

KEYWORD: Guideline G; Guideline E; Guideline J

DIGEST: Applicant failed to rebut the presumption that the Judge considered all of the record evidence. The record provides no reason to conclude that Applicant's *pro se* status denied him due process. Adverse decision affirmed.

CASENO: 09-01735.a1

DATE: 08/31/2010

DATE: August 31, 2010

In Re:	)	
	)	
-----	)	ISCR Case No. 09-01735
	)	
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 21, 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 E (Personal Conduct), and Guideline J (Criminal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On June 18, 2010, after the hearing, Administrative Judge Martin H. Mogul 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 the Judge failed to consider record evidence favorable to Applicant; whether Applicant was denied due process; and whether the

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

The Judge made the following pertinent findings of fact: Applicant is employed by a Defense contractor and is seeking a security clearance in connection with his job. In March 2006, Applicant was arrested and charged with burglary, assault with a deadly weapon, and public discharge of a firearm. He had been drinking on the day of the offense. He threatened his next-door neighbor with a gun and fired it twice into the ground in front of her porch. Pursuant to a plea agreement, he was convicted of the assault charge and sentenced to three years of confinement (suspended). He was ordered to undergo three years of probation, during which time he was to abstain from possessing or consuming alcohol. He also was required to attend a residential rehabilitation clinic and to attend Alcoholics Anonymous (AA).

The record includes evidence of previous alcohol related offenses. In March 1995, Applicant was arrested and charged with DUI. He was fined \$1,000. In March 1986 Applicant was arrested for DUI, although his breathalyzer results were below the legal limit. Applicant admitted, however, that he had consumed beer before driving.

Applicant abstained from alcohol from 2006 to 2008. However, he resumed drinking in 2008, during which time he was still on probation. He enjoys an excellent reputation for the quality of his job performance. On appeal, Applicant denies drinking any alcohol in 2008. The Judge's findings on this point conform to the record evidence. Tr. at 41-42; Decision at 3.

Applicant contends that the Judge did not consider favorable record evidence concerning the high quality of his job performance. However, a Judge is presumed to have considered all of the evidence in the record. See ISCR Case No. 09-05830 at 2 (App. Bd. Jun. 25, 2010). As stated above, the Judge made explicit findings concerning Applicant's job performance. However, his explanation as to why he concluded that Applicant had failed to meet his burden of persuasion as to mitigation reflects a reasonable interpretation of the record, viewed as a whole. Applicant has not rebutted the presumption that the Judge considered all of the record evidence. Neither has he demonstrated that the Judge weighed the evidence in an arbitrary or capricious manner. *Id.*

Applicant states that, though he originally thought that he did not need counsel to represent him at the hearing, upon reflection he believes that his failure to have counsel led to the adverse decision in his case. We construe this as an argument that Applicant was denied due process. The record demonstrates that Applicant received pre-hearing guidance advising him of his right to employ counsel. Additionally, at the beginning of the hearing, the Judge advised Applicant of this right and conducted an inquiry to determine whether Applicant was capable of representing himself, concluding in the affirmative. Tr. at 4-5. There is no indication that Applicant was denied the due process afforded by the Directive. See ISCR Case No. 08-03110 at 2 (App. Bd. Jan. 27, 2009).

After reviewing the record, the Board concludes 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).

**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  
Administrative Judge  
Member, Appeal Board