



**DEPARTMENT OF DEFENSE
 DEFENSE LEGAL SERVICES AGENCY
 DEFENSE OFFICE OF HEARINGS AND APPEALS
 APPEAL BOARD
 POST OFFICE BOX 3656
 ARLINGTON, VIRGINIA 22203
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Date: March 9, 2026

In the matter of:)	
)	
-----)	ISCR Case No. 24-01962
)	
Applicant for Security Clearance)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Troy L. Nussbaum, Esq., Department Counsel
 Andrea M. Corrales, Esq., Deputy Chief Department Counsel

FOR APPLICANT

Pro se

The Department of Defense (DoD) declined to grant Applicant a security clearance. On January 17, 2025, DoD issued a Statement of Reasons (SOR) advising Applicant of the basis of that decision – security concerns raised under 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). On November 28, 2025, Defense Office of Hearings and Appeals Administrative Judge Ross D. Hyams granted Applicant national security eligibility. The Government appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Judge’s Procedural Rulings

At hearing, the Government moved to amend the SOR for the first time, to add three allegations under Guideline G. The Judge granted the Government’s request, amended the SOR, and held the record open for 30 days after the hearing for Applicant to address the new SOR allegations.

One week after the hearing, while the record was still open, the Government moved to amend the SOR for a second time, to allege under Guideline E that Applicant testified falsely at the hearing. Pointing to the Directive's provision regarding SOR amendments at hearing and citing the Directive's requirement that judges conduct all proceedings in a fair, timely, and orderly manner,¹ the Judge denied the Government's second SOR amendment.

Judge's Findings of Fact

Applicant is in his mid-30s. He attended college for three years, from 2005 to 2008, and is currently reenrolled to complete his bachelor's degree. Applicant served on active duty in the military from 2009 until his honorable discharge in 2018, and he was twice deployed to combat zones during that service. He was married from 2017 to 2019 and has six minor children. Applicant has been employed as an engineer with a defense contractor since 2018.

Applicant began consuming alcohol when he was 17. He reported that, while in the military, drinking was encouraged and his unit "worked hard and partied hard." Decision at 3 (citing Tr. at 127).

In 2013, Applicant was reportedly drinking at a friend's birthday, drove his car home, was stopped at a checkpoint on the way, and was arrested for Driving Under the Influence (DUI) and Driving with an Unlawful Alcohol Concentration (SOR ¶¶ 1.d, 2.b). The charge was subsequently reduced to Reckless Driving.

In 2015, Applicant was reportedly at a pool hall with a friend and, while attempting to leave, was confronted by an intoxicated patron who retrieved a gun from his car. In response to feeling threatened, Applicant's friend also retrieved a gun from his car and handed it to Applicant for a period. When police arrived, all three individuals were arrested. The SOR alleged that Applicant was arrested for holding a firearm during an altercation with another person (SOR ¶ 1.f); however, Applicant averred that he was not charged with anything from the incident. He further testified that he was neither drinking nor intoxicated at the time. The Judge acknowledged that, per the incident's police report, all three involved individuals admitted to drinking alcohol at the establishment. He went on to conclude, however, that there "was no evidence that Applicant was intoxicated while holding the gun, and he was never charged for that offense." Decision at 5.

In January 2017, Applicant was reportedly drinking at his child's mother's house, with whom he shared a long-term on-again, off-again relationship, went through her phone to look at her text messages, declined to reciprocate with his own phone or to return her phone, and then left the residence. The Judge found that "[s]he called police and filed a false report that he hit her, and stole her phone and vehicle." *Id.* Applicant was not arrested for this incident and reported it to his command, and he subsequently attended a family advocacy program to help prevent future issues between the parties. The SOR alleged this incident as Applicant having been involved in an alcohol-related domestic violence incident (SOR ¶ 1.g), which he denied.

