

KEYWORD: Guideline G

DIGEST: The Judge applied an overly strict definition of the terms medical professional and licensed social worker. Guideline G disqualifying conditions 22(d) and 22(e) should not be construed narrowly. In analyzing cases before them DOHA Judges must be guided by common sense and with a view toward making a reasoned determination consistent with the interests of national security. Favorable decision remanded.

CASENO: 07-00558.a1

DATE: 04/07/2008

DATE: April 7, 2008

In Re:)	
)	
-----)	ISCR Case No. 07-00558
)	
Applicant for Security Clearance)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James F. Duffy, Esq., Department Counsel

FOR APPLICANT

Pro Se

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On August 2, 2007, DOHA issued a statement of reasons 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 November 29, 2007, after the hearing, Administrative Judge Mary E. Henry 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 raises the following issues on appeal: whether the Judge erred in failing to apply Alcohol Consumption Disqualifying Conditions (ACDC) 22(d) and (e);¹ and whether the Judge’s conclusion that Applicant had mitigated the security concerns alleged in the SOR was arbitrary, capricious, and contrary to law. Finding error, we remand the case to the Judge.

Whether the Record Supports the Judge’s Factual Findings

A. Facts

The Judge made the following pertinent findings of fact: Applicant began drinking beer around age 22 or 23. In June 2004, Applicant attended a family picnic, where he drank beer from early afternoon until about an hour before his departure. On his way home, the police arrested and charged him with driving under the influence (DUI) after his breathalyzer results showed a 13% level of alcohol. Applicant had never received a ticket for DUI prior to this date. He pled guilty. The court sentenced him as a first time offender to 30 days in jail, suspended, fined him \$300, \$100 suspended, and restricted his driving privileges for one year, contingent upon his participation in an alcohol and substance abuse program.

As directed, Applicant enrolled in an alcohol and substance abuse program. He started attending the program in October 2004 after his initial one-on-one 45 minute interview with the program director. He completed six months of weekly group counseling in April 2005 and attended 52 sessions of Alcoholics Anonymous (AA) before he completed the program in September 2005. During his time in this program, he did not drink alcohol. At no time did any counselor advise him not to drink alcohol in the future. The record contains no clinical reports from this program.

Since 2005, Applicant has continued to drink beer on the weekends. He usually consumes three to four beers at one time, sometimes when watching a game. He will occasionally drink a mixed drink when out. He may not drink anything for a week or more. Since completing the alcohol program, he will not drive if he drinks two beers at home. He has not experienced any blackouts as a result of his drinking. He does not drink in the morning. His work attendance record for the last seven years indicates that he regularly arrives at work on time and does not miss work on a regular basis because of unexcused absences or health reasons. This record supports his statement that he

¹Directive ¶¶ E2.22(d), (e).

has not missed work because of alcohol usage. He denies an alcohol problem. His supervisor has never sent him to the clinic because of alcohol use.

After completing his SF-86, he returned to the same alcohol and substance abuse program for an evaluation at the request of his security office. He met with the same director in May 2007 for approximately 45 minutes and provided her with a urine sample. At the hearing, he admitted that he had not been truthful with her about when he last consumed alcohol. He told her he had not consumed alcohol in one month, when it had been two days.

The Director, who is a Licensed Professional Counselor (LPC), Licensed Marital and Family Therapist (LNFT) and Licensed Substance Abuse Treatment Practitioner (LSATP), prepared a written report on this interview and the one urine test result. Based on the positive ethylglucuronide reading, his statement that there was blood in his urine test at work in March 2007, treatment history (without any further information), and his lack of honesty in self-reporting his alcohol use, the Director recommended an intensive treatment program of at least six months after a complete medical evaluation and liver enzyme testing program.² In a supplemental report, the Director stated that Applicant's diagnosis after the May 2007 interview was Alcohol Dependence 303.90 (with tolerance). The supplemental report reflects that the diagnosis is based on his urine test results.³ Applicant has not followed up with the recommended treatment. However, he consulted with a professional counselor about an evaluation. The counselor advised that it would take four or five sessions at least to provide an evaluation.

