

KEYWORD: Guideline G

DIGEST: The Judge’s findings about Applicant’s history of alcohol consumption are based on substantial evidence, or constitute reasonable characterizations or inferences that could be drawn from the record. Adverse decision affirmed.

CASE NO: 14-03986.a1

DATE: 04/19/2017

DATE: April 19, 2017

In Re: ----- Applicant for Security Clearance)))))))	ISCR Case No. 14-03986
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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 July 15, 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 January 11, 2017, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge David M. White 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 his findings of fact 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 is a 47-year-old employee of a defense contractor. He is divorced with one child. He admitted all of the allegations in the SOR. In 2008, he was arrested for willful cruelty to a child when he passed out on a couch while he was supposed to be supervising his child and another. The children left the house and went to a store for candy. A law enforcement officer took or followed the children home where Applicant was found unconscious after consuming alcohol and medicine. He was sentenced to two days in jail, four years probation, and a fine.

In 2012, Applicant's drinking became so excessive that he missed a lot of work and family members intervened to convince him to enroll in a detoxification and inpatient treatment program. He was diagnosed as alcohol dependent by a qualified medical professional. He also participated in an outpatient program, but relapsed later that year and resumed binge drinking. He was arrested for driving under the influence (DUI) in late 2012. He entered into a deferred prosecution agreement that placed him on probation for five years and required him to complete alcohol treatment while remaining abstinent. In April 2015, his probation officer reported he had two relapses and failed to comply with the terms of his probation. In May 2015, he tested positive for alcohol consumption and was discharged from the outpatient program. His deferred prosecution agreement was vacated and he was convicted of the DUI charge. He entered another intensive outpatient program, which he successfully completed in early 2016. He has remained sober since May 2015 and has continued active Alcoholics Anonymous participation.

The Judge's Analysis

Applicant has a lengthy history of alcohol-related problems. He admitted habitual and binge consumption of alcohol from 1988 to May 2015 with periods of sobriety followed by relapses. Given his pattern of drinking in violation of a court order and treatment program requirements as well as his relatively short period of sobriety, it cannot be determined that recurrence is unlikely or doubts about his judgment and reliability are resolved. He successfully completed a treatment program in early 2016 but offered no evidence of a favorable prognosis. He failed to establish pertinent mitigating conditions.

Discussion

Appellant contends there is no evidence that he used alcohol frequently to the point of intoxication from 1988 to 2015. In his SOR response, Applicant admitted that he consumed alcohol, at times to excess and to the point of intoxication, from approximately 1988 to May 2015, when he tested positive for alcohol. At the hearing, he testified about his excessive consumption of alcohol during certain periods, his participation in alcohol treatment programs, his relapses, and his DUI. Tr. at 32-52, 56-89. The Judge's findings about Applicant's history of alcohol consumption are based on substantial evidence, or constitute reasonable characterizations or inferences that could be drawn from the record. *See, e.g.*, ISCR Case No. 12-03420 at 3 (App. Bd. Jul. 25, 2014).

Applicant also contends there is no proof that he consumed alcohol in the afternoon or evening of the date he was arrested for child cruelty in 2008. However, in his answer to the SOR, Applicant admitted that he drank alcohol in the morning hours of that day, but denied drinking prior to his arrest that night and noted he was on medicine then because of a severe sickness. At the hearing, he testified that he had a double mixed drink earlier that day with friends. He also stated that he was not drunk when arrested, but did not know whether the combination of the alcohol earlier that day with the strong medication is what affected him. Tr. at 32-36, 71-72. In a background interview, he reportedly told an investigator that he drank two beers about three or four hours before falling asleep on that occasion. Government Exhibit (GE) 3. Of note, the judge did not find that Applicant was intoxicated when he was apprehended but stated a law enforcement officer “found Applicant unconscious after having consumed alcohol and medicine.” Decision at 2. In his analysis, the Judge characterized this incident as an alcohol-related offense. Based on our review of the record, we find no harmful error in the Judge’s findings or characterization of the child cruelty offense.

In the Appeal Brief, Applicant claimed he failed alcohol tests while in treatment because he was breathing flumes at work from solvents that contained alcohol. He testified about this industrial exposure at the hearing (Tr. at 44-49), but the Judge made no findings concerning it. The reason why Applicant is raising industrial exposure in his Appeal Brief is not clear. As best as we can discern from his brief, he is apparently challenging his positive alcohol tests, stating in part, “there’s no actual facts that I was actually drinking.” This assertion, however, lacks merit. In his testimony, he acknowledged that he failed three alcohol tests because he had been drinking, but attributed other positive alcohol tests to industrial exposure. Tr. at 46, 49, 80-81. Between alcohol treatment programs from November 2014 to May 2015, he also admitted to drinking “a little bit” while still on probation.¹ Tr. at 65. Moreover, the Judge’s findings about Applicant’s relapses while in the deferred prosecution program are supported by a state court record. *See*, GE 3. We find no harmful error in the Judge not addressing the industrial exposure issue in the Decision.

Applicant notes that his security clearance was reinstated after his child cruelty conviction in 2008 and argues that consideration of that same offense is a form of double jeopardy. The double jeopardy protection afforded criminal defendants under the Fifth Amendment of the U.S. Constitution does not apply to security clearance cases, which are administrative proceedings. *See, e.g.*, ISCR Case No. 02-12199 at 7, n.13 (App. Bd. Oct 7, 2004). Additionally, the Government cannot be precluded from protecting classified information under the doctrine of equitable estoppel and has the right to reconsider the security significance of past conduct in light of more recent conduct having negative security significance. *See, e.g.*, ISCR Case No. 03-08073 at 3-4 (App. Bd. Oct. 25, 2005). Applicant also argues that Department Counsel “targeted” him by using his 2012 DUI, treatments, and rehabilitation, and that he “felt threatened under act of prejudice.” Appeal Brief at 2. There is a legal presumption that government officials carry out their duties properly in good faith, and a person seeking to rebut or overcome that presumption has the burden of presenting clear evidence to the contrary. *See, e.g.*, ISCR Case No. 02-20947 at 3 (App. Bd. Jun. 18, 2004).

¹ At the hearing, Applicant also testified that his last consumption of alcohol was in early May 2015. On May 22, 2015, he signed interrogatories in which he listed his last consumption of alcohol as occurring in October 2013. Upon cross-examination, he testified that his statement in the interrogatories about when his last consumption of alcohol occurred was false. Tr. at 87.

Applicant failed to meet his burden of showing that Department Counsel acted in an improper manner.

Applicant raises various arguments supporting the granting of his security clearance, such as his disclosure of the conduct in question on his security clearance application, his successful completion of an alcohol rehabilitation program, and his responsible handling of classified information for 25 years. These arguments are neither enough to rebut the presumption that the Judge considered all of the evidence in the record nor are they 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. 15-04856 at 2-3 (App. Bd. March 9, 2017).

Applicant has not identified any harmful error likely to change the outcome of the case. The Judge examined the relevant evidence and articulated a satisfactory explanation for the decision. “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.” The decision is sustainable on this record.

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: James F. Duffy
James F. Duffy
Administrative Judge
Member, Appeal Board