

DATE: August 31, 2023

_____)	
In the matter of:)	
)	
)	
-----)	USAF-M Case No. 23-00056-R
)	
)	
Applicant for Security Clearance)	
_____)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel
Nicholas T. Temple, Department Counsel

FOR APPLICANT

Pro Se

On August 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 I (Psychological Conditions) of the National Security Adjudicative Guidelines (AG) in Appendix A of Security Executive Agent Directive 4, effective June 8, 2017.

On November 15, 2022, the DoD Consolidated Adjudication Services (CAS) revoked Applicant's eligibility for access to classified information, and Applicant 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Ronald Moultrie issued a memorandum requiring that DoD civilian or military personnel whose clearance eligibility was revoked or denied between September 30, 2022, and the date of that memorandum be provided the opportunity to pursue the hearing and appeal process set forth in DoD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 June 13, 2023, after close of

the record, Defense Office of Hearings and Appeals Administrative Judge Edward W. Loughran granted Applicant's request for a security clearance. The Government appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

On appeal, the Government contends that the Judge failed to properly consider all available evidence, misapplied the Guideline G mitigating conditions, and misapplied Guideline I disqualifying condition AG ¶ 28(a), rendering his adverse decision arbitrary, capricious, or contrary to law. Consistent with the following, we remand the decision to address errors in the Judge's Guideline I analysis. Other issues raised by the Government are not ripe for discussion at this time.

Judge's Findings of Fact and Analysis

The Judge's findings and analysis are summarized and quoted in pertinent part below.

Applicant is in his early thirties and is a non-commissioned officer in the military. He has served since 2011. He had a series of mental health, disciplinary, and criminal incidents, some of which involved alcohol. In 2014, he had a "panic attack" and stabbed himself repeatedly in the thigh with a pen and was treated in an emergency room. In 2017, 2019, and 2021, Applicant was involved in alcohol-related incidents for which he was directed to attend military-sponsored alcohol and drug abuse prevention and treatment programs.

A DoD psychologist evaluated Applicant in March 2022. She reported that Applicant had remained sober since July 2021. The psychologist concluded that Applicant did "not meet criteria for any current mental health disorders but has a history of mental health diagnoses including adjustment disorder, generalized anxiety disorder, and depression" dating back to 2014 or earlier. Decision at 3. Although the psychologist did not diagnose Applicant with an alcohol use disorder, she noted that he met the criteria for mild alcohol use disorder in 2017, that ranged to severe in 2019 and 2021. His past repeated alcohol use issues along with emotional and self-harming behaviors are evidence of a material deficit in judgment, reliability, and stability. She said that Applicant's "minimization of alcohol use and the severity of alcohol related incidents and his avoidance of discussing self-harm behaviors until asked . . . indicate a material defect in trustworthiness." *Id.* at 4.

Under Guideline I, the Judge analyzed potentially disqualifying conditions AG ¶¶ 28(a), (b), (c), and (d). In particular, he found disqualifying condition AG ¶ 28(a) applicable to Applicant's "panic attack" in 2014 and stabbing himself in the thigh with a pen; however, he found the remaining alcohol-related conduct was covered under Guideline G and, "by definition, cannot be 'behavior that casts doubt on an individual's judgment, stability, reliability, or trustworthiness, **not covered under any other guideline.**'" *Id.* at 10 (emphasis in original). The Judge also found that Applicant's suicidal ideations, with no actual attempts, are not contemplated by AG ¶ 28(a) because "[t]houghts are not behavior." *Id.*

The Judge noted that “Applicant has mental-health issues in addition to his alcohol abuse disorder,” but ultimately held that mitigating conditions AG ¶¶ 29(a), (d), and (e) were “partially or completely applicable and sufficient to alleviate any psychological conditions security concerns.” *Id.* at 12.

Discussion

On appeal, we consider the Government’s contention that the Judge erred by not applying disqualifying condition AG ¶ 28(a) to Applicant’s alcohol-related conduct and suicidal ideations. 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 Mfr. Ass’n v. State Farm Mut. Ins. Co.*, 463 U.S. 29, 43 (1983)).

