

DATE: July 18, 2022

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In the matter of:))
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-----) ISCR Case No. 20-00971
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Applicant for Security Clearance))
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APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

Pro Se

The Department of Defense (DoD) declined to grant Applicant a security clearance. On June 12, 2020, 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 April 11, 2022, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Mark Harvey denied Applicant’s request for a security clearance. Applicant appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Under Guideline G, the SOR alleged that Applicant was diagnosed with Alcohol Use Disorder (moderate) following an evaluation by a licensed psychologist, assessed to be at moderate risk of future alcohol-related incidents, and given a guarded prognosis. In his Answer to the SOR, Applicant denied the allegation, with an explanation.

Applicant raised the following issues on appeal: whether the Judge demonstrated bias by misapplying the Guideline G disqualifying and mitigating conditions. Consistent with the following, we remand.

The Judge's Findings of Fact

Applicant is in his mid-forties and single, with no children. He was employed by a defense contractor from 1999–2016 and is again seeking employment as a federal contractor. Exceptionally intelligent, Applicant has two bachelor's degrees and several highly technical certificates. There is no evidence of criminal offenses, drug abuse, or security violations. He has no military service.

The SOR alleges that Applicant was diagnosed with alcohol use disorder (moderate) in March 2020. Applicant agreed the diagnosis was accurate in March 2020. Applicant left his federal contractor job in March 2016 because of a pending sale of his division. He had been using alcohol to cope with the stress of work. Unemployed from March 2016 to November 2017, he then worked part time for several retailers.

Applicant has a family history of excessive alcohol consumption and mental health disorders, and he acknowledged that he may be predisposed to these issues. Applicant first consumed alcohol at age 11, consumed alcohol in college, and drank more regularly after college. He estimated that he consumed about six beers a week after college and about four to six beers a day after he started his defense-related employment and was traveling.

While on travel for work in about 2010, Applicant drank enough alcohol on one occasion to experience an alcohol blackout. He did not remember how he got from the bar back to his hotel room, but believed that one of his active duty companions drove him to his hotel. He missed the class he was supposed to attend the next day.

In 2011, Applicant consumed about six ounces of methanol that he kept in his freezer and mistook for vodka. He called poison control and was taken by ambulance to the hospital, where he remained overnight.

In 2015, Applicant slipped off of the couch after consuming alcohol, cut his toe on a knife that was on the floor, and received care at an urgent care clinic. The incidents in 2011 and 2015 were the only alcohol-related incidents for which he received medical care.

In 2016, Applicant went to a park after drinking alcohol and fell asleep. He woke to his alarm and walked back to his home. It was winter, with snow on the ground. Applicant did not suffer frostbite or other cold-related injury.

After he left his contractor job in 2016, Applicant began to drink more heavily. During a five-month period in 2017, he occasionally drank 500 milliliters of tequila or gin on more than one day during a week. In 2017, he hid bottles around his residence and hid his alcohol habits from his cohabitant. He described himself as having "extreme competency in being a functioning drunk," and his off-duty alcohol consumption did not adversely affect his performance at work. Decision at 3, quoting from Tr. at 30. His alcohol consumption peaked in 2017. Later that year, Applicant reduced his alcohol consumption and began therapy.

From 2018 to 2020, Applicant attended both individual therapy and group counseling. He met with his individual therapist on a weekly basis for 50-minute sessions: those sessions focused on addressing his anxiety and finding ways of coping with stress other than drinking. In late 2018, he began 105-minute weekly group therapy sessions. At this point, he limited his alcohol consumption to three to four beers when he drank. In March 2020, he stopped meeting with a therapist because of COVID-19 pandemic security protocols. His therapist did not provide a written diagnosis or prognosis. Applicant was never explicitly told that he should abstain from alcohol consumption. However, he acknowledged that—during group sessions—the message was that it was best to completely abstain from alcohol consumption. In addition to his group and individual therapy sessions, Applicant attended about 15 Alcoholics Anonymous (AA) meetings.

Applicant's current level of alcohol consumption is "almost zero." Decision at 4. For about eight months in 2021, he did not drink any alcohol. While visiting family in the month prior to his hearing, Applicant drank nine beers during a three-day weekend, which was the most alcohol he had consumed in the previous year. "He acknowledged that after consuming one drink, inhibitions are somewhat relaxed and the next drink is more of a possibility." Decision at 4, citing Tr. at 75–76. Nevertheless, he is confident that he is able to control the amount of alcohol he consumes. He lives in a drug-free and alcohol-free community.

