

KEYWORD: Guideline G; Guideline J

DIGEST: Applicant failed to rebut the presumption that the Judge was impartial. Judge’s finding concerning the timing of Applicant’s diagnosis of alcohol dependence was harmful error. Adverse decision remanded.

CASE NO: 10-00827

DATE: 03/03/2011

DATE: March 3, 2011

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**

Darin M. Groteboer, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On June 9, 2010, DOHA issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline G (Alcohol Consumption) and Guideline J (Criminal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On December 8, 2010, after the hearing, Administrative Judge Darlene D. Lokey Anderson denied Applicant’s request for a security clearance. Applicant appealed pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raised the following issues on appeal: (a) whether the Judge was biased; (b) whether certain findings of fact made by the Judge are supported by the record evidence; and (c) whether the Judge's application of mitigating factors was arbitrary, capricious, or contrary to law. For the reasons discussed below, the Board remands the Judge's unfavorable decision.

The Judge made the following pertinent findings of fact: Applicant is 27 years old and unmarried with one child. Applicant first tried alcohol as a junior high school student. He did not like it and did not try alcohol again until he was 21. From 2004 to 2009 he consumed alcohol several times a week, and at times to excess and to the point of intoxication. His drinking was restricted to social situations. He does not believe that he has ever had a drinking problem, that he is alcohol dependent, or that he is an alcoholic. At the most he would drink a maximum of eight beers, and sometimes he might have a shot of hard liquor. On most occasions, where he would drink with friends and consume five to nine beers, he would not drive a vehicle.

In 2007, the Applicant was concerned about his drinking, as he was consuming more alcohol than he wanted to. At this point he was consuming alcohol two or three times a week. He went on line and found an alcohol treatment program he could attend. From August 2007 to September 2007, he received inpatient treatment for his alcohol problem and was diagnosed with Alcohol Dependence. Applicant admitted that he was consuming alcohol more than twice a week during this time, as he was depressed about his job program shutting down, but he does not believe he was drinking to excess. He stated that he entered the treatment program of his own free will and not with the recommendation of his employer. He felt that the alcohol program was a scam, and so he left the program early, after 28 days instead of the full 30 day program. He did not want to take the medication that the psychiatrist was prescribing him, and he was told that if he did not follow the program, he was not wanted there. Following the 2007 alcohol program, Applicant did not consume any alcohol for about five or six months. He then resumed his drinking at the level of once or twice on the weekends.

In May 2009, Applicant was arrested for Driving Under the Influence. He explained that he was watching sports with friends and consumed eight or nine beers. He did not feel drunk and decided to drive home. Applicant failed a breathalyzer test and blew a .15%. His sentence included completion of a six month alcohol program. His driver's license was also suspended for six months. Since the arrest, he has not consumed alcohol. Applicant enrolled in and successfully completed an alcohol beverage control traffic program in 2010. He also attended AA meetings required as part of the program. He has been abstaining from alcohol for more than a year. Applicant wants to be a good role model for his son. He realizes that he has made some bad decisions in the past and he believes he has learned from them. He has no plans to ever consume alcohol again. He believes his consumption of alcohol is under control and that he can manage it by himself. Applicant is planning to go to AA meetings to give himself the extra security to abstain from drinking and to prevent relapse. Letters of recommendation describe him as trustworthy, responsible, mature, loyal and a good husband and father. Applicant is said to always take the proper steps to safeguard any and all information while supporting the classified program where he was assigned.

The Judge reached the following conclusions: The Government met its initial burden of proving that Applicant has engaged in alcohol abuse and criminal conduct. The totality of this evidence indicated poor judgment, unreliability and untrustworthiness on the part of the Applicant.

Applicant did not introduce persuasive evidence in rebuttal, explanation or mitigation that was sufficient to overcome the Government's case. The evidence showed that Applicant was an alcoholic in denial. Despite his treatment program in 2007 for alcohol dependence, he continued to drink at times excessively, until he was arrested for DUI in May 2009, just last year. Since then he has completely abstained from drinking and plans to maintain sobriety. He is commended for this. However, with only a year of sobriety, there is no guarantee that he will be able to maintain any long term sobriety. Based upon his past record of relapse following treatment, there is a strong chance at this point that he may return to his old habits. Applicant has only recently acknowledged his alcohol problem and expressed an intent to participate in an alcohol after care program. The arrest for DUI occurred just last year and he will remain on probation for the offense until May 2012. The conduct was criminal and recent and has not been mitigated. The Applicant is a 27 year old alcoholic who had just started to come to grips with the seriousness of his drinking problem. Under the particular facts of this case, the totality of the conduct set forth under all of the guidelines viewed as a whole, support a whole-person assessment of poor judgment, untrustworthiness, unreliability, a lack of candor, an unwillingness to comply with rules and regulations, and/or other characteristics indicating that the person may not properly safeguard classified information.

