Date: September 11, 2023

In the matter of:	)	
	)	
-----	)	ISCR Case No. 22-00749
	)	
Applicant for Security Clearance	)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT
James B. Norman, Esq., Chief Department Counsel
William H. Miller, Department Counsel

FOR APPLICANT
Christopher Snowden, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On August 3, 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 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On June 6, 2023, Defense Office of Hearings and Appeals Administrative Judge LeRoy F. Foreman granted Applicant's security clearance eligibility. The Government appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

The SOR alleged eight alcohol-related incidents; a diagnosis of alcohol use disorder-moderate; four criminal charges not involving alcohol-related conduct; and cross-alleged four Guideline G allegations under Guideline J. The Judge found in favor of Applicant on each of the allegations. On appeal, the Government argues the Judge improperly weighed the evidence; failed to consider relevant evidence in applying mitigation; and ignored relevant facts in the whole-person analysis. Consistent with the following, we reverse the Judge's decision.

Judge's Findings and Analysis

Applicant is in his late-30s and has been employed by a defense contractor since April 2020. He graduated from a military academy and served on active duty until November 2012. He has been offered employment by a defense contractor contingent on verification of his security clearance. He was married in 2009 and divorced in 2013. His only child lives with his ex-wife.

In 2003, while Applicant was attending a military academy preparatory school, he was disciplined by his military supervisor for underage drinking. While Applicant was on active duty, he became intoxicated between missions once or twice a month but had no alcohol-related disciplinary actions.

In 2012, Applicant was arrested for assault and battery on a family member and violating protective orders. These incidents resulted from disputes over their divorce. He said his spouse screamed at him and tried to hit him, but he fended her off. His spouse called police and he left the home. His spouse filed charges for assault and battery and obtained a protective order, which he violated. However, the charges were dismissed. Alcohol was not involved in these incidents.

In January 2013, Applicant was again charged with violating the protective order. His spouse called police when Applicant sent a friend to her home to retrieve items. Applicant was convicted and sentenced to 30 days confinement; 28 days suspended.

In March 2013, Applicant was convicted of driving while intoxicated (DWI), first offense. He drove a vehicle from a tow-away zone to another parking area, after drinking. He was arrested and registered a blood-alcohol level of .14% on a breathalyzer. He was sentenced to confinement for one year, suspended, and unsupervised probation for 12 months. His driver's license was suspended for one year, and he was required to install an ignition interlock on his vehicle and attend an alcohol safety action program.

In March 2014, Applicant had a positive reading on his ignition interlock resulting in referral for substance abuse treatment and counseling and extended breathalyzer testing. He attributed the positive reading to using mouthwash at work before driving home. He was required to attend weekly group therapy and Alcoholics Anonymous (AA) meetings. He completed the program in June 2014.

In July 2015, Applicant was charged with being drunk in public. He said he consumed about four drinks with friends and was "slightly buzzed" at the time he was arrested. Someone accused him of trying to break into cars, and the police found him arguing with a group of people. He was found not guilty of the charge but ordered to seek counseling and treatment. He attended weekly counseling for one year until August 2016 and completed the program.

In March 2017, Applicant was charged with being drunk in public. He was riding a bicycle in a park with friends when he was stopped by police because he and his friends were loud. He testified that he had consumed "one or two drinks." Decision at 3, citing Tr. at 37. He was found guilty in general district court, but appealed to the circuit court, pleaded not guilty, and the charge was dismissed.

In November 2017, Applicant was charged with DWI, second offense, after drinking at his girlfriend's apartment and sleeping in his car because he was too intoxicated to drive. He was found not guilty of the offense.

In March 2019, Applicant was charged with being drunk in public and fleeing from law enforcement officers after drinking about six beers at a bar with friends. He testified that he did not believe he was "overly intoxicated." As they were walking to their bicycles, they were approached by police. He ran but was tackled and arrested. He was found not guilty of fleeing from police, and the drunk in public charge was dismissed.

