



DEPARTMENT OF DEFENSE
DEFENSE LEGAL SERVICES AGENCY
DEFENSE OFFICE OF HEARINGS AND APPEALS
APPEAL BOARD
POST OFFICE BOX 3656
ARLINGTON, VIRGINIA 22203
(703) 696-4759

Date: February 28, 2024

In the matter of:)	
)	
-----)	ISCR Case No. 22-00328
)	
Applicant for Security Clearance)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Julie R. Mendez, Esq., Chief Department Counsel

FOR APPLICANT

Christopher Snowden, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On April 21, 2022, DoD issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guidelines E (Personal Conduct), F (Financial Considerations), and 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 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On December 5, 2023, after the record closed, Defense Office of Hearings and Appeals Administrative Judge Candace Le’i Garcia denied Applicant’s security clearance eligibility. Applicant appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raised the following issue on appeal: whether the Judge’s adverse decision was arbitrary, capricious, or contrary to law. Consistent with the following, we affirm.

The SOR contains one allegation under Guideline J, which is cross-alleged under Guideline E, and six allegations under Guideline F. The Judge found in favor of Applicant on all Guideline

F allegations. These favorable findings were not raised as an issue on appeal and are not discussed below.

The Judge's Findings of Fact and Analysis

Applicant, who is in his mid-thirties, served on active duty in the military from 2008 to 2012, and in the reserve force until 2021. He was administratively separated with a General under Honorable Conditions discharge in 2021 after being convicted by a state court of depositing into his bank account a \$5,000 check that was not made out to him. Originally charged with larceny of checks, forgery, uttering, obtaining money under false pretenses, and identity theft, he pled guilty to larceny and identity theft and the other charges were dropped. He was sentenced to a total of five years in prison, all of which was suspended, and one year of probation. He successfully completed his probation and his suspended sentence ends in February 2025. Applicant disclosed his convictions in his security clearance application, has no other criminal record, has accepted responsibility for his conduct, and credibly expressed remorse. The Judge concluded that, although Applicant has taken positive steps, insufficient time has passed to mitigate the criminal conduct.

Discussion

Applicant argues that the Judge erred in failing to comply with the provisions in Executive Order 10865 and the Directive by not considering all of the evidence, by not properly weighing the evidence, and by not correctly applying the mitigating conditions and Whole-Person Concept. In his arguments, he contends that the alleged misconduct is not recent or frequent, that it occurred under unusual circumstances that are unlikely to recur, and that he has rehabilitated himself in the intervening years. These arguments amount 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* ISCR Case No. 06-17409 at 3 (App. Bd. Oct. 12, 2007).

The Board has repeatedly declined to furnish "bright line" guidance regarding the concept of recency. The extent to which security concerns have become mitigated through the passage of time is a question that must be resolved based on the evidence as a whole. *See* ISCR Case No. 17-04070 at 3 (App. Bd. Mar. 18, 2019). Our review of the record and decision establishes that the Judge carefully considered all evidence in mitigation, including the passage of time since the February 2020 conviction, but determined it was insufficient given that Applicant remains under a suspended sentence. The suspended sentence can be revoked if Applicant commits further misconduct, and he is therefore subject to oversight and a level of control during the period of suspension. *See* Va. Code Ann. § 19.2-306 (2016). In evaluating an applicant's claim of rehabilitation, the judge may consider that an applicant's behavior during the suspended sentence period is largely dependent upon the controlling influences inherent therein. *See, e.g.*, ISCR Case No. 05-07983 at 5 (App. Bd. Oct. 1, 2007).

In rendering a decision, the Judge was required to consider all the record evidence. Directive ¶ 6.3. Given the nature and seriousness of Applicant's fraudulent conduct, we cannot conclude that the Judge erred in determining that the security concerns arising from such

misconduct were not mitigated by the passage of time or by the other evidence of rehabilitation. 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. *See, e.g.*, ISCR Case No. 19-01400 at 2 (App. Bd. Jun. 3, 2020). Moreover, the Judge complied with the requirements of the Directive in her whole-person analysis by considering all evidence of record in reaching her decision.

Applicant failed to establish the Judge committed any harmful error. The Judge examined the relevant evidence and articulated a satisfactory explanation for the decision. In light of the record before her, the Judge's determination that insufficient time has passed to conclude that Applicant is unlikely to engage in further misconduct was not arbitrary or capricious given his relatively recent conviction and ongoing probation. 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). "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: Moira Modzelewski
Moira Modzelewski
Administrative Judge
Chair, Appeal Board

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

Signed: James B. Norman
James B. Norman
Administrative Judge
Member, Appeal Board