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 22, 2024

In the matter of:	)	
-----	)	ISCR Case No. 23-00656
Applicant for Security Clearance	)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT
Julie R. Mendez, Esq., Chief Department Counsel

FOR APPLICANT
Christopher Snowden, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On May 12, 2023, DoD issued a statement of reasons (SOR) advising Applicant of the basis for that decision – security concerns raised under Guideline J (Criminal Conduct) and Guideline E (Personal Conduct) of the National Security Adjudicative Guidelines (AG) of Security Executive Agent Directive 4 (effective June 8, 2017) (SEAD 4) and DoD Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). On November 13, 2023, after conducting a hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Darlene D. Lokey Anderson denied Applicant's security clearance eligibility. Applicant appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30. For the reasons stated below, we remand the Judge's decision to a different Judge.

Under Guideline J, the SOR alleged that Applicant engaged in criminal activity to include convictions for driving under the influence of alcohol (DUI) in 2007, 2009, and 2018 and possession of a controlled substance (marijuana) in 2005 and 2008. Under Guideline E, the criminal conduct was cross-alleged, and Applicant was also alleged to have falsified his April 2023 response to DOHA interrogatories in which he stated he last consumed alcohol in June 2018.

In responding to the SOR, Applicant admitted the criminal conduct allegations and denied the falsification allegation. He did not answer the cross-alleged Guideline E allegation. Concluding that Applicant failed to demonstrate a willingness to comply with laws, rules, and regulations, the Judge found against him on each of the SOR allegations.

Judge's Findings of Fact and Analysis

Applicant is 42 years old, unmarried, and has no children. He is employed by a defense contractor since October 2022 and submitted a security clearance application in November 2022. Applicant's criminal conduct includes three DUI convictions and two convictions for possession of a controlled substance. Applicant started using marijuana at 15 years old, and in 2005 was charged with possession of methamphetamine and marijuana. He claimed the methamphetamine was not his, and he was convicted of the marijuana charge alone. He was placed in a diversion program and probation for five years. Decision at 2. In 2008, he was again charged with possession of marijuana, in violation of his probation. He was convicted and placed on probation for another five years. *Id*.

In June 2007, Applicant was charged and convicted of DUI after consuming about a case of beer and a bottle of liquor. He was ordered to attend an 18-month alcohol program and placed on probation for five years. The Judge noted that, following the arrest, Applicant tried to stop drinking and was completely sober for about one year, then returned to heavy drinking. *Id*.

In October 2009, Applicant was charged and convicted of DUI, ordered to complete an 18-month alcohol program, and placed on house arrest and probation for five years. The Judge noted that—following the arrest—Applicant again stopped drinking for about a year and a half, but then resumed:

> When he started consuming alcohol again, this time it was different. He would force himself not to leave the house if he was drinking alcohol. He would only buy a six or twelve pack at a time if he went to the store. This pattern has continued to the present. He reduced his alcohol consumption but continued to drink and at times to excess. [*Id*. at 3.]

In June 2018, Applicant was charged and convicted with DUI, ordered to complete a DUI program, and sentenced to 10 days in jail and five years' probation, which he recently completed. Applicant explained that he was celebrating his birthday and consumed a six-pack of beer. Later that evening, he drove to the store to purchase more beer and was pulled over by the police. The Judge found that "[f]ollowing this arrest, he was able to remain sober for five or six months before returning to consuming alcohol. Now, he only drinks socially." *Id*.

In response to DOHA interrogatories in April 2023, Applicant stated that he last consumed alcohol in June 2018. The Judge found that "[t]his statement is not accurate since Applicant returned to drinking some five or six months following the 2018 arrest for DUI. He deliberately failed to disclose that he consumed alcohol approximately monthly and that he continues to consume alcohol to the present." *Id*. She went on to say–

> Applicant has not been formally diagnosed as an alcoholic, but he has seriously contemplated the issue. This is the main reason he tries to abstain from drinking because he does not want it to control his life. He has not received inpatient or outpatient treatment for his alcohol problem but he has thought about it. He has not received therapy or counseling for his drinking problem. He has not attended an Alcoholics Anonymous (AA) meeting for about a year. [*Id*.]

Applicant stated he is trying to improve himself and his lifestyle. Since 2018 he obtained a high school diploma, graduated from an apprenticeship program at work, and enrolled in community college. He also attended AA meetings and church men's groups.