In December 2019, Applicant was again charged with DWI, second offense. He was stopped by police for a taillight violation, and a field sobriety test was performed. Applicant refused the breathalyzer test and was charged with refusing to do so. He testified that he had consumed three drinks. He was held in confinement for a week before being released on bail. While awaiting trial, he was required to abstain from alcohol and seek counseling. Both charges were disposed of by *nolle prosequi*.[1]

In March 2020, Applicant was charged with assault and battery on a family member. He was sitting in his car with his girlfriend, now his fiancée, who accused him of cheating on her. She started screaming and hitting herself in the face. At the hearing, his fiancée testified that she suffers from anxiety and depression and hurts herself when upset. She said Applicant was shouting at her and trying to get her to stop. Witnesses to the incident saw her bleeding and concluded that Applicant had injured her. The charge was disposed of by *nolle prosequi* in January 2021. While awaiting trial on this charge, Applicant attended AA meetings in 2020 and had a sponsor but stopped all counseling or treatment thereafter.

Applicant testified that he stopped associating with his "bar-hopping" friends, and focuses on his cybersecurity career, working out, and adopting healthier habits. He is supported by a former supervisor and his direct supervisor. Additionally, his fiancée's mother, a practicing physician for 30 years who is familiar with his past alcohol problems, testified to his sobriety and said he has turned his life around.

In February 2022, Applicant was evaluated by a government-approved psychologist while the DWI and breathalyzer refusal charges were pending. Applicant was diagnosed with alcohol use disorder – moderate. The psychologist concluded that he had not been able to abstain from alcohol for more than six months at any time in his adult life, despite DWI charges, alcohol education courses, treatment programs, a requirement for monthly urinalysis tests, and a court order to abstain from alcohol until his court date for the charges of assaulting his girlfriend. In testimony, Applicant disagreed that he continued drinking, and testified that he stopped drinking in early 2020 except for a champagne toast at a New Year's Day celebration for an unrecalled year or years. The Judge took administrative notice of the DSM-5 diagnostic criteria for alcohol use disorder. He said the psychologist did not specifically identify which diagnostic criteria he relied on to make his diagnosis.

[1] Notably, the arresting officer resigned during the pendency of the case. Tr. at 43; Government Exhibit (GE) 4.

In his Guideline G analysis, the Judge noted that Applicant's last alcohol-related event, a DWI arrest in December 2019, was more than three years ago and the charges were *nolle prosequi*. The Judge also concluded that Applicant acknowledged his maladaptive alcohol use, completed a treatment program in August 2016, attended AA meetings in 2020, and has not consumed alcohol since his 2019 DWI arrest except for one or more isolated New Year's champagne toasts.

In concluding that the 2012 domestic violence incident, related protective order violations, and alcohol-related incidents were mitigated under Guideline J, the Judge noted that Applicant has been divorced since 2013, has minimal contact with his ex-wife,[2] and has not had any other incidents since. In addition, the Judge concluded that Applicant has significantly curtailed his use of alcohol, there have been no similar incidents since December 2019, and he is supported by his future mother-in-law.

Regarding the 2017 DWI charge and the 2020 domestic assault charge, the Judge concluded there was no reliable evidence to support those allegations. In his whole person analysis, the Judge noted Applicant's sincerity and candor, the change to his social life since his arrest in December 2019, his involvement in a serious relationship, and the support of his former supervisor and his fiancée's mother, who was a compelling witness in favor of Applicant's rehabilitation.

Discussion

A judge has broad discretion in weighing evidence, and the Appeal Board is required to give deference to a Judge's credibility determinations. However, such discretion or deference is not unlimited. A judge is not free to draw whatever inferences and conclusions he wants and "cannot simply ignore, disregard, or fail to discuss significant record evidence that a reasonable person could expect to be taken into account in reaching a fair and reasoned decision." ISCR Case No. 02-22603 at 4-5 (App. Bd. Sep. 3, 2004). *See also* ISCR Case No. 99-0511 at 13-14 (App. Bd. Dec. 19, 2000) (citations omitted).

