KEYWORD: Guideline G

DIGEST: Applicant's one month of abstinence and his stated intention to continue an alcohol treatment program begun the same month as the hearing are not sufficient to constitute a pattern of abstinence or responsible behavior..Favorable decision reversed.

CASENO: 06-17541.a1

DATE: 01/14/2008

DATE: January 14, 2008

In Re:	)	
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	)	
Applicant for Security Clearance	)	
	)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT
John Bayard Glendon, Esq., Department Counsel

FOR APPLICANT
Damian L. Martinez, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On October 23, 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 30, 2007, after the hearing, Administrative Judge Kathryn Moen Braeman 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 issues on appeal: whether the Judge's decision was arbitrary, capricious, or contrary to law because it was made without an adequate evidentiary basis and without consideration of important contrary record evidence; and whether the Judge's whole person analysis is not sustainable in light of the record evidence. Finding error, we reverse.

Whether the Record Supports the Judge's Factual Findings

A. Facts

The Judge made the following findings: Applicant admitted that he consumed alcohol "at times to excess and to the point of intoxication from 2000 to July 2005."[1] He has had three alcohol-related arrests between 2002 and 2004. In June 2002, he was charged with "aggravated driving while intoxicated," which was subsequently reduced to DWI. He had been arrested for passing in a no-passing zone and subsequently had a .16 reading in a breathalyser test. He was fined and ordered to attend a DWI class. He reported this incident to his supervisor. Although he referenced it in an October 2002 statement, he did not list it on his security clearance application (SCA) in 2006.

In early July 2002, Applicant was again arrested, this time for "resisting, evading, and obstructing an officer."[2] He was intoxicated and was arguing with his wife. When she called the police, Applicant tried to hide from them. He pled guilty to the charges, paid a fine of $51, and was placed on unsupervised probation, during the course of which he was not to consume alcohol. Applicant complied with this requirement.

In April 2004, Applicant was arrested for aggravated DWI, no registration, expired plates, and no insurance. He refused a breathalyser test. He pled guilty to DWI, and the court dropped the other charges. Applicant was fined $350, ordered to attend an alcohol awareness class and undergo a one-year probation. He attended classes at a counseling center. In February 2007 Applicant decided to stop drinking altogether. He sought an assessment from a clinical specialist, who concluded that Applicant has "a low probability of a substance dependence disorder."[3]

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 a conclusion in light of all the contrary evidence in the record." Directive

[1]Decision at 3.

[2]*Id*.

[3]*Id*. at 7.

¶ 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 Judge's findings, we are required to give deference to the Judge's credibility determinations. Directive ¶ E3.1.32.1.

Department Counsel has not expressly challenged the Judge's findings. His contention that the Judge failed to consider significant contrary record evidence will be addressed 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 the 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 a concern arises 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 rebut or mitigate those concerns. *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).

Department Counsel argues that the Judge did not consider "important contrary record evidence" in evaluating Applicant's case. Department Counsel's argument has merit. The Judge concluded that Applicant had sustained his burden of persuasion under Alcohol Consumption Mitigating Condition (ACMC) 23(b), which reads as follows: ""[T]he individual acknowledges his or her . . . issues with alcohol, provides evidence of actions taken to overcome this problem, and has established a pattern of abstinence . . . or responsible use . . ."[4] However, as Department Counsel points out, Applicant's efforts to overcome his problem began only a few weeks prior to the hearing in his case. Furthermore, Department Counsel argues persuasively that, in light of Applicant's history of alcohol related arrests and continued alcohol abuse thereafter, his one month of abstinence and his stated intention to continue an alcohol treatment program begun the same month as the hearing are not sufficient to establish a *pattern* of abstinence or responsible use, as required by the Directive. Indeed, Applicant's various statements are equivocal as to whether he even acknowledges

[4]Directive ¶ E2.23(a).

a problem with alcohol to begin with.[5]

