DEPARTMENT OF DEFENSE
DEFENSE LEGAL SERVICES AGENCY
DEFENSE OFFICE OF HEARINGS AND APPEALS
APPEAL BOARD
POST OFFICE BOX 3656
ARLINGTON, VIRGINIA 22203
(703) 696-4759

Date: February 28, 2024

In the matter of:

Applicant for Security Clearance

ISCR Case No. 22-01054

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Julie R. Mendez, Esq., Deputy Chief Department Counsel

FOR APPLICANT

Christopher Snowden, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On November 17, 2022, DoD issued a statement of reasons (SOR) advising Applicant of the basis of that decision—security concerns raised under Guideline J (Criminal Conduct), Guideline G (Alcohol Consumption), and Guideline E (Personal Conduct) of the National Security Adjudicative Guidelines (AG) in Appendix A of Security Executive Agent Directive 4 (effective June 8, 2017) and DoD Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On November 24, 2023, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Pamela Benson denied Applicant's security clearance eligibility. Applicant appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Under Guideline J, the SOR alleged a series of eleven arrests that began in 1990, ended in 2021, and included two arrests for Driving Under the Influence (DUI) in 2010 and 2021. Ten of the arrests were cross-alleged under Guideline E, and the two DUI arrests were cross-alleged under Guideline G as well. At his hearing, Applicant admitted to all allegations, and the Judge found adversely to him on all. On appeal, Applicant argues that the Judge failed to consider all of the evidence submitted in mitigation and that she "committed harmful error in the application of the facts that were not supported by the record evidence." Appeal Brief (AB) at 10. Consistent with the following, we affirm the Judge's decision.

The Judge's Findings of Fact

Applicant is in his mid-fifties and single, with no children. He earned an associate's degree in the early 2000s and has been employed by a federal contractor since 2017.

In December 1990, Applicant was arrested and charged with disorderly conduct (SOR ¶ 1.k) following a dormitory fight in which Applicant was identified as one of the primary instigators. A complaining witness saw Applicant holding what he believed to be a BB gun behind his back, and police found ammunition in Applicant's pocket. Applicant missed the original court date for this offense, a bench warrant was issued, and he was arrested pursuant to that warrant in September 1992. Applicant was found guilty of an ammunition violation and disorderly conduct, and he paid restitution and a fine. At hearing, Applicant denied that he had a BB gun the night of his arrest and testified that the "ammunition" was on a keychain and was found in a dresser drawer, not on his person.

In November 1991, Applicant was arrested and charged with aggravated assault (SOR ¶ 1.j) following a dispute and shoving match at his home with another family. In court, both families elected not to press charges, and the case was dismissed.

In September 1992, Applicant was arrested with a group of friends who were "acting immature" at a strip mall and charged with disorderly conduct (SOR ¶ 1.i). Decision at 3. They were found not guilty.

In about September 1996, Applicant was arrested and charged with disorderly conduct (SOR ¶ 1.h). He and his family were at a courtroom proceeding for an individual who had killed Applicant's father in a drunk driving incident. In the courtroom, an altercation broke out between Applicant's family and the defendant's family. Members of both families were charged with disorderly conduct, but the charges were subsequently dismissed.

In April 2004, Applicant was arrested and charged with aggravated assault (SOR ¶ 1.g), following a report by his sister that Applicant and his brother had assaulted her. Applicant testified that this sister suffers from bipolar disorder and that she made a false report following a family dispute. The charges against Applicant and his brother were eventually nolle prossed.

In June 2007, Applicant was arrested for soliciting prostitution. At hearing, he testified to the following details: he met up with an old friend; he did not know that she was a prostitute; they spoke in his car for about 30 minutes; the police pulled up behind them and first questioned his friend separately; he was then arrested and charged; and the charges were later dismissed.

In October 2010, Applicant was arrested for DUI (SOR ¶ 1.e). He testified he was coming out of a pharmacy, that there was a "commotion . . . going on," and that he was stopped and charged with DUI prior to entering his vehicle. Decision at 4, quoting Tr. at 52. Applicant testified that he believed he was arrested due to racial profiling and that he was not offered a field sobriety test. A certified statement of disposition confirms that Applicant was found not guilty of the DUI.