In the Judge's analysis under Guideline J, she found that Applicant's five convictions and a 2007 probation violation were sufficient to establish disqualifying conditions under Guideline J. The Judge listed several mitigating conditions under Guideline J as potentially applicable, but found that none were fully established. *Id*. at 5–6. She commended Applicant for completing the court-ordered requirements associated with each conviction, the progress he has made in obtaining an education to further improve his life, and for trying to change his past lifestyle patterns with involvement in church and "finding distractions unrelated to drinking." *Id*. at 6. However, she noted that his "criminal history involving alcohol and drugs remains very concerning" and that his "most recent conviction occurred in 2018 and his five-year probation has only recently been satisfied." *Id*. The Judge continued:

> [Applicant] stated that he continues to consume alcohol even though following each of his three DUI convictions he tried to stop drinking. He was successful for a period of time, before he relapsed and started consuming alcohol again. Presently, he still consumes alcohol and battles to maintain control of himself when he is under the influence. In the future, with hard work and discipline, and possibly using resources available to him such as treatment programs, counseling, therapy, and others, Applicant may be able to conquer this problem and remain alcohol free. [*Id*.]

The Judge concluded that, "at this time, his long history of criminal conduct involving drugs and alcohol does not show the requisite good judgment, reliability and trustworthiness necessary to be eligible for access to classified information and it presents doubts concerning his ability or willingness to abide by las, rules and regulations." *Id*.

The Judge found that Applicant's conduct established disqualifying conditions under Guideline E and that none of the mitigating conditions applied as "Applicant does not meet the qualifications for access to classified information." *Id*. at 8. She concluded that Applicant's criminal history of drug and alcohol abuse showed poor judgment, unreliability, and trustworthiness. Additionally, the Judge concluded:

> Applicant was not accurate in response to his interrogatories that he last consumed alcohol in June 2018. This was not true. He testified that following his last DUI arrest in 2018, he was able to abstain from alcohol for about five or six months before he started drinking again. He currently still consumes alcohol. There is no

> excuse for this dishonesty which calls his character into question. Considered in totality, Applicant's conduct precludes a finding of good judgment, reliability, and trustworthiness. [*Id*.]

The Judge held that "to be entrusted with the privilege of holding a security clearance, one is expected to be honest and truthful at all times, and to know and understand the rules and regulations that apply to them, and to always abide by those rules." She noted, "Applicant has not demonstrated this awareness." In her whole person analysis, the Judge said, "Applicant has not demonstrated a positive pattern of conduct and the level of maturity needed for access to classified information," noting that Applicant is not a person with whom the Government can be confident to know that he will always follow rules and regulations and do the right thing, even when no one is looking." He is "not qualified for access to classified information." *Id*. at 8–9.

Discussion

A judge is required to "examine the relevant data and articulate a satisfactory explanation for" the decision, "including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n of the United States v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)). "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). The Appeal Board may reverse a judge's decision to grant, deny, or revoke a security clearance if it is arbitrary, capricious, or contrary to law. Directive ¶¶ E3.1.32.3 and E3.1.33.3.

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).

On appeal, Applicant argues that the Judge improperly considered and analyzed this case under the framework of Guideline G (Alcohol Consumption) disqualifying and mitigating conditions rather than under Guidelines E and J, which were alleged. In analyzing his case under Guideline G, Applicant argues, the Judge erred in two regards. First, she violated his due process rights under the Directive, as he was not provided notice of any Guideline G allegations and had no opportunity to respond. Second, she failed to consider his evidence in mitigation under Guidelines J and E as she was obligated to do. Additionally, Applicant argues that the Judge erred in finding that he falsified his response to interrogatories, as that conclusion runs contrary to record evidence. Applicant's three arguments have merit.

Our review of the transcript confirms that both Department Counsel and the Judge focused primarily on alcohol consumption issues throughout Applicant's hearing, although no Guideline

G concerns were alleged on the SOR. In his brief opening statement, Department Counsel stated that there was "conflicting evidence" as to Applicant's alcohol use since his 2018 DUI, that there was "currently no evidence of aftercare or AA or anything like that," and that consequently "it will not be clearly consistent with national security interests for a favorable adjudication today." Tr. at 10–11. On cross-examination, Department Counsel inquired at length into Applicant's recent alcohol habits, his participation in AA meetings, his attendance at other alcohol programs or classes, and his answers to DOHA's interrogatories regarding alcohol consumption. Tr. 27–38.

