KEYWORD: Guideline G; Guideline J; Guideline E

DIGEST: The Board sees no error in the Judge's finding plausible Applicant's explanation that his decision to consider his military offenses under question 25 of the security application meant that he felt that he was not obliged to list under question 24. Department Counsel persuasively argues that the Judge's analysis of Applicant's alcohol related incidents was piecemeal. The Judge's conclusion that the disposition of Applicant's DWI charge was the equivalent of acquittal is not supported by the record. Favorable decision reversed.

CASENO: 04-12916.a1

DATE: 03/21/2007

DATE: March 21, 2007

In Re:	)	
	)	
----------	)	ISCR Case No. 04-12916
SSN: -------	)	
	)	
Applicant for Security Clearance	)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT
Fahryn Hoffman Esq., Department Counsel

FOR APPLICANT
Elizabeth L. Newman, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On September 30, 2005, DOHA issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline G (Alcohol Consumption), Guideline J (Criminal Conduct) and Guideline E (Personal Conduct), pursuant to Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On June 20, 2006, after hearing, Administrative Judge LeRoy F. Foreman, granted Applicant's request. Department Counsel submitted a timely appeal pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.

Department Counsel raised the following issues on appeal: (a) whether the Administrative Judge's decision concerning Guideline G was arbitrary, capricious, and contrary to law in that it was based on factual findings unsupported by record evidence and in that it was based upon a piecemeal analysis of Applicant's four alcohol related offenses; (b) whether the Administrative Judge's decision concerning Guideline J was arbitrary, capricious, and contrary to law in that it was based on factual findings unsupported by record evidence and in that it was based upon a piecemeal analysis of the record; (c) whether the Administrative Judge's decision concerning Guideline E was arbitrary, capricious, and contrary to law due to his exclusion of relevant and material evidence contained in Government Exhibit 3; and (d) whether the Administrative Judge's decision was arbitrary, capricious, and contrary to law in that he resolved a "close case" in favor of Applicant and against the interests of national security.

Whether the Record Supports the Administrative Judge's Factual Findings

A. Facts

The Administrative Judge made the following relevant findings of facts:

Applicant began consuming alcohol in college, becoming intoxicated about twice a year at parties. In December 1987, while on active duty with the U.S. Army, Applicant was apprehended for the offense of Driving While Impaired. The incident occurred after he had celebrated the successful completion of an exercise with his troops. Applicant's commander imposed punishment under Article 15, UCMJ, 10 U.S.C. § 815. The punishment consisted of forfeiture of $500 pay per month for two months. Additionally, his on-post driving privileges were suspended for one year.

Later that month, Applicant was apprehended for driving in violation of the suspension order and for having an open container of alcohol in his car. His commander administered an oral reprimand to him.

In April 1990, Applicant's security clearance was revoked, but it was restored in May 1991. In 1996 he was offered a sensitive position after submitting to a "full lifestyle and counterintelligence investigation and receiving a security clearance."

On July 28, 2000, Applicant was arrested for DWI by civilian authorities. He pled "nolo contendere" and was sentenced to 150 days in jail (suspended), a $500 fine, and 18 months probation. On January 2, 2003, Applicant joined some friends at a club, where, he testified, he consumed one beer. Leaving the club, Applicant was stopped for speeding. Applicant had a .06 result on the breathalyser and submitted to a field sobriety test, which was not videotaped. Civilian

authorities charged him with DWI (second offense) based on the arresting officer's observations of Applicant's bloodshot eyes, slurred speech, the smell of alcohol on the breath, unsteady balance and eye movements. Applicant was convicted after a jury trial and sentenced to 30 days in jail and a $1,500 fine.

