KEYWORD: Guideline G

DIGEST: Applicant challenges the Judge's suggestion to have Department Counsel question Applicant. There is nothing in the record to suggest that Department Counsel's examination of Applicant was conducted improperly. Adverse decision affirmed.

CASENO: 08-09898.a1

DATE: 11/19/2010

DATE: November 19, 2010

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 December 23, 2009, 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 August 30, 2010, after the hearing, Administrative Judge Darlene D. Lokey Anderson denied Applicant's request for a security clearance. Applicant appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raised the following issues on appeal: whether certain of the Judge's factual findings were supported by substantial record evidence; whether Applicant was denied due process; whether the Judge was biased against Applicant; and whether the Judge failed properly to apply the whole-person factors. Consistent with the following discussion, we affirm the decision of the Judge.

The Judge found that Applicant has a history of excessive alcohol use, continuing "off and on" from 1973 until at least 2008. During that time, Applicant had four instances of alcohol-related offenses. In 1992, 2002, and 2008, he was charged with driving under the influence of alcohol (DUI). In 1992 and 2008, he was convicted of DUI. In 2002, he pled guilty and was convicted of a form of reckless driving termed "wet reckless."[1] Decision at 3. During the security clearance interview, Applicant learned that there was an outstanding warrant for his arrest stemming from the 2002 offense, due to his having failed to pay off his fine.[2] In 2000, Applicant was arrested and charged with being drunk in public.

Applicant intends to continue drinking alcohol, though he acknowledges that he has a problem with drinking and driving. He also believes that he is an unlucky person who has been caught.

Applicant enjoys an excellent reputation for his integrity, trustworthiness, and job performance.

Applicant challenges certain of the Judge's findings of fact, notably her finding that Applicant has abused alcohol off and on during the times stated above. However, the Judge's finding is a reasonable interpretation of the record evidence. Considering the evidence as a whole, the Judge's material findings of security concern are sustainable. *See, e.g.*, ISCR Case No. 08-07528 at 2 (App. Bd. Dec. 29, 2009).

Applicant states that the Judge erred by permitting Department Counsel to cross-examine him. "No matter how well intended . . . this is an adversarial relationship between Applicant and the Government Counsel, this should not have been suggested by [the Judge] . . ." Brief at 2. This argument suggests that Applicant believes the Judge expressed bias against him. We have examined the record and find nothing to suggest that Department Counsel's cross examination of Applicant

[1]*See* Government Exhibit (GE) 1, Security Clearance Application, at 28; GE 4, Interrogatories, July 9, 2009, at 6.

[2]GE 3, Interrogatories, 23 April 2009, includes a letter from an attorney, describing a payment plan for this fine, which had been approved by the court.

was conducted in a manner at variance with the Directive. Applicant's appeal brief is not sufficient to rebut the presumption that the Judge was impartial. *See, e.g.*, ISCR Case No. 08-01306 at 4 (App. Bd. Oct. 28, 2009).

In support of his appeal, Applicant cites to evidence not contained in the record, concerning his enrollment in an alcohol education program. He had entered this program after the close of the record. We cannot consider this new evidence. *See* Directive ¶ E3.1.29. ("No new evidence shall be received or considered by the Appeal Board.")

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'" both as to the mitigating conditions and the whole-person factors.[3] *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).

Order

The Judge's adverse security clearance decision is AFFIRMED.

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

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

Signed: James E. Moody
James E. Moody

[3] *See* Tr. at 31-32: "Q: Now, since your DUI . . . the last one, the 2008 one . . . have you ever had alcohol and gotten behind the wheel of a car? A: Yes. But I wasn't legally drunk. Q: Okay. A: I wasn't .08. I may have had a beer."

Administrative Judge
Member, Appeal Board