Date: July 20, 2022

In the matter of:	)	
-----	)	ISCR Case No. 21-01551
Applicant for Security Clearance	)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT
Dan O'Reilley, Esq., Department Counsel

FOR APPLICANT
Pro se

The Department of Defense (DoD) declined to grant Applicant a security clearance. On September 15, 2021, 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 decision on the written record. On April 21, 2022, after considering the record, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Robert Robinson Gales 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 favorable decision ran contrary to the weight of the record evidence and, therefore, was arbitrary, capricious, or contrary to law. Consistent with the following, we reverse.

The Judge's Findings of Fact and Analysis

Applicant has worked for his current employer, a Defense contractor, since 2015. He has held similar positions with other companies since 2008. Applicant served in the military from 1987 until 1996, at which point he received an honorable discharge. He was granted a security clearance in 2012. Married, he has a daughter.

Applicant began using alcohol while he was in the military. He stated that drinking was the social norm among his fellow service members and that his overall level of consumption was "probably a lot." Decision at 3. After his 1996 discharge, Applicant matured and had a lifestyle change. He would drink perhaps a beer after work and four or five on weekends while watching football. Following his last alcohol-related incident, which occurred in 2019, he further scaled back his drinking, reducing his consumption from four or five beers while watching televised sports to one or two, which has had a positive result.

In late 2019, after drinking beer and liquor while watching sports at a friend's house, Applicant was stopped by a policeman for driving north in a southbound lane. After failing a field sobriety test, Applicant was charged with DUI, open container, and for a driving offense. He attended a DUI school of his own volition. In early 2020, the state motor vehicle agency restored Applicant's driving privileges because the arresting officer did not appear at an administrative hearing to present evidence.

In early 2014, Applicant consumed a "good bit" of beer and liquor while watching football at the same friend's house. Decision at 3. A policeman stopped him due to excessive speed and, after Applicant failed a field sobriety test, arrested Applicant for DUI and speeding. Applicant pled guilty to reckless driving and was sentenced to twelve months of unsupervised probation, a $1,315 fine, and completion of the DUI school. As happened in 2019, the arresting officer did not appear at a hearing convened to determine if Applicant's license should remain suspended. Consequently, the decision to suspend the license was reversed and the case dismissed.

Applicant had three earlier DUI incidents in the 1990s. In early 1995 and again in 1996, he was charged with that offense, pled guilty, and was sentenced to probation, a fine, community service, and, in 1996, a weekend in jail. His first DUI offense occurred in early 1994, for which he entered a plea to a reduced offense and was sentenced to a fine.

The Judge concluded that Applicant's misconduct raised concerns under both Guidelines. In deciding that Applicant had mitigated the Guideline G concerns, the Judge cited to evidence that, although Applicant drank heavily in the military, afterward he matured. He noted Applicant's claim that after his last DUI he had scaled back his drinking significantly, as a consequence of which he has had no alcohol-related offenses for twenty-eight months. He also relied upon Applicant's candor in having reported his DUIs to his employer.

Under Guideline J the Judge relied upon much of the same record evidence. Specifically, he noted that the record contains no evidence of alcohol offenses after late 2019, from which the Judge concluded that Applicant has shown rehabilitation. He further stated that compliance with the terms of probation, community service, modified drinking habits, and completion of DUI

school "are all positive factors." Decision at 8. The Judge concluded that Applicant's criminal conduct no longer casts doubt upon his reliability, trustworthiness, or good judgment.

Discussion

There is a strong presumption against the grant or maintenance of a security clearance. *See Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9th 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, Enclosure 2 ¶ 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 4 (App. Bd. Aug. 28, 2015).

Department Counsel argues that the Judge's analysis failed to consider important aspects of the record and failed to evaluate the record evidence as a cumulative whole. We find Department Counsel's arguments to be persuasive. We note first of all that Applicant did not make a response to the File of Relevant Material (FORM). Neither did he include a meaningful amount of mitigating evidence in his Answer to the SOR. Rather, he admitted the allegations and included evidence that, both in 2014 and 2019, the state restored his driving privileges. While the Judge is required to consider all of the evidence, these administrative actions provide little context to the underlying offenses and, under the facts of this case, are entitled to little weight in evaluating the extent to which Applicant has met his burden of persuasion.

