

DATE: October 25, 2023

In the matter of:)	
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-----)	ISCR Case No. 22-00474
)	
Applicant for Security Clearance)	
)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

Alan V. Edmunds, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On July 20, 2022, 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 the National Security Adjudicative Guidelines (AG) in Appendix A of Security Executive Agent Directive 4 (effective June 8, 2017) and DoD Directive 5220.6 (January 2, 1992, as amended) (Directive). On August 30, 2023, Defense Office of Hearings and Appeals Administrative Judge Edward W. Loughran denied Applicant’s security clearance eligibility. Applicant appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

The SOR alleged five alcohol-related arrests, and cross alleged the same allegations under Guideline J. The SOR was amended on December 22, 2022, to allege under Guideline J that Applicant was separated from the military for misconduct (drug abuse); and under Guideline H (Drug Involvement and Substance Misuse) that Applicant used synthetic marijuana in 2010 while granted access to classified information. The Judge found in favor of Applicant on the drug abuse allegation, and against him on the alcohol and criminal conduct allegations. On appeal, Applicant asserts that the Judge failed to properly consider all available evidence and applied facts not in evidence rendering his adverse decision arbitrary, capricious, or contrary to law; and failed to

properly apply the mitigating conditions and whole-person analysis. Consistent with the following, we affirm.

Judge's Findings of Fact and Analysis

Applicant is in his mid-thirties, has been employed by a defense contractor since 2020, and previously served on active duty in the military from 2007 to 2011. He is currently pursuing a second master's degree. He is unmarried and does not have any children. The Judge found that Applicant has a history of substance abuse, alcohol-related incidents, and criminal conduct. In 2011, he received non-judicial punishment while on active duty for his use of synthetic marijuana known as "spice."

Applicant was arrested and convicted of driving under the influence in 2013. He was drinking in a bar/restaurant when he attempted to drive home. The manager called a taxi and encouraged Applicant not to drive or he would call the police. Applicant refused the taxi and drove anyway. The police stopped him after seeing his erratic driving and noted a strong odor of alcohol and signs of intoxication. Applicant stumbled out of the car with his zipper down and refused field sobriety, breath, and blood tests. He pleaded guilty or no contest and received a deferred sentence, a fine, and one year of unsupervised probation. In testimony, he did not recall details of the incident or if he was intoxicated when he left the restaurant.

In 2014, Applicant was arrested, charged, and pled guilty to public drunkenness. He could recall few details of what occurred during the incident. In 2016, he was charged and convicted of public intoxication. He gave inconsistent testimony in his attempts to explain his actions that night that resulted in him walking from a bar/restaurant after drinking, in 44-degree temperatures, shoeless, and with mud around his legs to his knees. Applicant was again arrested for driving while intoxicated (with a blood alcohol concentration of .15% or greater) in 2017. He pleaded guilty to a lesser offense and was sentenced to 180 days confinement that was suspended, one year of probation, and fined.

In 2020, Applicant was arrested for public intoxication after being involved in a fight outside a bar. An acquaintance was trying to prevent Applicant from driving while intoxicated. Applicant admitted to police that he had "a lot to drink, he was intoxicated, and he planned to drive home until he was stopped by the other individual," but denied in his response to the SOR that he was "binge drinking or drinking to excess." He pleaded no contest or guilty to the charge and was fined, but in testimony he had little memory of the incident.

Applicant admitted to drinking issues but said he did not believe he is an alcoholic and does not believe he currently has a drinking problem. He signed a statement of discontinued drinking and intended to abstain from alcohol use in the future. He said he maintained sobriety for more than a year, which he described as not drinking to intoxication. However, in May 2023, he had three beers at a baseball game. The Judge noted that he did not find Applicant to be credible, and that the reports of his conduct were more reliable than his explanations.

The Judge found under Guideline G that Applicant's drinking and poor judgment exhibited while drinking were not sufficiently mitigated to overcome concerns about his alcohol use,

reliability, trustworthiness, judgment, and honesty. The Judge noted that Applicant's alcohol-related misconduct is serious, and it would be difficult to find such conduct mitigated, even if he believed Applicant. The Judge used the same analysis under Guideline J. Although he found that Applicant will not likely use illegal drugs again, it falls into his pattern of substance abuse and disregard for the law. He also said he did not believe Applicant's testimony and found that Applicant's criminal conduct including his illegal drug abuse, continues to cast doubt on his current reliability, trustworthiness, good judgment, and willingness to comply with laws, rules, and regulations. He found the mitigating conditions, individually or collectively, were insufficient to alleviate the Guideline J concerns. Finally, the Judge held that Applicant's drug involvement under Guideline H was mitigated because it occurred more than 12 years ago, and that he has abstained from illegal drug use for an appropriate period.

Discussion

On appeal, Applicant first alleges the Judge failed to consider all relevant evidence and erroneously applied the mitigating factors. Specifically, he claims the Judge did not consider the "vast circumstances relating to the [Applicant's] positive steps that have been taken to ensure that the security concerns against him were mitigated," and the Judge "improperly considered the Applicant's lack of [m]emory surrounding the events as the deciding factor in deciding that the Applicant was not suitable for clearance." Appeal Brief at 7. He argues that "[w]hile the encounters with the law due to intoxication raise concerns under alcohol use (Guideline G) and criminal conduct (Guideline J); it is the Administrative Judge's position to consider the record evidence as a whole and not view the information in a fragmented piecemeal fashion." Appeal Brief at 8.

