KEYWORD: Guideline G; Guideline M

DIGEST: The evidence, viewed as a whole, supports a reasonable conclusion that Applicant has habitually consumed alcohol to the point of impairment after which he operated a motor vehicle. Adverse decision affirmed.

CASENO: 16-02640.a1

DATE: 07/02/2018

DATE: July 2, 2018

In Re:	)	
	)	
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	)	
	)	
Applicant for Security Clearance	)	
	)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT
James B. Norman, Esq., Department Counsel

FOR APPLICANT
Joseph J. Valvo, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On October 7, 2016, 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). The SOR was later amended to add an allegation under Guideline M (Use of Information Technology). Applicant requested a hearing. On March 27, 2018, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Arthur E. Marshall, Jr., 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 misapplied a disqualifying condition; whether the Judge's findings of fact contained errors; and whether the Judge's adverse decision was arbitrary, capricious, or contrary to law. The Judge's favorable findings under Guideline M are not at issue in this appeal. Consistent with the following, we affirm.

The Judge's Findings of Fact and Analysis

Applicant, who is 58 years old, began consuming alcohol when he was in high school. He was arrested, charged, and convicted of DUI/DWI in 2001, 2005, and 2013. In 2012 he was charged with DWI, reckless driving, failure to wear a seat belt, and unsafe lane change. Applicant had consumed alcoholic beverages at a friend's house prior to this arrest. Applicant pled guilty to reckless driving and the other charges were dismissed. Applicant has never been diagnosed with an alcohol-related disorder. He no longer drives after drinking, and he has reduced his consumption of alcoholic beverages.

The Judge found that Applicant's circumstances raised two disqualifying conditions, 22(a) and 22(c).[1] In evaluating Applicant's case for mitigation, the Judge noted that each incident involved Applicant having placed himself in control of a car after having consumed alcohol. He stated that, at the close of the record, Applicant was not in counseling, undergoing treatment, or attending programs such as Alcoholics Anonymous. In the whole-person analysis, the Judge found Applicant to have been candid and believable and cited to his current duties and to his having held a clearance for many years. However, he went on to note that Applicant had been charged with drinking and driving four times during the course of his adult life. He also noted that Applicant's alcohol offenses occurred while he held a clearance, which should have made him careful about engaging in conduct that could imperil his access to classified information.

Discussion

[1]Directive, Encl. 2, App. A¶ 22(a): "alcohol-related incidents away from work, such as driving while under the influence, fighting, child or spouse abuse, disturbing the peace, or other incidents of concern, regardless of the frequency of the individual's alcohol use or whether the individual has been diagnosed with alcohol use disorder;" and ¶ 22(c): "habitual or binge consumption of alcohol to the point of impaired judgment, regardless of whether the individual is diagnosed with alcohol use disorder[.]"

Applicant contends that the Judge erred in his treatment of the disqualifying conditions. In particular he argues that there is no evidence that he had ever engaged in binge drinking or that his alcohol consumption has ever been classified as habitual or pathological, thereby challenging the Judge's favorable application of disqualifying condition 22(c). The evidence, viewed as a whole, supports a reasonable conclusion that Applicant has habitually consumed alcohol to the point of impairment after which he operated a motor vehicle. We find no reason to disturb the Judge's treatment of this disqualifying condition. Even if he erred, however, his favorable application of disqualifying condition 22(a) was sufficient to have placed upon Applicant the burden of persuasion regarding mitigation. Indeed, the Directive presumes a nexus between proved or admitted conduct under any of the Guidelines and an applicant's eligibility for a clearance. *See, e.g.*, ISCR Case No. 16-01900 at 3 (App. Bd. Apr. 19, 2018) . We resolve this assignment of error adversely to Applicant.

Applicant challenges some of the Judge's findings. For example, he cites to the following sentence in the whole-person analysis:

> In addition to Applicant's *past illegal drug involvement*, alcohol consumption, and personal conduct, I considered his present life, candor at the hearing, and credible explanations. Decision at 7 (emphasis added).

Applicant states that there is no record evidence of any illegal drug possession or use, arguing that the Judge's false assumption on this matter "drove the Court's process and tainted his decision." Appeal Brief at 13.

We agree that there is no evidence of drug involvement by Applicant and that the challenged comment is an error. However, we find no basis to conclude that it affected the decision, much less that it was a driving force behind the Judge's ultimate resolution of the case. We note that the Judge made no findings of fact about drug offenses and that when analyzing Applicant's security-significant conduct did so strictly in terms of alcohol consumption. We conclude that, contrary to Applicant's argument on appeal, this error was most likely inadvertent and that even if the Judge had not made the error he would have arrived at the same overall result.

Applicant also argues that the Judge erred by finding that he began consuming alcohol while in high school. However, in his security clearance interview, Applicant advised the investigator of that very fact. Government Exhibit 5, Clearance Interview Summary (2015), at 5. Applicant also states that he was not convicted of DWI as result of his 2012 arrest. As noted above, the Judge found that the DWI offense was dismissed. He did not err in finding that Applicant had consumed alcohol prior to this arrest.[2] The fact that criminal charges were dropped, dismissed, or resulted in an acquittal does not preclude a Judge from finding an applicant engaged in the conduct underlying those criminal charges. *See, e.g.*, ISCR Case No. 10-05039 at 3 (App. Bd. Oct. 17, 2011). We conclude that the Judge's material findings of security concern are supported by substantial

[2]"[Q]: You drank prior to driving on that particular occasion, as you said. [A]: Unfortunately, yes." Tr. at 54.

evidence, or constitute reasonable inferences that could be drawn from the evidence. Applicant has not cited to any harmful error in the Judge's decision. *See, e.g.*, ISCR Case No. 17-01181 at 4 (App. Bd. Apr. 30, 2018).

The Judge examined the relevant evidence 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, 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: 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