

KEYWORD: Guideline G

DIGEST: Disagreement with a Judge’s decision does not constitute a prima facie showing of bias. Adverse decision affirmed.

CASENO: 14-05022.a1

DATE: 03/09/2016

DATE: March 9, 2016

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**

Stephen J. Dunn, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On January 20, 2015, 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 November 21, 2015, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Paul J. Mason 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 was biased against him and whether the Judge’s adverse decision was arbitrary, capricious, or contrary to law. Consistent with the following, we affirm.

### **The Judge’s Findings of Fact**

Applicant served in the U.S. military from 1980 until 2000. His employment requires him to hold a clearance, which he has done since 2003. Applicant began drinking while he was in the military. He tended to do so on the weekend. In 2007, he attended a cookout where he consumed five or six beers. Afterward he drove home and was stopped by the police for speeding. His blood alcohol content at the time was .22. He pled guilty to DWI and received probation before judgment.

Applicant completed an alcohol treatment program, where he was diagnosed as alcohol dependent. He drank no alcohol at all during his first year of probation; then he resumed drinking with friends. He did so despite attendance at Alcoholics Anonymous (AA). This resumption was due to his failure to acknowledge the extent of his alcohol habit.

In 2011, Applicant attended a birthday party. He claimed that he drank two beers. He was returning from a department store when he was stopped for tapping the car in front of him. His blood alcohol level was .21. He was found guilty of DWI and sentenced to 12 months incarceration, which was converted to 15 consecutive weekends. Applicant was on supervised probation until September 2014.

Before his sentencing, Applicant attended an inpatient treatment program. He was again diagnosed as alcohol dependent. After completing treatment he was recommended for daily AA meetings. His participation in the inpatient program was evaluated “good.” Decision at 3. He considered this program to be an “eye opener.” *Id.* Applicant also received treatment from a licensed psychologist, who recommended AA attendance. He claimed that he has attended AA about once a week since August 2011. He has a sponsor and has not consumed alcohol since 2011.

Applicant modified his prior testimony by stating that he was attending Narcotics Anonymous (NA) instead. He stated that he was more comfortable sharing his feelings in that environment. Although he stated that he had completed the 12 NA steps, he could not name the first of them. The Judge stated that, given Applicant’s purported attendance at AA and NA since 2007, his inability to remember this step undercut his claims of reform.

Applicant stated that his decision to stop drinking was in part due to the potential probation violation that he would have faced otherwise. He also wanted to avoid a third DWI. He stated that his 2011 treatment had a positive impact on his recovery.

The facility manager at Applicant's place of employment stated that despite his two DWIs Applicant's presence makes the other workers more effective. He stated that Applicant had told him about the DWIs. Another witness testified that he sees Applicant from once a day to every two months. He stated that he had never seen Applicant hung over and finds him to be a dependable person.

### **The Judge's Analysis**

The Judge noted Applicant's abstinence since 2011. He stated, however, that the impact of this was diminished by his requirement to abstain from drinking as a condition of probation and by evidence that Applicant had returned to alcohol use after his 2007 conviction despite similar conditions. He also noted that this resumption of alcohol consumption occurred following the earlier diagnosis of alcohol dependence. The Judge stated that Applicant did not provide a prognosis from a health care provider as to his likelihood of relapse.<sup>1</sup> He provided little testimony or evidence as to substantive changes he had made in his lifestyle to maintain sobriety.

In the whole-person analysis, the Judge reiterated much of this discussion. He stated that, given Applicant's claims to have attended AA and/or NA for many years, he should have been able to recall the first of the 12 steps taught in those programs. The Judge stated that, in view of the absence both of an actual prognosis from a medical health professional and of independent evidence of lifestyle changes, Applicant had not mitigated the concerns arising from his alcohol abuse.