In February 2017, Applicant was again reportedly drinking at a friend's birthday, drove his car, was pulled over for driving too slowly, and was arrested for DUI and Failure to Maintain Lane

¹ See Directive ¶¶ E3.1.10, E3.1.17.

(SOR ¶¶ 1.c, 2.b). Again, the charge was subsequently reduced to Reckless Driving. Applicant was in the military at the time and reported the arrest to his chain of command.

From about February to November 2017, following the two earlier 2017 incidents, Applicant participated in a military-based group substance use disorder program, which he successfully completed. The SOR alleged that, during this treatment, Applicant was diagnosed with Substance Use Disorder (SUD) (SOR ¶ 1.e); however, Applicant stated that he was not informed about SUD or Alcohol Use Disorder (AUD) diagnoses or recommended to stop drinking. Rather, he stated that he was told to have a plan if he drank alcohol to avoid more DUI arrests. The Judge found that there was no evidence in the record establishing that Applicant was diagnosed with SUD or AUD.

In August 2017, Applicant was drinking with his child's mother at a bar when they encountered a man that she had been dating. When the pair returned home, Applicant took her phone to see if she was still communicating with the other man and the police were called. The SOR alleged this incident as Applicant having been involved in an alcohol related domestic violence incident (SOR ¶ 1.h). The Judge noted Applicant's explanation that "they had a difficult, up and down relationship over 14 years, where both parties participated in infidelity, which caused their emotions to boil over," and found that "[t]here was no physical altercation, and [Applicant] was not arrested for this incident." *Id.*

In November 2019, Applicant was out with his siblings and drinking, drove his car, was stopped for making an improper left turn, and was administered a field sobriety test and found to be intoxicated. He was charged with DUI, Failure to Maintain Lane, and Improper Turn (SOR ¶¶ 1.b, 2.b). Under Guideline G, the SOR, as amended, alleged Applicant's foregoing history of alcohol consumption and alcohol-related incidents. Several of the Guideline G concerns were cross-alleged under Guideline E.

In May 2020, a Continuous Evaluation Report was entered into the Joint Personnel Adjudication System, which requested more information about Applicant's 2019 DUI arrest. Based on this, the SOR further alleged under Guideline E that Applicant failed to report the 2019 DUI as required (SOR ¶ 2.a). Applicant asserted that he verbally reported the 2019 DUI to his employer's facility security officer (FSO) shortly after the arrest. The Judge found that there was "no documentation in the record stating that Applicant failed to report the arrest." *Id.* at 6.

Applicant testified that, following the 2019 DUI, he realized that he needed to stop drinking and he had not consumed alcohol since the end of 2019. He was supported by numerous reference letters that endorsed his reliability and security clearance worthiness, ten letters from friends stating they had not seen Applicant drink since 2019, and two witnesses (friends and colleagues of Applicant) who believe he is reliable and trustworthy. During his six years of abstinence, he has been promoted at work, coaches community sports, and no longer sees friends with whom he would get into trouble.

Regarding the Guideline G concerns, having found that there was no evidence of a 2017 SUD diagnosis, the Judge resolved SOR ¶ 1.e favorably. He went on to find that disqualifying

conditions AG ¶¶ 22(a) and 22(c)² applied to the remaining Guideline G concerns; however, noting that Applicant “acknowledged his pattern of maladaptive alcohol use, took actions to overcome the problem, and has demonstrated a clear pattern of modified consumption, in this case abstinence,” the Judge found full mitigation of the concerns through application of AG ¶¶ 23(a) and 23(b).³ Decision at 8.

