DATE: May 31, 2023

In the matter of:	)	
-----	)	USAF-C Case No. 23-00001-R
Applicant for Security Clearance	)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT
James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT
Christopher Snowden, Esq.

On February 1, 2022, the Department of Defense (DoD) issued a statement of reasons (SOR) pursuant to DoD Manual 5200.02 (Apr. 3, 2017, as amended) (DoDM 5200.02) advising Applicant that his conduct raised security concerns under Guideline G (Alcohol Consumption) and Guideline J (Criminal Conduct) of the National Security Adjudicative Guidelines in Appendix A of Security Executive Agent Directive 4, effective June 8, 2017 (AG). On May 9, 2022, Applicant submitted a reply.

On October 31, 2022, DoD Consolidated Adjudication Services (CAS) revoked Applicant's eligibility for access to classified information, and he appealed that revocation under the provisions of DoDM 5200.02. On December 2, 2022, Under Secretary of Defense (Intelligence & Security) Ronald Moultrie issued a memorandum requiring that DoD civilian or military personnel whose clearance eligibility was revoked or denied between September 30, 2022, and the date of that memorandum be provided the opportunity to pursue the hearing and appeal process set forth in DoD Directive 5220.6 (Jan. 2, 1992, as amended) (Directive).

As a result of Secretary Moultrie's memo, Applicant was given the opportunity to receive the process set forth in the Directive, and he elected that process. On March 14, 2023, after close of the record, Defense Office of Hearings and Appeals Administrative Judge Benjamin R. Dorsey denied Applicant's request for a security clearance. Applicant appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30. He contends that the Judge failed to properly consider all available evidence and misapplied the mitigating conditions, rendering his adverse decision arbitrary, capricious, or contrary to law. Consistent with the following, we remand.

The Judge's Findings of Fact: The Judge's findings are summarized and quoted in pertinent part below.

Applicant is in his late forties. He earned his high school equivalency in the 1990s and served on active duty from 1996 through 2000 and in the Reserve force until 2004. Married since 1996, Applicant has one daughter in her early twenties. His son died in 2013 at the age of 14. Applicant's wife also served in the military and retired in 2015.

Under Guideline G, the SOR alleged the following alcohol-related incidents: a 1994 arrest for Driving While Intoxicated (DWI) that resulted in conviction; a 1996 traffic stop in which Applicant's BAC was under the legal limit; a 1996 arrest for DWI that resulted in conviction; a 2005 verbal altercation with his wife in military family housing that resulted in a guilty plea to Public Intoxication; a 2008 verbal altercation with his wife in military family housing that resulted in Applicant's arrest for assault against a police officer and resisting a police officer but no convictions; a 2014 arrest for DWI that resulted in conviction; and a May 2019 arrest for DWI that resulted in a suspended sentence of one year jail time, a fine, a class for repeat offenders, and two years of community supervision, which ended in April 2023. In addition to these incidents, the SOR also alleged that Applicant attended a substance abuse course after his 2014 arrest for DWI and it alleged his history of alcohol consumption as related by him during his 2017 security clearance interview. Under Guideline J, all the alcohol-related incidents were cross-alleged, with the exception of the 1996 traffic stop that did not result in conviction.

Although Applicant attended Alcoholics Anonymous meetings for about 18 months following his 1994 DWI, he did not attend meetings or alcohol-related counseling from 1996 through 2014. After his 2014 DWI, Applicant attended a brief court-ordered counseling. He testified that he was diagnosed as having an alcohol abuse disorder and cautioned to monitor his alcohol consumption, but that he was not told to abstain. Applicant did not attend any alcohol-related counseling between 2015 and 2020.

> In February 2020, Applicant attended in-patient alcohol counseling for a week at a recovery center. During this in-patient treatment, he was again diagnosed with an alcohol use disorder and was advised to abstain from alcohol. After his in-patient counseling, he attended about four out-patient substance abuse and behavioral counseling sessions until about June 2020. In March 2022, he began attending out-patient counseling sessions with a licensed substance abuse counselor (SA counselor). He initially attended these sessions once a week, but based on his progress, he began attending them bi-weekly. His SA counselor notes that he is making progress with PTSD [Post-Traumatic Stress Disorder] and alcohol abuse.

She diagnosed him as having "alcohol abuse disorder-in remission" and stated he is working on abstaining from alcohol consumption. [Decision at 5–6.]

