



DEPARTMENT OF DEFENSE
DEFENSE LEGAL SERVICES AGENCY
DEFENSE OFFICE OF HEARINGS AND APPEALS
APPEAL BOARD
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Date: November 29, 2023

In the matter of:)	
)	
-----)	ISCR Case No. 22-01874
)	
Applicant for Security Clearance)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Julie R. Mendez, Esq., Deputy Chief Department Counsel

FOR APPLICANT

Pro se

The Department of Defense (DoD) declined to grant Applicant a security clearance. On October 24, 2022, DoD issued a statement of reasons (SOR) advising Applicant of the basis for that decision – security concerns raised under Guideline J (Criminal Conduct), Guideline E (Personal Conduct), Guideline G (Alcohol Consumption), and Guideline H (Drug Involvement and Substance Misuse) of the National Security Adjudicative Guidelines (AG) in Appendix A of Security Executive Agent Directive 4 (effective June 8, 2017) and Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On September 26, 2023, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Robert E. Coacher denied Applicant’s security clearance eligibility. Applicant appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Under Guideline J, the SOR alleged Applicant was charged in January 2021 with illegal discharge of a firearm, intoxication, and carrying a dangerous weapon under the influence of alcohol. He entered a plea in abeyance where the charge of carrying a dangerous weapon under

the influence was dismissed. He was sentenced to pay fines and fees and to serve a term of 12 months' probation while abstaining from alcohol use. The SOR also alleged Applicant was charged with wrongful use or possession of a controlled substance while on active duty and was administratively separated with a general discharge under honorable conditions in May 2019. Under Guideline G, the SOR cross-alleged the 2021 conviction and alleged that he was required to attend an alcohol education class. Under Guideline H, the SOR cross-alleged the military-related controlled substance charge and alleged Applicant used steroids from 2016 to 2017 while granted access to classified information. Applicant admitted these allegations, with explanations. Finally, under Guideline E, the 2021 conviction and 2019 military charge were cross-alleged, along with Applicant's alleged use of steroids.

The Judge found in favor of Applicant on the allegations under Guidelines G and H, and against him on the allegations under Guidelines J and E. On appeal, Applicant generally argues the Judge failed to properly consider all available evidence, rendering his adverse decision arbitrary, capricious, or contrary to law, and submits new evidence. Consistent with the following, we affirm.

The Judge's Findings of Fact

Applicant is in his mid-twenties. He served in the military from 2015 to 2019 when he was administratively separated with a general discharge. He has been employed by a defense contractor since 2020. Applicant used steroids while on active duty on the advice of other service members, in part because he was concerned about meeting his service's physical standards. As a result, he was administratively discharged from the military. When interviewed by military investigators about his steroid use, Applicant admitted to drinking about 10 beers at a housewarming party. As a result, he attended alcohol-education classes as ordered by his command.

In 2021, Applicant was arrested when he and a friend attended a party and fired a small caliber rifle into the air from a nearby field while celebrating the new year. A neighbor called police, and Applicant was cited for gun and alcohol violations to which he later entered a plea agreement.

The Judge found that Applicant's steroid abuse in 2018 and his 2021 arrest showed his "bad judgment." Applicant admitted that he let others, whom he considered mentors, convince him to use steroids, and in 2021 he and a friend engaged in celebratory gunfire in a residential area while consuming alcohol. The Judge held that both incidents displayed poor judgment and that, despite completing probation, it was too soon to determine that Applicant had been successfully rehabilitated and or that similar crimes were not likely to recur in the future. The Judge also found that Applicant's 2018 discharge from the military should have sent a powerful message that he needed to use better judgment but it was ignored when he was arrested in 2021. He held that Applicant's conduct under Guidelines J and E reflects questionable judgment and an unwillingness to comply with rules and regulations. The Judge found the alcohol and drug allegations under Guidelines G and H mitigated.

Discussion

Applicant contends that the Judge erred in two regards. First, he takes issue with some of the findings of fact and the Judge's application of the facts in his analysis. Second, he contends the Judge failed to consider all the evidence in mitigation. Third, he submitted new evidence in mitigation. 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.

Applicant appears to argue that—although his diagnosis of post-traumatic stress disorder (PTSD) and mental health treatment was discussed at the hearing—it was not considered in the Judge's mitigation analysis. He says that his diagnosis and treatment, along with his actions, “clearly show that Applicant realized he was not in the correct mental state from his previous military career and sought proper treatment as a result to rectify the situation.” Appeal Brief at 2. Applicant failed, however, to present his PTSD diagnosis during the evidentiary phase of the hearing, and rather he waited until closing arguments to mention it. Tr. at 49. As a result, he was then questioned on his PTSD diagnosis and treatment and had an opportunity to explain its relevance to the SOR allegations or in mitigation. He testified that he never sought treatment while on active duty but was diagnosed by the Veterans Administration with PTSD with anxiety, and depression as a secondary condition. Tr. at 50-52. There is a rebuttable presumption that the Judge considered all the record evidence unless he specifically states otherwise. Moreover, the Judge is not required to cite or discuss every piece of record evidence. *See, e.g.*, ISCR Case No. 06-17409 at 2 (App. Bd. Oct. 12, 2007).

Applicant also raises various other points that he argues should have been given greater weight in the Judge's analysis. First, he argues that Guideline I (Psychological Conditions) concerns, criminal conduct, and alcohol use concerns were mitigated by his mental health treatment, rehabilitation, and passage of time without recurrence. Next, he argues that he was pressured or coerced into using steroids. Finally, he said his alcohol abuse was related to PTSD, but he received treatment without relapse, controls his alcohol consumption, and maintains regular employment. 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. Guideline I was never alleged in the SOR, and the Judge found the drug and alcohol allegations were mitigated and in Applicant's favor.

The remaining issues raised on appeal appear to argue for an alternative weighing of the evidence in Applicant's favor. The record shows that the Judge complied with the requirements of the Directive in his whole-person analysis by considering all relevant evidence in reaching his decision. *See, e.g.*, ISCR Case No. 19-01400 at 2 (App. Bd. Jun. 3, 2020). As for new evidence that he appended to his appeal, the Appeal Board is prohibited from considering new evidence on appeal. Directive ¶ E3.1.29. Additionally, to the extent that Applicant's arguments amount to a disagreement with the Judge's weighing of the evidence, his arguments are insufficient 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. The favorable evidence cited by Applicant is not sufficient to demonstrate the Judge's decision is arbitrary,

capricious, or contrary to law. *Id.* Applicant has failed to establish that the Judge committed any harmful error or that he should be granted any relief on appeal.

A review of the record shows the Judge examined the relevant evidence and articulated a satisfactory explanation for the decision, and the decision is sustainable on the record. “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). *See also* AG ¶ 2(b): “Any doubt concerning personnel being considered for national security eligibility will be resolved in favor of the national security.”

Order

The decision is **AFFIRMED**.

Signed: Moira Modzelewski

Moira Modzelewski
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