

KEYWORD: Guideline G; Guideline F; Guideline J

DIGEST: Applicant failed to rebut the presumption that the Judge considered all of the record evidence. Applicant has submitted new evidence not contained in the record, which the Board cannot consider. Adverse decision affirmed.

CASE NO: 07-09746.a1

DATE: 07/27/2011

DATE: July 27, 2011

In Re:)	
)	
-----)	ISCR Case No. 07-09746
)	
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 September 29, 2010, DOHA issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline G (Alcohol Consumption), Guideline F (Financial Considerations) and Guideline J (Criminal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a decision on the written record. On May 18, 2011, after considering the record, Administrative Judge Edward W. Loughran denied Applicant’s request for a security clearance. Applicant appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raised the following issue on appeal: whether the Judge’s adverse security

clearance decision was arbitrary, capricious, or contrary to law. Consistent with the following, we affirm the Judge's decision.

The Judge made the following pertinent findings of fact: Applicant is an employee of a Defense contractor. He has worked for his current employer since 1990. He served in the Navy, both on active duty and in the Reserves, from 1982 to 1990.

In February 2002, Applicant was charged with driving under the influence of alcohol (DUI). He pled *nolo contendere* and was sentenced to community service, six months probation, attendance at a DUI school, and payment of court costs. His drivers license was also suspended.

In May 2003, Applicant was again charged with DUI. He had swerved his car several times, and the arresting officer noted that Applicant's eyes were bloodshot and that he emitted a strong odor of alcohol.¹ Applicant refused a breath test. The case was eventually *nolle prossed*.

In 2006, a DOHA Judge denied Applicant a security clearance, based upon the guidelines for alcohol consumption, personal conduct, and criminal conduct.²

In 2009 he was again charged with DUI. Convicted of the lesser offense of reckless driving, the court sentenced him to community service, probation, and a fine plus court costs. His probation required him to remain sober, and Applicant passed the monthly screening tests imposed by the court. He completed a required substance abuse course and a driver improvement course. He also completed an alcohol counseling program provided through the Department of Veterans Affairs.

Applicant has three delinquent debts, for \$214, \$1,412, and \$12,978 respectively. The largest debt is based upon a judgment awarded to a credit card company. Applicant attributed his financial problems to his wife's spending habits and stated that they would be resolved in the course

¹Item 6 is an arrest report pertaining to this incident. It states that Applicant failed a field sobriety test. It also states that, upon being stopped by the police, Applicant had a difficult time finding his vehicle registration. Applicant "then fumbled with his wallet and found his driver's license. I asked [Applicant] if he had anything to drink tonight and he advised he had three beers." Compare with the Judge's finding, a quote from Item 17, regarding Applicant's subsequent explanation of his conduct: "The [consumption] of alcohol was in the amount of one swallow from a bottle of beer which was then subsequently spilled on me by the waitress . . . who bumped my table while serving other patrons. Shortly thereafter I left the establishment to return home because the designated driver called and said that she was not able to come. While on the way home I dropped some pretzels on the floor under my feet. While trying to sweep the debris from under my feet, I swerved and my driver's side tires crossed the lane marker." In the Analysis portion of the Decision, the Judge concluded that Applicant's denial of guilt of the 2003 charge "is not credible, and it is not supported by the police report and the arresting officer's account of the incident." Decision at 7.

²Item 18 is the decision of the Administrative Judge in the 2006 case. In that case, the Judge stated, "I note that the misconduct alleged in the SOR and demonstrated by Government's evidence occurred when Applicant was in his late 30s and early 40s. I am compelled by the record to conclude that Applicant has simply not yet demonstrated adequate rehabilitation of his judgment, reliability, and trustworthiness. It is too soon to conclude that his alcohol-related problems are safely behind him." The Judge in the case before us stated that he was considering evidence of the prior adjudication "for the sole purpose of establishing that Applicant was aware that alcohol-related incidents could adversely impact his security clearance." Decision at 3.

of anticipated divorce proceedings.³

In his analysis of Applicant's security concerns, the Judge found that Applicant's alcohol-related conduct was recent and that he was not able to determine that it was unlikely to recur. Applicant's misconduct with alcohol, the Judge stated, casts doubt upon his reliability, trustworthiness, and good judgment. Regarding Applicant's debts, the Judge noted Applicant's wife's contribution to the problem, but he concluded that Applicant had not demonstrated responsible action in regard to his debts. The Judge concluded that Applicant had failed to demonstrate any of the pertinent mitigating conditions.

In his brief, Applicant draws attention to evidence to the effect that his physical condition had contributed to his failure of the 2003 field sobriety test.⁴ He also discusses his wife's contribution to his financial problems. To the extent that he is arguing that the Judge failed to consider these matters, a Judge is presumed to have considered all of the record evidence. *See, e.g.*, ISCR Case No. 09-06436 at 2 (App. Bd. Feb. 15, 2011). In the case before us, the Judge discussed the evidence which Applicant cites, but he plausibly explained his conclusion that Applicant had failed to meet his burden of persuasion. Applicant has not demonstrated that the Judge failed to consider all of the evidence, nor has he demonstrated that the Judge mis-weighted the evidence.

Applicant has submitted, as part of his appeal, evidence not contained in the record, for example a copy of a newspaper article addressing alleged problems with DUI arrests in Applicant's town of residence. We cannot consider new evidence on appeal. Directive ¶ E3.1.29. *See also* ISCR Case No. 09-06306 at 2 (App. Bd. Jan. 31, 2011).

The record supports a conclusion 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). *See also* Directive, Enclosure 2 ¶ 2(b): "Any doubt concerning personnel being considered for access to classified information will be resolved in favor of the national security."

Order

³The Judge quoted from Applicant's response to the SOR: "The amounts on these accounts come from credit card balances that my wife incurred and then transferred into these accounts to which I am legally responsible for to date. As I have spoken to a divorce attorney and under his advice I have not paid those balances because I think in some time to come I can prove that those debts were not incurred by me and will become the sole responsibility of . . . my former wife. What proof I have of this right now? None, but hopefully when you read this you will be able to understand my difficult position. Eventually this will be cleared up, I promise." Decision at 4.

⁴Item 7 is a sworn statement by Applicant concerning the 2003 DUI charge. Applicant stated that the arresting officer had failed properly to conduct the field sobriety test "by not asking if I was on pain medication or if I had any injuries. I was not able to do the field sobriety test because of an injured back. Case was dismissed. I was on prescribed medication for back pain."

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