

KEYWORD: Guideline G; Guideline E

DIGEST: The Judge’s material findings are supported by substantial evidence. Evidence of other wrongs or acts may be admissible to establish *mens rea*. Inconsistent statements can undermine an applicant’s reliability. A Judge is presumed to have considered all of the evidence in the record. Adverse decision affirmed.

CASE NO: 14-00978.a1

DATE: 06/16/2016

DATE: June 16, 2016

In Re:)	
)	
-----)	ISCR Case No. 14-00978
)	
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 June 13, 2014, DoD issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline G (Alcohol Consumption) and Guideline E (Personal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On March 28, 2016, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Elizabeth M. Matchinski 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 Judge erred in finding that he had deliberately omitted information during his clearance interview and whether the Judge erred in her mitigation analysis. Consistent with the following, we affirm.

The Judge's Findings of Fact

Applicant consumed alcohol at times to excess from about 1985 to early 2014. He was twice convicted of DWI and/or DUI. He had previously attended an outpatient program, in order to regain his driving privileges after the later DUI. After completion of this program, Applicant was evaluated by a licensed mental health counselor, who recommended individual psychotherapy and Alcoholics Anonymous (AA) attendance. A subsequent licensed clinical social worker diagnosed him with alcohol dependence. After completion of treatment, Applicant was considered to be of low risk for recidivism. The clinical social worker concluded that Applicant had been attempting to self-medicate for depression. He voluntarily sought substance abuse treatment in 2010. He revealed his treatment to his employer, although a union representative advised him that he did not need to reveal the reason for it.

During his clearance interview, Applicant did not disclose his 2010 treatment. In his response to the SOR, Applicant stated that the interviewer did not ask him about substance dependency. At the hearing, he testified that he thought the interviewer was asking about prior treatment. Applicant has attended AA since 2009 and counseling with a different organization since mid-2015. Though denying drinking to intoxication, Applicant admitted that he had consumed alcohol since 2009. He would like to stop drinking completely due to the problems that it had caused. His counselors have recommended that he abstain from alcohol, although he claims that it is only for health reasons later in life.

Applicant enjoys a good reputation for the quality of his work performance. A personal friend affirms that Applicant has learned from his counseling and drinks only one or two beers socially on holidays or special occasions.

The Judge's Analysis

The Judge stated that there is no evidence that the social worker's diagnosis of alcohol dependence had ever been modified or challenged. She noted his attendance at various treatment programs and his evidence of significantly reduced alcohol consumption. She stated, however, that he had yet to acknowledge his alcohol dependency problem and that he continues to consume alcohol despite recommendations by health care professionals that he abstain.

Under Guideline E, the Judge entered favorable findings on an allegation that he had declined to sign a release order authorizing clearance investigators to review his 2008 alcohol treatment records. She did so because she concluded that Applicant may not have understood the implications of this refusal. However, she found that his omission of his 2010 treatment during his clearance interview was deliberate. She noted evidence that he had not revealed this treatment on his clearance application and that his refusal to sign a records release indicated that he had an intent

to conceal the extent of his problems. She also noted that his explanations for this omission were not totally consistent. She concluded that Applicant's favorable evidence was not enough to mitigate the concerns arising from his security-significant conduct.

Discussion

Applicant challenges the Judge's finding that his omission during the interview was deliberate. When evaluating the deliberate nature of an applicant's omissions or false statements, a Judge should consider the applicant's *mens rea* in light of the entirety of the record evidence. *See, e.g.*, ISCR Case No. 14-04226 at 3 (App. Bd. Aug. 18, 2015).

We find no reason to disturb the Judge's finding. Applicant failed to disclose his 2010 alcohol treatment twice—in his clearance application and during the interview. The multiple nature of Applicant's omissions support a finding that they were deliberate. *See, e.g.*, ISCR Case No. 14-02567 at 4-5 (App. Bd. Oct. 5, 2015). In addition, the Judge's reliance on Applicant's failure to authorize release of earlier treatment records is supportable. Despite concluding that he had mitigated security concerns arising from this failure, it was appropriate for the Judge to consider it for its bearing upon his intent. Evidence of other acts or wrongs may be admissible to prove motive, intent, knowledge, absence of mistake, etc. Federal Rule of Evidence 404(b). *See Id.* at 5. Moreover, Applicant's inconsistent statements undermine his credibility. *See, e.g.*, ISCR Case No. 14-01056 at 3 (App. Bd. Aug. 17, 2015). The challenged finding is supported by substantial record evidence.

On the question of mitigation, Applicant cites to evidence that, he believes, demonstrates that his alcohol problems are under control. Some of the evidence that he addresses is not contained in the record. We cannot consider new evidence on appeal.¹ Directive ¶ E3.1.29. Applicant's arguments are not enough to rebut the presumption that the Judge considered all of the evidence in the record, or to show that the Judge failed properly to weigh the evidence. *See, e.g.*, ISCR Case No. 14-05795 at 2, 3 (App. Bd. Apr. 26, 2016).

The Judge examined the relevant data and articulated a satisfactory explanation for the decision. The 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). *See also* Directive, Enclosure 2 ¶ 2(b): "Any doubt concerning personnel being considered for access to classified information will be resolved in favor of the national security."

¹Applicant argues that his failure to disclose the alcohol treatment was not listed in the summary of his clearance interview, a contention that the Judge addressed in the Decision. He also states that the interview summary includes the following: "he has never been professionally diagnosed as . . . being alcohol dependent." Appeal Brief at 4. This summary is not included in the record; therefore, it is new evidence. Even if we could consider it, however, it would be entitled to limited weight on the issue of Applicant's alcohol dependence. His own exhibit, Applicant Exhibit (AE) G, a State Public Health Service Aftercare Completion Form, signed by a health care provider, contains a diagnosis of alcohol dependence. AE G is the basis for the Judge's finding on this matter. To the extent that this comment by Applicant is a challenge to this finding, it is not sufficient to demonstrate error.

Order

The Decision is **AFFIRMED**.

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

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

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