

KEYWORD: Guideline G; Guideline H; Guideline J; Guideline E

DIGEST: The challenged findings are supported by substantial record evidence. The Judge considered the applicable mitigating condition but found Applicant under all four applicable guidelines. The Judge's application of the guidelines is sustainable.

CASENO: 05-11853.a1

DATE: 06/11/2007

DATE: June 11, 2007

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| In Re:                           | ) |                        |
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| -----                            | ) |                        |
| SSN: -----                       | ) | ISCR Case No. 05-11853 |
|                                  | ) |                        |
| Applicant for Security Clearance | ) |                        |
|                                  | ) |                        |

**APPEAL BOARD DECISION**

**APPEARANCES**

**FOR GOVERNMENT**

James B. Norman, Esq., Chief Department Counsel

**FOR APPLICANT**

Drew S. Pinkerton, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On February 9, 2005, DOHA issued a statement of reasons advising Applicant of the basis for that decision—security concerns raised under Guideline G (Alcohol Consumption), Guideline H (Drug Involvement), Guideline J (Criminal Conduct) and Guideline E (Personal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive).

Applicant requested a hearing. On October 31, 2006, after the hearing, Administrative Judge James A. Young denied Applicant's request for a security clearance. Applicant timely appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raises the following issues on appeal: whether some of the Judge's factual findings are not supported by substantial evidence; whether the Judge erred by not mitigating the security concerns raised in the SOR; and whether the Judge's whole person analysis fails to comply with the requirements of Directive ¶ E2.2.1. Finding no error, we affirm.

### **Whether the Record Supports the Judge's Factual Findings**

#### **A. Facts**

The Judge made the following pertinent findings: Applicant obtained a security clearance upon joining the Air Force in 1981. He left active duty in 1985, at which time he went to work for a Department of Defense contractor and was again granted a secret clearance.

Applicant has used alcohol "to excess and to the point of intoxication" from 1973 until 2003. In June 1993 he crashed his car into a tree during an episode of drunken driving. He later advised the police that his car had been stolen, and he filed a false insurance claim. He was eventually arrested and charged with DUI, filing a false police report, and insurance fraud. Convicted of DUI, he pled *nolo contendere* to the other charges. Withholding adjudication of guilt, the court placed him on probation for a year, ordered him neither to use nor possess alcohol and to attend a drunk drivers course.

In 1996, Applicant was charged with DUI and with speeding. Convicted of DUI, he was sentenced to 10 days in jail, a fine of \$741, and community service. The court also placed him on one year's probation and suspended his drivers license for five years. In 2001, Applicant was again arrested and charged with DUI. He was also charged with driving with a suspended license and failure to use a designated lane. Entering a plea of *nolo contendere* he was convicted and sentenced to 30 days in jail, a fine of \$1,321, and one year's probation. The court required him to attend "multiple DUI schools" and a victim impact course and to perform community service. The court revoked Applicant's drivers license for 10 years. In 2002, Applicant entered a rehabilitation center after having been given a choice of treatment or jail. During this treatment he admitted to going on drinking binges. He was diagnosed with alcohol dependence and was sober for only 2 or 3 months following treatment.

In May 2003, Applicant was again arrested and charged with DUI, as well as with refusal to submit to a test for alcohol and for driving under a suspended license. He was convicted of this last charge, the other two being dismissed. The Judge found that Applicant was "court ordered for treatment." Applicant entered an inpatient treatment and rehabilitation program, where he was diagnosed with alcohol dependence and polysubstance abuse. Applicant admitted to having misused prescription medication—MScotin, Morphine, Xanax, and Oxycotin. These had been prescribed for him as analgesics following a broken ankle and leg. Prior to entering the rehabilitation program, Applicant advised his supervisor about his problems. The facility security officer subsequently discovered Applicant's prior arrests, which he had failed to report as required by the National Industrial Security Program Operating Manual.

In addition to his DUIs and other related misconduct, Applicant was arrested in 2001 and charged with possession of a controlled substance (a felony) and possession of narcotic equipment. Applicant's girlfriend drove her car, with Applicant as a passenger, to a drug dealer where she purchased cocaine. Applicant was drunk at the time. The police found cocaine in the car. Police obtained a warrant for Applicant's arrest for violating the terms of his parole. Charges against Applicant were *nolle prossed* after Applicant agreed to attend a rehabilitation program.

The Judge noted that Applicant's brother and fiancé spend a considerable amount of time with him, both testifying that Applicant attends Alcoholics Anonymous regularly. They both corroborated Applicant's sobriety in the years between his last DUI and the date of the hearing.

## B. Discussion

The Appeal Board's review of the Judge's findings of fact 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.