Applicant consumed two alcoholic beverages in the year prior to the hearing—a shot of alcohol on his son's birthday in March 2022 and a glass of wine with Thanksgiving dinner in November 2022. In April 2022, his spouse acknowledged that Applicant had modified his alcohol consumption. In May 2022, Applicant asserted that he would never drink and drive again, that he would modify his alcohol consumption, and that if he drinks in the future, he will do so responsibly. At the hearing, he stated that he "doesn't really drink anymore" and that he decided to stop drinking after November 2022 because he does not miss it. *Id*. at 6. Applicant acknowledged that, according to his understanding of the principles of AA, the two drinks in 2022 are considered relapses. *Id*.

The Judge's Analysis: The Judge's analysis is quoted below in pertinent part.

Guideline G

Applicant has four DWI convictions. He engaged in multiple verbal altercations with his spouse while he was drinking that involved the police or MPs. On one of those occasions, he had a physical altercation with police. He was diagnosed with an alcohol use disorder. In 2020, while he was receiving inpatient alcohol counseling, he was told that he should abstain from alcohol consumption. As evidenced by the two drinks he has consumed in 2022 and his spouse's March 2022 statement that he drinks in a responsible manner, he has not followed that treatment recommendation. [AG ¶¶ 22(a), (d), (e), and (f)] are established.[1]

. . .

Applicant had a pattern of alcohol-related incidents that lasted over 20 years. Given the number of convictions for DWI and verbal or physical altercations where alcohol was involved, he has not shown that his behavior is infrequent or happened under unusual circumstances. His last DWI occurred recently enough that he is still on probation. Despite his many problems with alcohol, he consumed it as recently as November 2022. . . . AG ¶ 23(a) does not apply.[2]

While Applicant has taken steps to acknowledge and correct his problem with alcohol, he consumed alcohol as recently as November 2022, well after it was recommended that he abstain. He has not provided sufficient evidence of a clear

[1] AG ¶ 22(a), alcohol-related incidents away from work; AG ¶ 22(d), diagnosis of alcohol use disorder by duly qualified professional; AG ¶ 22(e), the failure to follow treatment advice once diagnosed; and AG ¶ 22(f), alcohol consumption, which is not in accordance with treatment recommendations after a diagnosis of alcohol use disorder.

[2] 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 established pattern of abstinence. AG ¶ 23(b) does not apply.[3]

Applicant provided evidence that he is participating in alcohol and behavioral therapy and making satisfactory progress. However, in 2020, while attending inpatient counseling, he was told that he should abstain from alcohol. He has not abstained from alcohol and therefore has a history of relapse. AG ¶ 23(c) does not apply.[4]

Applicant provided evidence that he successfully completed an alcohol treatment program in 2020. However, as he has not abstained from consuming alcohol, he has not demonstrated a clear and established pattern of abstinence in accordance with the treatment program's treatment recommendations. AG ¶ 23(d) does not apply.[5] [Decision at 8–9.]

Guideline J

Applicant had a pattern of DWI offenses that has extended for over 20 years. He has been convicted of four DWIs. He is still on probation for his last DWI in 2019. Despite a 2020 treatment recommendation that he should abstain from alcohol, he has not shown that he is able to do so for any extended period of time. Given these considerations, I cannot find that he has shown that his criminal behavior happened under unusual circumstances or that it is unlikely to recur. [Decision at 10.]

Discussion

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. 97-0184 at 5, n.3 (App. Bd. Jun. 16, 1998) (citing *Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 43 (1983)).

[3] AG ¶ 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.

[4] AG ¶ 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.

[5] 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.

On appeal, the gravamen of Applicant's argument is that the Judge made improper findings regarding Applicant's failure to follow treatment recommendations and that he relied upon those improper findings in applying the mitigating conditions, rendering his decision arbitrary and capricious. We agree. The Judge's repeated adverse determinations regarding Applicant's diagnoses, treatment recommendations, and failure to follow treatment recommendations raise two closely-related issues. These matters were not alleged in the SOR, raising due-process concerns, and the Judge failed to explain a satisfactory explanation for his conclusions given the ambiguous state of the evidence.