Following Department Counsel's cross-examination, the Judge asked a lengthy series of questions related entirely to Applicant's alcohol use, consumption levels, periods of abstinence, alcohol treatment, therapy, counseling, and future intent with regard to alcohol use. *Id*. at 38-57. At one juncture, the Judge asked Applicant, "[D]id it ever come to you that you're an alcoholic? Did you ever come to that realization?" *Id*. at 50. After another series of questions about Applicant's more recent alcohol consumption habits, the Judge proclaimed, "I do enough of these cases to know people that have a condition with alcoholism, and you have a condition definitely." *Id*. at 54.

In his closing argument, Department Counsel first acknowledged that Guideline G concerns were not alleged, but then focused almost entirely on Applicant's failure to submit the precise type of evidence necessary to mitigate under Guideline G:

> Your Honor, this isn't a Guideline G, but it certainly has discussion points of Guideline G with the alcohol use in this case. . . . Now the DUIs certainly could be mitigated over time except that one exacerbates the other, exacerbates the other. And, by the time you get to the 2018 DUI—again, that's not that long ago—but he just got off of probation. And the biggest concern is the lack of follow through, the lack of aftercare. *As you pointed out, and the concern is, he may be an alcoholic*. He may not. I don't know because *there's no evidence of any medical evaluation in the record and the burden is on the Applicant to show that*. . . . He's been pondering going to that alcohol support group at his Church . . .but he's not done it. He hasn't gone to AA for a year. There is no alcohol evaluation. *There is nothing else on the record, which it is his burden to provide, to show that he is following aftercare*. . . . And, *even if we looked at the 2018 DUI as could that be mitigated by time . . . it's not because of the lack of aftercare*. . . . Given the background here, given the pattern of recidivism, *given the pattern of not following through with aftercare, and given the complete lack of evidence of support in place right now for him on these issues of alcohol use*, it is not clearly consistent with national security interest for a favorable adjudication today. [Tr. at 58-60 (emphasis added).]

In her decision, the Judge continues this focus on alcohol consumption issues, both in her findings of fact and analysis. For example, the section that purports to be an analysis of whether Applicant has mitigated under Guideline J instead relies heavily on the factors one considers in a Guideline G case:

> First, Applicant is commended for completing the court-ordered requirements associated with each of his convictions. He is also commended for the progress he

> has made in obtaining his education to further improve his life. It is also noted that he is trying to change his past lifestyle patterns by getting involved in church and *finding other distractions unrelated to drinking*. However, Applicant's criminal history involving alcohol and drugs remains very concerning. His most recent conviction occurred in 2018, and his five-year probation has only recently been satisfied. He stated that *he continues to consume alcohol* even though following each of his three DUI convictions *he tried to stop drinking*. He was successful for a period of time, before *he relapsed and started consuming alcohol again.* Presently, *he still consumes alcohol and battles to maintain control of himself when he is under the influence*. In the future, with hard work and discipline, and *possibly using resources available to him such as treatment programs, counseling, therapy, and others, Applicant may be able to conquer this problem and remain alcohol free.* [Decision at 6 (emphasis added).]

Due Process

We turn first to Applicant's argument that the Judge "deprived [him] of his due process rights by adjudicating the case under Guideline G, rather than Guideline J and E." Appeal Brief (AB) at 2. Now represented by Counsel, Applicant argues:

> [Applicant], a *pro se* individual with a high school education, was notified that he would need to present evidence *relevant* to the mitigating factors of Guideline J and E. [Applicant] was *never* put on notice that he would need to present any evidence related to alcoholism, abusing alcohol, alcohol use counseling, participating in alcohol treatment programs, demonstrating a pattern of abstinence or modified consumption . . . and presenting evidence of overcoming the maladaptive use of alcohol. Yet, this is precisely the evidence that the Administrative Judge stated [Applicant] needed to present. In her words, "In the future, with hard work and discipline, and possibly using resources available to him such as *treatment programs, counseling, therapy*, and others, Applicant may be able to conquer this *problem* and remain *alcohol free*." The most obvious issue with this statement is when was the [Applicant] ever notified that he needed to present that evidence. . . . If the Government was concerned about [Applicant's] alcohol use, it should have notified [Applicant] under Guideline G which would put [him] on notice about the evidence that would be relevant, such as treatment programs, counseling, therapy, etc. to "conquer" his alcohol problem and remain "alcohol free." [Applicant's] due process rights were denied because the decision to deny him access to classified information was based on a lack of evidence under Guideline G and [Applicant] was never put on notice that Guideline G was at issue. [*Id*. at 17–18 (emphasis in original).]