The Administrative Judge found that, after serving his time in jail, Applicant requested a new trial, which was granted, for reasons not evident from the file. Prosecutors dismissed the DWI charge and refiled the case on a charge of obstructing a passageway (he was in the drive through lane of a fast food restaurant when the police stopped him). Applicant was sentenced to 3 days in jail, a $2,000 fine, 24 months of probation, and 24 hours of community service. In the Conclusions section of his decision, the Judge stated the following: "An acquittal is a mitigating condition...under [Guideline J]. Applicant was not acquitted of DWI after his July [sic] 2003 arrest, but I consider the judge's decision granting a new trial and dismissing the charge as sufficiently close to an acquittal to constitute a mitigating condition."

When Applicant filled out his SF 86, which asked in question 24 if he had ever been charged or convicted of any offense related to alcohol or drugs, he disclosed the July 2000 arrest but did not disclose the two military offenses from 1987. Applicant stated that he believed that military offenses were covered by question 25, which inquired about military disciplinary proceedings.

B. Discussion

The Appeal Board's review of the Administrative Judge's finding 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 finding from being supported by substantial evidence." *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620-21, 86 S. Ct. 1018, 16 L. Ed. 2d 131 (1966)). In evaluating the Administrative Judge's finding, we are required to give deference to the Administrative Judge's credibility determinations. Directive ¶ E3.1.32.1.

Department Counsel's statement of the issues on appeal include challenges to the sufficiency of the Judge's factual findings. One dispute is a particularly significant mixed question of law and fact. Department Counsel disagrees with the Judge having concluded that the new trial and subsequent dismissal of the 2003 DWI were the functional equivalent of an acquittal. Department Counsel points out that the Directive[1] makes no explicit provision "for approximations or similarities" of an "acquittal." The Department Counsel identifies the Judge's finding that this was "sufficiently close to an acquittal to constitute a mitigating condition" to be a factual error.

In this regard, we have examined the record evidence and take note of three documents. Government Exhibit 9, the motion for a new trial, includes the following: "Defendant...moves this Judge to grant a new trial for the reason that the verdict is contrary to the law and evidence." The bottom of the exhibit reflects that the Judge granted the motion. Government Exhibit 10 is a pleading submitted by the District Attorney requesting the Judge to dismiss the DWI, in light of

[1]"Conditions that could mitigate security concerns include . . . acquittal . . ." (Directive ¶ E2.A10.1.3.5).

Applicant having pled guilty to obstructing a passageway. Government Exhibit 11 contains the disposition of the Obstruction charge, with the imposition of the sentence as described above. These documents, taken together, appear to constitute a final disposition of the July 2003 DWI. Because the significance of these events involves the issue of whether, in totality, they constitute an "acquittal" for purposes of mitigation, the Board defers discussion until our discussion of whether the Judge's conclusions with regard to mitigation were arbitrary, capricious or contrary to law.

Whether the Record Supports the Administrative Judge's Ultimate Conclusions.

An Administrative 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 choice 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 Appeal Board may reverse the Administrative 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. Our scope of review under this standard is narrow and we may not substitute our judgment for that of the Administrative Judge. We may not set aside an Administrative Judge's decision "that is rational, based on consideration of the relevant factors, and within the scope of the authority delegated to the agency ..." *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 42. We review matters of law *de novo*.

Department Counsel has challenged the Judge's decision on a variety of grounds, including that he did not properly analyze the evidence as a whole and that he improperly excluded relevant and material evidence submitted by the Government. Concerning Guideline E, Applicant is alleged to have made a false statement when, in answering question 24, he did not mention his military offenses. This question asks, in pertinent part, whether Applicant had "ever been charged with or convicted of any offense(s) related to alcohol or drugs?" Applicant testified that he believed that military matters were covered by question 25 rather than 24. The Judge found Applicant's explanation to be plausible, and the Board sees no error in that finding. Neither punishment under Article 15, UCMJ, nor a reprimand, which are the apparent extent of Applicant's military disciplinary record, constitute convictions under military law. *See, for example,* 10 U.S.C. ¶ 815. A reasonable person, reading questions 24 and 25 in tandem, could well believe that 24 was concerned exclusively with judicial dispositions of cases and that 25 was seeking information about the broader spectrum of military adverse actions, which include judicial, nonjudicial, and administrative actions.