The Judge also concluded that Applicant had met his burden of persuasion under ACMC 23(c), which permits the mitigation of alcohol-related security concerns when "the individual is a current employee who is participating in a counseling or treatment program, has no history of previous treatment and relapse, and is making satisfactory progress."[6] In this case, the only counseling at issue is that which Applicant began just prior to the hearing.[7] As it is, there is insufficient evidence to permit a conclusion that Applicant has made satisfactory progress in a counseling regimen proposed to occur over a period of months after the close of the record. This paucity of record evidence as to satisfactory progress does not outweigh the contrary evidence of Applicant's history of security-significant alcohol related problems. When evaluated in light of the record as a whole, the Judge's favorable application of these two mitigating conditions is not sustainable.

For similar reasons, the Board concludes that the Judge's whole person analysis fails to take into account significant contrary evidence. She observed that Applicant "has now made a renewed commitment to abstinence. He demonstrated that he now has the motivation to maintain his abstinence and act responsibly . . . He credibly, candidly, and sincerely stated that he abstained from alcohol consumption since February 2007 and intended to continue his abstinence."[8] Generally speaking, promises of future good behavior are entitled to less weight than "a track record of reform and rehabilitation." ISCR Case 94-1109 at 4 (App. Bd. Jan. 31, 1996). This is especially so in light of the fact that Applicant previously promised to abstain from alcohol during the course of a security clearance investigation but subsequently resumed drinking.[9]

The Judge also took into account the favorable prognosis for Applicant's sobriety contained in the letter from his counselor. However, as Department Counsel has pointed out, the record is not clear as to whether Applicant apprised the counselor of his entire history of alcohol difficulties. Furthermore, the Board notes the following language in the letter: "In my professional opinion, [Applicant] does not have a problem with alcohol . . . I believe that in the near future, [Applicant]

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[5]*See* Government Exhibit (GE) 4, Statement by Applicant, at 3: "I do not consider my past alcohol consumption as a problem drinker." *See also* Applicant Exhibit (AE) A, Letter from Alcohol Counselor, to the effect that, in the counselor's opinion, Applicant does not have a problem with alcohol; GE 2, Report of Subject Interview at 2: "[Applicant] stated he does not consider himself an alcoholic or a problem drinker." Compare these with Applicant's testimony at Tr. at 54: ". . . I want all of this alcohol abuse and situation behind me . . . that it won't ever be a problem again."

[6]Directive ¶ E2.23(c).

[7]Applicant attended a DWI school after his 2004 incident, but the record is silent as to the contents of this program. Applicant did state during an 2006 interview that this program did not entail an alcohol evaluation and that he had never received alcohol counseling of any sort. GE 2 at 1.

[8]Decision at 7.

[9]"Q: [In 2002] [y]ou wrote . . . Due to my DUI and my alcohol consumption causing marital problems, I have no intention of consuming alcohol in the future. Did you say that and write that? A: Yes. Q: And you wrote that intending for the Government to rely upon it in granting you security clearance? A: Yes . Q: In fact, you did drink after that day, didn't you? . . . A: Yes. Q: In fact, you were arrested in April of '04 for DUI? A: Yes." Tr. at 76-77.

will not have any more legal problems with alcohol."[10] The first sentence is not entirely consistent with Applicant's own testimony at the hearing in which he characterized his prior experience with alcohol as "a problem."[11] The second quoted sentence does not address the security concerns raised by alcohol consumption, which are directed toward impairment of an applicant's judgment and reliability rather than simply whether he can expect to encounter legal problems in the future. In light of the above, the Board finds persuasive Department Counsel's argument that the Judge's decision "runs contrary to the record evidence." *See* ISCR Case No. 03-22861 at 2-3 (App. Bd. Jun. 2, 2006). Accordingly, the Board further concludes that the record does not sustain a favorable decision, whether through the application of mitigating factors or through a whole person analysis and that the Judge's decision is arbitrary, capricious, and contrary to law.

Order

The Judge's favorable security clearance decision is REVERSED.

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

[10]AE A at 1.

[11]Tr. at 54.