KEYWORD: Guideline G; Guideline E

DIGEST: Applicant was previously denied a security clearance. The decision to permit him to reapply did not equate to a favorable adjudication on those allegations addressed in his prior case. Furthermore, the Government is not estopped from reconsidering the security significance of past conduct. Adverse decision affirmed.

CASE NO: 06-10859.a1

DATE: 09/02/2010

DATE: September 2, 2010

In Re:	)	
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Applicant for Security Clearance	)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT
Jeff A. Nagel, Esq., Department Counsel

FOR APPLICANT
James F. Campbell, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On August 11, 2009, DOHA issued a statement of reasons (SOR) advising Applicant of the basis for that decision–security concerns raised under Guideline G (Alcohol Consumption) and Guideline E (Personal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On May 26, 2010, after the hearing,

Administrative Judge David M. White denied Applicant's request for a security clearance. Applicant appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raised the following issues on appeal: whether certain of the Judge's findings of fact were supported by substantial record evidence and whether the Judge erred in his application of the pertinent mitigating conditions. Consistent with the following discussion, we affirm the Judge's decision.

The Judge made the following pertinent findings of fact: Applicant is a 48-year-old employee of a Defense contractor. He held a security clearance from 1985 to 2002. Applicant had a previous security clearance case adjudicated by a DOHA Judge. In the prior adjudication, the Judge found against Applicant under Guideline E and in favor of Applicant under Guideline G. Applicant appealed that decision. The Appeal Board affirmed the adverse decision. Three of the current allegations under Guideline G and eight of the current allegations under Guideline E were also at issue in the prior adjudication.

Th Judge found the Findings of Fact from the first Judge's decision fully supported by the evidence and adopted them and incorporated them by reference.

In October 1998, Applicant was arrested for Driving Under the Influence (DUI). Applicant was very intoxicated that night . Applicant's friend drove Applicant's car. There was an accident and the friend left to find a tow truck, leaving Applicant at the site. Applicant, with a blood alcohol content (BAC) of .24%, was formally charged, but the DUI was later dismissed without trial when the friend told the prosecutor he had been driving.

Between August 1998 and October 2000, Applicant was cited seven times for traffic violations. He admits committing six of the violations. One charge (Driving While License Suspended) was an error and was so determined by a court.

In July 2001, Applicant was stopped for speeding and his BAC registered at .191%. He was arrested and charged with DUI. In February 2002, he successfully completed an alcohol treatment program for a diagnosed condition of Alcohol Abuse. He pleaded guilty to a lesser charge of Negligent Driving First Degree.

In December 2005, Applicant was cited for speeding.

In December 2006, Applicant was stopped twice in Canada for speeding. On the second stop, he was also cited for an open alcohol container, although he claimed not to know it was there.

In late December 2006 Applicant drank several beers with a meal before crossing the border into Canada. He was arrested at 6:30 pm. He told the officer he had had one beer at 4:00 pm. At 10:11 his BAC was .110% and at 10:49 .120%. Due to technical flaws in the timing, charges were not filed.

In February 2008, Applicant was in a traffic accident with a police car. He provided two breath samples which both registered .068%. A blood sample taken later had a reading .05% which

is presumed under state law to mean that he was not driving under the influence. No charges were filed, which meant under state law that he was detained not arrested. The police report showed the officer was at fault.

Applicant admitted consuming alcohol at times to excess and to the point of intoxication or impairment from 1997 to 2008. Applicant's reports as to his last drink are somewhat inconsistent.

In the context of 2004 DOHA proceedings, Applicant obtained a psychologist's report which stated that his substance use/abuse was within normal limits and that he had ceased drinking alcohol when away from home. It said he was at no more than a normal risk for alcohol abuse and very little risk for alcohol dependence.

Applicant omitted his 2004 consultation with the psychologist from his 2007 security clearance application. Given the context of the event, the wording of the question and Applicant's credible explanation this was not a deliberate falsification.

There is no record evidence to support allegation 2.m.