We agree. Based on our review of the transcript and the Judge's decision, we conclude that the focus on alcohol consumption violated Applicant's due process rights under the Directive. Directive ¶ 4.3 requires that an unfavorable clearance decision shall not be made without first providing the Applicant with notice of the specific reasons for the proposed action and an opportunity to respond to the reasons. Directive ¶ E3.1.3 further provides that an unfavorable

clearance decision shall not be made unless the applicant has been provided with a written SOR that shall be as detailed and comprehensive as national security permits.

We have previously stated that SORs are not to be judged by "the strict standards of a criminal indictment" and that "[a]s long as there is fair notice to the affected party and the affected party has a reasonable opportunity to respond, a case should be adjudicated on the merits of relevant issues and not concerned with pleading niceties." ISCR Case No. 99-0554 at 4–5 (App. Bd. Jul. 24, 2000) (citations omitted). Moreover, it is well established that conduct not alleged in the SOR may be considered for certain limited purposes, to include: assessing an applicant's credibility; evaluating an applicant's evidence of extenuation, mitigation, or changed circumstances; considering whether an applicant has demonstrated successful rehabilitation; or providing evidence for whole-person analysis under Directive ¶ 6.3. *See* ISCR Case No. 03-20327 at 4 (App. Bd. Oct 26, 2006).

Consequently, although Guideline G security concerns were not alleged in the SOR, it was not necessarily improper for the Judge to have inquired into and considered Applicant's alcohol consumption habits, insofar as that conduct might be relevant on issues of rehabilitation, likelihood of recurrence of criminal conduct, and the whole-person analysis under Directive ¶ 6.3. That said, non-alleged conduct cannot be inquired into and considered in a manner that contravenes the notice requirements in ¶¶ 4.3 and E3.1.3 of the Directive. While non-alleged conduct may be relevant in establishing an SOR allegation, it may not become the basis for denying or revoking a security clearance. *See, e.g*., ISCR Case No. 12-11375 at 6 (App Bd. Jun. 17, 2016). We recognize that this may appear—in the context of a particular case— to be a fine line. However, our review of this record persuades us that the Judge in this case crossed that fine line and "did not consider this evidence in its proper context." USAF-C Case No. 23-00001-R at 6 (App. Bd. May 31, 2023).

Reading the transcript and decision, we conclude that the focus on Applicant's alcohol consumption habits and closely related topics (*e.g*., aftercare, AA, therapy, abstinence, and relapse) went beyond the limited purposes for which non-alleged conduct may be used. Both in her inquiry at hearing and in her decision, the Judge addressed issues that are explicitly listed as mitigating factors under AG ¶ 23 of Guideline G: what steps has Applicant taken to overcome his alcohol problem?; has he demonstrated a pattern of modified consumption or abstinence?; is he participating in counseling or treatment?; does he have a history of treatment and relapse? We conclude that the weight of the decision was based upon non-alleged issues and that Applicant's due process rights under the Directive were violated. *Id*. 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. 05-05334 at 4 (App. Bd. Jan. 10, 2007). Under the facts of this case, we conclude the Judge's error is harmful.

Failure to Consider Mitigation under Guidelines J and E

As a corollary to his due process argument, Applicant asserts that—because the Judge erroneously focused on Guideline G mitigating factors—she failed to properly apply Guideline J and E mitigating conditions as required by the Directive. Specifically, he contends that the Judge did not appropriately consider his education level, accomplishments, life changes, employment, clean criminal record since 2018, and change of criminal associates in light of the applicable

mitigating conditions. Again, Applicant's argument has merit. The Judge's analysis fails to adequately address the relevant mitigating conditions, particularly the application of mitigating conditions AG ¶¶ 32(a) and (d).[1]

In her analysis, the Judge emphasized factors that are not directly relevant to whether Applicant's criminal conduct has been mitigated (*e.g.*, Applicant's continued alcohol consumption, periods of abstinence, and purported relapse), and she gave short shrift to evidence that is directly relevant under Guideline J's mitigating conditions. For example, the Judge failed to consider the five years since Applicant's last DUI as mitigation under AG ¶ 32(a), but instead implied that his recent successful completion of his five-year probation period is indicative of insufficient time elapsed since his last conviction. Under AG ¶ 32(d), the Judge should have analyzed the passage of time since the last occurrence of criminal activity, completion of probation, education, employment, community involvement, attendance at AA, and other factors in mitigation. She failed to do so. Additionally, her conclusion that "he still consumes alcohol and battles to maintain control of himself" and that "with hard work and discipline, and possibly using resources available to him such as treatment programs, counseling, therapy, and others, Applicant may be able to conquer this problem and remain alcohol free," is misplaced and not adequately supported by the evidence.