Applicant points to his negative Phosphatidyl Ethanol (PETH) alcohol tests as evidence of the positive steps he has taken since the 2020 incident to show he has learned habits to assist with positive outlets for his stress, grief, and PTSD that has triggered his alcohol abuse. *Id.* Applicant also argues that his lack of "incidents" since 2020, academic and professional achievements over the past three years, modified consumption and positive support network mitigated the Guideline G concerns. Applicant also argues that the Judge's decision is arbitrary and capricious because it fails to "properly" account for mitigating evidence such as Applicant's "rehabilitation efforts, counseling, evaluation, favorable prognosis, [Applicant's] remorse, [Applicant's] testimonial candor, and the Administrative Judge's clear disregard for the record as a whole." *Id.* at 10.

Applicant's three negative PETH tests from February, June, and July 2023 were admitted into the record (Applicant Exhibits (AE) J and O). There is a rebuttable presumption that the Judge considered all of the record evidence, and that presumption is not rebutted merely because the appealing party can point to information in the record that was not mentioned in the Judge's decision. *See, e.g.,* ISCR Case No. 01-09781 at 3 (App. Bd. Sep. 25, 2002). It is also well-established that "[d]etermining the weight and credibility of the evidence is the special province of the trier of fact." *Inwood Labs., Inc. v. Ives Labs., Inc.*, 456 U.S. 844, 856 (1982).

In addition to the evidence discussed above that reflects on Applicant's candor, the record contains numerous conflicts between Applicant's accounts and other record evidence. The Judge noted Applicant's two alcohol-related driving offenses, refusal of assistance from his friend and the staff at the bar on two other occasions, and apparent intent to drive intoxicated if not arrested.

Decision at 7. Applicant also stated in his response to the SOR that “it was in his best interest to refrain from alcohol consumption entirely” and signed a statement of intent in August 2022 to discontinue drinking and abstain from alcohol use in the future. *See*, AE D. He thereafter testified that he maintained sobriety for more than a year but admitted to drinking three beers at a baseball game in 2023. The Judge found it difficult to find Applicant credible. When conflicts exist within the record, a judge must weigh the evidence and resolve conflicts “based upon a careful evaluation of factors such as the comparative reliability, plausibility and ultimate truthfulness of conflicting pieces of evidence.” ISCR Case No. 05-06723 at 4 (App. Bd. Nov. 14, 2007). Here, the Judge’s resolution of conflicts between Applicant’s account and official records was reasonable and sustainable. We find no reason not to give deference to the Judge’s negative credibility determination regarding Applicant.

Applicant’s assertion that the Judge’s factual findings are unsupported by the record is unfounded. He claims that the Judge “improperly broadly applied that the [Applicant’s] lack of credibility equated to an unfavorable adjudication of alcohol-related allegations.” Appeal Brief at 8. Specifically, Applicant takes issue with the Judge’s comment with respect to Applicant’s poor memory and argues that “it is reasonable to have poor memory and recollection of events that transpired while the Applicant was drinking.” *Id.* This appears to be additional argument challenging the Judge’s interpretation and weight of the evidence, and his credibility determinations that are well-reasoned and consistent with the AG and Directive. As we have explained before, there is a difference between errors in a judge’s findings of fact and errors in the conclusions drawn therefrom. *See* ISCR Case No. 22-00822 at 3 (App. Bd. Jul. 5, 2023). Findings of fact must be supported by substantial evidence, while conclusions are reasonable inferences drawn from the evidence. *See* ISCR Case No. 18-00496 at 3 (App. Bd. Nov. 8, 2019), citing Directive ¶¶ E3.1.32.1 and E3.1.32.3.

Finally, Applicant argues the Judge’s analysis of the mitigating conditions and whole-person analysis are unsupported by the record evidence and were analyzed in an unreasonable and fragmented manner. Appeal Brief at 10. Applicant’s arguments regarding the Judge’s application of mitigating and whole-person factors amounts to a disagreement with the Judge’s weighing of the evidence, which is not sufficient to demonstrate that the Judge weighed the evidence or reached conclusions in a manner that is arbitrary, capricious, or contrary to law. *See, e.g.*, ISCR Case No. 06-17409 at 3 (App. Bd. Oct. 12, 2007).

Applicant has not established that the Judge committed harmful error. The Judge examined the relevant evidence and articulated a satisfactory explanation for the decision, and the record evidence supports that the Judge’s findings and conclusions are sustainable. “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). “Any doubt concerning personnel being considered for national security eligibility will be resolved in favor of the national security.” AG ¶ 2(b).

Order

The decision is **AFFIRMED**.

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

Signed: Gregg A. Cervi
Gregg A. Cervi
Administrative Judge
Member, Appeal Board

Signed: Allison Marie
Allison Marie
Administrative Judge
Member, Appeal Board