Turning to the Guideline E concerns, the Judge found disqualifying conditions AG ¶¶ 16(b) and 16(c)⁴ potentially applicable but concluded that Applicant successfully refuted the allegation at SOR ¶ 2.a that he failed to report his 2019 DUI arrest as required, “since he credibly testified that he verbally reported the arrest to his employer’s FSO.” *Id.* at 9. Noting that “Applicant determined that his life was incompatible with alcohol consumption and has completely abstained since” November 2019, he found the remaining Guideline E concern – the four cross-alleged Guideline G allegations – mitigated through application of AG ¶¶ 17(c) and 17(d).⁵

Scope of Review

The Board does not review a case *de novo* but rather addresses material issues raised by the parties to determine whether there is factual or legal error. When a judge’s factual findings are challenged, the Board must determine whether the “findings of fact are supported by such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the same record.” Directive ¶ E3.1.32.1.

When a judge’s ruling or conclusions are challenged, we must determine whether they are arbitrary, capricious, or contrary to law. Directive ¶ E3.1.32.3. A judge’s decision can be arbitrary or capricious if: it does not examine relevant evidence; it fails to articulate a satisfactory

² AG ¶¶ 22(a): alcohol-related incidents away from work, such as driving while under the influence, fighting, child or spouse abuse, disturbing the peace, or other incidents of concern, regardless of the frequency of the individual’s alcohol use or whether the individual has been diagnosed with an alcohol use disorder; 22(c): habitual or binge consumption of alcohol to the point of impaired judgment, regardless of whether the individual is diagnosed with alcohol use disorder.

³ 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; 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 ¶¶ 16(b): deliberately providing false or misleading information; or concealing or omitting information, concerning relevant facts to an employer, investigator, security official, competent medical or mental health professional involved in making a recommendation relevant to a national security eligibility determination, or other official government representative; 16(c): credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the individual may not properly safeguard classified or sensitive information.

⁵ AG ¶¶ 17(c): the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual’s reliability, trustworthiness, or good judgment; 17(d) the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that contributed to untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur.

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* ISCR Case No. 95-0600, 1996 WL 480993 at *3 (App. Bd. May 16, 1996) (citing *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)). In deciding whether a judge's rulings or conclusions are contrary to law, the Board will consider whether they are contrary to provisions of Executive Order 10865, the Directive, or other applicable federal law. *See* ISCR Case No. 03-22861, 2006 WL 2457675 at *2 (App. Bd. Jun. 2, 2006).

When an appeal issue raises a question of law, the Board's scope of review is plenary. *See* DISCR OSD Case No. 87-2107, 1992 WL 388439 at *3-4 (App. Bd. Sep. 29, 1992) (citations to federal cases omitted). If an appealing party demonstrates factual or legal error, then the Board must consider the following questions: (1) Is the error harmful or harmless?; (2) Has the nonappealing party made a persuasive argument for how the judge's decision can be affirmed on alternate grounds?; and (3) If the judge's decision cannot be affirmed, should the case be reversed or remanded? *See* ISCR Case No. 02-08032, 2004 WL 1434394 at *2 (App. Bd. May 14, 2004).

Discussion

On appeal, the Government challenges the Judge's conduct during and after the hearing, to include his denial of the second SOR amendment, contends that his favorable findings were unsupported by the record and based on an unsupported credibility determination, and argues that his application of the Guideline G and Guideline E mitigating conditions and Whole-Person Concept were arbitrary, capricious, and not supported by the record evidence. The Government's arguments persuasively establish error that warrants remand.

Judge's Conduct at Hearing

At the beginning of the hearing, the Government identified its exhibits for the record and the Judge interjected that "Government's Exhibit 14 is a -- 108 pages of medical records" and instructed Department Counsel to identify in a post-hearing submission "any parts of those records you want to highlight for me in particular." Tr. at 17. The Judge continued:

You know, we have sort of changed our processes up here where we're not just going to take hundreds of thousands of pages of medical records and expect me to figure out what -- you -- I know you have reviewed it already. So you know, let me know where the relevant pages are.

