DATE: September 28, 2023

In the matter of:	)	
	)	
-----	)	USAF-C Case No. 23-00001-R
	)	
Applicant for Security Clearance	)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT
James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT
Christopher Snowden, Esq.

On February 1, 2022, the Department of Defense (DoD) issued a statement of reasons (SOR) pursuant to DoD Manual 5200.02 (Apr. 3, 2017, as amended) (DoDM 5200.02) advising Applicant that his conduct raised security concerns 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).

On October 31, 2022, DoD Consolidated Adjudication Services (CAS) revoked Applicant's eligibility for access to classified information, and he appealed that revocation under the provisions of DoDM 5200.02. On December 2, 2022, Under Secretary of Defense (Intelligence & Security) Ronald Moultrie issued a memorandum requiring that DoD civilian or military personnel whose clearance eligibility was revoked or denied between September 30, 2022, and the date of that memorandum be provided the opportunity to pursue the hearing and appeal process set forth in DoD Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). As a result of Secretary Moultrie's memo, Applicant was given the opportunity to receive the process set forth in the Directive, and he elected that process. On March 14, 2023, Defense Office of Hearings and Appeals Administrative Judge Benjamin R. Dorsey denied Applicant's request for security clearance eligibility. Applicant appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

On his initial appeal, Applicant contended that the Judge failed to properly consider all available evidence and misapplied the mitigating conditions, rendering his adverse decision arbitrary, capricious, or contrary to law. On May 31, 2023, the Appeal Board determined that the record raised due process concerns and remanded the decision for assignment to a different judge and for a new hearing. On July 14, 2023, Administrative Judge Edward W. Loughran again denied Applicant's request for security clearance eligibility and Applicant appealed that decision.

Now on his second appeal, Applicant asserts that the Judge failed to properly consider all available 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, in his late forties, served on active duty in the U.S. military from 1996 through his honorable discharge in 2000, and served for the next four years in the Reserve force. He married his wife during his military service, but they recently separated. They have one adult daughter and lost their son to suicide in 2013. Applicant has been a civilian employee of the military since 2016.

Under Guidelines G and J, the SOR alleged concerns arising from the following conduct. In 1994, Applicant was arrested for driving while intoxicated (DWI) after consuming between two and eight drinks. He pled guilty and was sentenced to 180 days of probation, and subsequently attended Alcoholics Anonymous for a period and abstained from alcohol for over a year.

In March 1996, Applicant was arrested for suspicion of DWI after consuming about three drinks; however, his blood alcohol concentration (BAC) was below the legal limit and he was not charged. Later that same year, Applicant was arrested for DWI after drinking and driving following a Fourth of July barbeque. He informed his command about the July 1996 arrest and believed the military coordinated his punishment with the state. Applicant later learned this was incorrect and realized in about 2003 that he had an outstanding warrant. He pled *nolo contendere* to the DWI charge and was sentenced to three days in jail and 90 days' suspended license.

On Thanksgiving 2005, Applicant's wife contacted military police (MP) and reported a verbal altercation with Applicant over his having pointed a rifle at his head in front of their seven-year-old son the prior week. The son reported that Applicant asked him if he would like to see Applicant blow his brains out, then retrieved a rifle from the closet, loaded it, and pointed it at Applicant's own head. The MPs noted a strong odor of alcohol coming from Applicant, who corroborated his son's story. Applicant was arrested for disorderly conduct, to which he later pled guilty. At his security clearance hearing, he denied loading or pointing the shotgun at his head.

In December 2008, Applicant's wife again contacted the MPs to report a domestic disturbance after she overheard Applicant express that he was going to end her career and she responded by locking herself and the children in a bedroom. Applicant became angry and beat on the door, causing minor damage. The MPs reported that Applicant appeared to be extremely intoxicated. He refused to comply with their directions, pushed one officer, resisted apprehension,

and was subsequently pepper-sprayed, which made him more aggressive and combative. Applicant was transported to the hospital for treatment and issued citations for battery on a peace officer, resisting arrest, and assault against a peace officer, which were later dismissed. At his security clearance hearing, Applicant denied becoming physical during the incident, and asserted that the MPs tackled, kicked, and beat him without provocation. He believes the charges were dismissed because of the injuries he sustained from the MPs.

In November 2014, Applicant was again arrested for DWI (BAC .15%) and open container. He pled guilty to the former charge and was sentenced to twelve months of probation and completion of an alcohol assessment and treatment, which he attended for five days in April 2015 and consisted of group education about drinking and driving.

