

KEYWORD: Guideline G

DIGEST: The Judge issued one finding which is erroneous. That error is harmless. Applicant has not met his heavy burden o appeal in challenging the Judge’s credibility determination Adverse decision affirmed.

CASENO: 03-16936.a1

DATE: 08/02/2007

DATE: August 2, 2007

In Re:)	
)	
-----)	ISCR Case No. 03-16936
)	
Applicant for Security Clearance)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

Kathleen E. Voelker, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On August 12, 2006, DOHA issued a statement of reasons 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 31, 2007, after the hearing, Administrative Judge John Grattan Metz, Jr. denied Applicant's request for a security clearance. Applicant filed a timely appeal pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raised the following issues on appeal: whether some of the Judge's findings, to include his negative credibility determination, were not supported by record evidence; and whether the Judge's unfavorable clearance decision is arbitrary, capricious, or contrary to law. Finding no error, we affirm.

The Judge made the following pertinent findings: Applicant has a history of alcohol abuse from 1966 until July 2003, which includes five alcohol-related arrests. He began drinking in high school¹ and drank to excess and to the point of intoxication while in the Marines.

In January 1987, Applicant was arrested for DUI, after having consumed 8 draft beers. He was convicted of negligent driving and fined.

Between July 1987 and July 1988, Applicant was assigned as a Marine to a remote location. He began to abuse alcohol regularly, given the limited choices for social activity available to him. Although he lightened up on his drinking after his return, he began abusing alcohol again and, in March 1991, was arrested a second time for DUI. This arrest was dismissed and expunged from his record.

Applicant retired from the Marines in 1993, after which he increased his level of drinking. In December 1994 he was again arrested for DUI, pleading guilty, paying a fine, spending a day in jail, and being required to complete an alcohol safety action program (ASAP). He completed the program in March 1995.

Applicant resumed drinking after completing ASAP and was arrested again for DUI, in December 1996. Again he pled guilty, was fined, received a suspended sentence to 60 days confinement, and was ordered to attend another ASAP, and to attend two Alcoholics Anonymous (AA) meetings per week for a year. He completed ASAP successfully.

In September 1999, Applicant was arrested for another DUI. Upon the advice of counsel he attended an alcohol treatment program, which lasted from November 1999 to January 2000.² He was diagnosed as alcohol dependent. He was indicted on felony DUI, due to the fact that it was his third DUI in a five year period. Applicant pled guilty. He was sentenced to five years imprisonment and to a fine, although all but two months of the imprisonment was suspended, conditioned on good behavior for five years, indefinite supervised probation, and completion of the alcohol treatment aftercare program.

Applicant completed his prison sentence in September 2000 and was released from supervised probation in July 2001. He attended AA meetings until "at least July 2001," after which the Judge found that evidence of Applicant's AA attendance is contradictory. The Judge also noted

¹Applicant testified that he was 17 years old when he began consuming alcohol. Tr. at 43.

²The Judge refers to this once incorrectly as "intensive inpatient" and once correctly as "intensive outpatient."

certain apparent inconsistencies in Applicant's evidence. For example, although Applicant admitted in his response to the SOR that he had been diagnosed as alcohol dependent, he testified that he had never explicitly received such a diagnosis.³ Additionally, Applicant testified that he did not drink alcohol from his 1999 arrest until December 2002,⁴ which is not consistent with Government Exhibit 3, in which he states that he had been using alcohol occasionally during the year and a half preceding his making of that document, June 23, 2003.

Although Applicant testified that he does not consider himself to be an alcoholic, he acknowledged that counselors at his treatment program advised him to abstain from drinking alcohol. Nevertheless, Applicant continues to consume alcohol, although he states that he has changed his lifestyle and can control his drinking.

The Appeal Board's review of the Judge's findings of facts is limited to determining if they are supported by substantial evidence—"such relevant evidence as a reasonable mind might accept as adequate to support such a conclusion in light of all the contrary evidence in the record." Directive ¶ E3.1.32.1. "This is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's findings from being supported by substantial evidence." *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620-21 (1966). In evaluating the Judge's findings, we are required to give deference to the Judge's credibility determinations. Directive ¶ E3.1.32.1.