In deciding whether rulings or conclusions are erroneous, we will review the judge's decision to determine whether: it does not examine relevant evidence; it fails to articulate a satisfactory explanation for its conclusions, including a rational connection between the facts found and the choice made; it does not consider relevant factors; it reflects a clear error of judgment; it fails to consider an important aspect of the case; it offers an explanation for the decision that runs contrary to the record evidence; or it is so implausible that it cannot be ascribed to a mere difference of opinion. *See, e.g.*, ISCR Case No. 97-0435 at 3 (App. Bd. Jul. 14, 1998) (citing *Motor Vehicle Mfr. Ass'n v. State Farm Mut. Ins. Co.*, 463 U.S. 29, 43 (1983)). On appeal, the Government contends that, under Guideline G and J, the Judge erred in applying mitigating conditions in a manner that is arbitrary, capricious, and contrary to law, and unsupported by the totality of the evidence.

[2] We note that Applicant's ex-wife has custody of his minor child, so the opportunity for future interactions with her are likely more than minimal.

Recency of Alcohol Consumption

In analyzing the Guideline G allegations, the Judge concluded two mitigating conditions applied. These are AG ¶ 23(a), "so much time has passed, or the behavior was so infrequent, or it happened under such unusual circumstances that it is unlikely to recur or does not cast doubt on the individual's current reliability, trustworthiness, or judgment;" and AG ¶ 23(d), "the individual has successfully completed a treatment program along with any required aftercare, and has demonstrated a clear and established pattern of modified consumption or abstinence in accordance with treatment recommendations." The Government challenges the Judge's application of those conditions. We agree the Judge erred in his analysis of these conditions.

Application of both mitigating conditions is largely based on the Judge's key conclusion that Applicant "has not consumed alcohol since his arrest for DWI in December 2019, more than three years ago, except for one or more isolated incidents involving a New Year's champagne toast." Decision at 8. In reaching that conclusion, however, the Judge did not make specific findings about, or appropriately analyze, the contradictory evidence in the psychologist's evaluation of February 2022. Specifically, the evaluation contains the following statements:

> 1. "Subject currently drinks approximately once per month, usually on special occasions. He admitted that his drinking has reduced recently due to his legal issues . . . . However, he admitted that "when I drink, I may drink a lot". GE 7 at 2.
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> 2. "By report, Subject's longest period of abstinence was 4-6 months within a controlled environment (deployment) and he has continued to consume alcohol, despite his latest DWI in 2019 and the instructions that he should stay sober until his adjudication." *Id*. at 4.
>
> 3. "While no legal consequences were formalized against him for [some] incidents, he does not deny that he had been drinking when the incidents occurred. Of greater concern, is the fact that the Subject has not been able to achieve a period of abstinence greater than 6 months at any point in his life despite completing alcohol educational courses, attending treatment programs, and being charged with his DWIs. The Subject admitted that he still drinks despite being required to take monthly uranalysis tests and being ordered by the court to remain abstinent until his court date. As such, this Evaluator cannot provide a favorable recommendation as he meets criteria for an [Alcohol Use Disorder] which inherently presents a threat to his judgment and reliability." *Id*. at 5.
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> As a related matter, the psychologist also stated:
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> The results of the personality assessment indicated that the Subject answered the questions in a manner that presented himself in a consistently favorable light. He may be reluctant to admit to minor faults or personal problems. This type of defensiveness did not invalidate the assessment but indicated that attention should be directed toward the possibility of denial in areas of alcohol/drug use. *Id.* at 4.

At the hearing, Applicant was questioned about the psychologist's evaluation. When asked whether he continued to drink alcohol as stated in the evaluation, Applicant responded, "That is incorrect, actually. I mentioned that I was not drinking alcohol because I was not allowed to, but I considered having a champagne toast on New Year's, and that would be about it, and that's what I was referring to." Tr. at 49. Applicant was not asked if he had an explanation, nor did he provide one, for the discrepancy between the amount of his alcohol consumption reported in the psychologist's evaluation and the amount he stated during his testimony at the hearing. *Id*. at 49-50. The Judge accepted Applicant's claim that the psychological evaluation was incorrect without addressing the specific statements in the evaluation. More specifically, in making a finding that Applicant "disagreed" with the psychologist's statement about his continued drinking, the Judge neither made findings about the details of Applicant's continued alcohol consumption as reflected in the psychological evaluation nor conducted any analysis of this significant discrepancy in the evidence. Decision at 5.