Accordingly, the Judge's favorable decision was based in substantial measure on the summary of Applicant's clearance interview that is included in Item 4, Answers to Interrogatories. During this interview, Applicant disclosed that he had consumed alcohol in substantial quantities while in the military but, after his discharge in 1996, had matured and experienced a lifestyle change. Item 4 at 7-8. Nevertheless, eight years later, he had another DUI incident, followed by yet another five years after that. In 2014, Applicant, was stopped for travelling 52 miles per hour in a 35 mile per hour zone. During the field sobriety test, Applicant "had trouble maintaining his balance and . . . was staggering." Item 6, Police Department Records, at 4. A subsequent breathalyzer test yielded .178 and .188 g/ml. *Id.* at 3, 5. In 2019, Applicant was stopped for driving north in a southbound lane. After Applicant had failed the field sobriety test, the officer retrieved Applicant's cell phone and noticed, in the driver side door, an empty beer can that was "cold to the touch," supporting a reasonable inference that Applicant had consumed alcohol while driving. Item 5, Arrest Report, at 4-8. A test of the alcohol content of Applicant's breath showed

a result of .14 g/mL. *Id.* at 9. That these two offenses occurred despite Applicant's claims of a changed lifestyle after leaving the military and despite the passage of several years from his earlier misconduct diminishes the weight to which his current claim of behavioral change is entitled. In addition, these offenses are not consistent with the Judge's conclusion that the twenty-eight months that had elapsed from his last DUI until the close of the record clearly demonstrated rehabilitation. It is well established that questions regarding the recency of misconduct, or the extent to which the significance of that misconduct has been attenuated through the passage of time, must be evaluated in light of the entirety of the record evidence. *See, e.g.*, ISCR Case No. 12-03402 at 2 (App. Bd. May 4, 2016). The Judge's analysis failed adequately to explain his conclusion that twenty-eight months without evidence of additional DUIs clearly shows rehabilitation despite record evidence of such previous re-offenses following the expiration of more extensive periods of time.

Moreover, we note an absence of corroborating evidence for Applicant's contention that he has instituted permanent changes to his lifestyle and, in particular, his drinking habits. In a DOHA case, it is an applicant's responsibility to present evidence sufficient to mitigate the concerns raised in the SOR, and the applicant bears the ultimate burden of persuasion that he or she should be granted a clearance. Directive ¶ E3.1.15. *See, e.g.*, ISCR Case No. 16-02243 at 2 (App. Bd. Nov. 30, 2018). *See also* ISCR Case No. 17-01193 at 4 (App. Bd. Jan 22, 2019) (It is reasonable to expect an applicant to present corroborating documentation of his or her efforts to establish mitigation of the concerns raised in the SOR.) In the case before us, Applicant submitted no character references, no statements by knowledgeable persons attesting to his care regarding the consumption of alcohol, no evidence of attendance at Alcoholics Anonymous, no evidence of formal counseling, no confirmation of his having completed DUI courses, or any other matter that would lend credibility to his case for mitigation. This paucity of independent mitigating evidence significantly undercuts the Judge's conclusion that Applicant has demonstrated rehabilitation.

We note Department Counsel's argument that the Judge substituted a credibility determination for record evidence. Of course, in a decision on the written record such as this, a Judge has no opportunity to evaluate a witness's demeanor and, therefore, any credibility determination he or she makes is entitled to less deference than would be appropriate when there was a hearing. *See* Directive ¶ E3.32.1. In the case under consideration, the Judge appears to have given conclusive effect to those interview answers contained in Item 4 that were favorable to him but did not address answers that presented Applicant in a less encouraging light. These include his statement that he continued to consume alcohol under the same circumstances that underlay his two most recent offenses—drinking while watching sports with his named friend. They also include Applicant's statement that he had reduced his alcohol consumption only months before his clearance interview. Item 4 at 7-8. A Judge cannot 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. *See, e.g.*, ISCR Case No. 15-02903 at 3 (App. Bd. Mar. 9, 2017). The Judge's analysis failed in this regard.

To sum up, the record contains evidence, including Applicant's SOR admissions, that (1) in the mid-1990s he had three arrests for DUI that resulted in convictions; (2) following the last of these incidents Applicant claimed that he had matured and changed his practice regarding drinking; (3) after eight years Applicant was again charged with DUI and convicted of reckless driving after

having consumed liquor and beer at the house of a friend and registering breathalyzer test results of .178 and 188 g/ml.; (4) he was again charged with DUI in late 2019, which resulted in a conviction for driving on the wrong side of the road following consumption of liquor and beer at a friend's home and registering a breathalyzer test result of 1.4 g/ml.; and (5) Applicant continues to consume alcohol under circumstances identical to those underlying his two most recent DUI incidents. Moreover, Applicant submitted no evidence of any kind that would corroborate the claims in his 2020 clearance interview that he has diminished the amount of alcohol that he consumes. The concern under both Guidelines raised in the SOR is that problems with alcohol as well as criminal conduct raise questions about an applicant's judgment, reliability, and trustworthiness. Directive, Encl. 2, App. A ¶¶ 21, 30. Such evidence as this case contains is not enough to mitigate these concerns in light of the standard set forth in *Egan, supra*. The Judge's favorable decision fails to consider important aspects of the case and runs contrary to the weight of the record evidence. Accordingly, the Judge's decision is not sustainable.

Order

The Decision is **REVERSED**.

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