge's findings of fact. He states that the information is available, "if investigated." Applicant also asserts that he has an intrinsic behavior profile, that he does not associate with his working peers outside the workplace, and that he does not talk about his personal life. He asserts that these aspects of his life were not asked about or addressed by the Judge when considering the whole-person concept.

Many of Applicant's assertions constitute new matters not contained in the record, which the Board cannot consider. Directive ¶ E3.1.29. Concerning Applicant's assertion that he testified that he did not intend to drink on the day when he did drink and subsequently got stopped for DUI, the Board is unable to find such a statement on the record. In this and in the other matters mentioned on appeal, Applicant fails to overcome the presumption that the Judge considered all the evidence in the record. *See, e.g.*, ISCR Case No. 07-00196 at 3 (App. Bd. Feb. 20, 2009). Also, Applicant appears to argue that there were aspects of his case available to be brought forth and developed on the record by parties to the hearing other than himself. The Applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven by Department Counsel. Directive ¶ E3.1.15. Thus, Applicant cannot now complain that there were facts in his case that he deems pertinent or significant that were not included in the record, or that were not included in the Judge's findings of fact.

Applicant argues that the Judge merely assumed that he showed signs of a serious alcohol problem, without any medical evidence.¹ He also argues that he has acknowledged alcohol abuse, has demonstrated consistent, responsible use of alcohol, and has shown positive changes in drinking habits and lifestyle that should be considered mitigating. He asserts that the Judge erred in her weighing of the whole-person concept. Considering Applicant's appeal arguments in light of the record as a whole, we conclude that the Judge's material findings of security concern surrounding Applicant's history of alcohol consumption, and her characterization of that history as serious, are supported by substantial record evidence, or constitute reasonable inferences from the evidence. We also conclude that nothing in the record evidence required the Judge, as a matter of law, to consider the Government's security concerns mitigated.

¹ In support of his argument that there is no evidence that he has an ongoing alcohol problem, Applicant has cited an outside source, "Alcohol Consumption and Security Clearances" by William Henderson. As this reference was not made part of the record, the Board cannot consider it.

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). Applicant's appeal brief essentially argues for an alternate interpretation of the record evidence. The gravamen of the Judge's decision is that Applicant is a troubled drinker who has had two DUIs and who has only recently come to realize the seriousness of his condition and its ramifications. This basic conclusion is reasonably supported by the evidence.

Applicant asserts that the Judge's assumption that he shows signs of a serious alcohol problem leads him to believe that there is a "hidden agenda" that has introduced bias into the decision to revoke his security clearance. There is a rebuttable presumption that a Judge is impartial and unbiased, and a party seeking to overcome that presumption has a heavy burden of persuasion. *See, e.g.*, ISCR Case No. 07-02253 at 3 (App. Bd. Mar. 28, 2008). Applicant's vague assertion fails to overcome that presumption.

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 the 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 is AFFIRMED.

Signed: Michael Y. Ra'anan
Michael Y. Ra'anan
Administrative Judge
Chairperson, Appeal Board

Signed: Jeffrey D. Billett

Jeffrey D. Billett
Administrative Judge
Member, Appeal Board

Signed: James E. Moody _____
James E. Moody
Administrative Judge
Member, Appeal Board