KEYWORD: Guideline G

DIGEST: The Judge's analysis of Applicant's twenty year history of alcohol related incidents was unsustainable because it was piecemeal in its approach to the disqualifying events and it gave greater weight than was reasonable to the two months of abstinence. The Judge did not adequately address Applicant's continued drinking after his second alcohol treatment program. Favorable decision reversed.

CASENO: 06-08708.a1

DATE: 12/17/2007

DATE: December 17, 2007

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

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT
Eric Borgstrom, Esq., Department Counsel

FOR APPLICANT
Thomas Albin, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On October 9, 2006, DOHA issued a statement of reasons (SOR) 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 July 11, 2007, after the hearing, Administrative Judge Charles D. Ablard granted Applicant's request for a security clearance. Department Counsel filed a timely appeal pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Department Counsel raised the following issue on appeal: whether the Judge's decision is arbitrary and capricious in that it reflects a piecemeal analysis and is contrary to record evidence. Finding error, we reverse.

Whether the Record Supports the Judge's Factual Findings

A. Facts

The Judge made the following pertinent findings of fact: Applicant is a nuclear machinist working for a federal contractor. He has been arrested twice for driving under the influence of alcohol (DUI) , once in 1985 and again in 1988. As a consequence of the second incident, he lost his drivers license, was require to pay a $500 fine, and to spend two days in jail, with six months suspended. In 1996 he voluntarily entered into an alcohol treatment program. Although his treatment was interrupted by hospitalization for pneumonia, he completed the program on an outpatient basis.

In January 2004 he was found to be under the influence of alcohol while on his job. He was escorted from the workplace. He entered the same facility as he had in 1996 and was diagnosed as alcohol dependent. The Judge found that, upon completion of the program in March 2004, he never received a copy of the discharge summary, and consequently was unaware of this diagnosis, until receiving notification from DOHA during adjudication of his security clearance application. He believed that he could drink in moderation, not realizing that he was alcohol dependent and, therefore, required to abstain.

In September 2006 he was evaluated by a licensed clinical social worker, who concluded that Applicant had experienced more than two years in post-inpatient treatment without relapse and that his overall prognosis was good, provided that he monitor his alcohol usage and frequency.

At the time of the hearing, Applicant had been abstinent from alcohol for two months and had entered Alcoholics Anonymous (AA). He did so that time due to his having finally seen the discharge summary referenced above, which advised that he abstain from alcohol and attend AA or some similar program. He has a sponsor and does not intend to use alcohol in the future.

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.

In the course of arguing the issue on appeal, Department Counsel has raised numerous challenges to the sufficiency of the Judge's findings. The Board will address these challenges in the discussion 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.

Once there has been a concern articulated regarding an Applicant's security clearance eligibility, there is a strong presumption against the grant or maintenance of a security clearance. *See, Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9th Cir. 1990), *cert. denied,* 499 U.S. 905 (1991). After 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 whether the Judge's rulings or 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. In deciding whether the Judge's rulings or conclusions are contrary to law, the Board will consider whether they are contrary to provisions of Executive Order 10865, the Directive, or other applicable federal law. *See* ISCR Case No. 03-22861 at 2-3 (App. Bd. Jun. 2, 2006).

The Judge applied three Alcohol Consumption Mitigating Conditions (ACMC) to Applicant's case. The first, ACMC 23(a), reads as follows: "so much time has passed, or the behavior was so infrequent, or it happened under such unusual circumstances that it is unlikely to recur or does not cast doubt on the individual's current reliability, trustworthiness, or good

judgement."[1] The Judge appeared to conclude that Applicant had met these criteria, in that his DUIs had "occurred three years apart 20 years ago and do not indicate a pattern."[2] Department Counsel argues that the Judge's reasoning on this point reflects a piecemeal analysis. Department Counsel's argument has merit. A Judge must evaluate an applicant's case in light of all the evidence and must consider specific facts in light of the record as a whole. Failure to do so may result in decisions made without reference to significant contrary evidence and which are not founded upon a realistic understanding of an applicant's true circumstances.[3] In this case, the Judge's application of ACMC 23(a) does not take into account his January 2004 on the job alcohol incident, Applicant's having undergone alcohol treatment both in 1996 and in 2004, his having missed work due to alcohol consumption,[4] and the fact that Applicant's misuse of alcohol has in the past alarmed his family and associates.[5] Therefore, the Judge's treatment of the DUIs in isolation from Applicant's extensive history of alcohol related problems distorted his presentation of the circumstances from which Applicant's security concerns flowed and impaired his conclusion that Applicant had met his burden of production under this mitigating condition.

