KEYWORD: Guideline G; Guideline E

DIGEST: In this case the weight of the evidence that runs contrary to the Judge's finding of falsification is sufficient to render that finding unsustainable. However the Judge's unfavorable decision under Guideline G is sustainable. Adverse decision affirmed.

CASENO: 06-18809.a1

DATE: 11/20/2007

DATE: November 20, 2007

In Re:	)	
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	)	
	)	
Applicant for Security Clearance	)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT
D. Michael Lyles, Esq., Department Counsel

FOR APPLICANT
R. Burl McCoy, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On September 26, 2006, DOHA issued a statement of reasons 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 24, 2007, after the hearing, Administrative Judge Philip S. Howe denied Applicant's request for a security clearance. Applicant timely appealed pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raised the following issue on appeal: whether the Judge's decision is arbitrary, capricious, or contrary to law.

With regard to Guideline E, Applicant argues that the government did not prove that Applicant falsified his Security Clearance Application (SF 86) by deliberately failing to disclose a September 2004 mental evaluation at a state hospital. The Board agrees that the Judge's finding that Applicant falsified his SF 86 was error. The Appeal Board's review of the 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. In this case, the weight of the record evidence that runs contrary to the Judge's finding of falsification is of sufficient magnitude to render that finding unsustainable.

Applicant had a domestic dispute with his wife in September 2004. During that incident, according to his wife, Applicant talked about hurting himself. Applicant's wife called the police. The police obtained a mental detention warrant and proceeded to Applicant's residence. Upon arrival at the residence, an officer informed Applicant that he possessed a court order stating that Applicant had to go to a local hospital for a mental evaluation. Applicant, who was expecting the arrival of his parents from out of town, asked the officer, "could we do it later?" The officer replied in the negative and Applicant went with the police without being handcuffed. Once at the hospital, Applicant spent 15 minutes with a physician. They discussed Applicant's marital problems and the doctor recommended marriage counseling. They discussed an anti-depressant that Applicant was taking at the time and the doctor suggested to Applicant that he might want to double the dose and get follow-up therapy. The doctor then told Applicant that he was fine and to go home. The police took Applicant home without further incident and told him to have a nice day.

Question 21 of the SF 86 asked, "In the last 7 years, have you consulted with a mental health professional (psychiatrist, psychologist, counselor, etc.) or have you consulted with another health care provider about a mental health related condition?" Applicant answered "yes" and provided the dates, location, and the name of the therapist/doctor for a regimen of mental health treatment that took place between January and February 2005 (he also listed this treatment when answering Question 25 relating to alcohol treatment). In the "Additional Comments" section of the SF 86, Applicant also listed a voluntary (not mandated or court-instructed) alcohol rehabilitation treatment program he participated in between June 7 and June 12, 2004.

The record evidence indicates, therefore, that Applicant freely revealed two other interactions of significant duration he had with mental health professionals. On the facts of this case, these disclosures, standing alone, significantly undercut any notion that Applicant had a motive to conceal his mental health history from the government. These interactions were initiated by the voluntary actions of Applicant (the 2005 regimen had been suggested to him by health care providers who were

aware of his problems with alcohol–the submission to the June 2004 treatment was purely voluntary on Applicant's part). By contrast, the September 2004 incident was an involuntary interaction that followed a domestic incident, involved the police, and was of very short duration (Applicant spent approximately 15 minutes with a mental health professional who spent a significant part of that time discussing Applicant's marital problems). Applicant testified at the hearing that at the time he completed Question 21 on the SF 86, it never dawned on him that the September 2004 incident should be listed. This expression of his state of mind at the time he answered Question 21 is strongly supported by the disclosures he made on the SF 86 and by other record evidence.

Viewed objectively, Question 21 arguably encompasses the type of interaction that took place in September 2004. However, it is not a precise fit. The question speaks in terms of "consultations" with mental health professionals. Being taken involuntarily by the police after a domestic incident to a court-ordered emergency mental health referral that lasted only a few minutes might not qualify as a mental health consultation in the minds of many. The fact that the scenario presented by this case is less than clearly contemplated by the question is a significant factor to be considered when evaluating Applicant's state of mind. Indeed, Applicant's other experiences with mental health professionals, which he readily listed on his SF 86, differed markedly in circumstance from his brief encounter in September 2004.

