

Applicant raised the following issue on appeal: whether the Judge failed to properly consider all available evidence, rendering his adverse decision arbitrary, capricious, or contrary to law. Consistent with the following, we affirm.

The Judge's Findings of Fact

Applicant is in his mid-thirties. He served in the military from 2005 through 2012 and has held a security clearance since 2006. Around May 2008, Applicant returned to his military installation after drinking and was apprehended at the gate for driving while impaired. Applicant believed his blood alcohol content (BAC) was below the legal limit. He received Article 15 nonjudicial punishment for drunk driving and subsequently attended alcohol-related training.

Around September 2011, Applicant was arrested for DUI with a BAC of .08 and convicted of DUI in a civilian court. His sentence included probation, a fine, and court costs. Applicant successfully completed an alcohol abuse class and modified his alcohol consumption.

Applicant was arrested twice for DUI in 2017—in January and again in April. For the April 2017 arrest, he was cited for DUI and driving with a suspended license. Additionally, the police alleged that Applicant failed to yield to their commands and that they drew and pointed their firearms. Applicant did not remember either resisting arrest or having firearms pointed at him. His first BAC from the April 2017 DUI arrest was .197, and his second BAC was .16. The January and April DUI charges were adjudicated in the same court proceeding and resulted in two DUI convictions. His combined sentence included probation, a fine, court costs, and a suspended jail sentence. He attended an alcohol and substance abuse class.

Applicant has never been diagnosed with an alcohol use disorder. He now has different friends from 2017 and enjoys healthy activities unrelated to alcohol consumption. Applicant denied having alcohol-related blackouts or withdrawal symptoms. Over his adult life, he has abstained for nine or ten month periods. He completed alcohol-related counseling in April 2018 and has signed a statement of intent not to drive while under the influence of alcohol.

In March 2020, a licensed clinical social worker (LCSW) provided an assessment of Applicant's alcohol consumption. Her report adopted Applicant's assertion that, of the four incidents, the only time in which his BAC level was above the legal limit was the April 2017 incident; she did not indicate his BAC levels for that arrest. She concluded that Applicant has not engaged in binge drinking or habitual drinking to the point of impaired judgment and highlighted his successful completion of random drug and alcohol testing, alcohol and drug abuse classes, and eight hours of one-one-one counseling. The LCSW diagnosed no alcohol use disorder.

Applicant presented character evidence that spoke to his knowledge, intelligence, honesty, dependability, and volunteerism. His evidence confirms his success in his chosen field, as well as his prior military career.

The Judge's Analysis

Applicant's SOR alleges four alcohol-related incidents involving the police, courts, or both: a nonjudicial punishment in 2008 and three civilian convictions in 2011 and 2017. In his April 2017 DUI, his BAC was .16. Although the term "binge drinking" is not defined in the Directive, Applicant's BAC of .16 for the April 2017 DUI is high enough to establish Applicant engaged in binge consumption under the generally accepted definitions.

After each arrest, Applicant completed some type of alcohol training or counseling. Although he received a favorable prognosis from the LCSW, the value of that prognosis is diminished by the LCSW's apparent failure to consider critical information, including the commander's determination that Applicant committed a drunk driving offense in 2008, his three subsequent civilian convictions, and his elevated BAC during his April 2017 incident.

After careful consideration of the Appeal Board's jurisprudence on alcohol consumption and Applicant's history of alcohol consumption and rehabilitative efforts, I have continuing doubts about the risks of poor decisions after excessive alcohol consumption. It is too soon to conclude alcohol-related incidents involving the police and courts or compromise of classified information are unlikely to recur. [Decision at 8.]

Under his analysis of the whole person concept, the Judge concluded:

The factors weighing against continuation of his security clearance are more substantial than the mitigating circumstances. . . . He is not currently involved in any alcohol counseling or treatment. He said that he continues to consume alcohol albeit at a responsible level. He has had previous periods of abstinence. He did not provide any statements from friends or family discussing his current level of alcohol consumption.

. . . .

This decision should not be construed as a determination that Applicant cannot or will not attain the state of reform necessary for award of a security clearance in the future. With more time without excessive alcohol consumption and criminal conduct, he may well be able to demonstrate persuasive evidence of his security clearance worthiness. [Decision at 11.]

Discussion

Applicant has not challenged any of the Judge's specific findings of fact. Rather, he contends that the Judge erred in two regards: first, he failed to consider all the mitigation evidence submitted; and, second, he failed to properly apply the whole-person concept. Consequently, Applicant argues, the Judge failed to adhere to the procedures required by the Directive and rendered a decision that was arbitrary, capricious, and contrary to law.

As an example, Applicant contends that the Judge failed to consider the mitigating effect of the passage of time: “The amount of time that has passed since the Appellant’s *last actual binge* should have been given more weight regarding his reliability and trustworthiness. The Appellant’s last case of overconsumption was in April 2017, almost five (5) years ago.” (emphasis added) Appeal Brief at 6. Surprisingly, Applicant also challenges the Judge’s characterization of his .16 BAC in April 2017 as indicative of binge drinking. Regardless of this incongruity, our review of the record and decision establishes that the Judge carefully considered all evidence in mitigation, including the passage of time since the 2017 convictions, but determined it was insufficient—for now—given the number of DUIs and the elevated BAC of the most recent.

None of Applicant’s arguments are enough to rebut the presumption that the Judge considered all of the record evidence or to demonstrate the Judge weighed the evidence in a manner that was arbitrary, capricious, or contrary to law. Moreover, the Judge complied with the requirements of the Directive in his whole-person analysis by considering all evidence of record in reaching his decision. *See, e.g.*, ISCR Case No. 19-01400 at 2 (App. Bd. Jun. 3, 2020). Although we give due consideration to the Hearing Office cases that Applicant’s counsel has cited, they are neither binding precedent on the Appeal Board nor sufficient to undermine the Judge’s decision. *See, e.g.*, ISCR Case No. 17-02488 at 4 (App. Bd. Aug. 30, 2018).

Applicant has failed to establish that the Judge committed any harmful error or that he should be granted any relief on appeal. The Judge examined the relevant evidence and articulated a satisfactory explanation for the decision. The decision is sustainable on the record. “The general standard is that a clearance may be granted only when ‘clearly consistent with national security.’” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). *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 national security.”

Order

The decision is **AFFIRMED**.

Signed: James F. Duffy
James F. Duffy
Administrative Judge
Chairperson, Appeal Board

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

Signed: Moira Modzelewski
Moira Modzelewski
Administrative Judge
Member, Appeal Board