On a morning in May 2019, Applicant's wife crashed her car into a fence after swerving to avoid hitting a deer. She walked a few miles home to inform Applicant, who had been drinking the night before. Applicant drove his truck with his wife to the scene of the accident, stating that he planned to repair the fence to prevent any livestock from entering the road. He also stated that he packed some beer in a cooler to drink while he repaired the fence. Deputies were already at the scene when Applicant and his wife returned, and state highway patrol officers arrived later. An officer reported a strong odor of alcohol from Applicant, who informed the officer that he had about nine or ten beers the night before. Applicant initially participated in a field sobriety test, but stopped partway through, and later refused breathalyzer and blood tests. He was arrested and transported to a hospital, where his blood was drawn pursuant to a warrant and his BAC was .141%. Applicant was charged with DWI (3rd or more), a felony. In April 2021, he pled *nolo contendere* to DWI (2nd), a misdemeanor, and was sentenced to two years of probation. He later testified that he accepted the plea because security personnel informed him that a felony conviction would affect his security clearance, while a misdemeanor conviction likely would not.

At his security clearance hearing, Applicant expressed that he waited at the scene of the accident for about two and a half hours and passed the time by drinking two of the beers he brought. Applicant later moved his truck at the request of law enforcement and, when he walked back to the scene, the officer requested to conduct a field sobriety test. Applicant believed that the request to move his truck was a set-up so the investigator could have evidence of Applicant driving, and he refused to consent to any of the procedures until the court ordered a blood test. Contrary to Applicant's recollection, the police report stated neither that Applicant drank at the scene nor that he moved his truck. Regarding this conflicting evidence, the Judge found that Applicant's account was not credible, and that the police report was the more accurate description of what occurred.

Applicant received inpatient alcohol treatment for seven days in February 2020 and had received outpatient treatment since April 2022. He was diagnosed with post-traumatic stress disorder and alcohol use disorder, in remission. Applicant drank a shot in March 2022 for his late son's birthday and a glass of wine in November 2022 for Thanksgiving but has otherwise abstained from alcohol since 2020. Applicant testified that he is committed to remaining sober and his therapist reported that Applicant has made significant progress in his treatment goals related to his grieving process and alcohol abuse. Applicant submitted numerous documents attesting to his excellent job performance and strong moral character, and the Judge noted that Applicant is

"praised for his trustworthiness, dependability, work ethic, leadership, professionalism, expertise, dedication, and loyalty to the United States." Decision at 8.

The Judge found that Applicant's "[f]our DWI convictions are not to be taken lightly, and [did] not accept [Applicant's] versions of some of the incidents." *Id*. at 10. While "Applicant may someday reach the point where he can mitigate alcohol consumption security concerns, . . . it will take full acceptance of responsibility for his conduct, complete candor, and a longer period without misconduct." *Id*. The Judge concluded that Applicant's alcohol use and criminal conduct continue to cast doubt on his reliability, trustworthiness, and good judgment, and the mitigating conditions, either individually or collectively, are insufficient to alleviate those concerns. *Id*. at 10, 11.

Discussion

On his second appeal, Applicant contends that the Judge erred in failing to comply with the provisions in Executive Order 10865 and the Directive by not considering all the evidence, by applying facts that were not supported by the record evidence, and by not properly applying the mitigating conditions and Whole-Person Concept.

Challenge to Findings of Fact

Applicant first asserts that "several of the Administrative Judge's factual findings are wholly unsupported by the record." Appeal Brief at 10. 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. Applicant's purported factual errors are simply challenges to the Judge's weighing of the evidence and are therefore addressed along with his other arguments.

Challenge to Judge's Credibility Determination

Applicant challenges the Judge's resolution of conflicting evidence regarding the 2019 DWI arrest, namely the Judge's determination that Applicant's account of the incident was not credible and that the police report was the more accurate description of what occurred. Appeal Brief at 10-12.[1] As set forth below, Applicant's challenge is unpersuasive.

Applicant first argues that "in deciding to resolve the apparent conflict in favor of the police report, the Administrative Judge does not address a statement signed by [Applicant] four days after the incident which is exactly the same as [Applicant's] testimony at two administrative hearings." Appeal Brief at 11.[2] Applicant's focus on this statement as the basis for any assignment of error is

[1] Directive ¶ E3.1.32.1 provides that "the Appeal Board shall give deference to the credibility determinations of the Administrative Judge." With respect to this conflicting evidence, we note that the Judge on remand, without having reviewed the original decision, reached the same unfavorable conclusion about the credibility of Applicant's account of the 2019 incident.