Id. The Board is aware of no Hearing Office policy or process that authorizes judges to limit their review of record evidence to "relevant pages" as identified by any party. To the contrary, any such policy would run contrary to the Directive and Appeal Board precedent that judges are responsible for considering *all* relevant evidence in reaching national security eligibility determinations,⁶ and

⁶ *See, e.g.*, Directive ¶ 6.3; AG ¶ 2(a); DISCR OSD Case No. 90-0766, 1992 WL 450050 at *2 (App. Bd. Mar. 12, 1992) (citing *W. Pac. Fisheries v. SS Pres. Grant*, 730 F.2d 1280, 1285 (9th Cir. 1984)).

we are confident that the Hearing Office would not contradict those guidelines. While seeking specific citations for particularly relevant evidence amidst voluminous records is not prohibited or problematic in itself, that assistance is not a substitute for the judge's ultimate responsibility to consider all relevant and material information in the record.

In the Decision and as set forth below, the Judge failed repeatedly to acknowledge relevant evidence contained in Applicant's 2017 treatment records. Given his statements about those records at hearing, the Judge's subsequent disregard of that and other record evidence is of particular concern.

Factual Findings & Evidentiary Conflicts

We turn next to the Government's argument that the Judge credited Applicant's testimony without acknowledging the record's conflicting evidence and without addressing how those conflicts impact upon Applicant's credibility. The Government contends that the Judge erred in this regard and that, because the resulting factual findings and credibility determination were central to his disqualification and mitigation analyses, the error was harmful. As discussed below, the Government's arguments have merit.

For example, regarding the allegation that Applicant was arrested for holding a firearm during an altercation after leaving a bar in May of 2015 (SOR ¶ 1.f), Applicant testified that he was not drunk during the incident *and* that he had not been drinking. Tr. at 63. In his factual findings, the Judge noted both denials from Applicant's testimony and, after acknowledging the police reports in evidence, went on to find that there "was no evidence that Applicant was intoxicated while holding the gun." Decision at 4, 5. The Judge failed to address, however, that the police reports reflect that Applicant "admitted to have been drinking alcohol" when the argument began. Government Exhibit (GE) 15 at 7.

The conflict between Applicant's testimony and the 2015 police report represents one – but not the only – example of the Judge failing to explain his resolution of conflicting evidence in Applicant's favor. The Judge also credited Applicant's testimony that he "was never charged with anything from this incident" to find the same. Decision at 4, 5. The Government argues that, here again, the Judge ignored conflicting record evidence, including the police report that all three individuals involved "were all taken into custody and transported to . . . jail for possession of firearm w/ alcohol"; Applicant's 2017 treatment disclosure that he was arrested for possession of a firearm while under the influence "but the charges were dropped"; Applicant's 2019 security clearance application disclosure that he was charged with Possession of a Firearm for the incident; and Applicant's testimony that the court required him to undergo urinalysis because of the arrest. GE 1 at 35; GE 14 at 16; GE 15 at 7; Tr. at 102. We further note that the Judge's emphasis on whether Applicant was ultimately *charged* following the incident is misplaced. Rather, it is his *underlying conduct* during the incident that is relevant to the Guideline G concern and evaluating Applicant's national security eligibility. The Judge erred in failing to consider the evidence that this was – despite Applicant's testimony – another alcohol-related incident and part of a pattern of such incidents.

Regarding the allegation that Applicant was treated in 2017 for a condition diagnosed as SUD (SOR ¶ 1.e), the Judge held that "[t]here is no documentation in the record showing that

Applicant was diagnosed with [SUD], as alleged, or [AUD].” Decision at 4. The Government argues that Applicant’s 2017 treatment records, however, repeatedly identify his diagnosis of Alcohol Abuse.⁷ We find no error in the Judge’s technically-correct finding – there appears to be no evidence that Applicant was diagnosed with SUD or AUD – but note that the Decision is silent to Applicant’s 2017 *Alcohol Abuse* diagnosis. The Judge erred in failing to discuss this relevant evidence in the findings of fact or mitigation analysis.⁸