The SOR does not allege either a diagnosis of alcohol use disorder or a failure to follow treatment recommendations. Instead, the SOR under Guideline G alleges Applicant's numerous alcohol-related incidents, his drinking history as reported by him to the background investigator, and the fact that Applicant attended a substance abuse class following his 2014 DWI.

In arriving at his findings regarding diagnoses, treatment recommendations, and Applicant's purported failure to follow those recommendations, the Judge appears to rely on the following testimony elicited during Department Counsel's cross-examination of Applicant:

> DC: And what were your takeaways from that three-day course [in April 2015 following conviction for the 2014 DWI]? Did . . . anyone sit down with you and examine your record of alcohol abuse and come to a recommendation for you?
>
> APP: To the best of my knowledge, I believe so. I want to say that they found that I was alcohol abusive, and . . . basically told me to watch the amount of alcohol I consumed.
>
> DC: So . . . what they identified you as is alcohol abusive? Was that a prognosis (sic) of alcohol abuse disorder?
>
> APP: I don't know. [Tr. at 79.]
>
> . . .
>
> DC: [Regarding Applicant's 2020 inpatient treatment] Do you recall if there was a diagnosis of what your issues may be [when you checked in]?
>
> APP: Well, they don't really diagnose you at the beginning because they don't . . . know enough about you. At conclusion, that was when they diagnosed me with post-traumatic stress as well as alcohol abuse.
>
> DC: So they confirmed the alcohol abuse disorder that was first diagnosed formally when you were in treatment in April of 2015. Is that correct?
>
> APP: Yes.

DC: And when you left there at the end of your seven-day stay, what was their recommendation and professional advice to you with regard to future drinking?

APP: Pretty much to abstain.

DC: Okay.

APP: Well, I believe that's correct. I'm not a hundred percent on that. I'd have to look at the paperwork they issued to . . . be exactly sure. [*Id*. at 87–88.]

Applicant also testified that his current SA counselor has not recommended abstinence, that he reported his two drinks in 2022 to her, and that she cautioned him to "be careful with drinking anything." *Id.* at 91–92. The SA counselor submitted a letter on Applicant's behalf in which she referenced his current diagnoses of Alcohol Use Disorder in Remission and PTSD and cited his "significant progress." AE K.

The Judge appears to have concluded that Applicant's testimony alone established AG ¶¶ 22(d), (e), and (f)—*i.e.*, that Applicant was diagnosed with alcohol use disorder in 2015 and 2020, that he failed to follow treatment advice once diagnosed, and that he consumed alcohol in violation of treatment recommendations after a diagnosis of alcohol use disorder. Decision at 7–8. In rendering his unfavorable clearance decision, the Judge relied heavily on his conclusion that Applicant drank alcohol in violation of treatment recommendations, citing that fact as dispositive in his analysis of three of the four mitigating conditions under Guideline G and again as a factor in his analysis under Guideline J. *Id*. at 9, 10.

We note that it was Applicant who introduced the subject of his 2020 inpatient treatment in his SOR response. Although a failure to follow treatment recommendations was not alleged in the SOR, it was not necessarily improper for the Judge to have considered a failure to adhere to the treatment recommendations from that program, insofar as non-alleged conduct can be relevant on, *inter alia*, issues of mitigation, rehabilitation, and the whole-person analysis. *See*, *e.g.*, ISCR Case No. 15-07369 at 3 (App. Bd. Aug. 16, 2017). However, our review of the decision and of the record as a whole persuades us that the Judge did not consider this evidence in its proper context. *Cf*. ISCR Case No. 17-01193 at 3 (App. Bd. Jan. 22, 2019).

First, the Judge erred in that he failed to explain how he reached his conclusion that Applicant was advised to abstain from alcohol and that he consumed it in violation of that recommendation, given the equivocal nature of Applicant's testimony, the lack of any medical records or evaluations substantiating that recommendation, and the current counselor's diagnosis of alcohol use disorder in remission. The Judge did not recognize and resolve the obvious ambiguities, but instead simply stated his finding in a conclusory manner. Second, the Judge erred in that he did not consider the purported failure to follow treatment recommendations for limited purposes, as permitted, but instead repeatedly cited Applicant's failure to abstain as the determinative factor in his analysis. Decision at 8, 9, and 10.