Guidelines J and E do not require an Applicant to receive alcohol counseling or treatment, abstain, or modify alcohol consumption in order to qualify for a security clearance. The Judge's analysis appears to impose such a requirement without an adequate explanation of how Applicant's alcohol consumption may be relevant to the mitigating conditions established under Guideline J. Said differently, in focusing on Applicant's non-alleged alcohol consumption, the Judge failed to explain why those facts outweighed Applicant's significant mitigating evidence: the passage of time since the last criminal activity, his successful completion of a lengthy probation period, his educational achievements, and the completion of an apprenticeship program. In sum, we agree that the Judge erred in that her decision fails to properly apply the evidence in mitigation to the appropriate mitigating conditions, and we conclude that the error was harmful.

Falsification

We turn finally to Applicant's argument that the Judge erred in finding that, in April 2023, he falsified his response to DOHA interrogatories regarding his alcohol consumption habits. In his answers to the Government's interrogatory questions, Applicant stated that he last consumed alcohol in June 2018. The Judge found that Applicant failed to disclose that he has consumed alcohol approximately monthly until at least December 2022, as he stated in his PSI, which he adopted in his response to DOHA's interrogatories. The relevant portion of the interrogatory reads as follows:

[1] AG ¶ 32: (a) so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances, that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment. AG ¶ 32: (d) there is evidence of successful rehabilitation; including, but not limited to, the passage of time without recurrence of criminal activity, restitution, compliance with the terms of parole or probation, job training or higher education, good employment record, or constructive community involvement.

C. Alcohol

1. Do you **currently** consume alcoholic beverages (e.g. beer, wine, liquor)?

Yes [ ] No [x]

a. If you answered "No", please respond to questions 1(a)(1) through (1(a)(4). If you answered, "Yes", please respond to question 1(b):

(1) Please state the approximate date of your LAST CONSUMPTION; the amount and types(s) of alcoholic beverages consumed on that occasion; and the circumstance (e.g. at a party, at a bar, etc.).

[Answer] June 2018 about six beers. I was hanging out with a friend on the weekend and decided to have a drink due to my (sic) because I had a birthday during that week. (emphasis added.)

(2) For what reason(s) did you stop consuming alcohol?

[**Answer**] **Personal choice not to drink and my responsibilities are more important.** (emphasis added.)

. . . .

(3) Do you intend to consume alcoholic beverages in the future?

Yes [ ] No [X]

. . . .

2. Do you currently consume alcohol to the point of intoxication?

Yes [ ] No [X]

3. What was the approximate date (month/year) of your last intoxication?

[**Answer**] **June 2018.** (emphasis added.)

GE 2 at 18–20. Applicant contends that the Judge improperly concluded that he deliberately falsified a material fact in his interrogatory answer as her factual findings are "wholly unsupported by the record." AB at 7.

Applicant points out that the Judge found that he "deliberately failed to disclose that he consumed alcohol approximately monthly and that he continues to consume alcohol," relying exclusively on an inaccurate answer he gave in response in the interrogatory question asking when he last consumed alcohol, without considering other evidence that he provided at the same time. In his response to interrogatories, Applicant answered: "June 2018," and described drinking about six beers during his birthday celebration. The Government's interrogatory also asked Applicant to

correct and/or adopt the summary of his security clearance interview (PSI). He adopted his December 2022 PSI as accurate. In the PSI, he confirmed that he continued to drink, consuming about one to two beers monthly, but said that he reduced his alcohol use and no longer drives after drinking. He also described the June 2018 incident as a birthday celebration where he consumed about six beers before driving. GE 2 at 5. Applicant's statement in the adopted PSI and his answer to interrogatory question C.1.(a)(1) are contradictory. At hearing, Applicant clarified that he was confused and mistakenly answered the interrogatory question with the date of his last DUI incident, not the date of his last drink. Applicant's full response to question C.1.a.(1) supports this contention.

The Directive provides that "the adjudicative process is predicated upon individuals providing relevant information pertaining to their background and character for use in investigating and adjudicating their national security eligibility. Any incident of intentional material falsification or purposeful non-cooperation with security processing is of significant concern. Such conduct raises questions about an individual's judgment, reliability, and trustworthiness and may be predictive of their willingness or ability to protect the national security." AG ¶ 2(i).