Another of the Judge’s problematic findings was that Applicant “was not told that he must stop drinking” during the 2017 treatment program. Decision at 4. In adopting this testimony as fact, the Judge failed to acknowledge the contrary record evidence that Applicant’s 2017 treatment plan included maintaining abstinence, which recommendation Applicant was repeatedly advised of and understood, but initially disagreed with.⁹ When conflicts exist in a record, the judge must carefully consider all of the evidence, weigh it in a reasonable manner, and make factual findings that reflect a reasonable interpretation thereof.¹⁰ The Judge’s factual findings, drawn uncritically from Applicant’s testimony and in the face of conflicting evidence, were arbitrary and capricious.¹¹

Regarding the Guideline E allegation that Applicant failed to report his 2019 DUI as required (SOR ¶ 2.a), the Judge found that “[t]here is no documentation in the record stating that Applicant failed to report the arrest.” Decision at 6. Contrary to that finding, the record reflects that Applicant’s 2019 DUI was discovered pursuant to the DoD Continuous Evaluation (CE)

⁷ Appeal Brief at 27 (citing GE 14). On appeal, the Government notes that Alcohol Abuse was the precursor diagnosis to AUD, used in the previous version of the Diagnostic and Statistical Manual of Mental Disorders (DSM). *Id.* Even assuming that the Judge was unaware that the diagnoses were linked through sequential updates to the DSM, his failure to acknowledge the given alcohol-related diagnosis and address any potential disqualifying impact thereof was arbitrary and capricious.

Moreover, an SOR is an administrative pleading, which is not held to the stringent standards of a criminal indictment and is instead “a means to assist the disposition of a case on its merits.” ISCR Case No. 99-0710 at 2 (App. Bd. Mar. 19, 2001) (As long as an applicant receives fair notice about the matters at issue in his case and has a reasonable opportunity to respond, a case should be decided on the merits of the relevant issues and not concerned with pleading niceties.). The reference in SOR ¶ 1.e to a *SUD* diagnosis during Applicant’s 2017 alcohol treatment, while technically incorrect, was sufficient to place Applicant on notice that his *Alcohol Abuse* diagnosis during that same treatment was of security significance and would be addressed as a concern at hearing.

⁸ See ISCR Case No. 05-03250, 2007 WL 1560031 at *3 (App. Bd. Apr. 6, 2007) (A judge “cannot ignore, disregard, or fail to discuss significant record evidence that a reasonable person could expect to be taken into account in reaching a fair and reasoned decision.”).

Similarly, a reasonable person would expect the Decision to acknowledge that, per the 2017 treatment records, Applicant had previously been Command-referred for military-based alcohol treatment programs in 2013 and 2015, and that he was Command-directed for evaluation in November 2017 due to his undergoing Chapter Separation following “too may alcohol related incidents.” GE 14 at 5, 97.

⁹ See, e.g., GE 14 at 98-99 (during January 12 assessment, Applicant “expressed an understanding of the [Alcohol Abuse] diagnosis and plan” – to include remaining abstinent – but disagreed with treatment plan, did “not agree that he has an alcohol problem,” and was “not amenable to enrollment” in the program); *id.* at 64 (following February 2017 DUI, Applicant agreed for first time with treatment goal to maintain abstinence).

¹⁰ See ISCR Case No. 98-0507 at 4 (App. Bd. May 17, 1999).

¹¹ See ISCR Case No. 00-0620, 2001 WL 1729289 at *2 (App. Bd. Oct. 19, 2001) (citing *Anderson v. City of Bessemer*, 470 U.S. 564, 575 (1985) (It is arbitrary and capricious for a judge “to uncritically accept a witness’s testimony without considering whether it is plausible and consistent with other record evidence.”).

Program, through which a CE Report was entered because the Program “developed . . . *unreported* information about [Applicant],” namely, that he was charged with DUI on November 29, 2019. GE 13. Here again, the Judge should have acknowledged the CE Report’s specific language and explicitly addressed why he found Applicant’s explanation more credible.

