KEYWORD: Guideline F; Guideline G

DIGEST: The Judge favorable conclusions do not follow from his findings that there are indications of an ongoing problem namely that Applicant continues to drink to the point of intoxication on weekends and drives after consuming alcohol. Favorable decision reversed.

CASENO: 05-10019.a1

DATE: 06/21/2007

DATE: June 21, 2007

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

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT
Robert E. Coacher, Esq., Department Counsel

FOR APPLICANT
Pro Se

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On June 12, 2006 DOHA issued a statement of reasons (SOR) advising Applicant of the basis for that decision–security concerns raised under Guideline F (Financial Considerations), and

Guideline G (Alcohol Consumption) pursuant to Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant elected to have his case decided based on the written record. On October 31, 2006, Administrative Judge Mark W. Harvey granted Applicant's request for a security clearance. Department Counsel timely appealed pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.

Department Counsel raised the following issue on appeal: whether the Administrative Judge erroneously concluded that the government's concerns about Applicant's consumption of alcohol had been mitigated.[1] We reverse the Administrative Judge's decision to grant the clearance.

Whether the Record Supports the Judge's Factual Findings

A. Facts

The Judge made the following factual findings regarding Applicant's history of excessive alcohol consumption: (a) Applicant began drinking when he was 13 years old; (b) he drinks beer to relax and because he likes its taste; (c) he usually drinks four times a week, and sometimes drinks alcohol to intoxication; (d) he only gets intoxicated on weekends, which usually involves drinking 8-10 beers; (e) he gets "loud" when he drinks, and this led to an incident where his stepdaughter summoned the police because she thought Applicant had threatened her mother; (f) Applicant attended a 30-day inpatient alcohol treatment program in 1995 or 1996 as part of an agreement with his wife to terminate divorce proceedings; (g) he subsequently received outpatient counseling and attended Alcoholics Anonymous meetings for about a year; (h) in May 1994, Applicant received a ticket for speeding and having an open container of alcohol in his truck, for which he paid a fine; (i) prior to the incident, he had taken a few drinks; (j) On or about July 4, 2000, Applicant was arrested for driving under the influence of alcohol and reckless endangerment for having children in his vehicle; (k) he was sentenced to 30 days in jail, fined, and his driver's license was suspended; (l) in October 2004, Applicant stated he planned to cut down on his drinking; (m) Applicant still drinks and drives; (n) he does not drive when he has had too many, and uses another driver on such occasions; and (o) he does not go to bars, but drinks at home.

B. Discussion

The Appeal Board's review of the Administrative Judge's findings of fact is limited to determining if they are supported by substantial record 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 (1966). In evaluating the Administrative Judge's findings, we are required to give deference to the Administrative Judge's credibility determinations. Directive ¶ E3.1.32.1.

Regarding the Administrative Judge's factual findings, Department Counsel on appeal does not assert that the Judge made erroneous factual findings. Rather, Department Counsel challenges

[1]The Judge's favorable findings with regard to Guideline F were not challenged on appeal.

the Judge's analysis of his factual findings and the record evidence in the Judge's "Conclusions" section. Therefore, Department Counsel's appeal arguments will be discussed in detail with reference to the Judge's conclusions.