Applicant’s psychological concerns long predate his alcohol consumption concerns. He began having suicidal ideations in approximately 2007 and last had such thoughts as recently as September 2021. Tr. at 31-33. In 2014, with no apparent alcohol consumption, Applicant experienced a “panic attack” after receiving a Letter of Reprimand issued for smoking during training and repeatedly stabbed himself in the thigh with a pen, requiring emergency room treatment. Decision at 2; Government Exhibit (GE) 3 at 2. In 2019, after consuming an unknown amount alcohol, Applicant had an incident wherein he, feeling dissatisfied with his personal progress in his career and life, became aggressive, broke a table, punched a wall, head-butted a steel structure, and made suicidal comments. Decision at 2; GE 3 at 2; Tr. at 23-24. In 2021, after reportedly consuming two beers, Applicant’s military superior realized that Applicant was under the influence and indicated that he was going to take the rest of Applicant’s alcohol away. Tr. at 41-42. When the two arrived at Applicant’s residence, Applicant responded by smashing the alcohol bottles, slamming his head into the wall, punching the wall, and repeatedly stating that his “life was over.” Decision at 3; GE 2 at 1. At hearing, the Judge appeared to acknowledge that this latest incident, which occurred after Applicant purportedly consumed only two beers, presented more of a mental health concern than an alcohol consumption concern:

JUDGE: Do you think that was an alcohol-related incident or a mental health incident, because clearly something went wrong?

...

APPLICANT: Your Honor, the [military] quantifies any related incident that a member has consumed alcohol as an alcohol-related incident. So, in the eyes of the [military], it was an alcohol-related incident.

JUDGE: I'm asking in your eyes. Do you think it was caused by your drinking, or by your mental health issues? Or both? Because if it wasn't drinking, then something's wrong. Right? Because it wasn't normal behavior for somebody who's not drinking.

APPLICANT: Yes, sir. Excuse me. Yes, Your Honor. Alcohol at the time brought out negative feelings that I had internally, that I had unresolved trauma that I had not worked through, and the meeting I had with my supervisor at the time . . . triggered an emotional response, as I felt that he was shaming me for something that I thought had been accepted by those around me in my leadership chain structure, Your Honor. [Tr. at 42-43.]

In March 2022, a Government-approved psychologist opined that Applicant's "emotional lability and self-harming behavior in particular demonstrates problems with stability and judgment." GE 3 at 2. The psychologist noted that Applicant has previously been diagnosed with adjustment disorder, generalized anxiety disorder, and depression, but did "not appear to meet criteria for any current mental health disorders." GE 3 at 1. Still, the psychologist determined that Applicant's prognosis is guarded and concluded that, "[w]hile alcohol contributes to [Applicant's] poor decision-making, *he also has demonstrated self-harm with no indications of alcohol use,*" and that "[t]here is a high possibility that outside of treatment, [Applicant] could decompensate significantly." GE 3 at 3 (emphasis added). Aside from medications to address anxiety and insomnia, which are prescribed by his general practitioner, Applicant does not participate in mental health treatment. Tr. at 53-54.

Despite the foregoing and as a result of his interpretation of disqualifying condition AG ¶ 28(a), the Judge's analysis focused primarily on the alcohol-related elements of Applicant's conduct without fully addressing the significance of Applicant's mental health history. AG ¶ 28(a) contemplates disqualification for "behavior that casts doubt on an individual's judgment, stability, reliability, or trustworthiness, not covered under any other guideline and that may indicate an emotional, mental, or personality condition, including, but not limited to, irresponsible, violent, self-harm, suicidal, paranoid, manipulative, impulsive, chronic lying, deceitful, exploitative, or bizarre behaviors." For the following reasons, the Judge's failure to analyze Applicant's 2019 and 2021 incidents and suicidal ideations under AG ¶ 28(a) was in error.¹

¹ In arguing that the Judge erred by failing to apply AG ¶ 28(a), the Government contends that this condition is a "catch-all" provision for Guideline I and should be construed similarly to AG ¶ 16(d), the Guideline E catch-all provision. Appeal Brief at 15. We decline to adopt this interpretation. The language of these two disqualifying conditions is not only tailored to their specific Guideline but is also linguistically distinct – AG ¶ 28(a) considers behavior "not covered under any other guideline and that may indicate an emotional, mental, or personality disorder," while AG ¶ 16(d) considers information "not *explicitly* covered under any other guideline." (Emphasis added). Moreover, the language of AG ¶ 16(d) is inclusive in nature and provides a basis to allege information that "may not be sufficient by itself for an adverse determination." As discussed further herein, the language of AG ¶ 28(a) is designed to exclude allegations of conduct, which are otherwise fully addressed elsewhere in the Guidelines, and prevent unnecessary duplication.

