

KEYWORD: Guideline G; Guideline J

DIGEST: Applicant next notes that the first four of his alcohol-related incidents were adjudicated prior to him being granted a security clearance in April 2017. To the extent that Applicant may be arguing that those incidents should no longer be considered, we do not find that argument persuasive. The Board has previously held that there is no right to a security clearance, nor is there a presumption in favor of continuing or granting a security clearance. Moreover, the Government has the right to reconsider the security significance of past conduct in light of more recent conduct having negative security significance. Applicant has not established that the Judge erred in considering each of the five alleged alcohol-related incidents to evaluate his current security clearance eligibility. Adverse Decision affirmed

CASENO: 18-02856.a1

DATE:09/09/2019

DATE: September 9, 2019

In Re:)	
)	
)	
-----)	ISCR Case No. 18-02586
)	
Applicant for Security Clearance)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

Pro se

The Department of Defense (DoD) declined to grant Applicant a security clearance. On November 19, 2018, DoD 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). Department Counsel requested a hearing. On July 25, 2019, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Michael H. Leonard 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 erred in the findings of fact and whether the Judge’s adverse decision was arbitrary, capricious, or contrary to law. Consistent with the following, we affirm.

The Judge’s Findings of Fact and Analysis

Applicant is a 26-year-old employee of a defense contractor. He has never been married and has no children. He has earned a bachelor’s degree and is pursuing a master’s degree. The SOR alleges five alcohol-related incidents of criminal conduct between 2012 and 2017. Applicant admitted the allegations in his SOR response.

When Applicant was 19 years old in 2012, he was cited twice for alcohol-related conduct. In the first incident, he pled guilty to criminal damage and a minor with alcohol in body. He was placed in a diversion program and required to attend alcohol-education classes. The second incident involved him pleading guilty to minor with alcohol in body after the car in which he was a passenger was stopped by police. He paid a small fine and was again required to attend an alcohol-education class. About two years later, he was arrested for public nuisance-obstruction of property and failure to obey a police officer. For the third incident, he pled guilty to the public nuisance charge and was ordered to pay a fine.

At age 22, Applicant was arrested and charged with felony aggravated assault on a peace officer (non-serious injury) for spitting in the officer’s face. This occurred after he and his girlfriend had a noisy disagreement in her apartment for which the police were called. The police described Applicant as quite intoxicated and combative. In his security clearance application (SCA), he stated, he “accidentally spat in the direction of another person with no foul intentions.” Decision at 3, quoting Government Exhibit (GE) 1. At the hearing, Applicant explained his characterization of the incident as “accidental” was due to an oversight. The Judge found that explanation to be not credible. Applicant pled guilty to attempted assault and was sentenced to 18 months probation and required to attend alcohol-education classes. His probation was terminated after 12 months and the offense was designated a misdemeanor.

The fifth incident occurred when Applicant was age 24 and was working for his current employer. After crashing his car into a wall, he was arrested for driving under the influence of

alcohol. He refused to take a breath test. The police report reflect that Applicant initially ignored commands at the scene and was restrained. He pled guilty to a DUI offense and was sentenced to serve 30 days in jail (28 days suspended), 12 months probation, and a required alcohol/substance abuse evaluation. Applicant did not recall if he received any diagnosis regarding his alcohol use. Based on Applicant's motion, his conviction for DUI was set aside in 2018.

At the hearing, Applicant took full responsibility for his misconduct and lack of judgment. He noted he could count on one hand how many times he used alcohol in the past six months. His ultimate goal is to abstain from alcohol given the problems it has caused him. He has a plan to avoid situations where alcohol is served and to not drink and drive. He has a good employment record. His supervisor describes him as forthright and dependable.

While noting that Applicant presented a decent case in mitigation, including evidence of reform and rehabilitation as well as the passage of time since the last incident, the Judge concluded the frequency and seriousness of Applicant's alcohol-related incidents weighed heavily against him. His conduct demonstrates a pattern of behavior that calls into question his reliability, trustworthiness, good judgment, and ability or willingness to comply with laws and regulations. "Simply stated, it is too soon to tell if he will continue responsible use of alcohol and conduct himself as a law-abiding person." Decision at 7.