Whether the Record Supports the Administrative Judge's Ultimate Conclusions

The Judge reached the following conclusions regarding Applicant's alcohol consumption: (a) Applicant's 1994 driving with an open container of alcohol in his vehicle, his inpatient alcohol treatment in the mid-1990's, his 2000 DUI, his drinking to the level of intoxication, and his continued consumption of alcohol before driving are actions that raise security concerns; (b) Alcohol Consumption Mitigating Conditions 1,[2] 2,[3] and 3[4] partially apply; (c) Applicant continues to drink to intoxication on weekends and he drives after consuming alcohol, both indications of an ongoing problem; (d) some mitigation is shown because the two alcohol-related incidents involving the police are not in close temporal proximity to each other, and they are not recent; (e) Applicant receives some credit because of the absence of evidence that his alcohol use has recently caused him problems with his family, the police, or judicial authorities; (f) there is some evidence of reduction of factors leading to the incidents, or facts supporting a change in Applicant's life circumstances because he has significantly reduced his alcohol consumption from the 1990's; (g) Applicant's history of alcohol abuse is counterbalanced by his strong desire to avoid judicial intervention, confinement, fines, and loss of his driver's license; and (h) the likelihood of a future DUI or other alcohol-related incident is low because six years have elapsed since the last DUI and Applicant credibly indicates he will not drive after consuming sufficient alcohol to become intoxicated.

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*.

On appeal, Department Counsel asserts that the Administrative Judge's conclusion that Applicant has mitigated security concerns about his alcohol consumption is arbitrary, capricious and contrary to law. Department Counsel's argument has merit.

More specifically, Department Counsel contends: (i) the Judge failed to properly consider Applicant's ongoing alcohol use; (ii) the Judge improperly gave undue weight to the fact that

[2] "The alcohol-related incidents do not indicate a pattern."

[3] "The problem occurred a number of years ago and there is no indication of a recent problem."

[4] "Positive changes in behavior supportive of sobriety."

Applicant's last alcohol-related arrest was in 2000 and there was no evidence of recent family or police problems related to alcohol; (iii) there is no record evidence supporting the conclusion that Applicant has "significantly" decreased his alcohol consumption since the 1990's; (iv) there is no credible evidence that Applicant has made any significant changes in lifestyle; and (v) the Judge considered the record evidence in a piecemeal fashion. All of these contentions are persuasive.

The Administrative Judge found that Applicant currently consumes alcohol to the point of intoxication on weekends and drives after consuming alcohol, and that both of these facts were "indications of an ongoing problem." The Judge then concluded that Applicant's alcohol consumption was mitigated because of the lack of recency of the police involvements relating to alcohol, the lack of evidence that alcohol use has recently caused him problems with his family, a change in life circumstances in that Applicant has significantly reduced his alcohol consumption from the 1990's, and Applicant's credible testimony that he will not drive after consuming enough alcohol to become intoxicated. The Judge's conclusion that Applicant's alcohol consumption is no longer of security concern is not sustainable in light of his finding that Applicant still drinks to intoxication, drives after consuming alcohol, and has an ongoing problem. On the facts of this case, which also include Applicant's attendance at a 30-day inpatient alcohol treatment program in the 1990's, the mitigating circumstances cited by the Judge are not of sufficient magnitude to undercut the overriding concern of Applicant's current, open-ended abuse of alcohol.

In terms of mitigation, the Judge gives inordinate weight to the facts that Applicant has had no incidents with the police since 2000 and there is no evidence that his alcohol use has recently affected his family life. The mere fact that Applicant has avoided alcohol-related incidents for a recent period, while entitled to some weight, does little to mitigate the government's security concerns in the face of the totality of Applicant's history and the evidence of continuing alcohol abuse. In his analysis of matters of mitigation, the Judge's emphasis on the lack of recent alcohol-related incidents is arbitrary and capricious because it focuses on the absence of a symptom or result of Applicant's alcohol problems (*i.e.*, alcohol-related incidents) and ignores the record evidence of security significance (*i.e.*, Applicant's continued drinking to intoxication). *See*, *e.g.*, ISCR Case No. 02-11454 at 4 (App. Bd. June 7, 2004).[5]

There are additional problems with the Judge's mitigation analysis. The Judge concluded there is some evidence about reduction of factors that led to earlier alcohol-related incidents and facts supporting a change in Applicant's life circumstances. However, the Judge does not specifically identify what these reductions or changes are. Also, the Judge did not make factual findings relating to a reduction of factors leading to alcohol-related incidents or changes in his life circumstances. Similarly, the Judge's conclusion that Applicant has "significantly reduced his alcohol consumption from the 1990's" is not reasonably supported by the record evidence. The Judge made no findings concerning the level or frequency of Applicant's use of alcohol during the 1990's, and there is no objective record evidence of same. The record evidence contains statements

