

KEYWORD: Guideline G; Guideline J

DIGEST: Contrary to the Judge's finding, Applicant's background interview in which he stated "he would not drink and drive ever again" did not occur in 2018. Applicant made that statement in July 2017, about two weeks before his third arrest for a drinking and driving offense. Department Counsel persuasively argues "[c]orrectly connecting the date of the interview and the subsequent DUI is a significant aspect of the case because avowal not to drink and drive, followed by another DUI weeks later reflects an inordinate level of bad judgment . . . ." Moreover, the Judge's failure to address this significant aspect of the case considerably weakens her favorable mitigation analysis. As a related matter, Department Counsel compellingly argues that the Judge's favorable credibility determination was flawed because she failed to analyze the impact of Applicant's previous failure to follow through on his declaration to the investigator that he would never again drink and drive. This was a significant factor that undermines his statement at the hearing regarding his intention to abstain from alcohol use in the future. While the Board gives deference to a Judge's credibility determination that deference is not without limits. When the record contains a basis to question an applicant's credibility (such as evidence that would support a contradictory finding) the Judge should address that aspect of the record explicitly, explaining why he or she finds an applicant's version of events to be worthy of belief. Failure to do so suggests that a Judge has merely substituted a favorable impression of an applicant's demeanor for record evidence. Favorable decision reversed.

CASENO: 18-01926.a1

DATE: 09/19/2019

DATE: September 20, 2019

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Applicant for Security Clearance )  

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ISCR Case No. 18-01926

**APPEAL BOARD DECISION**

## **APPEARANCES**

### **FOR GOVERNMENT**

Brittany White, Esq., Department Counsel

### **FOR APPLICANT**

Mark A. Myers, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On October 29, 2018, 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 June 14, 2019, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Noreen A. Lynch granted Applicant’s request for a security clearance. Department Counsel appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Department Counsel raised the following issues on appeal: whether the Judge erred in her findings of fact and whether the Judge’s adverse decision was arbitrary, capricious, or contrary to law. Consistent with the following, we reverse.

Under Guideline G, the SOR alleged the Applicant was arrested and charged with three alcohol-related driving offenses between 2010 and 2017. Those allegations were cross-alleged in a single Guideline J allegation. In responding to the SOR, Applicant admitted the Guideline G allegations and admitted in part and denied in part the Guideline J allegation.

### **The Judge’s Findings of Fact**

Applicant, who is in his mid-40s, has been working for the same employer for about four years. He is married with children. He has earned a master’s degree and has held a security clearance for about 15 years.

In 2010, Applicant was arrested and charged with driving under the influence (DUI) and possession of an open container. The police stopped him for an erratic lane change after he left a nightclub. He pled not guilty, and the case was dismissed for lack of evidence.<sup>1</sup> He attended alcohol counseling classes and later returned to social drinking.

In 2013, Applicant was arrested and charged with DUI. He was found guilty of that charge, was ordered to attend alcohol safety classes, had his driver’s license restricted for one year, and paid a fine. This incident occurred after he left a bar but did not feel intoxicated. He acknowledged that he had consumed three or four cocktails.

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<sup>1</sup> Government Exhibit 5 indicates this charge was “Dismissed for Want of Prosecution”, which is not the same as a lack of evidence.

In 2017, Applicant was arrested and charged with driving while intoxicated (DWI) second offense in five years. He pled guilty, was ordered to attend an alcohol safety action program, and had his driver's license restricted until October 2018.<sup>2</sup> An ignition interlock system was placed on his vehicle and he blew positive on one occasion, "but this was not from drinking but rather from mouthwash." Decision at 2. He completed 15 weeks of counseling with a social worker. His family convinced him that he had to abstain from drinking. He acknowledged that he had a problem with alcohol that was impacting his life and he needed to change. Since 2017, he has not had a drink. He submitted treatment progress reports that showed he was in full compliance with the plan. He signed letters of intent in 2018 and 2019. He still attends Alcoholics Anonymous (AA) meetings and no longer socializes with those with whom he would abuse alcohol. During his 2018 investigative interview, Applicant discussed his early alcohol use and "also stated that he would not drink and drive again." Decision at 2, citing investigative interview.

Applicant's witnesses stated he is a man of integrity who is dedicated to his family. Applicant's father has not seen him drink in two years. His wife testified there is no alcohol in their home and she does not drink. She is convinced that he has learned his lesson.

### **The Judge's Analysis**

Under Guideline G, the Judge noted that Applicant completed an alcohol and drug counseling program, 15 sessions of counseling, and still attends AA. His last alcohol use was in 2017. He signed two letters of intent. "At least a year free of drinking seems to be a reasonable period or benchmark upon which to best assess that Applicant is fully in control of his use of alcohol and capable of responsible judgment." Decision at 5-6.

Under Guideline J, the Judge noted that Applicant's drinking and driving convictions in 2013 and 2017 established disqualifying conditions. However, he is genuinely contrite, changed his lifestyle, and abstains from alcohol. He completed all court-ordered requirements and is now ready to go forward in compliance with laws and regulations.

In her whole-person analysis, the Judge noted that she "considered Applicant's highly credible testimony, background, age, behavioral changes, and subsequent maturation." Decision at 7. She concluded the alcohol consumption and criminal conduct concerns were mitigated.