The Judge also extended favorable application to ACMC 23(b) and (d). The former reads as follows: "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)."[6] The latter reads: "the individual has successfully completed inpatient or outpatient counseling or rehabilitation along with any required aftercare, has demonstrated a clear and established pattern of modified consumption or abstinence in accordance with treatment recommendations, such as participation in [AA] or a similar organization and has received a favorable prognosis by a duly qualified . . . licensed clinical social worker who is a staff member of a recognized alcohol treatment program."[7] The Judge found that Applicant had met his burden of persuasion regarding these two mitigating conditions. Department Counsel disagrees on the ground that the Judge did not take into account significant record evidence.

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[1]Directive ¶ E2.23(a).

[2]Decision at 4.

[3]*See U.S. v. Bottone,* 365 F. 2d 389, 392 (2d Cir. 1966), *cert. denied,* 385 U.S. 974 (1966) ("The trier is entitled, in fact bound, to consider the evidence as a whole; and, in law as in life, the effect of this generally is much greater than the sum of the parts.") *See also Schulz v. Secretary of HEW*, 1987 WL 15314 (DC NJ 1987) (unreported decision), reversing an administrative law judge decision which considered various pieces of medical evidence separately rather than as a whole. ("[The ALJ] arrived at [his] judgement through a piecemeal analysis of the medical evidence, considering separately rather than cumulatively the effects of plaintiff's conditions. Thus, the ALJ could not determine the full extent of plaintiff's disability.")

[4]"[Applicant] tends to drink by himself and is not able to go to work. He has worked at [contractor] for 30 years and is at risk of losing his employment due to lost time. He is having difficulty in recognizing that his alcohol use is affecting his ability to go to work." GE 7, Discharge Summary dated March 12, 2004, at 1. *See also* Tr. at 85: "Q: Did your alcohol use ever contribute to you missing time at work? A: Not that I know of. Q: Do you recall the problems with being absent at work, though? A: I got warning slips, yes."

[5]Tr. at 90.

[6]Directive ¶ E2.23(b).

[7]Directive ¶ E2.23(d).

Both of these mitigating conditions require Applicant to establish a pattern of abstinence or modified/responsible use, depending upon Applicant's diagnosis[8]. The word "pattern" describes "[a] mode of behavior or series of acts that are recognizably consistent."[9] In the context of the two mitigating conditions under consideration, it would connote responsible use or abstention for a period of time sufficient clearly to establish that an applicant's trustworthiness and reliability are not subject to question. The Judge concluded that Applicant's two months of abstention and AA attendance preceding the hearing constitute such a pattern. Even if the Board were to concur with that, it would require accepting as credible Applicant's testimony that he did not know he was supposed to abstain from alcohol.

The evidence is clear that Applicant continued to drink even after completion of his second alcohol treatment program and admitted as much. He claimed that he did not receive a copy of the discharge summary upon his release from the program and, therefore, did not know that he was diagnosed as alcohol dependent and that he should refrain from consuming alcohol. The Judge accepted Applicant's explanation for his continued drinking. Acknowledging that Applicant's two months of abstention preceding the hearing was brief, he stated that "the briefness . . . is overcome by . . . the fact that he was not aware of the alcohol dependent diagnosis until he received documents relating to this proceeding."[10]

There is nothing in the record to contradict Applicant's testimony that he never got a copy of the discharge summary. Whether that supports a conclusion that he reasonably did not know he was supposed to abstain from alcohol requires a closer examination. The summary states that, "[g]iven the duration of [Applicant's] substance problem, it was felt that he needed to understand the dynamics of addiction, its progressive nature and the medical consequences of using. *He was asked to establish a pro-recovery routine, which would support his abstinence*. This included attending education and therapy groups and AA/NA meetings every night . . ."[11] (emphasis added) That Applicant was advised during the course of his treatment to abstain from alcohol and to attend AA is corroborated by Applicant's own testimony: "Q: When you were being treated . . . did they discuss with you the need to stay abstinent and not drink any alcohol? A: During the counseling sessions I suppose they did that . . . we read and we'd discuss each other but as far as saying that there's a need for abstinence I imagine that was said, yes."[12] "Q: [Y]ou remembered discussions about abstaining from alcohol and how the people that you were in these group sessions with were recommending that. Is that right? A: During the sessions, yes. But not right prior to leaving."[13] This is further corroborated by Applicant's admission that, following his treatment, he did indeed

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[8]Compare with previous edition of the Adjudicative Guidelines, Directive ¶ E2.A7.1.3.4.