Applicant contends that the following findings are in error: that Applicant has a history of alcohol abuse from 1966 to 2003; that Applicant had not benefitted from AA; and that Applicant has recanted previous statements that he is alcohol dependent. We have examined the challenged findings in light of the record as a whole. As regards the first, we note that Applicant's answer to the SOR admitted that he had "consumed alcohol, at times to excess and to the point of intoxication, from approximately 1966 to at least June 23, 2003." Furthermore, we note Government Exhibit 2, a signed sworn statement by Applicant, in which he says, "I started drinking when I was 17 years old. I went to parties on weekends and would drink about a six-pack." These admissions, read in light of Applicant's DUI arrests and other evidence of alcohol abuse, constitute substantial evidence for the challenged finding. As regards the remaining two, they are located in the Conclusions section of the decision and are evaluative comments based upon a plausible interpretation of the record evidence. To the extent that there is error in them, it is harmless, given the record as a whole.⁵ *See, e. g.*, ISCR Case No. 04-00949 at 2 (App. Bd. Mar. 27, 2007). During the course of challenging the sufficiency of the Judge's decision, Applicant also took issue with the following statement: "In 1982, Applicant experienced a period of increased alcohol consumption when his wife died of cancer . . ." Decision at 2. After examining the record, we conclude that Applicant's position on this

³Tr. at 53-4.

⁴Tr. at 54.

⁵Applicant admitted that, during his alcohol treatment program, he was diagnosed as "alcohol dependent" and that at the time of the treatment he thought he was an alcoholic. However, he went on to state that he does not "right now" consider himself to be an alcoholic and that, in fact, no one had ever explicitly said to him that he was. Tr. at 68-9. While he never used the word "recant" or other similar term, a reasonable person could infer that Applicant's testimony was an attempt to discount his diagnosis.

statement has merit. This particular finding is erroneous. However, given the record as a whole, we conclude that the error is harmless. We will address the Judge’s credibility determination below.

A Judge is required to “examine the relevant data and articulate a satisfactory explanation for” the decision, “including a ‘rational connection between the facts found and the choices made.’” *Motor Vehicle Mfrs. Ass’n of the United States v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)(quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)). “The general standard is that a clearance may be granted only when ‘clearly consistent with the interests of national security.’” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). The Appeal Board may reverse the Judge’s decision to grant, deny, or revoke a security clearance if it is arbitrary, capricious, or contrary to law. Directive ¶¶ E3.1.32.3 and E3.1.33.3.

“[T]here is a strong presumption against granting a security clearance.” *Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991). Once the government presents evidence raising security concerns, the burden shifts to the applicant to establish any appropriate mitigating conditions. See Directive ¶ E3.1.15. “The application of disqualifying and mitigating conditions and whole person factors does not turn simply on a finding that one or more of them apply to the particular facts of a case. Rather, their application requires the exercise of sound discretion in light of the record evidence as a whole.” See ISCR Case No. 05-03635 at 3 (App. Bd. Dec. 20, 2006).

We have considered Applicant’s brief, the Judge’s findings, and the record as a whole. Given Applicant’s lengthy history of alcohol abuse, his five DUI arrests, his having continued to drink despite his counselors having advised him to abstain, and the apparent discrepancies the Judge noted in Applicant’s evidence, the Judge’s conclusion that Applicant had not met his burden of persuasion is sustainable. Furthermore, the record does not support a conclusion that Applicant has met his “heavy burden” in challenging the Judge’s credibility determination. See ISCR Case No. 97-0356 (App. Bd. Apr. 21, 1998). In addition to the above-referenced discrepancies, the Judge also noted the self serving character of Applicant’s statements to investigators concerning his DUI arrests, to the effect that, on the dates in question, his driving was erratic due not to intoxication but to his efforts to avoid potholes in the road, etc. In light of these matters, and the record as a whole, the Judge’s view that Applicant suffers from “general credibility issues”⁶ is sustainable. Accordingly, the Judge’s adverse security clearance decision is not arbitrary, capricious, or contrary to law.

⁶Decision at 8.

Order

The Judge's decision denying Applicant a security clearance is AFFIRMED.

Signed: Michael Y. Ra'anan

Michael Y. Ra'anan

Administrative Judge

Chairman, Appeal Board

Signed: William S. Fields

William S. Fields

Administrative Judge

Member, Appeal Board

Signed: James E. Moody

James E. Moody

Administrative Judge

Member, Appeal Board