In June 2011, Applicant was arrested for driving on a revoked/suspended license (SOR ¶ 1.d). Applicant testified that he was unaware that his driver's license had been suspended following the October 2010 arrest and that he needed to pay a fee to have it reinstated. Applicant was sentenced to perform community service, and the charge was subsequently dismissed.

In February 2020, Applicant was arrested and charged with domestic battery/physical contact (SOR ¶ 1.c.), which led to a protective order and a subsequent August 2020 arrest for the violation of that protective order (SOR ¶ 1.b). Applicant testified that these charges arose from a family dispute with his then-fiancée and that she made false allegations against him. In April 2021, the judge found Applicant not guilty of the two charges.

In November 2021, Applicant was arrested and charged with DUI–2nd offense, improper traffic lane usage, and operating an uninsured motor vehicle (SOR ¶ 1.a). The police report contained the following details: Applicant reported that he was on his way home from his sister's birthday party; he initially denied any alcohol consumption; he later admitted to the police officer that he had consumed one alcoholic beverage; his breathalyzer test revealed a blood alcohol content (BAC) of 0.245%; and he appeared to have urinated in his pants. Additionally, Applicant's car appeared to have been involved in an accident as there was significant damage to the front of the car, the front passenger tire was blown, and Applicant had been driving on the rim. At the police station following his arrest, Applicant refused to provide another breath sample or to answer police questions, and he was taken home after completing the booking process.

In December 2022, Applicant pled guilty to the reduced charge of reckless driving on the advice of counsel. Applicant was "required to enroll in an alcohol program, use an alcohol-testing device for one year, attend a victims-impact panel, and pay fines of $2,502," although his use of the testing device was later reduced to six months after he successfully passed all alcohol-breath tests. Decision at 6. Placed on probation for two years, Applicant remained on probation at the time of the hearing in September 2023.

At hearing, Applicant testified that he had not consumed any alcohol the night of his arrest or at any time since his father was killed by a drunk driver in 1996. Applicant testified that he had been to the dentist to have a tooth removed three days prior to the incident, that he had not felt well afterwards, and that he was not eating or taking his Type II diabetes medication. Around 4:00 AM on Sunday, Applicant decided to drive himself to the hospital and was pulled over by the police for driving under 20 mph in a 45 mph zone. Under direct examination, Applicant admitted that he was confused when pulled over and introduced the possible explanation of hyperglycemia, which he explained to be a condition that occurs when one's blood sugar is not properly controlled with medication. The symptoms include confusion and loss of motor skills. Applicant testified that he had not previously experienced symptoms of hyperglycemia because he had always taken his diabetic medication as prescribed until he experienced severe pain after his dental appointment. Because he had not consumed any alcohol, Applicant proffered that a condition known as diabetic ketoacidosis might have caused a false positive on the breathalyzer test, and he submitted medical studies explaining the condition. Applicant testified that he told the police officer that he was not feeling well and that he needed medical treatment, but the police report does not reflect that Applicant made those statements.

Applicant testified that—after the police dropped him off at his home—he called 911 to go to the hospital, where "he did not specifically request any alcohol test or toxicology tests." *Id*. Instead, the hospital records reflect that Applicant apparently complained of abdominal pain following a motor vehicle accident and that he was given a CT scan, which revealed no acute abnormality in the chest, abdomen, or pelvis. His panel of lab results included a blood sugar reading of 126. The medical studies and reports submitted by Applicant noted that "Hyperglycemia usually doesn't cause symptoms until blood sugar (glucose) levels are high – above 180 to 200 milligrams." *Id*. at 6, quoting Applicant Exhibit (AE) P. The Judge concluded that "[t]here is no documentary evidence that Applicant experienced, tested, or was treated for high blood sugar levels, hyperglycemia, or diabetic ketoacidosis." *Id*. at 6.