When the weight of a decision is based upon non-alleged issues, the applicant may have been denied due process insofar as he did not receive adequate notice of the concerns against him. *See, e.g.*, ISCR Case No. 12-11375 at 5-6 (App. Bd. Jun. 17, 2016). Based on our review of the Judge's decision, we conclude that his heavy reliance on AG ¶¶ 22(e) and (f)—Applicant's noncompliance with purported treatment recommendations—violated Applicant's due process rights under the Directive. In the absence of an amendment to the SOR, an Administrative Judge cannot find against an applicant based on a matter not encompassed by the SOR. *See, e.g.*, ISCR Case No. 99-0500 at 3 (App. Bd. May 19, 2000).

Conclusion

The errors identified above warrant a remand. Directive ¶ 4.3 provides that an unfavorable clearance decision shall not be made without first providing an applicant with notice of the specific reasons for the proposed action and an opportunity to respond to those reasons. In this case, the SOR alleged that Applicant attended alcohol treatment. This consisted of a DWI education course following his first DWI conviction in 1995 and a group education class following his third DWI conviction in 2015. The SOR makes no reference to Applicant being diagnosed with an alcohol use disorder, a failure to follow advice once diagnosed, or alcohol consumption not in with accordance treatment recommendations. The Judge applied disqualifying conditions, AG ¶¶ 22(d), (e), and (f), when there are no SOR allegations that fairly raise those security concerns. A fair reading of the Judge's decision shows that it is based significantly on unalleged conduct and circumstances. Such a due process violation is not harmless error. Although the Judge did not explicitly make a credibility determination regarding Applicant, his findings implicitly call Applicant's credibility into question. This would cause a reasonable person to question the impartiality of the Judge on remand. *See, e.g*., ISCR Case No. 03-03974 at 6 (App. Bd. Apr. 20, 2006). Given these circumstances, we conclude that the best resolution is to remand this case to a different judge for a new hearing. Under Directive E3.1.35, the Judge assigned the case is required to issue a new clearance decision. 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
Chair, Appeal Board

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

Separate Opinion of Board Member Allison Marie

I would affirm the Decision below. The Majority Opinion identifies no harmful error, and its chosen remedy serves no valid juridical purpose. I respectfully dissent.

Remand is Unnecessary

As an initial matter, I disagree that remand is appropriate in this case. The majority concludes that the Judge's handling of the Guideline G concern was arbitrary and capricious for two reasons. First, they find that he failed to satisfactorily explain his conclusions regarding Applicant's diagnosis and failure to follow treatment recommendations "given the ambiguous state of the evidence." Majority Opinion at 5. The majority also fault the Judge's analysis of these two things under the disqualifying conditions because the "SOR does not allege either a diagnosis of alcohol use disorder or a failure to follow treatment recommendations." *Id*.

I agree that it would have been preferable for the Judge to explain how he reconciled ambiguities in the record regarding Applicant's diagnosis and treatment recommendations. I do not agree, however, that either his failure to do so or his application of disqualifying conditions 22(d), (e), and (f) constitutes harmful error.

Analysis of Diagnosis and Treatment Recommendations Not Error

The majority finds that Applicant was denied due process because the Judge analyzed Applicant's diagnosis and failure to follow treatment recommendations under the Guideline G disqualifying conditions, even though the SOR alleged neither concern explicitly.

Generally, a judge is "precluded from raising security *concerns* outside the scope of the SOR . . . and conduct not alleged or otherwise *fairly embraced* by the SOR" may only be considered for limited purposes, including evaluating an applicant's credibility, rehabilitation, or case in mitigation. ISCR Case No. 14-03475 at 3 (App. Bd. Jun. 15, 2016) (emphasis added).

The purpose of an SOR is to put an applicant on notice of the Government's security concerns and to enable him to present his case for mitigation. ISCR Case No. 12-01266 at 3 (App. Bd. Apr. 4, 2014). It is an administrative pleading and should not be held to the "strict requirements of a criminal indictment." ISCR Case No. 00-0430 at 6 n.3 (App. Bd. Jul. 3, 2001). Variances between an SOR allegation and a judge's findings and conclusions are expected, and they are material only when so great that the SOR fails to provide an applicant with reasonable notice of the concerns against him, thereby subjecting him to unfair surprise at hearing. *See* ISCR Case No. 12-01266 at 3. As long as an applicant receives reasonable notice about the matters at issue in his case and has a meaningful opportunity to respond, a security clearance case should be decided on the merits of the relevant issues and should not be overly concerned with pleading niceties. *See, e.g.*, ISCR Case No. 99-0710 at 2 (App. Bd. Mar. 19, 2001).