On March 5, 2020, a psychologist, Dr. B, evaluated Applicant and diagnosed alcohol use disorder (moderate). In summary, she wrote:

Given [Applicant's] drinking habits, his family history of substance abuse and mental health conditions, as well as [Personality Assessment Inventory (PAI)] results pointing to significant alcohol-related problems and variable mood, there is reason for concern. These factors, coupled with his history of alcohol-related incidents and lack of long term plans to abstain from alcohol, raise questions about his judgment.

* * *

CONCLUSIONS: Taken together, the risk of future alcohol-related incidents seems moderate, and [Applicant's] prognosis appears guarded. Although [Applicant] reported that he had been consistent with individual and group therapy, and he has gained insight into himself and his drinking, a medical opinion could not be obtained and during the investigatory process, he consistently conveyed a lack of confidence in his ability to avoid relapse in the face of future stressors. As such, his diagnosis could pose a risk to his judgment, reliability or trustworthiness concerning classified information. [Decision at 4, citing GE 2 at 6, emphasis in Decision.]

At the time of his March 2020 evaluation, Applicant had been sober for two months, and he was concerned about "reversion into the past behaviors and activities." Decision at 5, quoting from Tr. at 50. After his March 2020 evaluation, he ended his alcohol-related therapies, but is nevertheless comfortable with his current state of limited-to-almost-zero alcohol use.

After receiving the March 2020 evaluation, Applicant recognized that he would have a better chance of approval for access to classified information if he stopped consuming alcohol. However, he decided to continue his alcohol consumption because complete abstinence from alcohol was not his goal or intention. “He did not want to stop consuming alcohol because of his security clearance. (Tr. 77) He rationalized that the reason for ending his alcohol consumption should be because of his personal goals and not because of security concerns related to his alcohol consumption. (Tr. 77)” Decision at 5.

Applicant never drives after consuming alcohol. Over the last three years, he has consumed sufficient alcohol to be intoxicated on three or four occasions. In that time frame, the most alcohol he consumed was one mixed drink and five beers in November 2020, when his father passed away.

Applicant provided letters from four character references, who describe him as a model employee—mature, professional, empathetic, punctual, helpful, trustworthy, responsible, and reliable. Two statements also described an improvement in Applicant’s health and general wellbeing in the last few years.

The Judge’s Analysis: The Judge’s analysis is summarized and quoted below.

The record evidence establishes Adjudicative Guideline (AG) ¶ 22(a), alcohol-related incidents away from work; AG ¶ 22(c), habitual or binge consumption of alcohol; and AG ¶ 22(d), diagnosis of alcohol use disorder. Directive, Encl. 2, App. A ¶ 22(a), 22(c), and 22(d). Although none of the four mitigating conditions¹ fully apply, Applicant provided important mitigating information. He voluntarily and credibly disclosed his history of alcohol consumption during his OPM interview, during his March 2020 evaluation, and at his hearing. He attended individual and group counseling and reduced the amount and frequency of his alcohol consumption. He has no alcohol-related arrests, and there is no evidence of security violations or abuse of illegal drugs.

Under DSM-5, Applicant has met the criteria for sustained remission, as he has not had any employment, legal, familial, or relationship difficulties for more than 12 months. He is in control of his alcohol consumption, and it has a limited role in his life. He is sincere, credible, and candid. Nevertheless, Applicant’s satisfaction of the DSM-5 criteria for sustained remission does not necessarily establish mitigation for security clearance requirements.

The evidence against mitigation is more persuasive at this time. In 2010, Applicant had an instance of alcohol-related memory loss or an alcohol blackout.

¹ 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; 23(b), the individual acknowledges his or her pattern of maladaptive alcohol use, provides evidence of actions taken to overcome this problem, and has demonstrated a clear and established pattern of modified consumption or abstinence in accordance with treatment recommendations; 23(c), the individual is participating in counseling or a treatment program, has no previous history of treatment and relapse, and is making satisfactory progress in a treatment program; and 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 memory loss was due to binge-alcohol consumption. In an alcohol blackout, a person:

is still fully conscious. They're moving around, acting, engaging, talking, dancing, driving, engaging in all kinds of behavior, but because of alcohol's inhibition of the transfer of information from short-term memory to long-term memory, they simply will be unable to remember those decisions or actions they made while in the blackout.

In *United States v. Pease*, 74 M.J. 763, 769 (N-M. Ct. Crim. App. 2015), an expert on the effects of alcohol intoxication, Dr. Kim Fromme, Ph.D., described the levels of alcohol intoxication and the impact on human behavior, cognitive abilities, and memory. *See also United States v. Collins*, No. 201000020, 2011 CCA LEXIS 22 at *4-*8. (N-M. Ct. Crim. App. 2011) (unpub.) (testimony of prosecution toxicology expert, Jon Jemiomek).