[9]*Black's Law Dictionary* (8th ed. 2004).

[10]Decision at 4.

[11]GE 7 at 2.

[12]Tr. at 81.

[13]Tr. at 86. There is no evidence that anyone involved in Applicant's treatment ever advised him to be other than abstinent.

abstain from alcohol, though he resumed drinking four months later "for no particular reason."[14]

Therefore, whether or not Applicant actually received a copy of his discharge summary, there is substantial record evidence that he had been counseled to abstain and yet, four months after his treatment, resumed the consumption of alcohol.[15] The record evidence is contrary to the Judge's finding that Applicant was unaware that he should abstain and vitiates the conclusion that his two months abstention prior to the hearing is sufficient to establish the pattern of reformed behavior contemplated by ACMC 23(b) and (d). The Judge's failure to address this significant contrary evidence impairs his favorable decision.

In any case, it is not viable for the Judge to conclude that Applicant has established such a new pattern of conduct in light of Applicant's extensive history of security-significant alcohol related conduct. Applicant's alcohol consumption has been a problem since the 1980s. Given the totality of facts and circumstances in this case, two months' abstention is simply not sufficient to overcome such a lengthy history of alcohol consumption.

We also note that the Judge concluded that Applicant had met the requirement of ACMC 23(d) of a "favorable prognosis by a . . . licensed clinical social worker," having spoken with such a person in September 2006. She reported to DOHA the results of her interview with Applicant. She stated that Applicant admits "to an occasional beer after working in the yard . . . he is fully aware that should he ever exceed his one or two beers that he may relapse."[16] She also stated that "[Applicant] feels confident that he can control this occasional usage." She opined that "[Applicant's] overall prognosis is good, provided he continues to self monitor his usage with continued decrease in usage and frequency." While this letter is favorable to Applicant, Department Counsel notes that the social worker did not have access to the 2004 discharge summary, with its recommendations for abstinence and AA attendance.[17] Department Counsel notes that Applicant has apparently not followed the social worker's recommendation for decreasing his alcohol consumption below even the one or two beers that she referenced in her letter. For example, he admitted to having consumed four or five beers during a single day at some point after his appointment, and he admitted that on an occasion in February 2007 he drank hard liquor to the point of intoxication.[18] These matters detract from the social worker's favorable opinion of Applicant's commitment to sobriety[19] and are inconsistent with a reasoned judgement that Applicant has met his burden of persuasion under this mitigating condition.

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[14]Tr. at 85.

[15]Compare with GE 4, a letter from a licensed clinical social worker concerning his interview with Applicant. She states that Applicant "has consumed alcohol . . . since six months after his treatment in 2004."

[16]GE 4 at 3.

[17]"Q: You didn't have this discharge summary when you met with [social worker], is that right? Q: I don't believe so." Tr. at 81-2.

[18]Tr. at 77, 80.

[19]"He realizes the dangers of his occasional alcohol consumption . . . He states that he will seek assistance immediately if usage changes. He agrees to this plan." GE 4 at 4.

Department Counsel also draws attention to Applicant's apparent reluctance to accept his diagnosis of alcohol dependence. At the end of the hearing his attorney asked him, "you concede today that . . . you are considered alcohol dependent? A: I don't consider myself alcohol dependent but I don't know how to answer that question. Q: . . . But you concede that professionals who have looked at you at [rehabilitation facility] diagnosed you with alcohol dependence, is that correct? A: That's their answer."[20] In addition, Applicant was apparently equivocal in his discussions with the social worker, her letter stating that Applicant "feels his dependency on alcohol is not present."[21] Department Counsel persuasively argues that this reluctance detracts from Applicant's claim that he will abstain from any future use of alcohol and can control his inclinations to drink. In light of the forgoing, the record does not sustain the Judge's favorable decision that Applicant met his burden of persuasion that it is "clearly consistent with the interests of national security" for him to have a clearance. *Egan*, 484 U.S. at 528. The Board concludes that the Judge's favorable decision is arbitrary, capricious, and contrary to law.

Order

The Judge's favorable security clearance decision is REVERSED.

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

[20]Tr. at 105.

[21]GE 4 at 3. Compare with the discharge summary, which described Applicant as "not in touch with the severity of his situation." GE 7 at 1.