Applicant's February 2020 alcohol treatment, which was initiated in response to his 2019 arrest for Driving While Intoxicated (DWI), was fairly embraced by the SOR's Guideline G allegations concerning the 2019 DWI and Applicant's 25-year history of other alcohol-related

incidents. Applicant himself appears to have understood that the 2020 treatment was encompassed by the SOR as he alerted the Government to this information in his SOR response. *See* SOR Response at 5-6, 8, 12. Applicant also raised the subject of his 2020 alcohol treatment first at hearing, during his direct examination. *See* Tr. at 60-61. Therefore, Applicant's 2020 alcohol treatment and all that flowed from it cannot plausibly have caused him unfair surprise.

Moreover, even though the subject matter was not formally added to the SOR, Applicant requested and was granted an opportunity to specifically obtain and present treatment records, which certainly could have included "the paperwork they issued to [him]," as referenced during questioning about the treating provider's recommendations. *See* Tr. at 9, 63-64, 87-88; SOR Response at 8, 19. Therefore, the purpose of a notice requirement – to afford an individual an opportunity to prepare and respond – was satisfied in this case, and Applicant suffered no prejudice.

The majority insists that any conduct not explicitly alleged in the SOR may be used for only limited purposes, even if the conduct fell under the same adjudicative concern and even if the applicant had a meaningful opportunity to address the conduct prior to the close of the record. This strict position is difficult to reconcile with prior pronouncements that an SOR, an administrative pleading, should not be held to the same rigid standards as a criminal indictment or overly concerned with pleading niceties. Exploration of the evolution of this policy would require more in-depth analysis, to include examining whether a judge is precluded from considering only new adjudicative *concerns* (*i.e.*, Guidelines) or from considering any conduct not explicitly alleged under those concerns, and what conduct is "fairly embraced" or "encompassed" by, but not explicitly stated in an SOR. This is ultimately unnecessary at this time, however, because the Judge's decision in this matter is sustainable on other grounds.

Denial is Sustainable on Other Grounds

Remand in this case is also unnecessary because the Judge's ultimate adverse decision was based on other, sustainable grounds beyond the Guideline G analysis with which the majority takes issue, rendering that purported error harmless.

An error is harmless, and remand is therefore inappropriate, "when a clearance denial is based on multiple security concerns, some of which are sustainable and not affected by the error." ISCR Case No. 05-11366 at 5 (App. Bd. Jan. 12, 2007).[6] Here, the SOR cross-alleged the following summarized concerns under Guidelines G and J, all of which the Judge found adversely: Applicant was charged with DWI in 1994, 1996, 2014, and 2019; he remained on probation for the 2019 DWI at the time of the hearing; military police responded to Applicant's residence in 2005 due to reports of domestic dispute and observed him to have a strong odor of alcohol; and military police

[6] *See also, e.g.*, ISCR Case No. 04-11181 at 2 (App. Bd. May 8, 2007) (adverse decision sustainable based on Guideline E and J grounds despite error in Guideline H analysis); ISCR Case No. 03-12361 at 5 (App. Bd. Oct. 31, 2005) (adverse decision sustainable based on Guideline E and H grounds despite error in Guideline G analysis); ISCR Case No. 03-12862 at 4 (App. Bd. Apr. 5, 2005) (adverse decision sustainable based on Guideline E grounds, despite error in Guideline F analysis); ISCR Case No. 02-17276 at 4 (App. Bd. Mar. 15, 2005) (adverse decision sustainable based on Guideline G, J, and E grounds, despite error in Guideline H analysis); ISCR Case No. 03-06028 at 3 (App. Bd. Feb. 11, 2005) (adverse decision sustainable based on Guideline F grounds, despite error in Guideline E analysis).

responded to Applicant's residence in 2008 due to reports of domestic dispute and observed him to be extremely intoxicated. None of these concerns were involved in or impacted by the Judge's findings, analysis, or conclusions about Applicant's alcohol use disorder diagnosis or failure to follow treatment recommendations and are therefore independently sustainable.

Reassignment is Improper

Finally, reassigning this case to a new judge is inappropriate. If remand were warranted, the matter should be returned to the original Judge to correct the purported errors.