[2] In support of this statement, Applicant points to a statement entered into the record as Government Exhibit (GE) 9; however, the statement actually appears at GE 10.

misplaced for several reasons, not the least of which is that 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).

Additionally, Applicant's counsel asserts that this statement was "signed by [Applicant] four days after the incident." Appeal Brief at 11. We interpret counsel's inclusion of this assertion as an attempt to show that the close temporal proximity between the event and the statement lends to the latter's credibility; however, counsel's assertion is inaccurate. The incident occurred on the morning of May 11, *2019*, and Applicant signed the referenced statement on May 15, *2020 – one year* and four days after the incident. GE 10 at 4-5. It bears noting that, from our examination of this evidence, Applicant did not self-report his 2019 arrest to his security officer. Rather, the 2019 arrest was identified in March 2020 as part of the Continuous Evaluation Program, following which DoD issued Applicant a Request for Further Information (RFI)[3] in April 2020, and he thereafter responded with the referenced statement. GE 6; GE 10 at 5. The timing and involuntary nature of Applicant's disclosure weigh against his overall candor about the incident.

Applicant's claim that his statement is "exactly the same" as his testimony across two administrative hearings is also inaccurate. In the statement, Applicant details the events of the morning, beginning when his wife arrived home, through his arrest. Applicant asserted in the statement that he "had brought a couple of beers with [him] to drink while [he] worked on the fence" and "drank two beers while we waited for the investigator." GE 10 at 4. Applicant went on to explain his interaction with the police wherein, after complying with an officer's instruction to move his truck, the officer requested that Applicant perform a field sobriety test. In response to the officer saying that he smelled alcohol on Applicant's breath, Applicant asserted that he "had drank two sixteen ounce beers on the side of the road while waiting for him and to fix the fence." *Id*. The foregoing information indeed mirrors Applicant's hearing testimony; however, and quite notably, nowhere in the statement did Applicant acknowledge having had anything else to drink prior to arriving at the scene. That significant detail was omitted from Applicant's very first reporting of the incident to DoD, which further weighs against his candor.

It is 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 account and other evidence. For example, contrary to Applicant's explanation that he drank two beers at the accident scene, the reporting officer noted that no open containers were found during an inventory of the vehicle. GE 8 at 3. Additionally, Applicant's wife reported that she saw him with his last drink, which he left at their house and did not bring with him in the car before returning to the scene, and which was still on the table when she returned home. Applicant's wife also reported that she checked the vehicle herself and found no open containers. *Id*. 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

[3] The RFI was issued "to aid in the determination of [Applicant's] eligibility for access to classified information." GE 10 at 6.

between Applicant's account and the police report was reasonable and sustainable. We find no reason not to give deference to the Judge's negative credibility determination regarding Applicant.

Challenge to Application of Mitigating Conditions and Whole-Person Analysis

The remainder of Applicant's argument on appeal is that the Judge failed to duly consider and give adequate weight to his favorable evidence in terms of possible mitigation and application of the Whole-Person Concept. For example, Applicant repeatedly challenges the Judge's conclusion that he has yet to accept responsibility and accountability for his conduct. *See* Appeal Brief at 3, 10, 12, 14, 15 (referring to Decision at 10). Applicant argues that the Judge's finding that AG 23 ¶¶ (a) and (b) did not apply was in error and relied on "the improper finding that [Applicant] failed to accept responsibility for his actions." Appeal Brief at 14. He asserts that the record reflected, and the Judge ignored, "significant evidence that [Applicant] has made significant lifestyle changes since the 2019 incident which is *indicative* that [he] has acknowledged a change was necessary." *Id*. (emphasis in original).

Applicant also argues that the Judge "failed to give any consideration in his analysis to favorable evidence offered by [Applicant] through testimony and exhibits and instead substituted his own impression of [Applicant] contrary to favorable record evidence." Appeal Brief at 14. The decision reflects that the Judge considered the evidence favorable to Applicant, including his efforts to remain sober; his therapist's report of treatment progress and characterization of the two drinks in 2022 being "lapses," not "relapses;" and his honorable military service and his favorable character evidence. Decision at 10, 12. When weighed against a lengthy and significant history of alcohol-involved personal and criminal incidents, however, the Judge had "lingering concerns about [Applicant's] drinking and the extremely poor judgment he exhibited while drinking," and ultimately concluded that the record left questions and doubts about Applicant's eligibility and suitability for a security clearance. *Id*. 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