### **Discussion**

Applicant contends that the Judge was biased against him, citing to evidence that he believes to be mitigating and that the Judge either ignored or failed properly to weigh. We construe his argument to be that his mitigating evidence was so compelling that an adverse decision is attributable to bias.

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<sup>1</sup>Applicant contends that a favorable prognosis is implicit in letters from Applicant's psychologist. Applicant submitted three such letters, included in the record as Applicant Exhibit (AE) E. These letters describe the scope of the treatment provided Applicant, the matters that the psychologist discussed with him, and a breakdown of costs that Applicant incurred in obtaining treatment. The psychologist stated that Applicant understood himself to suffer from Alcohol Dependence Disorder and that he "will need to apply all of his skills, positive attitudes and routines of daily living to maintaining sobriety, one day at a time." AE E at p. 2. Nowhere in these three letters does the psychologist provide an expert opinion as to Applicant's likelihood of success.

We have examined the Decision as well as the Judge's conduct of the hearing and find nothing therein that would convince a reasonable person that he lacked the requisite impartiality. Disagreement with a Judge's decision does not constitute a *prima facie* showing of bias. *See, e.g.*, ISCR Case No. 08-03233 at 3 (App. Bd. Aug. 7, 2009).<sup>2</sup> Applicant has not rebutted the presumption that the Judge was impartial. *See, e.g.*, ISCR Case No. 14-03108 at 3 (App. Bd. May 20, 2015).

Applicant argues that the Judge substituted a credibility determination for record evidence. We are required to give deference to a Judge's credibility determination. Directive ¶ E3.1.32.1. In this case, Applicant's inability to recall the first step of AA and NA, despite many years of attendance, supports the Judge's conclusion, in that it detracts somewhat from Applicant's claims of vigilance in maintaining sobriety.<sup>3</sup> As with the issue of bias, Applicant's argument appears to be that his evidence in mitigation is conclusive and that the Judge's adverse decision is explicable only as the result of impropriety.

However, evidence that (1) Applicant has twice been convicted of DWI, (2) Applicant returned to drinking after having been diagnosed as alcohol dependent in 2007, (3) Applicant submitted letters from his psychologist following a second diagnosis of alcohol dependence that contained no actual prognosis regarding sobriety, and (4) Applicant provided little corroboration regarding lifestyle changes in support of sobriety could persuade a reasonable person that he had not met his burden of persuasion as to mitigation, even without regard to an adverse credibility determination. Applicant has not provided a reason to disturb the Judge's credibility determination. Neither has he demonstrated that the Judge substituted his adverse credibility determination for record evidence.

Applicant's brief argues that the Judge either did not consider, or mis-weighed, favorable record evidence. However, the Judge discussed much of the evidence that Applicant has cited. Applicant has not rebutted the presumption that the Judge considered all of the evidence in the record. *See, e.g.*, ISCR Case No. 14-06093 at 3 (App. Bd. Dec. 4, 2015). Applicant argues for an alternative interpretation of the evidence, which is not sufficient to show that the Judge weighed the evidence in a manner that was arbitrary, capricious, or contrary to law. *See, e.g.*, ISCR Case No. 14-06440 at 4 (App. Bd. Jan. 8, 2016).

The Judge examined the relevant data and articulated a satisfactory explanation for the decision, both as to the mitigating conditions and the whole-person factors. 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

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<sup>2</sup>In the cited case, the applicant offered no explanation for her claim of bias other than the adverse decision. This failed to meet the standard that applies to claims of bias, which is whether the Judge acted in a manner that would lead a disinterested person to question his or her fairness or impartiality.

<sup>3</sup>The Judge's finding that Applicant claimed to have consumed only two beers in the 2011 incident despite a .21 blood alcohol level also supports his credibility determination.

being considered for access to classified information will be resolved in favor of the national security.”

**Order**

The Decision is **AFFIRMED**.

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

Signed: Jean E. Smallin  
Jean E. Smallin  
Administrative Judge  
Member, Appeal Board

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