The majority concludes *sua sponte* that reassignment is necessary because, "[a]lthough the Judge did not explicitly make a credibility determination regarding Applicant, his findings implicitly call Applicant's credibility into question." Majority Opinion at 7. In reaching this conclusion, the majority points to no specific portion of the Judge's decision, but it appears they are relying on the Judge's discussion reconciling conflicting evidence of the events precipitating the 2019 DWI, as presented in Applicant's version and the police report. Decision at 5.[7]

Reassignment of a case on remand is appropriate only when the lower court judge's conduct is "so extreme as to display clear inability to render fair judgment'" *Liteky v. United States,* 510 U.S. 540, 551 (1994). It should be exercised only in extraordinary cases. *Cobell v. Kempthorne*, 455 F.3d 317, 331 (D.C. Cir. 2006). A judge's opinions about the facts of a case do not raise concerns about bias or partiality "unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible" and "judicial rulings alone almost never constitute a valid basis for a bias or partiality motion." *Liteky*, 510 U.S. at 555.

A practice has evolved that sometimes[8] – but not always[9] – the Board will reassign a case on remand if the original judge rendered something amounting to a credibility determination. This

[7] The Judge made the following findings:

> "The result of the blood test was that [Applicant] had a .141% BAC. Applicant claimed that he was not intoxicated when he drove to the crash scene. He claimed that, as he was hot, he drank two 12-ounce beers between about 10:30 a.m. and 11:00 a.m. while waiting for the police to complete their crash investigation. . . . He claimed that he was not intoxicated until after he had the two beers late that morning, but also acknowledged that he must have been intoxicated before that, but he did not 'feel it.' The police report does not reference him drinking these two beers and it reflects that his spouse did not believe he drank these two beers.
>
> Applicant was over the legal limit of .08 BAC. I find it highly unlikely that the two beers he drank over two hours before his blood draw cause his BAC to go over the legal limit of .08 BAC. Instead, I find that he was driving while intoxicated when he drove to the accident scene that morning."

Decision at 5 (internal citations omitted).

[8] *See, e.g.*, ADP Case No. 20-02075 at 7 (App. Bd. Dec. 6, 2022) (reassigned due to implicit credibility determination); ISCR Case No. 20-01622 at 2 (App. Bd. Jun. 27, 2022) (reassigned even though Applicant failed to establish bias because Judge made "what amount[ed] to an adverse credibility determination").

[9] *See, e.g.*, ISCR Case No. 19-01014 (App. Bd. Oct. 5, 2020) (remanding case to original Judge despite the Judge having found against Applicant on multiple falsification allegations); ISCR Case No. 11-00180 (App. Bd. Jun. 19, 2012) (remanding case to original Judge despite the Judge having found Applicants claims to be lacking credibility); ISCR Case No. 09-00306 (App. Bd. Nov. 19, 2010) (remanding case to original Judge despite having made a negative

is not the standard for reassignment. Neither Applicant nor the majority have raised any concern that the Judge evinced bias or partiality in the proceedings below. Without more, the Judge's implicit credibility determination, which stemmed from his weighing conflicting record evidence,[10] falls far short of the very high standard required for reassignment.

Additionally, to invoke the extraordinary remedy of reassignment without having met the burden of showing that an original judge was biased or lacked partiality is to question that judge's ability to carry out his or her duties in good faith – something that is presumed and demands a heavy burden of persuasion to rebut. *See, e.g.*, ISCR Case No. 03-21329 at 2 (App. Bd. Sep. 25, 2006). Nothing in the Judge's handling of this matter or in his decision leaves me with questions about his ability to render fair judgment in further proceedings. In the absence of a supported allegation of bias or partiality, reassigning this case is improper.

Signed: Allison Marie
Allison Marie
Administrative Judge
Member, Appeal Board

credibility assessment); DISCR Case No. 93-0519 (App. Bd. Apr. 14, 1994) (remand because negative credibility determination was not sufficient to establish applicant was an alcohol abuser).

[10] Such a weighing is required of Administrative Judges. *See, e.g.*, ISCR Case No. 05-06723 at 4 (App. Bd. Nov. 14, 2007) ("A Judge is required to weigh conflicting evidence and to resolve such conflicts based upon a careful evaluation of factors such as the comparative reliability, plausibility and ultimate truthfulness of conflicting pieces of evidence.").