

KEYWORD: Guideline G

DIGEST: The Directive does not specify how much time must pass to mitigate the various types of misconduct identified in the adjudicative guidelines. Contrary to the Judge’s conclusion, the Board has repeatedly declined to establish a “benchmark” or “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. Regarding Applicant’s recent two-year period of abstinence from alcohol, Department Counsel notes that Applicant had a four-year gap between his first two alcohol-related driving offenses and 13-year gap between the last two offenses. Moreover, Applicant testified that, after his second alcohol-related incident, he abstained from drinking and driving for approximately six years because the “ramifications” of that incident were “very fresh in [his] mind.” However, as time passed, he stated that he “felt more comfortable having a couple of drinks and driving.” Favorable decision reversed.

CASE NO: 18-02526.a1

DATE: 12/20/2019

DATE: December 20, 2019

In Re:	)	
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	)	ISCR Case No. 18-02526
	)	
Applicant for Security Clearance	)	

**APPEAL BOARD DECISION**

**APPEARANCES**

**FOR GOVERNMENT**

Andrea Corrales, Esq., Department Counsel

**FOR APPLICANT**

*Pro se*

The Department of Defense (DoD) declined to grant Applicant a security clearance. On November 16, 2018, DoD issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline G (Alcohol Consumption) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On September 17, 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 issue on appeal: whether the Judge’s decision was arbitrary, capricious, or contrary to law. Consistent with the following, we reverse.

### **The Judge’s Findings of Fact**

Applicant, who is in his 30s, has been working for the same employer for about five years. He is single with no children. He earned an undergraduate degree in the mid-2000s.

In 2000 while in his late teens, Applicant paid a fine for the offense of consuming an alcoholic beverage while operating a vehicle. In 2004 while in his early 20s, he was charged with driving while under the influence (DUI), driving while impaired (DWI) by alcohol, speeding, and DWI *per se*. He pled guilty to the merged charges and received probation before judgment. He completed a alcohol/drug treatment program, paid a fine of about \$1,000, and performed community service. In 2017, he was charged with alcohol-related offenses, pled guilty to driving or attempting to drive a vehicle while under the influence of alcohol *per se*, and received probation before judgment. His 12 months of probation ended in December 2018. He attended a MADD (victim impact panel). He believes that he had perhaps five beers before driving in this last incident.

After his last arrest, Applicant successfully completed a weekend intervention program for alcohol-related offenses and a 26-week aftercare outpatient program. Reports indicate he made good progress and was compliant with rules and policies. He accepted full responsibility for his action in 2004 and 2017 and is remorseful. He attended three to four Alcoholics Anonymous (AA) meetings a week and has a AA sponsor, although he has not attended an AA meeting lately. He has not had a drink since his latest DWI and made a pledge to abstain from the use of alcohol in the future.

A witness, who has known Applicant for five years, stated he is trustworthy and reliable. The witness has seen Applicant in social events on numerous occasions and “never observed Applicant drinking that much and recently he has not seen Applicant drinking at all.” Decision at 3, citing Tr. at 16. Applicant’s girlfriend believes he is a good role model for her children.

### **The Judge’s Analysis**

Applicant’s three alcohol-related incidents, two of which resulted in convictions, reflect poor judgment. He takes responsibility for his actions and has completed an inpatient program, alcohol counseling program, and probation. He stopped drinking in 2017. His two-year period of sobriety

appears to be a reasonable benchmark for concluding that he is in control of his alcohol abstinence and is capable of hereafter acting responsibly.

### **Discussion**

Department Counsel contends that the Judge erred in her analysis of the mitigating conditions. Specifically, she argues that the Judge's decision does not address important aspects of the case that significantly weaken the favorable mitigation analysis and runs contrary to the weight of the evidence. We agree.