A person who is in a blacked-out state may still “engage in voluntary behavior and thought processes. ‘They might make decisions, for example, to drive home from a bar, or [engage in other] . . . activities which require complex cognitive abilities, but the individual might not remember the next day and might, in fact, might regret it.’” *Pease*, 74 M.J. at 769. *See also United States v. Clark*, NMCCA 201400232 at *13-*17, *22-*23. (NMCCCA Jul. 14, 2015) (statements of Dr. Stafford Henry, M.D. and Dr. Thomas Grieger, M.D.). A person who consumes alcohol to a blacked-out state may not remember how much alcohol they consumed, or they may violate national security and have no recollection of their conduct.

. . .

Applicant drank nine beers over a three-day period 30 days before his hearing. He has consumed sufficient alcohol over the last three years to be intoxicated on three or four occasions. A commitment to sobriety is not required under the Adjudicative Guidelines; however, his declination from committing to sobriety while holding a security clearance is inconsistent with the recommendation of the evaluating psychologist, Dr. B. He attended numerous therapeutic sessions, including about 15 AA meetings, and complete sobriety as a goal is often suggested at those sessions. Nevertheless, Applicant has elected to continue alcohol consumption. Moreover, if Applicant receives a security clearance and resumes stressful employment, there is also an increased risk he will utilize alcohol to address his anxiety. Applicant has not fully accepted the risk entailed in his strategy of continued, albeit limited, alcohol consumption.

Applicant's history of alcohol consumption and plans for continued alcohol consumption cast doubt on his current reliability, trustworthiness, and judgment. None of the mitigating conditions fully apply, and Guideline G security concerns are not mitigated at this time. [Decision at 9–10.]

Whole Person Concept

Applicant has a history of binge alcohol consumption, an alcohol blackout in 2010, and alcohol-related instances including injury to his toe, missing a class, and mistakenly drinking about six ounces of methanol. In March 2020, a psychologist diagnosed him with alcohol use disorder (moderate) and commented that his “lack of long term plans to abstain from alcohol, raise questions about his judgment.” Despite completion of counseling, attendance at AA meetings, and therapy, he continues to consume alcohol. [Decision at 11.]

Discussion

Applicant argues that the Judge was biased. In particular, he contends that the Judge applied his personal criteria—rather than AG ¶ 22’s criteria—in denying a clearance based on Applicant’s continued consumption of alcohol. Applicant highlights that continued alcohol consumption is a disqualifying condition under AG ¶ 22(f) when it is done against treatment recommendation. However, Applicant points out, there is no evidence of any treatment recommendation that he abstain. Thus, he argues, the Judge demonstrated a lack of impartiality in imposing an abstinence requirement upon him.

This argument by Applicant raises two distinct issues: whether the Judge erred in his application of the disqualifying conditions under AG ¶ 22 and whether he demonstrated a lack of impartiality in this regard or otherwise. We turn first to Applicant’s argument that the Judge improperly imposed a requirement of abstinence.

As evidence in support of his argument that the Judge would be satisfied only with total abstinence, Applicant cited to a statement that the Judge made during the hearing: “[I]f you came into your hearing today and said, ‘I have not consumed alcohol since I received Dr. B’s report. Complete abstinence,’ that would improve your chance of getting a clearance.” Appeal Brief at 2, citing Tr. at 76.

The Judge’s reference to Dr. B’s report highlights a thread that runs through his decision—equating Dr. B’s comment with a treatment recommendation. In the course of adjudicating Applicant’s clearance, DoD Consolidated Adjudications Facility (DoD CAF) requested that he submit to a psychological evaluation. GE 4 at 3. Applicant agreed, and DoD CAF sent him to Dr. B, a clinical psychologist. Dr. B conducted a clinical interview, administered the Personality Assessment Inventory, and reviewed the investigative file. Her report contained the diagnosis of Alcohol Use Disorder (moderate) that formed the basis for the sole SOR allegation. In that report, she referenced Applicant’s “lack of long term plans to abstain from alcohol” as a factor that raised questions about his judgment. GE 3 at 6. Her report was prepared for—and submitted to—DoD CAF, not Applicant. Apparently, it was later sent to Applicant as part of the Government’s required disclosure of evidence prior to hearing.

Dr. B’s report is not a treatment recommendation within the meaning of AG ¶ 22(f), *alcohol consumption, which is not in accordance with treatment recommendations, after a diagnosis of alcohol use disorder*. The Judge apparently recognized the same, as he did not find that the

evidence established AG ¶ 22(f). Nevertheless, in his decision, the Judge effectively converted Dr. B's comment into a treatment recommendation and relied upon it in imposing what amounts to a requirement of total abstinence. Consequently, although he concluded that Applicant met the criteria for sustained remission of his alcohol use disorder, that he is in control of his alcohol consumption, and that alcohol has a limited role in his life, the Judge nevertheless concluded that Applicant has not mitigated the security concerns. "A commitment to sobriety is not required under the Adjudicative Guidelines; however, [Applicant's] declination from committing to sobriety while holding a security clearance is inconsistent with the recommendation of the evaluating psychologist, Dr. B." Decision at 10.