Applicant contends that the Judge erred in some of his findings. After reviewing the record, the Board concludes that the Judge's material findings of security concern are based on substantial evidence, or constitute reasonable characterizations or inferences that could be drawn from the record. Applicant has not identified any harmful error likely to change the outcome of the case. Considering the record evidence as a whole, the Judge's material findings of security concern are sustainable. *See, e.g.*, ISCR Case No. 08-11564 at 2 (App. Bd. Jun. 21, 2010).

Applicant presumes that the decision to permit his reapplication for a security clearance to go forward equated to an adjudication in Applicant's favor on the substance of the issues alleged in the SOR. Such is not the case. The Administrative Judge was not barred from ruling against Applicant on issues raised by the SOR merely because of the reapplication decision. *See* Directive ¶ E3.1.38 - ¶ E3.1.41.

Applicant challenges the Judge's application of the mitigating conditions on the grounds that the government had failed to meet its burden. Applicant's premise is mistaken; the government's burden is only to present witnesses and other evidence to establish facts alleged in the SOR that have been controverted. Beyond that the burden of persuasion lay with the Applicant. Directive, ¶ E3.1.14 and ¶ E3.1.15. Where the Department Counsel failed to present evidence, as with allegation 2.m., the Judge found in Applicant's favor. Once substantial evidence had been presented on the controverted allegations, it was up to Applicant to mitigate, explain, rebut, or refute. Department Counsel never has the burden of refuting a mitigating condition.

Applicant contends that the Judge did not consider record evidence, such as Applicant's testimony. However, a Judge is presumed to have considered all of the evidence in the case record. *See, e.g.,* ISCR Case No. 09-05830 at 2 (App. Bd. Jun. 25, 2010). In this case, the Judge discussed Applicant's recent abstinence, the psychologist's report and the passage of time since Applicant's omissions from his security clearance applications. However, he also explained why he concluded that Applicant's evidence was not sufficient to mitigate the Government's security concerns.

Applicant's brief does not rebut the presumption that the Judge considered the entire record. Nor does it demonstrate that the Judge weighed the evidence in the record in an arbitrary or capricious manner. *See, e.g.*, ISCR Case No. 06-21819 at 2 (App. Bd. Aug. 13, 2009). To the extent that Applicant is arguing for an alternative interpretation of the record evidence, such argument is not sufficient to demonstrate error by the Judge. *See, e.g.*, ISCR Case No. 08-08944 at 2 (App. Bd. Nov. 3, 2009).

Applicant cites his favorable adjudication in the past. It is well settled that the government is not estopped from reconsidering the security significance of past conduct. *See* ISCR Case. No. 07-00260 at 2-3 (App. Bd. Jan. 24, 2008):

> Prior security clearance adjudications and the granting of clearances for the Applicant have no bearing on the legal sufficiency of the Judge's adverse clearance decision here. *See, e.g*, ISCR Case No. 03-04927 at 5 (App. Bd. Mar. 4, 2005). The government is not estopped from making an adverse clearance decision when there were prior favorable adjudications. *See, e.g.*, ISCR Case No. 01-24506 at 3 (App. Bd. Feb. 11, 2003). In that regard, the government has the right to reconsider the security significance of past conduct or circumstances in light of more recent conduct or circumstances having negative security significance. *See, e.g.*, DISCR Case No. 91-0775 at 3 (App. Bd. Aug. 25, 1992); ISCR Case No. 02-17609 at 3-4 (App. Bd. May 19, 2004).

Applicant suggests that the Judge should have analyzed in a piecemeal fashion. The Board has previously made clear that such analysis is contrary to the objective of accomplishing a reasonable interpretation of the full evidentiary record. *See, e.g.*, ISCR Case No.04-12648 at 3-4 (App. Bd. Oct. 20, 2006) *citing, in part, Raffone v. Adams*, 468 F. 2d 860 (2nd Cir. 1972) (taken together, separate events may have a significance that is missing when each event is viewed in isolation).

After reviewing the record, the Board concludes that the Judge examined the relevant data and articulated 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 Judge's adverse decision is sustainable on this record. "The general standard is that a clearance may be granted only when 'clearly consistent with the interests of the national security.'" *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).

Order

The Judge's adverse security clearance decision is AFFIRMED.

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

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

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