Applicant argues that the Judge did not remain objective and failed to take an unbiased viewpoint during Applicant's testimony. At one point the Judge stated, "I don't believe you" to Applicant when he was describing the amount of alcohol he was consuming just prior to entering the alcohol treatment program in 2007. Applicant cites this as indicative of bias as well as the Judge's failure to present any logical reason for not believing Applicant's testimony.

There is a rebuttable presumption that a Judge is impartial and unbiased, and a party seeking to overcome that presumption has a heavy burden of persuasion. *See, e.g.*, ISCR Case No. 07-02253 at 3 (App. Bd. Mar. 28, 2008). In evaluating a bias claim, the Board will not review individual cited passages or instances in isolation. Rather, the Board will review the entirety of the record and the Judge's decision to determine whether the Judge has maintained her role as impartial fact finder. The standard is not whether a party personally believes a Judge was biased or prejudiced, but rather whether the record of the proceedings below contains any indication that the Judge acted in a manner that would lead a reasonable, disinterested person to question the fairness and impartiality of the Judge. *See* ISCR Case No. 03-07245 at 3-4 (App. Bd. May 20, 2005). Although the Judge's comment to Applicant during his testimony is arguably not a model of judicial decorum, the comment is isolated, and after a review of the whole record and the Judge's decision, the Board concludes that Applicant has not met his burden of overcoming the presumption of impartiality.

Applicant contends that the Judge made a finding that Applicant was diagnosed as alcohol dependent in 2007, and that this was not true. The Board construes this argument as stating that the Judge's finding has no basis in the evidentiary record. Applicant's argument has merit. SOR allegation 1.c. included the claim that Applicant was diagnosed as alcohol dependent in 2007. Applicant did not admit this allegation. Department Counsel therefore had the burden of producing substantial evidence to establish this controverted fact. There is no evidence in the record to support a finding that Applicant was diagnosed as alcohol dependent during his inpatient treatment between August 2007 and September 2007. Indeed, there is no documentary evidence whatsoever pertaining to Applicant's inpatient treatment in 2007 and the record contains no evidence of any diagnosis at that time. Instead, there is evidence of a diagnosis of alcohol dependence in 2010. Government

Exhibit 4 is an addiction severity index, dated April 23, 2010, that Applicant was required complete as a result of his 2009 DUI. It appears to be little more than the documented results of an interview with Applicant, but it does cover his entire history with alcohol in some detail and it does contain a diagnosis of alcohol dependence.

The Board must now consider the magnitude of the Judge's erroneous finding of fact. The fact that Applicant was diagnosed as alcohol dependent three years after the Judge found that he was does not render the error harmless. The timing of the diagnosis is an important element of the case. The Judge concluded that Applicant was an alcoholic in denial and despite his treatment program in 2007 for alcohol dependence, he continued to drink, sometimes excessively, until he was arrested for DUI in 2009. The Judge concluded that, among others, Guideline G Disqualifying Conditions 22(d)<sup>1</sup> and 22(f)<sup>2</sup> applied. Absent record evidence of a diagnosis of alcohol abuse or alcohol dependence by a duly qualified medical professional in 2007, there is no basis for applying Disqualifying Condition 22(f). Also, the Judge's application of Disqualifying Condition 22(d) would need to take into consideration her own finding that Applicant stopped drinking in 2009, prior to the diagnosis. While other disqualifying conditions apply, the strength of the case against Applicant and the relative strength of any applicable mitigating conditions is affected by the non-applicability of the two disqualifying conditions previously mentioned. The Board cannot conclude that the erroneous finding of a diagnosis of alcohol dependence in 2007 did not affect the Judge's application of the Guideline G and Guideline J mitigating conditions. The potency of the Judge's conclusions that Applicant exercised poor judgment and that he has only recently acknowledged his alcohol problem would necessarily be affected by the length of time Applicant has lived and consumed alcohol with a diagnosis of alcohol dependence. The absence of such a diagnosis casts his post-2007 drinking pattern and subsequent DUI in a different light.

For these reasons, the Board cannot reasonably conclude that, had the Judge not made the error, she would nevertheless have arrived at the same decision. *See, e.g.*, ISCR Case No. 03-23829 at 3 (App. Bd. Apr. 27, 2007). Inasmuch as the identified error likely affected the Judge's application of the Guideline G and Guideline J mitigating conditions, the Board need not address Applicant's arguments regarding same at this time.

## Order

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<sup>1</sup>“[D]iagnosis by a duly qualified medical professional (e.g., physician, clinical psychologist, or psychiatrist) of alcohol abuse or alcohol dependence[.]”

<sup>2</sup>“[R]elapse after diagnosis of alcohol abuse or dependence and completion of an alcohol rehabilitation program[.]”

In accordance with the Board's preceding discussion, the Judge's decision denying Applicant a security clearance is REMANDED. The Judge shall issue a new decision consistent with the analysis contained herein.

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: William S. Fields

William S. Fields  
Administrative Judge  
Member, Appeal Board