Regarding the Administrative Judge's application of disqualifying or mitigating conditions, the standard is whether he exercised sound discretion in light of the record evidence as a whole. *See*, *e.g.*, ISCR Case No. 01-14740 at 7 (App. Bd. Jan. 15, 2003). As the trier of fact, the Judge has to weigh the evidence as a whole and decide whether the favorable evidence outweighs the unfavorable evidence, or *vice versa*. A party's disagreement with the Judge's weighing of the record evidence is not sufficient to demonstrate the Judge weighed the evidence in a manner that is arbitrary, capricious, or contrary to law. *See*, *e.g.*, ISCR Case No. 05-00609 at 2-3 (App. Bd. Nov 24, 2006).

When the rulings or conclusions of an Administrative Judge are challenged, the Board must consider whether they are: (1) arbitrary or capricious, or (2) contrary to law. Directive ¶ E3.1.32.3. In deciding whether the Judge's rulings and conclusions are arbitrary or capricious, the Board will review the Judge's decision to determine whether: it does not examine relevant evidence; it fails to

articulate a satisfactory explanation for its conclusions, including a rational connection between the facts found and the choice made; it does not consider relevant factors; it reflects a clear error of judgment; it fails to consider an important aspect of the case; it offers an explanation for the decision that runs contrary to the record evidence ; or it is so implausible that it cannot be ascribed to a mere difference of opinion. *See*, e.g., ISCR Case No. 97-0435 at 3 (App. Bd. July 14, 1998) (citing Supreme Court decision).

Department Counsel persuasively argues that the Administrative Judge erred in concluding that the four incidents are not part of a pattern and that the Judge had engaged in piecemeal analysis. The Judge concluded that Alcohol Consumption Disqualifying Conditions 1[2]and 5[3] applied to Applicant, and that Disqualifying Condition 5 applied to Applicant because of excessive alcohol consumption during college and his military service. Decision at 6. The record also establishes that Applicant had two alcohol-related driving incidents in December 1987 and one in July 2000.[4] Even though the 2003 incident may not have resulted in a conviction for driving while intoxicated, it was another alcohol-related driving incident that followed a similar pattern as the conduct in the first 1987 incident and in 2000. It occurred after socializing with current or former friends and colleagues and resulted in an arrest due to abuse of alcohol in conjunction with the operation of a motor vehicle. The Judge concluded that the four incidents were unrelated because the two December 1987 incidents were too remote and the January 2003 incident was a "one-time relapse, akin to a sober alcoholic 'falling off the wagon'" after a "boys' night out." The Judge recognized that "Applicant was not acquitted of DWI after his July [sic] 2003 arrest," but as stated earlier, regarded the disposition of charges "as sufficiently close to an acquittal to constitute a mitigating condition."

An "acquittal" connotes an adjudication on the merits of a criminal case that results in a finding of not guilty. *See*, *e.g.*, ISCR Case No. 00-0016 at 2 (App. Bd. Oct. 23, 2000). The Board has held that it is arbitrary and capricious for a Judge to apply Criminal Conduct Mitigating Condition 5 absent evidence of acquittal. *See, e.g.*, ISCR Case No. 03-00741 at 6-7 (App. Bd. Nov. 15, 2005). A review of the 2003 incident indicates that Applicant was not acquitted; moreover, the outcome of the legal proceedings cannot plausibly be characterized as something equivalent to an acquittal. In this case, Applicant was convicted by a jury of a second offense driving while intoxicated, but was granted a new trial. The prosecutor could have re-prosecuted the driving while intoxicated charge, but for whatever reason, declined to do so when Applicant pled guilty to the non-alcohol charge. As the Judge stated, the Applicant was sentenced to 3 days in jail, a $2,000 fine, 24 months of probation, and 24 hours of community service, which is a heavy fine for a non-alcohol driving offense. Additionally, the record indicates that Applicant was subject to alcohol evaluation, participation in a repeat offenders program, and preclusion of Applicant from driving a vehicle that did not have an alcohol level monitoring system installed. *See* Government Exhibit 11.