The Government also argues that if AG ¶ 28(a) was "limited to conduct that could not be alleged under any other guideline, it would effectively cease to exist." Appeal Brief at 17. As demonstrated by the Judge's appropriate

Failure to Apply AG ¶ 28(a) to Alcohol-Related Incidents

The Judge held that AG ¶ 28(a) could not be used as a disqualifying condition to analyze Applicant's alcohol-related incidents in 2019 and 2021 because that provision only applied to behavior "not covered under any other guideline." In other words, the Judge held that, because the 2019 and 2021 incidents had alcohol components that were addressed under Guideline G, the incidents were precluded from analysis under Guideline I's AG ¶ 28(a). This narrow interpretation is problematic.

The Judge's interpretation of AG ¶ 28(a) effectively prohibits the condition's application when an element of certain conduct can be analyzed under another Guideline, in this case Guideline G. There are certainly some types of conduct that fall squarely under Guideline G analysis, such as plain Driving Under the Influence. But other types of conduct are multifaceted and not fully covered under other Guidelines, such as when an individual consumes alcohol and *also* exhibits "violent, self-harm, suicidal, paranoid, manipulative, impulsive, chronic lying, deceitful, exploitative, or bizarre behaviors."

To highlight its potential impact, the Judge's narrow interpretation of AG ¶ 28(a) would bar application of the disqualifying condition to the following incidents simply because the individual had consumed alcohol beforehand: self-mutilating; attempting suicide; seeing apparitions; running in the streets and entering the homes of strangers without permission; having a reciprocated conversation with an inanimate object. To withhold application of AG ¶ 28(a) to such multifaceted behaviors simply because there was an alcohol component (or some other element covered by another Guideline) could result in a judge overlooking significant psychological concerns. Such an interpretation and related potential result would undermine the effectiveness of the industrial security program in protecting the national security, which the Board will not abide. *See, e.g.*, ISCR Case No. 01-24356 at 4-5 (App. Bd. Feb. 26, 2003) (citation omitted). *See also* DISCR Case No. 87-2107 at 7 (App. Bd. Oct. 25, 1990) (In construing the Directive, the Board will give "broad and liberal construction in order to effectuate [its] essential purpose *vis-à-vis* protecting and safeguarding classified information.").

To be "covered" by another Guideline, the security concerns arising from the behavior at issue must be fully addressed by that other Guideline. If not, then psychological security concerns may go unexamined when Guideline I is not applied to that behavior, which would undermine the effectiveness of the industrial security program.

Here, Applicant's violent, self-harming, and bizarre behaviors during the 2019 and 2021 incidents raised security concerns about his mental stability that go beyond the concerns arising from his alcohol consumption. In her evaluation, the psychologist also raised concerns about Applicant's mental stability based on his mental health history. An analysis of Applicant's behavior during the 2019 and 2021 incidents solely under Guideline G did not "cover" the Guideline I mental stability security concerns arising from those incidents. Those mental stability security concerns should not go unaddressed. Based on the facts of this case, we conclude the Judge erred in not applying AG ¶ 28(a) to Applicant's 2019 and 2021 incidents.

application of AG ¶ 28(a) to the 2014 incident, and by our analysis of AG ¶ 28(a) herein, this argument is without merit.

Failure to Apply AG ¶ 28(a) to Suicidal Ideations

The Judge also held that Applicant’s history of suicidal ideations is not disqualifying under AG ¶ 28(a) because “thoughts are not behaviors.” Decision at 10. Without making a ruling directly regarding this statement, we note it is potentially problematic. Such a restrictive reading would render a host of thoughts – such as homicidal ideations, delusions (hearing voices to turn over classified information to a foreign adversary), bizarre beliefs (thinking one can control the weather with his mind), etc. – immune from Guideline I disqualification. The potential to overlook security concerns of that nature simply because they are thoughts undercuts such a narrow interpretation of AG ¶ 28(a).

Here, Applicant experienced suicidal ideations for about 14 years and also repeatedly engaged in self-harming behavior, which, when viewed in totality, elevated his ideations beyond mere “thoughts.” The Judge’s decision to withhold application of AG ¶ 28(a) to Applicant’s history of recurrent suicidal ideations simply because “thoughts are not behaviors” resulted in him overlooking behaviors of potential significant psychological concern and was in error.

Conclusion

The Government has demonstrated error that warrants remand. Pursuant to Directive ¶ E3.1.33.2, the Board remands the case to the Judge with instruction to issue a new decision, consistent with the requirements of Directive ¶ E3.1.35, after correction of the errors identified, above, and reconsideration of the record as a whole.

Order

The decision is **REMANDED**.

Signed: James F. Duffy

James F. Duffy
Administrative Judge
Chair, Appeal Board

Signed: Gregg A. Cervi

Gregg A. Cervi
Administrative Judge
Member, Appeal Board

Signed: Allison Marie

Allison Marie
Administrative Judge
Member, Appeal Board