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 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 highlights that Applicant's first alcohol-related driving incident occurred when he drank approximately a quarter of a liter of rum at a friend's house before driving a vehicle. Tr. at 34-36. Applicant testified that he was intoxicated on that occasion when the police stopped him. *Id.* During the second incident, the police detected alcohol on his breath when he was stopped for speeding after leaving a bar. Tr. at 36-38. He failed a field sobriety test, and a breathalyzer test revealed his blood alcohol content (BAC) was .14%. *Id.* The most recent incident occurred when Applicant consumed about five and a half beers at a bar. Tr. at 40. Even though less than a year earlier he completed a security clearance application in which he had to disclose his prior alcohol-related charges, he acknowledged that he did not think about those prior incidents before driving on that occasion. Tr. at 41 and Government Exhibit (GE) 1. When the police stopped him, his BAC was .10%. Tr. at 29 and 41. In the Decision, the Judge's failure to address many of these significant aspects of the case weakens her mitigation analysis.

Department Counsel argues that Applicant's recent period of sobriety does not negate the security concerns arising from his lengthy history of drinking and driving. In her analysis, the Judge concluded that "[a] two-year period free of drinking seems to be a reasonable period or benchmark upon which to best assess that Applicant is in control of his abstinence from alcohol and capable of responsible judgment." Decision at 5-6. As we have previously stated, the Directive does not

specify how much time must pass to mitigate the various types of misconduct identified in the adjudicative guidelines. Contrary to the Judge's conclusion, the Board has repeatedly declined to establish a "benchmark" or "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. 18-01926 at 4 (App. Bd. Sep. 20, 2019). Regarding Applicant's recent two-year period of abstinence from alcohol, Department Counsel notes that Applicant had a four-year gap between his first two alcohol-related driving offenses and 13-year gap between the last two offenses. Moreover, Applicant testified that, after his second alcohol-related incident, he abstained from drinking and driving for approximately six years because the "ramifications" of that incident were "very fresh in [his] mind." Tr. at 52-53. However, as time passed, he stated that he "felt more comfortable having a couple of drinks and driving." *Id.* and 48. The Judge's mitigation analysis is undercut by her failure to address that Applicant changed his problematic behavior for a number of years following the second incident, but then again exercised poor judgment by reverting to drinking and driving. In light of this prior behavior, the Judge did not adequately explain how the circumstances have sufficiently changed following the third incident to remove pertinent doubts.

Department Counsel argues that the Judge gave undue credit to Applicant's alcohol-related counseling and treatment. First, it merits noting that Applicant had already completed an eight to ten week alcohol/drug treatment and counseling program before his third alcohol-related incident. Second, following his third incident, Applicant hired an attorney and participated in a weekend alcohol intervention program before his court proceeding. The intervention program recommended that Applicant attend a minimum of two AA meetings weekly and complete a structured, aftercare outpatient program. Applicant's Exhibit (AE) A; GE 3, Tr. at 44. Third, Department Counsel notes, since Applicant completed his court-ordered treatment requirements, most of which was completed by March 2018, he has not attended any AA meetings, spoken with his AA sponsor, or received alcohol-related counseling or treatment. AE B, D, F and Tr. at 43-46. Finally, most of Applicant's recent two-year period of abstinence from alcohol occurred either while he was serving court-ordered probation that required him to abstain from alcohol (AE C and Tr. at 42) or while he was on notice through the issuance of the SOR that his security clearance was in jeopardy because of his alcohol-related incidents. In the Decision, the Judge did not either directly or adequately address these factors that detract from her favorable mitigation analysis.

In his reply brief, Applicant makes several arguments which rely on the premise that the Government has a burden to disprove assertions Applicant offered in his case in mitigation. Such a premise is mistaken. Applicant has the burden of producing evidence to mitigate facts admitted by him or otherwise proven by Department Counsel (here, the DUI events). Furthermore, Applicant has the ultimate burden of persuasion that it is clearly consistent with the national interest to grant him a favorable clearance decision. *See* Directive ¶ E3.1.15 and Encl. 2, App. A ¶¶ 1(d) and 2(c).

The evidence establishes that Applicant drove vehicles on three occasions while impaired by alcohol between 2000 and 2017. Given Applicant's drinking and driving history and the circumstances of his latest alcohol counseling and treatment, the Judge's conclusion that Applicant's two-year period of abstinence was sufficient to establish his alcohol-related misconduct was behind him is not sustainable. From 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