In light of his determination that Applicant was in sustained remission, the Judge failed to explain adequately why he placed such emphasis on total abstinence which—given the facts of this case—is not required. Said differently, in effectively adopting a requirement for abstinence, the Judge failed to explain why Dr. B's comment outweighed Applicant's significant mitigating evidence: the passage of time since the incidents that the Judge cites; the passage of two more years since Dr. B's evaluation; the fact that Applicant has "limited to almost zero alcohol use";² the fact that he has chosen to live in an alcohol-free community; and the fact that he is in sustained remission from the diagnosis of alcohol disorder (moderate), which is the sole SOR allegation.

We turn next to Applicant's allegation of bias. Bias involves partiality for or against a party, predisposition to decide a case or issue with regard to the merits, or other indicia of a lack of impartiality. *See, e.g.*, ISCR Case No. 03-03974 at 6 (App. Bd. Apr. 20, 2006). There is a rebuttable presumption that a Judge is impartial and unbiased, and a party seeking to overcome that presumption has a heavy burden of persuasion. *See, e.g.*, ISCR Case No. 18-02722 at 5 (App. Bd. Jan. 30, 2020). The standard is not whether a party personally believes a Judge was biased or prejudiced against that party, but rather whether the record of the proceedings below contains any indication that the Judge acted in a manner that would lead a reasonable, disinterested person to question the fairness and impartiality of the Judge. *See, e.g.*, ISCR Case No. 03-03974 at 6.

Unlike Applicant, we are not persuaded that the Judge's emphasis on abstinence arose from bias. A reasonable person might well conclude that the Judge simply conflated the evaluating psychologist's remarks with a treatment recommendation. However, our review of the record and decision reveals a separate issue of concern. We conclude that the Judge demonstrated a lack of impartiality in this case in that he sought, considered, and relied upon evidence not introduced by the parties, that he did so post-hearing, and that he did so with no notice to the parties. Specifically, the Judge sought evidence regarding the effects of alcohol intoxication and its impact on cognitive abilities and memory. He found that evidence in three decisions from the Navy-Marine Corps Court of Criminal Appeals, which contained expert testimony on intoxication that was offered at the preceding courts-martial. In particular, the Judge relied upon the experts' testimony regarding blackouts in reaching his own conclusion that "[a] person who consumes alcohol to a blacked-out state may not remember how much alcohol they consumed, or they may violate national security and have no recollection of their conduct." Decision at 9. In other words, the Judge imported expert testimony from three Navy-Marine Corps courts-martial into this case to reach an adverse conclusion about Applicant's blackout incident of twelve years ago.

² Decision at 5.

A Judge's decision must be based on record evidence. *See, e.g.*, ISCR Case No. 02-05110 at 4-6 (App. Bd. Mar. 22, 2004). *See also*, ISCR Case No. 14-06050 at 3 (App. Bd. Feb. 28, 2017). (“[I]n a DOHA proceeding, the Judge bases his or her decision strictly on the pleadings and on the evidence submitted by the parties.”) The Judge may not serve as an advocate for either side. *See, e.g.*, ISCR Case No. 12-10335 at 4 (App. Bd. Dec. 29, 2017). The Judge should not become an investigator for either side by seeking out or introducing new evidence into the case, as such a course of action is inconsistent with his duty of impartiality. *See, e.g.*, ISCR Case No. 16-03709 at 2 (App. Bd. Jul. 2, 2018). It is particularly problematic when the Judge does so after conclusion of the hearing and with no notice to the parties. In addition to compromising his impartiality, the new evidence introduces an unfair element of surprise into the decision and raises issues of due process, as nothing at the hearing would have led Applicant to believe that the Judge would consider anything other than the documents and testimony presented by the parties and admitted into the record. *See, e.g.*, ISCR Case No. 14-06050 at 3. Based on our review of the record and decision, we conclude a reasonable person might question the Judge's impartiality based on his *sua sponte* post-hearing consideration of expert testimony from unrelated courts-martial without providing notice to the parties. In effect, the Judge's decision was impermissibly based, at least in part, on non-record evidence.

Given these errors, we conclude that the best resolution is to remand this case to a different judge for a new hearing. Applicant raises other issues on appeal that are not ripe for consideration. The Board retains no jurisdiction over a remanded decision. However, the Judge's decision issued after remand may be appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Order

The decision is **REMANDED**.

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

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

Signed: Moira Modzelewski
Moira Modzelewski
Administrative Judge
Member, Appeal Board