> Based on this information it does not appear, nor is there any evidence to support, that Applicant was suffering from hyperglycemia at the time of his second [DUI] arrest. Applicant's symptoms are consistent with a highly intoxicated individual whose BAC was measured at 0.245%. . . . Because the record evidence did not establish Applicant suffered from hyperglycemia, Applicant similarly did not establish that he suffered from diabetic ketoacidosis. [*Id*. at 7 (internal citations omitted).]

Sentenced to enroll in an intensive outpatient program (IOP), Applicant successfully completed the program in January 2022. The counselor's one-page IOP summary stated that Applicant "has been encouraged to regularly engage in community support group meetings (e.g., 12-step groups), get a sponsor; engage regularly in mental health treatment and continue to actively apply what had been learned in group." *Id*., quoting AE J, Z. Although the IOP summary does not provide a diagnosis or prognosis, "it appears that Applicant was treated for some type of substance misuse." *Id*. at 7. Applicant provided no treatment records other than the one-page summary.

The Judge's Analysis

<u>Guideline J: Criminal Conduct</u>

Applicant's multiple arrests between 1990 and 2021 and his current probation status establish security concerns under Guideline J. These concerns are not mitigated because Applicant's "pattern of criminal conduct spans over three decades," he remains on probation until December 2024, and "[i]nsufficient time has passed to demonstrate that Applicant's criminal conduct will not recur." *Id*. at 10.

<u>Guideline G: Alcohol Consumption</u>

The record evidence establishes security concerns under Guideline G, as Applicant "was involved in two alcohol-related arrests in 2010 and 2021, and his November 2021 BAC recording was extremely high at .245%." *Id*.

> Applicant denied that he has consumed any alcohol since his father was killed by a drunk driver in 1996. . . . When addressing his most recent arrest, he claimed he

> needed immediate hospital treatment for his high blood sugar and/or tooth pain when he was arrested by police in November 2021. He initially denied drinking any alcohol but then he admitted to police he had consumed one alcoholic beverage. His blood alcohol content registered extremely high at .245%, well above the legal limit. There is no mention in the police report of any request for immediate medical treatment. Applicant reiterated that immediately following his arrest he went to the hospital to get his high blood sugar levels under control. The post-hearing submission of the hospital records does not support his testimony. The records clearly indicate that he received a CT scan on his chest, abdomen, and pelvis following a motor vehicle accident. There was nothing in the hospital record that indicated Applicant complained of symptoms consistent with high blood sugar levels, hyperglycemia, or diabetic ketoacidosis, provided test results establishing these conditions, or has ever been treated for these conditions. Given the pattern of discrepancies between the documentary evidence and Applicant's claims, I did not find his testimony credible. . . . Based on him being an unreliable witness, there is insufficient evidence to establish mitigation under any of the [mitigating] conditions. [*Id*. at 11.]

Guideline E: Personal Conduct

The Judge found that Applicant's history of criminal conduct, two alcohol-related arrests, and probation status until December 2024 raise security concerns under Guideline E and that none of the mitigating conditions apply:

> Applicant is not a credible witness. His failure to accept responsibility for his misconduct and his misrepresentation of relevant facts indicate that he may be personally or professionally vulnerable if his criminal and alcohol-related misconduct were known to the community. Overall, he has shown little remorse or rehabilitation following his pattern of rule violations, and his behavior continues to cast doubt on his reliability, trustworthiness and good judgment. [*Id*. at 12.]

Whole-Person Concept

> Applicant was arrested on at least 11 occasions over three decades. He is currently on probation until December 2024. He has not been candid about the circumstances of his criminal and alcohol-related offenses. I find that more time is required without repeat offenses before Applicant can be considered successfully rehabilitated. [*Id*. at 13.]

Discussion

On appeal, Applicant raises the following issues: whether the Judge failed to consider all the mitigating evidence submitted by Applicant, particularly evidence that many of Applicant's arrests had resulted in either dismissals or acquittals; whether she erred in her credibility

assessment; and whether she committed harmful error in applying facts that were not supported by the record, rendering her decision arbitrary and capricious. [1]

In deciding whether the Judge's rulings or conclusions are arbitrary and capricious, we will review the Judge's 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. 97-0435 at 3 (App. Bd. Jul. 14, 1998).