Applicant's explanations as to why he did not list the September 2004 incident are consistent and express a recurring theme. Applicant reveals that although it was his understanding that he had not been arrested, he was taken involuntarily to the hospital by the police. His statements, taken as a whole, indicate that he viewed the episode as a law enforcement incident as opposed to an instance of mental health treatment. In his answer to the SOR on the falsification allegation, he did not admit the allegation, and, by way of explanation, he indicated that he did not think he had been arrested. During his hearing testimony, when offering an explanation as to why he did not include the September 2004 incident on the SF 86, Applicant stated, "I was very forthcoming from beginning to end with it as far as arrests and any other issues with the law. There was no reason for me not to have included that if I had known I was arrested." This focus on the September 2004 incident as primarily a law enforcement matter continued during questioning of the Applicant by the Judge. With reference to Question 21, the Judge asked, ". . . why didn't you think that it [the incident with the police] was a consultation with a mental health professional?" Applicant answered, "Your Honor, it just did not dawn on me. I don't know why. But if the arrest–I didn't know I was arrested, and I'm not sure I actually was. May be it's a generic form that the county uses for a mental health pickup." After stating to Applicant that he didn't think whether Applicant was or was not arrested was pertinent to the question, the Judge asked him, "If you walked in voluntarily and talked to this guy for 15 minutes and walked out voluntarily, would you have disclosed it then?" Applicant answered, "Absolutely." Applicant's unwavering focus on the law enforcement component of the incident, along with its involuntary nature provides strong evidence that his state of mind was such that it honestly never occurred to him that the September 2004 incident fit the question.

Given the totality of the circumstantial evidence of Applicant's state of mind, the Judge's finding that Applicant stated he did not include the incident on the SF 86 because "it slipped his mind" is not an accurate characterization of the evidence. Additionally, the Judge's conclusion that Applicant "had no persuasive explanation why he did not disclose it when it occurred in the midst of his other rehabilitation programs and later DUI arrest" fails to take into consideration significant record evidence such as that discussed in preceding paragraphs. The record, considered as a whole,

does not provide a reasonable basis for the Judge's finding of falsification. However, this error is ultimately harmless in that the Judge's findings and conclusions under Guideline G are sustainable.

With regard to Guideline G, Applicant argues that the Judge should have found Applicant's conduct mitigated. Applicant cites two Hearing Office decisions in other cases he considers similar to his in which the Hearing Office Judges granted clearances. Applicant argues that the Judge should have applied Mitigating Condition (MC) 23(b).[1]

Applicant's reliance on the two other Hearing Office decisions is misplaced. Hearing Office decisions in other cases constitute authority, but are not binding on the Board or on Hearing Office Judges in other cases. They are not indicative of error on the part of Hearing Office Judges in other decisions. *See, e.g.,* ISCR Case No. 02-15003 at 4 (App. Bd. Mar. 17, 2005).

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. *See, e.g.,* ISCR Case No. 05-05439 at 2 (App. Bd. May 29, 2007). Thus, the presence of some mitigating evidence does not alone compel the Judge to make a favorable security clearance. As the trier of fact, the Judge has to weigh the evidence as a whole and decide whether the favorable evidence outweighs the unfavorable evidence, or *vice versa.* An applicant's disagreement with the Judge's weighing of the evidence, or an ability to argue for a different interpretation of the evidence, is not sufficient to demonstrate the Judge weighed the evidence or reached conclusions in a manner that is arbitrary, capricious, or contrary to law.

In this case, the Judge properly considered the security concerns raised by Applicant's alcohol consumption. He reasonably weighed the mitigating evidence against the seriousness of the disqualifying conduct. The Judge considered the possible application of relevant mitigating conditions and explained why their application was not warranted. He cited such factors as Applicant's abuse of alcohol until 2005, a diagnosis of alcohol dependence, his continued drinking after a December 2004 DUI arrest and after his participation in alcohol rehabilitation programs in 2004 and 2005, his removal from the 2004 outpatient program when he came to a session with alcohol on his breath, his conflicting statements about his completion of the AA 12-step program, and his lack of clarity about when he became abstinent. These factors, upon which the Judge's conclusion that the mitigating factors did not apply is based, are supported by substantial record evidence. The Board does not review a case *de novo*. The favorable evidence cited by Applicant is not sufficient to demonstrate the Judge's decision is arbitrary, capricious, or contrary to law. *See, e.g.,* ISCR Case No. 02-28041 at 4 (App. Bd. Jun. 29, 2005). Given the record that was before him, the Judge's ultimate unfavorable clearance decision under Guideline G is sustainable.

[1]"The individual acknowledges his or her alcoholism or issues of alcohol abuse, provides evidence of actions taken to overcome his problems, and has established a pattern of abstinence (if alcohol dependent) or responsible use (if an alcohol abuser)" Directive ¶ E2.23(b).

Order

The decision of the Judge denying Applicant a security clearance is AFFIRMED.

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

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

Signed: William S. Fields
William S. Fields
Administrative Judge
Member, Appeal Board