KEYWORD: Guideline G

DIGEST: The Board gives due consideration to prior Hearing Office decisions, however, such decisions are not legally bing precedent for the Hearing Office or the Appeal Board, Adverse decision affirmed.

CASENO: 07-09124.a1

DATE: 07/11/2008

DATE: July 11, 2008

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

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT
James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT
Pro Se

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On November 15, 2007, 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 April 7, 2008, after the hearing, Administrative Judge Henry Lazzaro 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 adverse security clearance decision is arbitrary, capricious, or contrary to law.

Applicant contends that the Judge erred in concluding that the security concerns raised under Guideline G had not been mitigated under the mitigating conditions and the whole person concept. In support of that contention, Applicant argues that the Judge misstated the frequency of his attendance at Alcoholics Anonymous (AA)[1] and the length of time he had abstained from using alcohol,[2] gave insufficient weight to his mitigating evidence, and reached conclusions that were not supported by the record as a whole. He also argues that the Judge's overall unfavorable conclusion is inconsistent with other hearing-level decisions in which applicants in ostensibly similar circumstances had been granted a clearance. The Board does not find Applicant's arguments persuasive.

The Board's review of a Judge's findings 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 finding from being supported by substantial evidence." *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620 (1966). In this instance, even if the challenged findings were changed to reflect Applicant's interpretation of the record evidence, it would not have undermined the Judge's conclusions. Therefore, any such error would be at most harmless. *See* ISCR Case No. 05-08459 at 2, n.1 (App. Bd. Nov. 16, 2006). Considering the record as a whole, the Judge's material findings with respect to Applicant's conduct of security concern reflect a sustainable interpretation of the record evidence. *See, e.g.,* ISCR Case No. 03-21933 at 2 (App. Bd. Aug. 18, 2006).

Applicant points to several hearing-level cases which he contends support granting him a clearance. The Board gives due consideration to these cases. *See, e.g.,* ISCR Case No. 06-05903 at 3 (App. Bd. Oct. 15, 2007). However, the Board has previously noted that decisions in other hearing-level cases are not legally binding precedent, even if an applicant can establish close factual

[1]The Judge stated that Applicant attended AA meetings "a couple of times a month," whereas Applicant testified that he attended AA meetings "every two weeks at a minimum."

[2]The Judge stated that Applicant "had undertaken an alcohol abstinent lifestyle for about 13 months as of the date of the hearing, just as he did following successful completion of alcohol programs in 1988 and 1996," whereas Applicant had testified that he remained abstinent after the 1988 and 1996 incidents "for quite a while" and after the 2004 incident for "probably two or three months."

similarities between those cases and his case. *See, e.g.,* ISCR Case No. 04-04004 at 2 (App. Bd. Jul. 31, 2006). Accordingly, the Judge was not legally obligated to reconcile his decision in this case with decisions in other ostensibly similar cases. *See, e.g.,* ISCR Case No. 06-25743 at 2 (App. Bd. Jan. 10, 2008). "The adjudication process is the careful weighing of a number of variables known as the whole-person concept." Directive at ¶ E2.2(a). "Each case must be judged on its own merits . . ." *Id* at ¶ E2.2(b).

Once the government presents evidence raising security concerns, the burden shifts to the applicant to establish mitigation. Directive ¶ E3.1.15. The presence of some mitigating evidence does not alone compel the Judge to make a favorable clearance decision. 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*. *See, e.g.* ISCR Case No. 06-09542 at 2 (App. Bd. Sep. 4, 2007). 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. *See, e.g.,* ISCR Case No. 04-08116 at 2 (App. Bd. Jul. 2, 2007).

A review of the Judge's decision indicates that the Judge weighed the mitigating evidence offered by Applicant against the seriousness of the disqualifying conduct, and considered the possible application of relevant mitigating conditions and factors. The Judge reasonably explained why the evidence presented in mitigation was insufficient to overcome the government's security concerns. The Board has examined the Judge's decision in light of the record as a whole and concludes that the Judge has drawn "a 'rational connection between the facts found'" under Guideline G and his adverse decision. *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). Accordingly, the Judge's adverse decision is not arbitrary, capricious, or contrary to law.

Order

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

Signed: Michael D. Hipple
Michael D. Hipple
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