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[2]"Alcohol-related incidents away from work, such as driving while under the influence, fighting, child or spouse abuse, or other criminal incidents related to alcohol use" (Directive ¶ E2.A7.1.2.1).

[3]"Habitual or binge consumption of alcohol to the point of impaired judgment" (Directive ¶ E2.A7.1.2.5).

[4]The Judge's reference in the Conclusions portion of his Decision at 6 to the "July 2003 incident" instead of a January 2003 incident and his reference to Applicant's excessive alcohol consumption ending in "January 2000" instead of July 2000, conflict with his findings of fact in the Decision at 3-4. In the overall context, these errors appear to be harmless.

Considering this record, the Judge erred in his decision that Applicant's outcome could be viewed as equivalent to an acquittal for mitigation purposes. *See*, *e.g.*, ISCR Case No. 04-07714 at 3 (App. Bd. Oct. 19, 2006).

Considering their factual similarity, the Administrative Judge's conclusions that the four alcohol incidents do not indicate a pattern,[5] and that the crimes were isolated,[6] are not sustainable. Because the security significance of the alcohol-related behavior began when Applicant was in college and continued episodically until at least 2003, and the associated criminal conduct continued episodically from 1987 until at least 2003, the Judge could not apply Alcohol Consumption Mitigating Condition 2[7] and Criminal Conduct Mitigating Condition 1[8] so as to fully mitigate the government's security concerns. The remaining question is whether the Judge's conclusions that (a) there are positive changes in behavior supportive of sobriety[9] and (b) clear evidence of successful (criminal conduct) rehabilitation,[10] are sustainable. The Judge based his favorable sobriety conclusions on the following: (a) that "Applicant substantially changed his drinking habits after his DWI conviction in 2000; (b) that the January 2003 arrest was a one-time relapse; (c) that Applicant no longer socializes with his old drinking friends; (d) that he has become very family-oriented; (e) and that he has established a reputation as an outstanding and dependable worker. Decision at 6-7. The Judge also recognized that clear evidence of successful rehabilitation is dependent on the passage of a significant period of time without recurrence of past misconduct. Decision at 7.

Although he mentions that Applicant made changes in his lifestyle and behavior, the primary bases for the Administrative Judge's application of Criminal Conduct Mitigating Condition 6 are the passage of six years since Applicant's last DWI conviction and more than three years "since his questionable arrest for DWI and its generally favorable disposition." Decision at 8. In view of the Judge's unsustainable characterization of the 2003 incident and its legal disposition, and his erroneous comparison of the 2003 with the 1987 and 2000 incidents, the record does not contain sufficient record evidence to sustain the Judge's successful application of Criminal Conduct Mitigating Condition 6. While the Judge had to consider Applicant's testimony that he no longer socializes with old drinking friends and other testimony indicating lifestyle changes toward sobriety, the Judge's conclusion that Applicant made positive changes in behavior supportive of sobriety is predicated in significant part on the findings that Applicant changed his drinking habits after his DWI conviction in 2000 and that the January 2003 arrest was a one-time relapse. These two findings are untenable considering the record evidence as a whole.

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[5]"The alcohol related incidents do not indicate a pattern" (Directive ¶ E2.A7.1.3.1).

[6]"The crime was an isolated incident" (Directive ¶ E2.A10.1.3.2).

[7]"The problem occurred a number of years ago and there is no indication of a recent problem" (Directive ¶ E2.A7.1.3.2).

[8]"The criminal behavior was not recent" (Directive ¶ E2.A10.1.3.1).

