

KEYWORD: Guideline G; Guideline H; Guideline E

DIGEST: Judge’s conclusion that Applicant’s 22 months of sobriety were insufficient to mitigate the security concerns in his case is sustainable. To the extent that the Judge’s decision appears to recommend the future grant of a clearance after a greater period of sobriety, it has no binding effect on the Government. Adverse decision affirmed.

CASENO: 09-00431.a1

DATE: 07/07/2010

DATE: July 7, 2010

In Re:)	
)	
-----)	ISCR Case No. 09-00431
)	
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 July 30, 2009, DOHA issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline G (Alcohol Consumption), Guideline H (Drug Involvement), and Guideline E (Personal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On April 27, 2010, after the hearing, Administrative Judge Roger C. Wesley denied Applicant’s request for a security clearance. Applicant timely appealed pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.

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

clearance decision is arbitrary, capricious, or contrary to law.¹ For the following reasons, the Board affirms the Judge's unfavorable decision.

The Judge made the following findings pertinent to the issues raised on appeal: Applicant began consuming alcohol regularly by age 13. During his active duty tour in the military, he developed serious alcohol and drug abuse problems. In 1985 he was charged with drunk driving and punished under the UCMJ. Applicant managed to successfully conclude his military career despite his substance abuse problems. Following his discharge from active duty in 1989, Applicant continued to abuse alcohol on a regular basis. Because of his drinking, he encountered considerable difficulties in his marriage and in holding jobs. Besides alcohol, Applicant abused drugs (marijuana and cocaine) over a period of many years, including the years of his military service. Applicant admitted himself to a 28-day substance abuse program in 2000. It is not clear from the record what the program entailed or how Applicant progressed in the program.

In March 2008, Applicant enrolled in a VA-sponsored inpatient First Step program. Upon admission, he was diagnosed with alcohol dependence, cocaine dependence and cannabis abuse. Applicant experienced problems with the program regimen and, after participating for just over a month, was discharged from the program prior to completion due to aggressive behavior and an altercation with another patient. There was no change in his diagnosis. Since his discharge, Applicant has maintained abstinence from alcohol and drugs and is committed to a lifestyle of permanent abstinence. He is participating in VA aftercare groups. Applicant has not consumed alcohol since February 2008.

The Judge concluded: Applicant's recurrent problems with abusive and addictive drinking raise major concerns over his risk of recurrent alcohol abuse. Whether Applicant can safely avert recurrent drinking cannot be firmly established without an updated professional evaluation by a credentialed physician or licensed substance abuse counselor. Although Applicant has been able to avoid any more alcohol-related arrests since his last arrest and conviction in 1985, his past excessive alcohol consumption was frequent, extreme, and recurrent over long periods of time. Without proof of a longer period of sustained abstinence, application of mitigating conditions is precluded. Based on a whole-person assessment, Applicant fails to make a sufficiently convincing showing that he has a sufficient period of sustained abstinence, considering his lengthy history of recurrent alcohol abuse. Applicant's mitigation efforts, while considerable, are not enough to overcome risks of potential relapse, given his recurrent abuse and addictive history. Regarding Applicant's drug abuse, at this time there is insufficient credible seasoning of Applicant's mitigating efforts to avert foreseeable risks of recurrent cocaine and marijuana use.

Applicant argues that the Judge failed to consider or comment on his clearly demonstrated intent not to abuse any drugs in the future, as indicated by disassociation from drug users and contacts, avoiding the environment where drugs are used, and his signing of a statement of intent not to use with automatic revocation of his clearance for any violation. Applicant asserts that the Judge

¹The Judge made formal findings favorable to Applicant under Guideline E. Those findings are not challenged on appeal.

erred by not informing him that he could submit the letter of intent. Applicant states that the record evidence indicates that the alcohol and drug abuse concerns should have been mitigated. Applicant's arguments do not establish error on the part of the Judge.

Portions of Applicant's argument are based on the content of documents that were submitted with his appeal brief. These documents were not part of the record below. The documents submitted included an undated statement from Applicant indicating his intent not to use drugs or alcohol in the future and agreeing to an automatic revocation of his clearance in the future if he engages in substance abuse. The Board cannot consider new evidence on appeal. Directive, Enclosure 3, ¶ E3.1.29.

Applicant asserts that the Judge erred by not informing him that he could have submitted the signed statement of intent. Applicant received a copy of the Directive prior to the hearing in his case. The Directive's adjudicative guidelines state that such a letter of intent may be mitigating. Directive, Enclosure 2, ¶ 26(b)(4). In DOHA proceedings, the parties are responsible for preparing and presenting their own cases. The Judge is responsible for adjudicating the case based on the record. The Judge was not obligated to advise the parties of specific steps that might advance their case (such as submission of a letter of intent). Applicant has not demonstrated error on the part of the Judge.

Applicant states that the Judge did not consider certain evidence (cited in a previous paragraph) relative to mitigation. There is a rebuttable presumption that the Judge has considered all the record evidence. *See, e.g.*, ISCR Case No. 07-18303 at 2 (App. Bd. Nov. 13, 2008). Applicant has failed to overcome this presumption.

Applicant contends that the Judge's conclusion that 22 months of sobriety without a recurrence is an insufficient amount of time to mitigate the case is arbitrary, capricious, and not supported by the evidence. He also asserts that the Judge's conclusion that another year of abstinence is needed to provide sufficient assurances that he will not relapse is unreasonable. After a review of the record, the Board concludes that the Judge's conclusion, in light of this record, that 22 months of sobriety is insufficient to mitigate the government's security concerns is sustainable. The Judge's comment that an additional year of sobriety is needed to provide "sufficient assurance" that Applicant will not relapse is more problematic. The Judge's comment concerning an additional year of sobriety may simply be an acknowledgment that, once an Applicant's clearance is denied, he is precluded from reapplying for a clearance for one year. Directive, Enclosure 3, ¶ E3.1.37. However, to the extent that the Judge's comment about an additional year of sobriety constitutes a recommendation for a future grant of a clearance to Applicant, it has no binding effect upon the government inasmuch as it is based on presumed future conduct that is not before the Judge and cannot be a component of his current security clearance decision. Indeed, the Judge acknowledges that he does not have the authority to commit the government to approval of a clearance for Applicant at some identifiable future date. Given this, the Board is unclear as to what purpose the Judge's recommendation serves, and it is out of place.

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). A party'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. 06-17409 at 3 (App. Bd. Oct. 12, 2007).

In this case, the Judge weighed the mitigating evidence offered by Applicant against the seriousness of the disqualifying conduct and considered the possible application of relevant conditions and factors. He discussed the applicability of the mitigating factors listed under Guidelines F and G and indicated in some detail why some mitigating conditions did not apply and why others only partially applied and why those partial applications did not ultimately mitigate the substance abuse concerns raised in the case. Reading the Judge's decision as a whole, the Board concludes that the Judge had sufficient bases to conclude that Applicant's long history of recurrent periods of both alcohol and drug abuse were of such gravity that they outweighed the more recent efforts Applicant has made to abstain from substance abuse and change his lifestyle. The Judge also appropriately expressed a concern that the last regimen of inpatient treatment for Applicant ended with an involuntary withdrawal from the program short of the completion date.

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 his 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 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: Jeffrey D. Billett
Jeffrey D. Billett
Administrative Judge
Member, Appeal Board

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