In conducting mental health evaluations of individuals with possible alcohol use disorders, psychologists are likely to focus on the individual's current rate of alcohol consumption and the length of any periods of abstinence. The amount of Applicant's then-level of alcohol consumption was a focal point in his 2022 psychological evaluation. The psychological report is quite specific on that issue, indicating that Applicant "currently drinks approximately once per month, usually on special occasions," that his "longest period of abstinence was 4-6 months with a controlled environment (deployment)," and that he has continued to drink alcohol "despite being required to take monthly uranalysis tests and being ordered by the court to remain abstinent until his court date." Such details reflect that the psychologist was cognizant of legal restrictions and other pertinent circumstances regarding Applicant's alcohol consumption. These details provide indicia of reliability to the evaluation's statements about Applicant's alcohol consumption and also make it unlikely the psychologist may have mistakenly interpreted or reported what Applicant told him regarding such consumption. A reasonable person would expect the Judge to address this significant discrepancy as a key issue. The Judge erred in failing to conduct such an analysis, which undermines his application of AG ¶¶ 23(a) and 23(d).

Successfully Completed a Treatment Program

In applying AG ¶ 23(d), the Judge also concluded that Applicant completed a treatment program in 2016, which was apparently based on an estimated date in Applicant's security clearance application. GE 1 at 45. This, however, is not the correct year. Regarding alcohol treatment, the Judge found Applicant was required to attend an Alcohol Safety Action Program after his 2013 DWI conviction and to attend weekly group therapy and bimonthly AA meetings following his 2014 ignition interlock violation. Decision at 3; GE 5 at 3; Tr. at 29, 51-52. The Judge also found that Applicant "attended weekly counseling from August 2015 to August 2016 and completed the treatment program" after a 2015 drunk in public charge. Decision at 3. However, Applicant testified that he did not attend alcohol treatment counseling after the 2015 drunk in public charge. Tr. at 51-52. Applicant further testified that, other than attending AA meetings in 2020, he had no other alcohol treatment or counseling besides that mentioned above. *Id*. at 51-52. Even if the finding that Applicant completed a treatment program in 2016 had not been rebutted by his own testimony, a conclusion that Applicant *successfully* completed a treatment program in 2016 is dubious because he had four alcohol-related arrests between 2017 and 2019.

Recency of Criminal Conduct

In analyzing the Guideline J allegations regarding Applicant's 2019 DWI charge and 2020 Assault and Battery-Family charge, the Judge applied AG ¶ 32(d), "no reliable evidence to support that the individual committed the offense." These charges were significant in the mitigation analysis because they were the most recent and, if established, would undermine a conclusion that so much time has passed to make it unlikely such conduct will recur. The Government contends that Judge erred in concluding there was no reliable evidence supporting these charges. We agree.

Regarding Applicant's 2019 DWI charges, the Judge placed significant weight on the fact Applicant's level of intoxication was not established and the charges were *nolle prosequi*. Decision at 8. However, the Judge did not fully address that Applicant (1) admitted to drinking and driving on that occasion, testifying that he had three drinks before he was stopped by police (Tr. at 42); (2) that he failed at least some aspects of the field sobriety tests (*Id.*; GE 2 at 11; GE 7 at 3); (3) that he refused take a breathalyzer test (GE 2 at 11) and was charged with refusing to do so (GE 8 at 13); and (4) that he was arrested and incarcerated for about a week on these charges (Tr. at 41). At the time of his psychological evaluation in 2022, these charges were still pending, and Applicant reportedly told the psychologist that "[h]e intends to take a plea deal which will likely result in fines and alcohol education." GE 7 at 3; Tr. 42-43. The court record for the DWI charge reflects the Judge ordered "a nolle prosequi on prosecution's motion . . . officer resigned." GE 4 at 2 (emphasis added). Considering the record as a whole, there is substantial evidence to establish that Applicant committed the 2019 DWI offense. The Judge erred in applying AG ¶ 32(d) to the 2019 DWI charge.