Applicant argues both that his adoption of the PSI and incorrect answer to the written interrogatory question created, at worst, contradictory information about his alcohol consumption, not a deliberate falsification and that the mistaken interrogatory answer was immaterial to the Government's concerns regarding his criminal conduct. In concluding that Applicant deliberately falsified his interrogatory answer, the Judge failed to adequately examine and resolve the contradictions, failed to explain why Applicant' concurrent adoption of his PSI did not resolve the issue, and failed to explain its materiality. The record fails to support a finding of intentional falsification of a material fact, and the Judge's analysis of SOR ¶ 2.b is unsustainable.

Conclusion

The errors identified above warrant a remand. Based on our review of the record, we find that the nature of the Judge's questions at hearing, the focus of her decision on non-alleged conduct, and her adverse credibility determination would cause a reasonable person to question the impartiality of the Judge on remand. *See* USAF-C Case No. 23-00001-R at 7. Given these circumstances, we conclude that the best resolution is to remand this case to a different judge. 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: Moira Modzelewski
Moira Modzelewski
Administrative Judge
Chair, Appeal Board

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

Separate Opinion of Board Member James B. Norman

While I concur with the majority that a remand to another Judge is necessary, I respectfully disagree with the conclusion that the Judge's focus on Applicant's alcohol use constituted a deprivation of due process that crossed the "fine line" between permissible and impermissible consideration of unalleged conduct.

Although the Judge's questions and her discussion of Applicant's alcohol consumption bore a resemblance to issues under Guideline G, this does not equate to having failed to put Applicant on notice of the relevance of his alcohol consumption as it relates to his past criminal conduct, nor did it require amendment of the SOR. An SOR must provide Applicants with "detailed and comprehensive" notice of DOHA's basis for the proposed denial of a clearance, which the SOR clearly did under Guideline J. Directive ¶ E3.1.3. An applicant's behavior may have security significance under more than one Guideline and either the Judge or Department Counsel could have amended the SOR to allege a Guideline G allegation. *See* ISCR Case No. 06-21537 at 5 (App. Bd. Feb. 21, 2008); Directive ¶ E3.1.17. However, amendment is not mandatory when that same information has independent relevance and significance under another guideline. "The fact that Government did not allege that conduct under all possible applicable guidelines did not relieve Applicant of the responsibility of mitigating the conduct within the scope of the guideline alleged." ISCR Case No. 15-02326 at 4 (App. Bd. Oct. 14, 2016).

As discussed in the majority decision, unalleged conduct can be considered for a number of reasons. As applied to the Guideline J mitigating conditions in a case in which an applicant's criminal conduct was alcohol-related, consideration of past and current alcohol consumption is

relevant to the judge's assessment of rehabilitation and the likelihood of recurrence. In this case, the Guideline J allegations provided Applicant with sufficient notice of the conduct under consideration, which on its face raised obvious issues related to his drug and alcohol use. Taken as a whole, the SOR satisfied the requirements of the Directive. *See* ISCR Case No. 06-19544 at 4 (App. Bd. May 28, 2008). Therefore, it is reasonable to expect that Applicant should have anticipated that his drug and alcohol use were elements of the criminal conduct to be addressed at his hearing.[2] Although *pro se* applicants cannot be expected to act like lawyers, they must take timely, reasonable steps to protect their rights under Executive Order 10865 and the Directive. ISCR Case No. 00-0593 at 4 (App. Bd. May 14, 2001). If applicants fail to take such steps, their failure to do so does not constitute a denial of their rights. ISCR Case No. 02-19896 at 4 (App. Bd. Dec. 29, 2003).

Although addressing Applicant's alcohol habits is a relevant and appropriate part of assessing the Guideline J allegations, the Judge made factual assumptions and conclusions – such as diagnosing Applicant as an alcoholic who must abstain from drinking – that are wholly unsupported by the record evidence and which permeated the decision. This unreasonably tainted her assessment of the mitigating evidence and constitutes harmful error. When coupled with the judgmental manner in which the Judge proceeded to address Applicant's use of alcohol, as described in the majority decision, this raises the issue of whether the Judge still retains the substance and the appearance of fairness and impartiality. ISCR Case No. 09-02839 at 4 (App. Bd. Oct. 29, 2010). Accordingly, I concur with the majority's ultimate disposition of this case.

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

[2] This differs from ISCR Case No. 94-0084 at 3, 6 (App. Bd. Dec. 13, 1994) in which the applicant was faced with surprise witnesses.