It is well-established that when a record contains a basis to question an applicant’s credibility, the judge “should address that aspect of the record explicitly,” explaining why an applicant’s version of an event is worthy of belief when it is contradicted by other evidence or common sense. ISCR Case No. 07-10158, 2008 WL 4635412 at *4 (App. Bd. Aug. 28, 2008). Failure to do so suggests that a judge “has merely substituted a favorable impression of an applicant’s demeanor for record evidence.” *Id.*

In summary, in multiple instances the Judge erred in failing to explain why he credited Applicant’s testimony without addressing or even acknowledging the record’s conflicting evidence and without addressing how those conflicts impact upon Applicant’s credibility. As a result, he made underdeveloped or unsupported factual findings and disregarded potentially applicable disqualifying conditions, including AG ¶¶ 22(d), 22(e), and 22(f),¹² leading to an incomplete and unsustainable disqualification analysis.

Conclusion

Considering the Judge’s statements made during hearing coupled with his uncritical acceptance of Applicant’s explanations in the face of other conflicting record evidence, we are satisfied that the Government has rebutted the presumption that the Judge considered all of the evidence before him. The Government has met its burden on appeal of demonstrating harmful error below and we conclude that the best resolution of this case is remand.¹³ Moreover, because the foregoing combination of factors could lead a reasonable person to question the Judge’s fairness and impartiality, we further conclude that this case should be assigned to a different judge on remand.¹⁴

When there is a remand to a different judge, and credibility is an issue in the case, a new hearing may be necessary. *See* DISCR Case No. 90-0279, 1993 WL 545025 at *5 (App. Bd. Sep. 22, 1993). Because Applicant’s credibility may be important to the issues in this case, the judge assigned on remand should ascertain if the parties consent to have a determination made on the

¹² AG ¶¶ 22(d): diagnosis by a duly qualified medical or mental health professional . . . of alcohol use disorder; 22(e): the failure to follow treatment advice once diagnosed; 22(f): alcohol consumption, which is not in accordance with treatment recommendations, after a diagnosis of alcohol use disorder.

¹³ *See* ISCR Case No. 22-01002, 2024 WL 4445514 at *3 (App. Bd. Sep. 26, 2024) (“[Remand] is appropriate when the legal errors can be corrected through remand and there is a significant chance of reaching a different result upon correction, such as when a judge fails to consider relevant and material evidence.”).

¹⁴ “Implicit in the [due process] concept of a meaningful opportunity to respond is the premise that a party will receive fair consideration of the evidence that it presents. Public confidence in the fairness and integrity of the industrial security program depends, to a large degree, on there being both the substance and the appearance of a fair and impartial adjudication after reasonable consideration of the record evidence as a whole. If an Administrative Judge makes statements or acts in a manner that could lead a reasonable person to question whether the Judge considered all the record evidence, then a party could understandably question whether it received fair consideration of the evidence it presented.” ISCR Case No. 02-23979, 2004 WL 2152746 at *3 (App. Bd. Aug. 25, 2004).

basis of the existing record. If both parties consent to such a determination, then the judge should render a new decision without holding a new hearing. If either party declines to consent to having the case decided on the basis of the existing record, then the judge should hold a new hearing and issue a decision that complies with all of the relevant provisions of the Directive. 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 E3.1.30.¹⁵

Order

The decision in ISCR Case No. 24-01962 is **REMANDED**.

Signed: Moira Modzelewski

Moira Modzelewski
Administrative Judge
Chair, Appeal Board

Signed: Allison Marie

Allison Marie
Administrative Judge
Member, Appeal Board

Signed: Jennifer I. Goldstein

Jennifer I. Goldstein
Administrative Judge
Member, Appeal Board

¹⁵ In light of this resolution, the Board need not address the remaining issues raised by the Government on appeal.