

KEYWORD: Guideline G; Guideline J

DIGEST: Applicant committed four alcohol-related offenses between 2007 and 2014. Adverse decision affirmed.

CASENO: 17-00506.a1

DATE: 08/07/2018

DATE: August 7, 2018

In Re:

Applicant for Security Clearance

ISCR Case No. 17-00506

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

Barbara T. Hanna, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On April 11, 2017, 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 Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On April 16, 2018, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Braden M. Murphy denied Applicant's request for a security clearance. Applicant appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raised the following issue on appeal: whether the Judge's findings are supported by substantial evidence and whether the Judge's adverse decision was arbitrary, capricious, or contrary to law. Consistent with the following, we affirm.

The Judge's Findings of Fact

Applicant, who is 42 years old, has been working for his current employer since 2003. He has held a security clearance since 2005.

In 2007, after consuming alcohol with friends at a bar, Applicant was a passenger in a vehicle that backed into another vehicle in the bar's parking lot. He "talked back" to a police officer who came to investigate the mishap and was arrested for, and charged with, obstructing justice and public swearing or intoxication. Decision at 3. The charges were reduced to disorderly conduct and being drunk in public. He was fined \$50 for each offense.

In 2011, Applicant was pulled over by the police for speeding. He was administered a roadside sobriety test, which resulted in him being arrested and charged with driving under the influence of alcohol (DUI). He was later found guilty of reckless driving and sentenced to 30 days in jail (suspended); six months of restricted driving privileges, and two years of unsupervised probation.

In the spring of 2014, after being at a bar, Applicant was a passenger in an idling vehicle in the drive-thru-line of a fast food restaurant. While waiting in line, the driver got out of the vehicle and asked Applicant to get behind the wheel in case the line moved. Applicant fell asleep behind the wheel and was cited and fined for being drunk in public.

Later in 2014, Applicant pulled off the road because his car was overheating and dozed off. A police officer came to investigate and wanted him to submit to a sobriety test. Applicant refused the test and testified he could not perform the test because of medical issues. He was arrested and charged with driving while intoxicated (DWI), refusing a breathalyzer test, and another unspecified traffic offense. In 2016, he pled guilty to DWI based on his lawyer's advice. He was sentenced to six months in jail (suspended), a driver's license suspension for one year, attendance at a ten-week alcohol safety awareness program (ASAP), and a fine. He testified that he completed the probation. He did not disclose this arrest on his 2015 security clearance application (SCA) because the case was pending. However, the SCA asked, "Are you currently on trial or awaiting a trial on criminal charges?" He did disclose the arrest during a subsequent background interview.

Applicant initially testified that he has not consumed any alcohol in almost a year, but he later stated he has not consumed any alcohol since before his second arrest in 2014. His wife testified that she had a long discussion with him about how his actions were affecting the family and noted he has become more family-oriented and responsible. His most recent performance review rated him as exceeding or far exceeding standards in most categories.

The Judge's Analysis

Applicant committed four alcohol-related offenses between 2007 and 2014. He either admitted each offense in his SOR answer or in his testimony. Disqualifying condition 22(a)

applied.¹ Six months prior to the hearing, Applicant was on probation. He provided no documentation of his participation in the ASAP, and he has not pursued alcohol counseling. His alcohol issues are recent and not isolated. His failure to disclose his 2014 DWI arrest on his 2015 SCA was troubling. He also under-reported his DUI arrest as reckless driving. Although not alleged in the SOR, these SCA reporting deficiencies could be considered in weighing the evidence in mitigation, in assessing credibility and rehabilitation, and in analyzing the whole-person concept. Applicant's lack of candor undercuts his claim that he has modified his behavior. His plea of guilty to the 2014 DWI also undercuts his claim that he did not consume alcohol before that incident.

Discussion

Applicant contends that public intoxication-related offenses in 2007 and 2014 are “not of the magnitude of conduct contemplated” in disqualifying condition 22(a). Appeal Brief at 2. He argues that public intoxication in his state is a low-level misdemeanor punishable by a fine of not more than \$250 and those two incidents are not significant enough to raise security concerns. We do not find Applicant's argument persuasive. First, Applicant cites no authority in support of this contention. Second, we do not agree with Applicant's characterization of those incidents as merely involving public intoxication. In the 2007 incident, he was arrested not only for public intoxication but also for obstruction of justice, and he pled guilty to disorderly conduct, which is similar to the listed offense of “disturbing the peace” in disqualifying condition 22(a). During the incident in spring of 2014, he was behind the wheel of an idling vehicle when he was found asleep and intoxicated. When weighing the evidence, the Judge must consider the evidence as a whole and not view it in an isolated and piecemeal fashion, as Applicant is apparently advocating. *See, e.g.*, ISCR Case No. 02-11498 at 4 (App. Bd. Sep. 11, 2003). In this case, the Judge appropriately considered evidence as a whole. Third, disqualifying condition 22(a) encompasses “other incidents of concern.” Depending on the circumstances, as in this case, public intoxication can raise security concerns. Fourth, an applicant's conduct, as opposed to the disposition of charges, is the important consideration in a security clearance adjudication. Even if criminal charges are reduced, dropped, or result in an acquittal, the Judge may still consider the underlying conduct in evaluating an applicant's security clearance eligibility. *See, e.g.*, ISCR Case No. 10-05039 at 3 (App. Bd. Oct. 17, 2011). Fifth, Applicant's other two alcohol-related incidents were sufficient independently for the Judge to find that disqualifying condition 22(a) applied in this case. The Judge's findings and conclusions regarding Applicant's alcohol-related incidents are supported by substantial evidence, *i.e.*, “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the same record.” Directive ¶ E3.1.32.1. *See, e.g.*, ISCR Case No. 16-01329 at 2 (App. Bd. Apr. 11, 2018).

The balance of Applicant's arguments amounts to a disagreement with the Judge's weighing of the evidence. His arguments, however, are not sufficient to show that the Judge weighed the evidence in a manner that was arbitrary, capricious, or contrary to law. *See, e.g.*, ISCR Case No. 14-06440 at 4 (App. Bd. Jan. 8, 2016).

The Judge examined the relevant evidence and articulated a satisfactory explanation for the decision. The decision is sustainable on this 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* Directive, Encl. 2, App. A ¶ 2(b): “Any

¹Directive, Encl. 2, App. A ¶ 22 (a) states, “alcohol-related incidents away from work, such as driving while under the influence, fighting child or spouse abuse, disturbing the peace, or other incidents of concern, regardless of the frequency of the individual's alcohol use or whether the individual has been diagnosed with alcohol use disorder[.]”

doubt concerning personnel being considered for national security eligibility will be resolved in favor of the national security.”

Order

The Decision is **AFFIRMED**.

Signed: James E. Moody
James E. Moody
Administrative Judge
Member, Appeal Board

Signed: Charles C. Hale
Charles C. Hale
Administrative Judge
Member, Appeal Board

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