[5]At one point in his "Conclusions" section, the Judge states: "As noted above, Applicant's history of alcohol abuse, is counterbalanced by his strong desire to avoid judicial intervention, confinement, fines and loss of his driver's license." This case was brought under Guideline G (Alcohol Consumption), not Guideline J (Criminal Involvement). The government's primary concern is Applicant's abuse of alcohol, not how many alcohol-related incidents he might incur in the future. To conclude, therefore, that Applicant's desire, however strong, to avoid judicial intervention, etc. in the future counterbalances his history of alcohol abuse, where that abuse is ongoing, is to engage in an arbitrary and capricious analysis.

by Applicant where he indicates that he drinks less now than he did in the 1990's. The Applicant's statements are record evidence that the Judge was entitled to consider and accord some weight. However, in this case, Applicant's statements are vague, lack specificity, and there is no objective record evidence of Applicant's drinking patterns during the 1990's which would serve to (a) corroborate his claim of a reduction in drinking, and (b) provide a basis for the Judge's conclusion that any reduction in drinking was "significant." Moreover, even if the Board were to sustain the Judge's conclusion that Applicant had significantly reduced his drinking in recent years, it would have limited value in terms of mitigation in light of the record evidence that Applicant still drinks to intoxication on a regular basis.

A review of the Judge's decision leads the Board to conclude that the Judge failed to consider the totality of Applicant's overall history of problems with alcohol and failed to analyze matters in mitigation in the context of that overall history. Thus, there is merit to Department Counsel's argument that the Judge considered the evidence in a piecemeal fashion.

Order

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

Signed: Jeffrey D. Billett
Jeffrey D. Billett
Administrative Judge
Member, Appeal Board

Signed: Jean E. Smallin
Jean E. Smallin
Administrative Judge
Member, Appeal Board

CONCURRING OPINION OF ADMINISTRATIVE JUDGE JAMES E. MOODY

I agree with my colleagues in their resolution of this appeal. I note first of all that this case was decided on the written record, which diminishes the degree of deference which the Board extends to the Judge's credibility determination. *See* ISCR Case 04-04302 at (App. Bd. Jun. 30, 2005) ("[W]hen an applicant waives a hearing and chooses to have his or her case decided by a Judge based on a written record, the Judge has no ability to make a credibility determination based on observation of the applicant's demeanor. Accordingly, a credibility determination based solely on a written record is not entitled to the same deference on appeal as a credibility determination based on observation of a witness's demeanor.") *See also* ISCR Case No. 97-0752 at 3 (App. Bd. Dec. 4, 1998); ISCR Case No. 97-0625 at 2-3 (App. Bd. Aug. 17, 1998). Additionally, by choosing

such a forum, Applicant deprived himself of the opportunity to submit to questioning, which would enable him to provide more detailed explanations for the problematic aspects of the record.

These aspects are not *de minimis*. Applicant, who has consumed alcohol since he was thirteen years old, received inpatient treatment for alcohol abuse in the mid 1990s. Since completing the program, he has continued to drink, has been convicted of DUI and reckless endangerment (his children were in the car with him on that occasion), and admits that he still drinks and drives. These matters raise serious concerns about Applicant's judgement, reliability, and self control. *See* Directive ¶ E2.A7.1.1. In my view, the evidence which Applicant submitted in response to the SOR and to the FORM is not sufficient to overcome the "strong presumption against granting a security clearance." *Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9th Cir. 1990), *cert den* 499 U.S. 905 (1991). Applicant has failed to meet his burden of persuasion that it is ""clearly consistent with the interests of national security" to grant him a clearance." *Department of the Navy v. Egan*, 484 U.S. 581, 528 (1988). I agree that the Judge's decision should be reversed.

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