In his appeal brief, Applicant took issue with what he termed factual conclusions of the Judge. Many of these issues are more properly characterized as disagreement with the Judge's application of mitigating conditions and with his whole person analysis, which will be discussed below. However, we have identified several challenges to the Judge's factual findings in Applicant's brief. First, he disagrees with the Judge's statement in his Conclusions section that Applicant had not been acquitted of any of his charged criminal conduct.<sup>1</sup> We have examined the Judge's findings in light of the record evidence and conclude that Applicant's allegation is without basis. While some of Applicant's charges were disposed of without trial, we have discovered none in the record which resulted in a formal acquittal.

Second, Applicant alleges that the Judge erred by finding that Applicant had admitted to having engaged in the illegal use of prescription medications. This finding formed the basis of the Judge's adverse decision concerning paragraphs 2g and 4c of the SOR.<sup>2</sup> However, in his response to the SOR, Applicant stated that “*I have abused drugs that were lawfully and legally prescribed to me. I did not take them in accordance with their prescribed usage.* However, I had them legally and did not acquire them illegally.” (emphasis added) The highlighted sentences clearly admit to the misuse of drugs which were lawfully prescribed to Applicant. Additionally, Applicant admitted that he abused prescription drugs, both elsewhere in his response to the SOR and during the hearing. Tr at 51. Therefore, Applicant's own statements support the challenged finding.

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<sup>1</sup>An acquittal is a Guideline J mitigating condition. Directive ¶ E2.A10.1.3.6.

<sup>2</sup>Paragraph 2g states, “You illegally used controlled substances while holding a Secret Department of Defense Industrial Security Clearance granted in December 1985.” Paragraph 4c repeats that allegation as a Guideline E security concern.

Finally, Applicant contends that the Judge erred in finding that, following his 2003 arrest for DUI, the court ordered him to undergo treatment. Applicant contends that he entered into treatment voluntarily. However, Government Exhibit 5, medical notes from Applicant's treatment facility, dated June 2003, contains the following comment: "[Applicant] states that he is 'court-ordered to treatment for a DUI charge on 4/24/03.'"<sup>3</sup> Therefore, the Judge did not err in his finding as to this matter. Accordingly, after considering the record as a whole, we conclude that the challenged findings are supported by substantial record evidence. *See* ISCR Case No. 02-04455 at 4-5 (App. Bd. Jul. 31, 2003).

### **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. 581, 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 (9<sup>th</sup> Cir. 1990), *cert den* 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).

Our review of the Judge's decision leads to the conclusion that he gave explicit consideration to all mitigating conditions which were plausibly raised by the evidence, finding in Applicant's favor on two allegations under Guideline E, which alleged false statements on the security clearance application.<sup>4</sup> Nevertheless, the Judge found against Applicant on all four Guidelines. Given the Judge's findings as described above, we conclude that the Judge's application of the Guidelines G, H, J, and E mitigating conditions was not arbitrary, capricious, or contrary to law.<sup>5</sup>

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<sup>3</sup>Statements made for the purpose of a medical diagnosis are sufficiently trustworthy to constitute an exception to the hearsay rule. *See* Fed. Rule Evid. 803(4). This exception "is predicated on the notion that people are motivated to tell the truth to a physician who is going to . . . treat them, to avoid adverse health consequences." Paul Rothstein, *Federal Rules of Evidence* at 553 (2007). The Federal Rules of Evidence serve as a guide in DOHA hearings. Directive ¶ E3.1.19.

<sup>4</sup>*See* Mitigating Condition 1 under Guideline E, "The information was unsubstantiated or not pertinent to a determination of judgment, trustworthiness, or reliability." Directive ¶ D2A5.1.3.1.

<sup>5</sup>To the extent that challenges to the Judge's factual findings, other than those discussed above, are implicit in Applicant's second and third allegations of error, we have considered all the record evidence and resolve those challenges adversely to Applicant.

Neither are we able to agree that the Judge's whole person analysis is defective. He gave weight to Applicant's favorable evidence, such as his recent sobriety and excellent work record. However, the Judge balanced that against the record evidence establishing, *inter alia*, (1) Applicant's extensive alcohol-related criminal misconduct; (2) the fact that, while intoxicated, Applicant accompanied a woman as she purchased cocaine; and (3) Applicant's failure to remain sober after completing his first alcohol rehabilitation program. The Judge also noted that Applicant still suffers from the pain which underlay his addiction to prescription drugs, raising the possibility of future drug misuse. We conclude that the Judge's whole person analysis complies with the requirements of Directive ¶ E2.2.1, in that the Judge considered the totality of Applicant's conduct in reaching his decision. *See* ISCR Case No. 04-09959 at 6 (App. Bd. May 19, 2006). In light of the foregoing, we conclude that the Judge's decision is neither arbitrary, capricious, nor contrary to law.

### **Order**

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

Signed: Jean E. Smallin

Jean E. Smallin  
Administrative Judge  
Chairman, Appeal Board

Signed: Williams S. Fields

William S. Fields  
Administrative Judge  
Member, Appeal Board

Signed: James E. Moody

James E. Moody  
Administrative Judge  
Member, Appeal Board