

KEYWORD: Guideline E; Guideline G; Guideline J

DIGEST: The adverse decision rested upon Applicant’s multiple DUIs and a paucity of evidence to show both the full extent of Applicant’s drinking habits and any steps Applicant may have taken to ensure that he is rehabilitated from alcohol abuse. Adverse decision affirmed.

CASENO: 16-00781.a1

DATE: 03/14/2018

DATE: March 14, 2018

In Re:)	
)	
-----)	ISCR Case No. 16-00781
)	
Applicant for Security Clearance)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

Daniel M. Smith, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On September 2, 2016, DoD issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline G (Alcohol Consumption), Guideline E (Personal Conduct), and Guideline J (Criminal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a decision on the written record. On November 22, 2017, after considering the record, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Roger C. Wesley 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 Applicant was denied due process 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 military for 22 years, retiring as a noncommissioned officer. Since 2006, he has worked for his current employer. In June 2011, Applicant was arrested and charged with DUI. He had been to a restaurant where he claimed that he had consumed two beers. After he left the restaurant, Applicant was stopped by the police because he failed to use a turn signal. The officer administered a breathalyzer test, yielding a result of .14%, a result apparently at odds with Applicant's claim that he had consumed only two beers. Applicant pled guilty to DUI. He was required to complete an alcohol education program, followed by a Mothers Against Drunk Driving class. He was also fined \$2,100 and placed on five years probation.

In 2014, Applicant drank four beers while barbecuing at his home. He then drove to pick up his grandson at school. While driving home with his grandson, he struck a stopped police officer on a motorcycle. Applicant admitted to the officer that he had been drinking, and his breathalyzer result yielded .12%. Applicant pled guilty to this second DUI offense and to a charge of child endangerment, both felonies. "Both felonies were dropped by the court." Decision at 4. Applicant was fined, ordered to complete an 18-month alcohol education program, and placed on five years probation.

The Judge cited Applicant's security clearance application where Applicant stated that he had been sober for almost 13 months and committed himself to never "taking another drink" in his life. *Id.* The Judge also referenced his clearance interview where Applicant stated that he had not had a drink since the 2014 DUI and that he had no intention of resuming drinking in the future. "Applicant, however, is still on probation and declined to admit or deny consuming alcohol while on probation." *Id.*

The Judge noted favorable letters from Applicant's supervisor and the attorney who represented him in his DUI cases. The supervisor stated that Applicant has been serious about avoiding another alcohol-related incident. He stated that Applicant has avoided alcohol consumption for "more than two years." *Id.* at 5. The attorney stated that Applicant is a responsible person, but he provided no additional information. The Judge found that Applicant's favorable character evidence, which included a letter from the director of his 18-month education program were helpful, but not dispositive, concerning Applicant's continued sobriety. He noted that the record contains no evaluations by a substance abuse counselor and found that, without more evidence regarding Applicant's substance abuse history and the steps Applicant is taking to avoid alcohol abuse, his assurances about his sobriety "cannot be afforded full weight." *Id.* at 4.

The Judge's Analysis

The Judge stated that little is known about Applicant's drinking history or whether he

consumed alcohol during his periods of probation. Due to a paucity of evidence on these matters, the Judge concluded that it is difficult to gauge Applicant's case for rehabilitation. The Judge noted that, in his answer to the SOR, Applicant stated that he neither affirmed nor denied drinking during his probation. He also noted that there is no evidence of follow-on counseling. The Judge cited to evidence that Applicant remains on probation as of the close of the record and concluded that the record as a whole did not support a favorable result.

Discussion

Applicant notes the Judge's comments about a paucity of evidence concerning rehabilitation. He states that, if he had known that he could respond to the File of Relevant Material (FORM) he could have submitted additional information. The record shows, however, that Applicant was provided with notice of his right to respond. In an email from Department Counsel, dated December 28, 2016, Applicant was advised that he would receive a copy of the written record, after which he would have "thirty (30) days to respond with any objections, clarifications, or additional documents that you want considered[.]" The FORM itself included a memo by Department Counsel that explained to Applicant that he could submit a "documentary response setting forth objections, rebuttal, extenuation, mitigation, or explanation as appropriate." DOHA sent Applicant a copy of the FORM along with a cover letter that provided similar guidance. Applicant acknowledged receipt of the FORM and cover letter on March 15, 2017. Applicant received adequate guidance about his right to respond to the FORM. He was not denied the due process that the Directive provides. *See, e.g.*, ISCR Case No. 15-06494 at 2-3 (App. Bd. Oct. 5, 2017).

Applicant challenges a comment by the Judge to the effect that his claim to have consumed only two beers prior to the 2011 incident was at apparent odds with his .14% breathalyzer result. However, the Judge's doubt about Applicant's claim is not unreasonable. In any event, his overall adverse decision appears to have rested upon Applicant's multiple DUIs and a paucity of evidence to show both the full extent of Applicant's drinking habits and any steps Applicant may have taken to ensure that he is rehabilitated from alcohol abuse. Therefore, even if the Judge's comment was in error, it did not likely affect the overall result of the case. Assuming without deciding that the comment was erroneous, it was harmless. On the whole, Applicant's appeal brief is a challenge to the manner in which the Judge weighed the evidence. Among other things, he cites to the court never having ordered him to abstain from consuming alcohol while on probation from his first DUI, his years of sobriety following his second DUI, his compliance with court-ordered counseling, his family circumstances, etc. However, an ability to argue for an alternative interpretation of the evidence is not enough 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.15-07062 at 2 (App. Bd. Nov. 21, 2017).

The Judge examined the relevant evidence 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, Encl. 2, App. A ¶ 2(b): "Any doubt concerning personnel being considered for national security eligibility will be resolved in favor of the national security."

Order

The Decision is **AFFIRMED**.

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

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

Signed: Charles C. Hale
Charles C. Hale
Administrative Judge
Member, Appeal Board