Discussion

Applicant asserts the Judge erred in finding that he was seeking a security clearance for the first time. In support of this assertion, he points to his testimony in which he informed the Judge that he was seeking to retain an existing clearance. Tr. at 5-6. He argues that, because of the error regarding his clearance status, the Judge did not apply the factors in Directive, Encl. 2, App. A ¶ 2(f) that an adjudicator should consider in evaluating a security concern involving an individual who holds a security clearance. We do not find this argument persuasive. Applicant has not pointed to any applicable factor listed in ¶ 2(f) that the Judge did not consider. To the contrary, the Judge's decision touches on a number of those factors. Also, a Judge is presumed to have considered all of the evidence in the record and need not discuss all of the analytical factors set forth in the Directive. *See, e.g.*, ISCR Case No. 17-02236 at 2 (App. Bd. Jul. 2, 2018). While the Judge erred in making a finding about Applicant's clearance status, it was a harmless error because it did not likely affect the outcome of the case. *See, e.g.*, ISCR Case No. 11-15184 at 3 (App. Bd. Jul. 25, 2013).

Applicant next notes that the first four of his alcohol-related incidents were adjudicated prior to him being granted a security clearance in April 2017. To the extent that Applicant may be arguing that those incidents should no longer be considered, we do not find that argument persuasive. The Board has previously held that there is no right to a security clearance, nor is there a presumption in favor of continuing or granting a security clearance. Moreover, the Government has the right to reconsider the security significance of past conduct in light of more recent conduct having negative security significance. *See, e.g.*, ISCR Case No. 03-08073 at 3-4 (App. Bd. Oct. 25, 2005). Applicant has not established that the Judge erred in considering each of the five alleged alcohol-related incidents to evaluate his current security clearance eligibility.

Applicant also highlights the passage of time since his last alcohol-related incident and argues the decision is arbitrary because “no quantifiable baseline is provided to indicate how much time needs to pass to achieve a certain confidence level of non-reoccurring incidents.” Appeal Brief at 3. Security clearance decisions, however, are not an exact science, but rather are predictive judgments about a person's security suitability in light of that person's past conduct and present circumstances. *Department of Navy v. Egan*, 484 U.S. 518, 528-529 (1988). The Board has repeatedly declined to furnish "bright-line" guidance regarding the concept of recency. The extent to which security concerns have become mitigated through the passage of time is a question that must be resolved based on the evidence as a whole. *See, e.g.*, ISCR Case No. 14-01847 at 3 (App. Bd. Apr. 9, 2015). In this case, we note a period of over two years elapsed between Applicant's last two incidents. Considering the record evidence, the Judge's determination that insufficient time has passed to conclude that Applicant is unlikely to engage in further misconduct was not arbitrary or capricious.

Applicant further argues that, due to the error regarding his clearance status, the Judge did not consider his three-year record as a clearance holder without any security violations. Additionally, he contends that, while the Judge discussed aspects of Mitigating Condition 23(b) in the decision, he failed to list it specifically in his decision.¹ These also were, at most, harmless errors. The Judge's main findings and conclusions – that Applicant was involved in five alcohol-related incidents of criminal conduct between 2012 and 2017; that those incidents raise significant questions about his reliability, trustworthiness, good judgment, and willingness to comply with the law; and that insufficient time has passed to conclude that he will use alcohol responsibly in the future and be a law-abiding citizen – are sustainable.

Applicant has failed to establish that the Judge committed any harmful error. The Judge examined the relevant evidence and articulated a satisfactory explanation for the decision. The 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.’” *Egan* at 528. *See also* Directive, Encl. 2, App. A ¶ 2(b): “Any doubt concerning personnel being considered for national security eligibility will be resolved in favor of the national security.”

¹ Directive, Encl. 2, App. A ¶ 23(b) states, “the individual acknowledges his or her pattern of maladaptive alcohol use, provides evidence of actions taken to overcome this problem, and has demonstrated a clear and established pattern of modified consumption or abstinence in accordance with treatment recommendations[.]” In the decision, the Judge listed the disqualifying and mitigating conditions that he considered were “most pertinent.” Decision at 5-6. There is no basis for concluding the Judge discounted Mitigating Condition 23(b).

Order

The Decision is **AFFIRMED**.

Signed: Michael Ra'anan
Michael Ra'anan
Administrative Judge
Chairperson, Appeal Board

Signed; James E. Moody
James E. Moody
Administrative Judge
Member, Appeal Board

Signed; James F. Duffy
James F. Duffy
Administrative Judge
Member, Appeal Board