Applicant's arguments are of mixed merit. We turn first to his argument that—in her Guideline J analysis—the Judge neglected to consider or address evidence of dismissals and acquittals. Applicant highlights that, although the SOR alleges eleven incidents of criminal conduct, only two incidents resulted in convictions—one for disorderly conduct in 1990 (SOR ¶ 1.k.) and one for reckless driving in 2021 following an arrest for DUI (SOR ¶ 1.a.). He notes that Applicant provided court documents confirming findings of "Not Guilty" to two offenses—the 2010 DUI (SOR ¶ 1.e.) and the 2020 domestic battery (SOR ¶ 1.c.); that Applicant testified that other incidents were dismissed (SOR ¶¶ 1.d., 1.f., 1.g., 1.h., and 1.i.); and that the Government failed to submit evidence of the underlying facts for any of the offenses of which Applicant was not convicted.

> Nonetheless, the Administrative Judge ruled *entirely* against [Applicant], even for allegations that resulted in a "not guilty" verdict. The Administrative Judge provided *no explanation* why any of the allegations outside of 1.a. were unfavorable for [Applicant]. The Administrative Judge's analysis under Guideline J did not provide a rational finding related to the evidence. A finding without explanation or evidence is clearly arbitrary and capricious. [AB at 17 (emphasis in original).]

This argument has merit. The Judge erred in that she failed to articulate a satisfactory explanation for her summary conclusion that "Applicant's pattern of criminal conduct spans over three decades and raises serious security concerns." Decision at 10. The record confirms a 1992 conviction for an ammunition violation and a 2022 plea to reckless driving following a 2021 DUI arrest. Those two offenses may bookend a span of thirty years, but the Judge fails to explain how they constitute a "pattern" given the equivocal evidence about the nine incidents in the middle. Of those nine incidents, the record confirms a nolle prosequi of an alleged 2004 assault, an acquittal of a 2010 DUI charge, and an acquittal of a 2020 domestic battery charge. For the remaining six offenses, three of which date back to the 1990s, the Government submitted no evidence on the underlying conduct, and Applicant testified to favorable resolutions for all six (*i.e.*, either dismissals or expungement). It is possible that the underlying criminal conduct gives rise to security concerns despite the acquittals and dismissals. The Judge, however, neglected to articulate

---

[1] At one point in a lengthy brief, Applicant's counsel also alleges that the Judge "introduced the issue of bias through her questions to [Applicant]," AB at 10, but fails to expand on that allegation at any point in his brief. The Directive requires that an "appeal brief must state the specific issue or issues being raised, and cite specific portions of the case record supporting any alleged error." ¶ E3.1.30. In light of counsel's failure to comply with this fundamental requirement, we conclude that the issue of bias has not been raised and decline to address it.

how that might be the case here and instead—without explanation—simply made sweeping adverse findings on all eleven allegations. That is error.

Having determined error, we turn next to whether it is harmful and necessitates remand. In the context of this case, we conclude that the Judge's error is harmless as it does not appear likely that she would have reached a different result in this case even had she articulated her reasoning given the evidence of acquittals and dismissals of much of the alleged criminal conduct. *See* ISCR Case No. 95-0495 at 4 (App. Bd. Mar. 22, 1996) (an error is harmless if it is not outcome determinative), citing *NLRB v. American Geri-Care*, 697 F.2d 56, 64 (2nd Cir. 1982) (remand required only where there is a significant chance that, but for the error, a different result might have been reached), *cert. denied*, 461 U.S. 906 (1983)). That is because the gravamen of this case—and of the Judge's decision— is the 2021 DUI arrest, Applicant's explanation of that incident, and the Judge's determination that he was not testifying credibly about that incident, as discussed below.