As for the 2020 domestic violence charge, the Judge made findings about Applicant's then-girlfriend, now fiancée, testifying about her finding a condom wrapper in his car, suspecting him of cheating on her, and experiencing an emotional breakdown in which she started screaming and hitting herself in the face, scratching her face, and pulling out her hair. Her testimony, however, varies significantly from the police report of the incident, which states:

> [The police officer] responded to . . . Starbucks for an assault and battery between the victim . . . and boyfriend suspect . . . . On scene, the victim was found in the Starbucks bathroom bleeding from the head. The victim stated she found an empty condom wrapper in [Applicant's] vehicle, when she asked him why it was there a physical altercation ensued. The suspect from the passenger seat struck the victim . . . in the forehead & mouth 5-7 times with a closed fist. The victim balled up before [/] until the altercation stopped. Suspect left scene shortly after, prior to PD arrival. [GE 3 at 3.]

First, it merits noting that the above quote was a sworn statement of the police officer, and he also stated, "By swearing to these facts, I agree to appear in court and testify if a warrant or summons is issued." *Id.* Second, Directive ¶ 6.3 provides that "[e]ach clearance decision must be a . . . common sense determination based upon consideration of all the relevant and material information . . . ." (Emphasis added.) Victims of domestic violence have been known to change their stories or to decide not to cooperate with authorities after considering potential legal, economic, and domestic consequences that may arise if their partners are prosecuted. In this case,

the victim signed a document that she did not want to press charges before the criminal trial, and she testified at the DOHA hearing that she told the police that she hurt herself even though the police report only reflects Applicant assaulted her. Tr at 61; GE 3. It is fair to say that the victim's statement to the police was taken immediately after the event, while she was still suffering from the effects of the injuries incurred during that event. The brief period between the incident and the victim's statement to the police are indicia that the statement was reliably remembered and that there was little time for fabrication. Third, Applicant departed the scene before the police arrived despite claiming his girlfriend had an emotional breakdown and injured herself. In this circumstance, his departure from the scene may be evidence of consciousness of guilt. *See, e.g., United States v. Schepp*, 746 F.2d 406, 409-410 (8th Cir. 1984) ("It is well settled that flight of the accused subsequent to the commission of a crime is, in certain instances, a circumstance proper to be laid before a jury as having a tendency to prove guilt.").[3] Finally, this is not the first time Applicant was charged with domestic violence. In 2012, he was arrested and charged with Assault and Battery-Family for an alleged assault on his then-wife. In his background interview, Applicant claimed that his ex-wife instigated that incident when she started screaming at him, pushed the television over while he was playing video games, and was trying to fight with him when he knocked a cup out of her hand. GE 2 at 16. In essence, Applicant has been charged with assaulting two different domestic partners and, in both instances, he essentially claimed it was his domestic partner's fault. The police report regarding the 2020 Assault and Battery-Family charge was sufficient substantial evidence to establish that Applicant committed this offense. The Judge erred in concluding otherwise.

Conclusion

Applicant has a recent history of alcohol-related and criminal conduct charges. From 2012 to 2020, he had three DWI arrests, three drunk in public arrests, an ignition interlock violation, two domestic violence arrests, and two violating protective order arrests. *See, e.g.*, ISCR Case No. 13-00596 at 5-6 (App. Bd. Jun. 26, 2015) (multiple nature of criminal charges is a reason to doubt an applicant's claims of innocent behavior). In 2022, a psychologist diagnosed Applicant with alcohol use disorder, moderate, and concluded that he could not provide a favorable clearance recommendation because Applicant's condition "inherently presents a threat to his judgment and reliability." GE 7 at 5. As discussed above, the Judge erred in failing to examine relevant evidence, which resulted in him discounting the psychologist's evaluation as well as Applicant's 2019 DWI arrest and 2020 domestic violence arrest when conducting a recency analysis under Guidelines G and J.

From our review of the record, there was insufficient evidence for the Judge to conclude that "Applicant has mitigated the security concerns raised by his alcohol consumption and criminal conduct." Decision at 10. The Judge's decision runs contrary to the weight of the record evidence, and was therefore arbitrary, capricious, and contrary to law. The record, viewed as a whole, is not sufficient to mitigate the Government's security concerns under *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988) ("The standard applicable in security clearance decisions is that a clearance may be granted only when 'clearly consistent with the interests of the national security.'"). Therefore, the decision is not sustainable.

[3] Of note, Applicant was charged with fleeing from police during a drunk in public arrest in 2019.

Order

The decision is **REVERSED**.

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