Applicant's most recent performance evaluation by his current supervisor rated him at 4, the highest rating available. His supervisor from late 2004 until early 2007 describes Applicant as a dependable and excellent employee with excellent attendance. Applicant's recent credit report reflects that his bills are paid in a timely manner and his finances are well managed.

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 ¶ 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.

²See Government Exhibit (GE) 5, Memo from Director, dated May 12, 2007. This document states that blood in urine "is sometimes found in individuals who have considerable liver damage . . ."

³See GE 6, Memo from Director, dated September 16, 2007.

Department Counsel has not expressly challenged the Judge's factual findings. Therefore, they are not at issue in this appeal.

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 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).

In evaluating possible Disqualifying Conditions, the Judge rejected Department Counsel's argument that ACDC 22(d) and (e) apply in Applicant's case, stating that the Director of the alcohol abuse program was neither "a qualified medical professional [nor] a licensed social worker."⁴ The Judge went on to cite what she believed were problems with the Director's diagnosis of Applicant's alcohol dependence, for example that she did not use "the recommended standards and criteria set forth" in the Diagnostic and Statistical Manual of Mental Disorders (DSM) IV and that she failed

⁴Decision at 7.

“to provide a proper analytical basis” for her conclusion.⁵ The Judge also noted that the Director did not provide information as to the substance of Applicant’s treatment history.

Department Counsel argues that the Judge applied an overly strict definition of the terms “medical professional” and “licensed social worker.” He also argues that the Judge’s analysis of the Director’s opinion did not have a sufficient evidentiary foundation in the record. The Board finds Department Counsel’s arguments persuasive.

Alcohol abuse raises security concerns in that it can lead “to the exercise of questionable judgment or the failure to control impulses, and can raise questions about an individual’s reliability and trustworthiness.”⁶ The Directive states that “[c]onditions that could raise a security concern” involving alcohol “include . . . diagnosis by a duly qualified medical professional (e.g., physician, clinical psychologist, or psychiatrist) of alcohol abuse or alcohol dependence; [and/or] evaluation of alcohol abuse or alcohol dependence by a licensed clinical social worker who is a staff member of a recognized alcohol treatment program . . .”⁷ In this case, the official in question holds licensures in counseling and in the treatment of substance abuse. Furthermore, she directs a substance abuse counseling center that met the requirements of Applicant’s court-ordered treatment regimen.

The Board concludes that a diagnosis of alcohol dependence by such an official raises a security concern under Guideline G and that the Judge’s contrary decision is based upon an unreasonably narrow interpretation of the Directive. It is true that the record contains no evidence explicitly identifying the Director as a physician, clinical psychologist, psychiatrist, or social worker. However, ACDC 22(d) and (e) contemplate a broad range of providers who, by education and by position, are qualified to diagnose and treat alcohol dependence and other substance abuse disorders. By its own terms, ¶ 22(d) lists the previously mentioned types of care providers by way of example only. The Judge’s own findings place the Director within this criteria. Even a person who defines the terms in ACDC 22(d) and (e) narrowly, however, must still acknowledge that ¶ 22 is not an exhaustive and exclusive list of disqualifying conditions; rather, the word “include” in the preamble signals that the matters listed are illustrative in nature and do not provide a Judge with a basis to conclude that factors or categories not explicitly described do not raise security concerns. In analyzing cases before them, Judges must be guided by common sense and with a view toward making a reasoned determination consistent with the interests of national security. The Judge’s conclusions regarding ACDC 22(d) and (e) are error.

Department Counsel argues that the Judge erred in concluding that the Director’s diagnosis of alcohol dependence was not credible. The Judge stated that the diagnosis was not credible

⁵*Id.*

⁶Directive ¶ E2.21.

⁷*Id.* at ¶¶ E2.22(d), (e).

because it was “not supported by underlying documentation and a proper analysis.”⁸ The Judge stated this in support of her view that ACDC 22 (d) and (e) were not germane to Applicant’s case. Department Counsel contends that the Judge’s conclusion on this matter was made without a sufficient evidentiary foundation.

