

Guideline E (Personal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a decision on the written record. On May 30, 2007, after considering the record, Administrative Judge Paul J. Mason granted Applicant's request for a security clearance. Department Counsel filed a timely appeal pursuant to Directive ¶¶ E3.1.28 and E3.1.30. Applicant, in turn, filed a timely notice of cross-appeal pursuant to Directive ¶ E3.1.28.

Department Counsel raised the following issue on appeal: whether the Judge's decision is arbitrary, capricious, or contrary to law.¹ On cross-appeal, Applicant contends that certain of the Judge's findings are not supported by record evidence. Applicant requests that, if the Board should find harmful error, that the case be remanded to the Judge for further processing.

Whether the Record Supports the Judge's Factual Findings

A. Facts

The Judge made the following pertinent findings of fact: Applicant began drinking alcohol in high school at age 17. He has been convicted three times of DUI, the most recent in February 2005. He has also been arrested and charged with several incidents of illegal possession of alcohol and public intoxication, over a period extending from 1997 to 2001. He has received "alcohol-related treatment" from October 2003 until March 2004 and again from November 2005 until March 2006.

B. Discussion

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. Department Counsel has not expressly challenged the Judge's findings of fact. Applicant challenges certain facts in his cross-appeal, which the Board will address below.

Whether the Record Supports the Judge's Ultimate Conclusions

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.

¹The Judge's favorable decision under Guideline E is not at issue in this appeal.

“[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, e.g.*, ISCR Case No. 05-03635 at 3 (App. Bd. Dec. 20, 2006).

In deciding the case in Applicant’s favor, the Judge relied upon Alcohol Consumption Mitigating Condition (ACMC) 23(b): “the individual acknowledges his or her alcoholism or issues of alcohol abuse, provides evidence of actions taken to overcome this problem, and has established a pattern of abstinence (if alcohol dependent) or responsible use (if an alcohol abuser).”² The Judge stated that marriage has impressed upon Applicant the importance of responsible behavior concerning alcohol. He also noted that there is no record evidence of offenses after the February 2005 DUI and that Applicant has completed a treatment program and attends Alcoholics Anonymous.

Department Counsel disagrees with the Judge’s decision, arguing that the Judge relies too heavily on Applicant’s uncorroborated statements that he has mended his ways. We find merit in Department Counsel’s argument. While common sense supports the view that the assumption of marital responsibilities can be conducive to greater maturity, we note the considerable record evidence which is unfavorable to Applicant. First of all is the fact that his most recent DUI incident occurred after he had completed an alcohol treatment program, which diminishes the rehabilitative force of such treatment and AA attendance. Indeed, this last DUI occurred after Applicant had submitted his security clearance application that is the basis of this adjudication and after he had submitted a written statement to the Defense Security Service to the effect that his current alcohol consumption “is basically none.” Furthermore, in this statement Applicant claims that he has committed himself to sobriety in light of his obligations to his family. Applicant made such a statement in an effort to obtain a security clearance, which should have impressed upon him the need to conform his behavior to the requirements of the law. His subsequent alcohol-related misconduct vitiates his claims that he has demonstrated rehabilitation and increased maturity.³

The Board has examined the record as a whole and concludes that, while the Government has established a disqualifying condition under Guideline G,⁴ Applicant has not met his burden of persuasion that he has a “tangible track record” of responsible use of alcohol. *See* ISCR Case No. 94-0964 (App. Bd. Jul. 3, 1996). This is especially true in light of Applicant’s having requested an administrative determination, which deprived the Judge of an opportunity to evaluate the credibility

²Directive ¶ E2.23(b).

³Department Counsel points out in his brief that the February 2005 DUI occurred less than two months after his wedding. *See* Item 2 at 2; Item

⁴*See* Directive ¶ E2.22(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 whether the individual is diagnosed as an alcohol abuser or alcohol dependent . . .”

of his statements in the context of the hearing. We conclude that the Judge's favorable decision under Guideline G is not sustainable on this record.

We have considered the issues which Applicant raised in his cross-appeal. He argues that the SOR improperly listed an offense twice, creating the impression that Applicant had committed more alcohol-related misconduct than he contends is actually the case and that the Judge's factual findings reflect this same error. We have considered Applicant's brief in light of the Judge's findings and the record. We conclude that any error in the Judge's findings did not result in harm to Applicant, in light of the fact that the Judge decided in his favor on all allegations. Furthermore, we have taken Applicant's arguments into account in evaluating the appellate issues raised by Department Counsel. Even if the SOR did multiply one offense into two allegations, the record still does not support a conclusion that Applicant has met his burden of persuasion as to mitigation or extenuation. Therefore, we find no reason to remand the decision to the Judge.

Order

The Judge's favorable security clearance decision is REVERSED.

Signed: Jean E. Smallin

Jean E. Smallin
Administrative Judge
Member, 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