

KEYWORD: Guideline J; Guideline G

DIGEST: Applicant's claim not have had a drink since January (2009) warranted discussion by the Judge. The error is harmless Adverse decision affirmed.

CASENO: 07-16206.a1

DATE: 02/03/2010

DATE: February 3, 2010

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In Re:)	
)	
-----)	ISCR Case No. 07-16206
)	
)	
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 April 22, 2008, DOHA issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline J (Criminal Conduct), Guideline G (Alcohol Consumption) and Guideline F (Financial Considerations) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested that his case be decided on the written record. On November 9, 2009, after the close of the record, Administrative Judge Rita C. O’Brien denied Applicant’s request for a security clearance. Applicant appealed pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raises the following issue on appeal: whether the Judge’s decision is arbitrary, capricious, or contrary to law. For the following reasons, the Board affirms the Judge’s unfavorable decision.

On appeal, Applicant argues that the Judge did not consider evidence he submitted in a response to the FORM dated October 12, 2009. That response is in the case record, however, it is (without explanation) not located with the other evidentiary documents. Rather, it is located in a file that otherwise contains non-evidentiary correspondence.

There is a rebuttable presumption that a Judge has considered all the record evidence unless he or she specifically states otherwise. That presumption has not been overcome here. The evidence Applicant claims was excluded from the Judge’s analysis is specifically referenced by the Judge in the Statement of the Case portion of her decision. There is one area where the Judge’s failure to discuss the substance of Applicant’s response to the FORM is error. Applicant explicitly reported that he had been sober for nine months and had not had a drink since his birthday in January. The Judge’s findings and consequent analysis did not refer to these claims, and she found that he continues to drink daily. Applicant’s claims to the contrary warranted discussion in the Judge’s discussion. However, given the totality of facts and circumstances in Applicant’s case, the Board concludes that the error is harmless, as the Judge’s adverse conclusions under Guideline F and Guideline J are sustainable and provide an adequate basis for her ultimate adverse security clearance decision.

The presence of some mitigating evidence does not alone compel the Judge to make a favorable security 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. 06-10320 at 2 (App. Bd. Nov. 7, 2007).

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. 06-11172 at 3 (App. Bd. Sep. 4, 2007). After reviewing the record, the Board concludes that the Judge examined the relevant data and articulated a satisfactory explanation for her 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 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). Therefore, the Judge’s ultimate unfavorable security clearance decision under Guideline F is sustainable.

Order

The decision of the Judge denying Applicant a security clearance 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: William S. Fields
William S. Fields
Administrative Judge
Member, Appeal Board