DATE: October 31, 2022

In the matter of:	)	
-----	)	ISCR Case No. 20-01526
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 February 19, 2021, DoD issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline G (Alcohol Consumption) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On August 18, 2022, after close of the record, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Benjamin R. Dorsey denied Applicant's request for a security clearance. Applicant appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

The SOR alleged four arrests between January 1999 and December 2017 for driving under the influence. Applicant admitted to two of the allegations and denied two. The Judge found against Applicant on all four allegations.

Applicant raised the following issues on appeal: whether the Judge improperly admitted evidence and whether the Judge failed to consider the evidence in mitigation. Consistent with the following, we affirm.

The Judge's Findings of Fact

Applicant is in his late fifties, married, with one adult child. He served on active duty with the U.S. military from 1983 until 1999 and in the Reserve force from 2000 until 2004.

Applicant has a significant history of alcohol-related offenses. In about January 1999, he was charged with driving while intoxicated (DWI) in State A. He had a .15 or higher blood alcohol content (BAC) at the time of his arrest and pleaded guilty to DWI. His sentence included a suspended license, probation, a fine, and alcohol counseling. Because he did not believe that he had a drinking problem, Applicant did not pursue alcohol counseling beyond that mandated by the court.

Applicant asserted that he stopped drinking after his 1999 DWI arrest until about 2006 because of his military obligations. Nevertheless, Applicant was arrested in July 2004 in State A and charged with driving under the influence (DUI). According to the police report, he was initially pulled over for speeding. The police officer reported that Applicant had trouble stabilizing his motorcycle during the stop, that the officer smelled the strong odor of alcohol, and that Applicant had difficulty balancing. Applicant refused the field sobriety test and a breathalyzer and was arrested.

Applicant claimed that he was not drinking and that he was being unfairly targeted by local authorities. He pleaded not guilty, but was convicted of DUI after a jury trial. His sentence included a suspended license, fines, a short jail sentence, and supervised probation.

In 2010, Applicant was involved in a single vehicle accident in State B. Seriously injured, he was flown by helicopter to a nearby hospital. The police officer who responded to the scene noted the presence of alcohol containers and that Applicant smelled of alcohol. The hospital performed a blood draw of Applicant, with a resulting BAC of .351. Applicant was charged with DUI. Applicant does not believe that he had a drinking problem at the time and did not pursue any alcohol counseling. Despite the seriousness of the accident and Applicant's elevated BAC, the charges against him were dismissed.

In late 2017, Applicant was again arrested in State B and charged with his fourth DUI after another driver reported to police that Applicant's vehicle was weaving on the road. Applicant admitted to having had some alcohol but denied that he was intoxicated. Applicant failed his field sobriety test and refused any tests to determine his BAC. A judge issued a warrant for two vials of blood, which revealed a BAC of .14. Applicant was convicted of DUI and attended mandatory counseling. After his 2017 conviction, Applicant admitted that he had a problem with alcohol and stated that he has modified his behavior by drinking less and drinking only beer. He acknowledged that he continued to drink and drive between 2010 and 2017, but states that he has not done so since his 2017 conviction.

The Judge's Analysis

> Between 1999 and 2017, Applicant was excessively consuming alcohol often enough to be charged with an alcohol-related offense once every five or six years. While it has not been five years since his last DUI, his previously established pattern causes me to doubt that enough time has passed to show that his excessive alcohol consumption is unlikely to recur. This pattern also detracts from his ability to demonstrate a clear and established pattern of modified consumption or abstinence.
>
> While Applicant alleged that he has modified his alcohol consumption, he has done so after earlier DUIs only to be charged again. He has completed court-ordered alcohol counseling, but has not provided evidence of any treatment recommendations. Therefore, he cannot show that his modified consumption complies with those recommendations. Accordingly, Applicant has not provided sufficient evidence to mitigate the alcohol consumption security concerns.
> [Decision at 6.]

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 improperly admitted evidence; and, second, he failed to consider all the mitigation evidence submitted and to properly apply the whole-person concept.

Applicant contends that the Judge erred in admitting and considering Government Exhibit 5, the police report on Applicant's 2010 arrest. Applicant contends that it "should not have been used as I was not charged, and the information used would not have been used in a [State B] court of law." Appeal Brief at 1. Putting aside Applicant's failure to object at hearing, this exhibit is admissible both as an official record under Directive ¶ E3.1.20 and as a public record under Federal Rule of Evidence 803(8). *See, e.g.*, ISCR Case No. 15-02859 at 3 (App. Bd. Jun. 23, 2017). The Judge found that charges resulting from this conduct were dismissed. Such a circumstance, however, does not preclude a Judge from finding that the underlying misconduct occurred. *See, e.g.*, ISCR Case No. 16-03603 at 4 (App. Bd. May 29, 2019).

Applicant also contends that the Judge failed to give appropriate weight to his evidence in mitigation. For example, Applicant cites to the fact that his most recent DUI was almost five years ago. "This demonstrates that Applicant has taken steps to modify his behavior." Appeal Brief at 1. 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 been mitigated through the passage of time is a question that must be resolved on a case-by-case basis, based on the evidence as a whole. In this case, the Judge highlighted a pattern of DUIs that occurred once every five to six years. Considering the record evidence, the Judge's determination that insufficient time has passed to conclude that Applicant is

unlikely to engage in excessive alcohol consumption was not arbitrary or capricious. *See, e.g.*, ISCR Case No. 18-02586 at 3 (App. Bd. Sep. 9, 2019).

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).

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