### **Discussion**

There is a strong presumption against the grant or maintenance of a security clearance. *See Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9<sup>th</sup> Cir. 1990), *cert. denied*, 499 U.S. 905 (1991). The applicant is responsible for presenting evidence to rebut, explain, extenuate, or mitigate admitted or proven facts. The applicant has the burden of persuasion as to obtaining a favorable decision. Directive ¶ E3.1.15. The standard applicable in security clearance decisions "is that a clearance may

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<sup>2</sup> The Judge did not mention that Applicant was sentenced to 180 days imprisonment with 166 of those days suspended. Government Exhibit (GE) 3 and Tr. at 70.

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.” Directive, Encl 2, App. A ¶ 2(b).

In deciding whether the Judge's rulings or conclusions are erroneous, we will review the 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. 14-02563 at 3 (App. Bd. Aug. 28, 2015).

Department Counsel contends that the Judge erred in a finding of fact and in her analysis of the mitigating conditions. We agree. Department Counsel notes that, contrary to the Judge’s finding, Applicant’s background interview in which he stated “he would not drink and drive ever again” did not occur in 2018. Decision at 2. Rather, Applicant made that statement to an investigator in July 2017, about two weeks before his third arrest for a drinking and driving offense. GE 2 at 11. Department Counsel persuasively argues “[c]orrectly connecting the date of the interview and the subsequent DUI is a significant aspect of the case because avowal not to drink and drive, followed by another DUI weeks later reflects an inordinate level of bad judgment . . . .” Appeal Brief at 3. Moreover, the Judge’s failure to address this significant aspect of the case considerably weakens her favorable mitigation analysis.

As a related matter, Department Counsel compellingly argues that the Judge’s favorable credibility determination was flawed because she failed to analyze the impact of Applicant’s previous failure to follow through on his declaration to the investigator that he would never again drink and drive. This was a significant factor that undermines his statement at the hearing regarding his intention to abstain from alcohol use in the future. Tr. at 56 and 67. While the Board gives deference to a Judge’s credibility determination (Directive ¶E3.1.32.1), that deference is not without limits. When the record contains a basis to question an applicant’s credibility (such as evidence that would support a contradictory finding) the Judge should address that aspect of the record explicitly, explaining why he or she finds an applicant’s version of events to be worthy of belief. Failure to do so suggests that a Judge has merely substituted a favorable impression of an applicant’s demeanor for record evidence. *See, e.g.*, ISCR Case No. 10-09035 at 6 (App. Bd. Jun. 10, 2014).

Department Counsel also challenges the Judge’s conclusion that “[a]t least a year free of drinking seems to be a reasonable period or benchmark upon which to best assess that Applicant is fully in control of his use of alcohol and capable of responsible judgment.” Appeal Brief at 17, citing Decision at 5-6. The Directive does not specify how much time must pass to mitigate the various types of misconduct identified in the adjudicative guidelines. The Board has repeatedly declined to establish a "bright-line" rule for evaluating the recency of misconduct. 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, e.g.*, ISCR Case No. 17-04070 at 3 (App. Bd. Mar. 18, 2019). In this case, Department Counsel notes that “Applicant [previously] abstained from alcohol for a period of one to two years, and he also managed to avoid a DUI for more than two years

(from December 2010 to February 2013) and for more than four years (from February 2013 to August 2017) before reverting back to prior behavior.” Appeal Brief at 18. Given Applicant’s drinking and driving history, the Judge failed to explain convincingly why Applicant’s latest period of abstinence of was a sufficient gauge for concluding his alcohol-related misconduct was behind him.

Department Counsel further notes that Applicant had a positive alcohol reading on his ignition interlock system during the 12-month period his driver’s privileges were restricted. The positive reading precluded Applicant from using his vehicle on that occasion. In this proceeding, the Judge accepted Applicant’s explanation that the positive reading was due to his use of mouthwash without addressing that Applicant was required to appear before a state court judge to evaluate Applicant’s ignition interlock compliance, that Applicant gave the same explanation to the state court judge for the positive reading, and that he was ordered to maintain the ignition interlock system for an additional “three or six months” as a result of that positive reading. Tr. at 72-73. Again, the Judge’s failure to address the full extent of such negative evidence tends to suggest she was substituting a favorable impression of Applicant’s demeanor for record evidence. The ignition interlock system was removed from Applicant’s vehicle less than eight months before his security clearance hearing. AE J.

In short, Applicant was arrested three times for DUI/DWI between 2010 and 2017. He completed alcohol safety classes after his first two arrests but continued to drink and drive irresponsibly. He declared to an investigator in 2017 that he would never again drink and drive and less than a month afterwards was arrested for DWI. While his driving privileges were restricted following his latest conviction, he had a positive alcohol reading on his ignition interlock system that resulted in an extension of the period he was required to use that system. Based on our review of the record, we conclude the Judge’s favorable decision is arbitrary and capricious because it fails to consider important aspects of the case and runs contrary to the weight of the record evidence. Furthermore, we conclude that the record evidence, viewed as a whole, is not sufficient to mitigate the Government’s security concerns under the *Egan* standard. The decision is not sustainable.

**Order**

The Decision is **REVERSED**.

Signed: Michael Ra'anan  
Michael Ra'anan  
Administrative Judge  
Chairperson, Appeal Board

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

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