As stated above, the diagnosis was contained in memos submitted to DOHA at its own request after Applicant listed the Director by name as the person he chose to conduct the evaluation. They are not medical records, but appear to summarize the evaluation which the counseling center conducted. The Judge cites to no evidence in the record from which one can reasonably conclude that the Director did not utilize accepted standards, criteria, or methodology in making her diagnosis, nor is there any evidence that would otherwise impugn her competence. Furthermore, although Applicant has consulted with a psychotherapist not connected with the Director’s counseling center,⁹ there is nothing in the file, whether through documents or through expert testimony, that challenges the Director’s methodology or contradicts her diagnosis. The Judge stated that the Director’s report “does not reference his earlier treatment in her program, any prior diagnosis, any prior recommendations to abstain from drinking alcohol, or any previous prognosis.”¹⁰ This statement is partially incorrect in that the Director’s report makes clear references to Applicant’s prior participation in an alcohol treatment program. The Judge’s own findings acknowledge that Applicant’s treatment following his conviction consisted of six months of weekly counseling sessions and 52 sessions of AA. Furthermore, the interrogatories contain background information to the effect that Applicant’s records from this treatment show that he was diagnosed with alcohol dependence during the period between October 2004 and April 2005.¹¹ There is no reason to believe that the Director failed to provide the information which DOHA requested. Even if the matters she submitted were less detailed a statement of Applicant’s treatment and medical condition than was possible, that fact alone does not justify a negative conclusion as to the sufficiency of her methodology or the credibility of her diagnosis and report. Given the Board’s conclusion that the Judge erred in failing to address security concerns raised by the Director’s diagnosis, it was Applicant’s responsibility to demonstrate that the diagnosis was unworthy of belief.

To summarize, the record contains substantial evidence of the following: Applicant was arrested and convicted of DUI.¹² The court ordered him to receive alcohol counseling.¹³ Applicant

⁸Decision at 7.

⁹Decision at 4; Applicant Exhibit (AE) H.

¹⁰Decision at 7.

¹¹GE 2, Interrogatories, at 2.

¹²GE 1, Security Clearance Application, at 24; GE 3, FBI Identification Record, at 2; Tr. at 39.

¹³GE1 at 24; Tr. at 41.

received this counseling at a center managed by the Director.¹⁴ He completed this counseling in April 2005 and was diagnosed with alcohol dependence.¹⁵ As part of his security clearance investigation, Applicant was directed by DOHA to identify a person to conduct a follow-up evaluation. Applicant chose the Director and her counseling center.¹⁶ The Director's response to DOHA, contained in two letters written in 2007, diagnose him as alcohol dependent.¹⁷ The response further states that chemical testing revealed that Applicant was not truthful in having denied alcohol use.¹⁸ The Director recommended that Applicant undergo an abstinence-based treatment program requiring 12-step attendance and random urine and breath testing.¹⁹ However, Applicant has continued to consume alcohol.²⁰ The Board concludes that the Judge's favorable security clearance decision failed to take into account record evidence that established a security concern arising from Applicant's diagnosis of alcohol dependence and subsequent continued alcohol use. As a consequence, the Judge's analysis was arbitrary, capricious, and contrary to law in that it did not evaluate the record evidence in the context of Applicant's burden of persuasion as to mitigation. The Board concludes that the best resolution of this case would be to remand it to the Judge for a new decision consistent with this opinion.

Order

The Judge's favorable security clearance decision is REMANDED.

Signed: Jeffrey D. Billett

Jeffrey D. Billett
Administrative Judge
Member, Appeal Board

Signed: Jean E. Smallin

Jean E. Smallin

¹⁴Tr. at 38; GE 2 at 2.

¹⁵GE 2 at 2.

¹⁶*Id.*

¹⁷GE 5, 6.

¹⁸GE 5.

¹⁹Applicant's reply to SOR at 2.

²⁰Tr. at 70 - 75.

Administrative Judge
Member, Appeal Board

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