[9]Alcohol Consumption Mitigating Condition 3 (Directive ¶ E2.A7.1.3.3).

[10]Criminal Conduct Mitigating Condition 6 (Directive ¶ E2.A10.1.3.6).

When an appealing party demonstrates factual or legal error, the Board must consider whether: (a) the error is harmful or harmless; (b) the non-appealing party made a persuasive argument for how the Administrative Judge's decision can be affirmed on alternate grounds; and (c) if the Administrative Judge's decision cannot be affirmed, should the case be reversed or remanded. In this case, Department Counsel has demonstrated harmful error, and the Judge's decision cannot be affirmed on alternate grounds. Considering the record evidence as a whole, the amount of time that the security significant conduct had existed, and the necessity to resolve any doubts in favor of national security (Directive ¶ E2.2.2), it is unlikely that a favorable clearance decision would be sustainable and that the identified errors could be remedied by remand. *See* ISCR Case No. 03-22861 at 3 (App. Bd. June 2, 2006). Viewed cumulatively, the Judge's errors warrant reversal. *See* ISCR Case No. 03-10380 at 7 (App. Bd. July 28, 2006).

Order

The decision of the Administrative Judge granting Applicant a clearance is REVERSED.

Signed: Michael Y. Ra'anan
Michael Y. Ra'anan
Administrative Judge
Chairman, Appeal Board

Signed: Michael D. Hipple
Michael D. Hipple
Administrative Judge
Member, Appeal Board

Dissenting Opinion

I respectfully disagree with my colleagues, particularly in their analysis of the disposition of the 2003 offense. The three documents to which my colleagues refer in their discussion of the Judge's findings, taken together, appear to constitute a final disposition of the July 2003 DWI charge under circumstances that preclude retrial. U.S. Const. amend. V, cl. 2. In my view, the resolution of Applicant's case is legally the same as if Applicant had been found not guilty following a trial on the merits.

An acquittal does not necessarily mean that the defendant was factually innocent of the charged offense. In a given case, it may signify nothing more than that the government's admissible evidence was insufficient to prove his guilt beyond a reasonable doubt. Indeed, the Supreme Court has recognized that post-conviction resolutions favorable to the defendant can be the same as an acquittal for purposes of Double Jeopardy. *See, e.g., Monge v. California*, 524 U.S. 721, 729 (1998) ("We have held that where an appeals court overturns a conviction on the ground that the prosecution proffered insufficient evidence of guilt, that finding is *comparable to an acquittal* and the Double Jeopardy clause precludes a second trial.")(emphasis added). The Supreme Court has stated that what constitutes an acquittal is not the particular form wherein a court's ruling is expressed but

whether the ruling resolves some or all of the factual elements of a charged offense. *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 571 (1977).

In light of this, I see no legally significant difference between the situation described in *Monge* and that underlying Applicant's case. In the former, an appellate court reversed a conviction on the ground of insufficient evidence. In the latter, an appellate court vacated a conviction as being "contrary to law and evidence," and in the subsequent prosecution accepted a plea to a lesser offense, dismissing the more serious charge. Both *Monge* and Applicant's case were resolved in a manner that precludes retrial. Certainly the record evidence in Applicant's case provides no basis to suspect otherwise. Indeed, there can be no doubt that, had the this been the initial resolution of Applicant's case rather than the result of action taken on appeal, we would not be discussing this issue. Therefore, I find no error in the challenged conclusion by the Judge.

I also disagree with my colleagues' view that the Judge analyzed the case in a piecemeal fashion. To the contrary, I conclude that his analysis satisfies the requirements of Directive ¶ E2.2.1, in that he considered the totality of Applicant's conduct in reaching his decision. *See* ISCR Case No. 04-09959 (App. Bd. May 19, 2006). This is not to say that I would necessarily have reached the same decision as the Judge, only that I do not believe his decision to be arbitrary, capricious, or contrary to law. I would affirm the decision of the Judge.

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