In finding that Applicant's testimony regarding the November 2021 incident was not credible, the Judge highlighted the "pattern of discrepancies between the documentary evidence and Applicant's claims." Decision at 11. On appeal, Applicant improbably argues that there were no discrepancies but instead simply different explanations for a chain of events, and that the Judge erred in "concluding that a lack of corroborating evidence was a 'discrepancy.'" AB at 16. This argument is thoroughly unpersuasive. The Judge was confronted with two widely differing accounts of the November 2021 incident, which contained multiple contradictions. For one example, the police report indicated that Applicant smelled strongly of alcohol when pulled over, admitted to consuming one alcoholic beverage, and registered a blood alcohol content (BAC) of 0.245% on a breathalyzer test. Conversely, Applicant steadfastly maintained that he has not consumed alcohol since 1996 and submitted a letter from one of his sisters attesting to this long-term abstinence. AE U.[2] That is a discrepancy in the evidence. In another example, Applicant testified that he told the police he needed medical attention and that, after the police dropped him at his home, he went to the hospital to seek treatment for his diabetic condition. The police report, however, does not reflect any request for medical attention, and the medical records from the hospital indicate that Applicant sought treatment for possible injuries related to an auto accident.

In sum and contrary to Applicant's assertion, the record was rife with contradictions and discrepancies, which was the Judge's duty to resolve. *See* 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.") Confronted with two entirely contradictory explanations of the November 2021 event, the Judge thoroughly identified, analyzed, and resolved the conflicts in the evidence. Her findings and conclusions are amply supported by the record. This assignment of error is without merit.

---

[2] Applicant argues repeatedly that the Judge erred in that she failed to consider the letter from his sister that corroborates his long-term abstinence. Our review, however, confirms that the Judge reviewed the correspondence, as she cites to the letter in her discussion of Applicant's claim of abstinence. Decision at 6.

Having resolved that Applicant was intoxicated during the November 2021 incident, the Judge concluded that his testimony regarding the event was not credible. In general, we defer to a judge's credibility determination, as the Directive requires. Directive ¶ E3.1.32.1. In this case, the adverse credibility determination flowed directly from the Judge's resolution of the contradictory evidence, as detailed above. Nothing in the record or in Applicant's appeal brief gives us any reason to question or disturb her credibility determination. Notably, the Judge's adverse decision explicitly rests on this credibility determination:

> Guideline G Analysis: "Based on him being an unreliable witness, there is insufficient evidence to establish mitigation under any of the above conditions."
> Guideline E Analysis: "Applicant is not a credible witness. His failure to accept responsibility for his misconduct and his misrepresentation of relevant facts indicate that he may be personally or professionally vulnerable if his criminal and alcohol-related misconduct were known to the community."
>
> Whole Person Concept: "He has not been candid about the circumstances of his criminal and alcohol-related offenses." [Decision at 11, 12, 13.]

Because the gravamen of the Judge's decision was her determination that Applicant was not credible in testifying about the November 2021 DUI, we are convinced that the error made in her Guideline J analysis was harmless in that a remand would not change the outcome of this case.

The remainder of Applicant's brief is fundamentally an argument that the Judge misweighed the evidence in conducting her mitigation and whole-person analyses. None of Applicant's arguments, however, are enough to rebut the presumption that the Judge considered all of the record evidence or to demonstrate that the Judge weighed the evidence in a manner that was arbitrary, capricious, or contrary to law. Moreover, the Judge complied with the requirements of the Directive in her whole-person analysis by considering all evidence of record in reaching her decision. *See, e.g.*, ISCR Case No. 19-01400 at 2 (App. Bd. Jun. 3, 2020).

Applicant has not established that the Judge committed harmful error. Our review of the record reflects that the Judge examined the relevant evidence and articulated a satisfactory explanation for the decision, which is sustainable on this record. "The general standard 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." AG ¶ 2(b).

Order

The decision is **AFFIRMED**.

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

Signed: Gregg A. Cervi
Gregg A. Cervi
Administrative Judge
Member, Appeal Board

Signed: James B. Norman
James B. Norman
Administrative Judge
Member, Appeal Board