

KEYWORD: Guideline G; Guideline J

DIGEST: Department Counsel points out that, besides a four-month period, the record is void of any information about whether or not Applicant subsequently consumed alcohol. Therefore, there is nothing in the record to support a finding about of her alcohol consumption subsequent to her background interview. (“[A]bsence of evidence is not evidence of absence”). Accordingly, the Judge’s statements that Applicant “no longer abuses alcohol” and “has not abused alcohol for two-and-a-half years” are not supported by the record. Adverse decision affirmed.

CASENO: 14-04825.a1

DATE: 08/04/2016

DATE: August 4, 2016

In Re:	)	
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Applicant for Security Clearance	)	ISCR Case No. 14-04825

**APPEAL BOARD DECISION**

**APPEARANCES**

**FOR GOVERNMENT**

Braden M. Murphy, Esq., Department Counsel

**FOR APPLICANT**

*Pro se*

The Department of Defense (DoD) declined to grant Applicant a security clearance. On February 5, 2015, DoD issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline G (Alcohol Consumption) and Guideline J (Criminal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a decision on the written record. On April 11, 2016, after considering the record, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Arthur E. Marshall, Jr. granted Applicant’s request for a security clearance. Department Counsel appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Department Counsel raised the following issue on appeal: whether the Judge’s decision was arbitrary, capricious, or contrary to law. Consistent with the following, we reverse.

### **The Judge’s Findings of Fact**

Applicant is a 61-year-old employee of a defense contractor. She has worked for her current employer since 2006. She is a high school graduate, divorced, and raised two children. One of her children passed away in 2010 and the other is an adult. She has held a security clearance since 1992.

Applicant has a history of alcohol-related incidents and legal violations. She started consuming alcohol at about age 15 and continued doing so, including at times to excess and the point of intoxication, until about December 2012. In 1986, she pled guilty to driving while impaired (DWI) and hit-run property and was sentenced to 60 days (suspended), two years probation, community service, and a fine. In 1987, she was cited for failure to comply with restricted driving privileges and failure to wear seatbelt. In 1995 and 2005, she pled guilty to DWI offenses and received suspended jail sentences, probation, and fines.

In 2012, Applicant was arrested for failure to stop at a stop sign/flashing red light and reckless driving. She pled guilty to a lesser offense and was sentenced to a fine. Later in 2012, she was arrested for DWI, possession of an open container, and failure to maintain lane control. A breathalyzer test revealed her blood alcohol content was 0.20. In December 2013, she pled guilty to the charges and was sentenced to 120 days (suspended), one year probation, driver’s license suspension for 45 days, community service, and a fine.

For about four months in 2013, Applicant received outpatient treatment on her own initiative at a counseling facility and was diagnosed with alcohol abuse. She also participated in an employee assistance program (EAP). In December 2013, she had three or four cocktails before bed. In the morning, she received a reprimand at work because she smelled of alcohol. She revisited EAP counseling, expanding its coverage to include grief counseling for the loss of her son. She also began attending alcoholic anonymous (AA) meetings and went through a divorce during this period.

Applicant has not abused alcohol since December 2013. In March 2014, she completed early the probation imposed for her last DWI. She has been incident-free for over two years and continues EAP counseling and participation in AA.

### **The Judge's Analysis**

The Judge concluded that Applicant has not abused alcohol in nearly two-and-a-half years. She sought help through outpatient treatment, EAP counseling, and AA participation. It was unclear whether her incident at work in December 2013 was a relapse, poor hygiene, or another reason besides alcohol abuse. She completed her probation early due to her positive progress. She is remorseful, understands the gravity of her past behavior, and is committed to maintaining sobriety.

### **Discussion**

There is a strong presumption against the grant or maintenance of a security clearance. *See Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9<sup>th</sup> Cir. 1990), *cert. denied*, 499 U.S. 905 (1991). After the Government presents evidence raising security concerns, the burden shifts to the applicant to rebut or mitigate those concerns. *See* Directive ¶ E3.1.15. “The application of disqualifying and mitigating conditions and whole person factors does not turn simply on a finding that one or more of them apply to the particular facts of a case. Rather, their application requires the exercise of sound discretion in light of the record evidence as a whole.” *See, e.g.*, ISCR Case No. 05-03635 at 3 (App. Bd. Dec. 20, 2006).

In deciding whether the Judge's rulings or conclusions are erroneous, 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. 14-02563 at 3-4 (App. Bd. Aug. 28, 2015).

Department Counsel challenges the Judge's findings that Applicant “has not abused alcohol in nearly two-and-a-half years” and that she provided sufficient evidence of actions she took to overcome her alcohol abuse problem.<sup>1</sup> We examine a Judge's findings to see if they 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.

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<sup>1</sup> In his analysis, the Judge found the mitigating condition in Directive, Enclosure 2 ¶ 23(b) was applicable. This mitigating condition states, “the individual acknowledges his or her alcoholism or issues of alcohol abuse, provides evidence of actions taken to overcome this problem, and has established a pattern of abstinence (if alcohol dependent) or responsible use (if alcohol user)[.]”

We find Department Counsel's argument to be persuasive. During a background interview in March 2014, Applicant stated that she last consumed alcohol the night before she received a reprimand at work for smelling of alcohol in December 2013. Department Counsel points out that, besides that four-month period (December 2013 to March 2014), the record is void of any information about whether or not Applicant subsequently consumed alcohol. Her Answer to the SOR and her Response to Department Counsel's File of Relevant Material (FORM) do not address her consumption of alcohol. Therefore, there is nothing in the record to support an affirmative finding about the nature of her alcohol consumption subsequent to her background interview, and it goes without saying that there is nothing, and indeed can be nothing, concerning her conduct following the close of the record. *See, In re: Rail Freight Fuel Surcharge Antitrust Litigation*, 725 F.3d 244 at 254 (D.C. Cir. 2013) ("[A]bsence of evidence is not evidence of absence"). Accordingly, the Judge's statements that Applicant "no longer abuses alcohol" and "has not abused alcohol for two-and-a-half years" are not supported by the record.

Department Counsel also notes that the evidence of Applicant's actions taken to overcome her four DWI convictions and alcohol abuse diagnosis mostly predates her latest DWI sentencing in December 2013. Her security clearance application (SCA) dated February 2014 reflects she successfully completed 40-hours of court-ordered substance abuse counseling as well as four months of counseling or treatment in November 2013, which was the month before her alcohol-related incident at work. In her background interview, she provided amplifying information by stating she enrolled in the EAP in August 2013, which included grief counseling regarding the untimely death of her son. In November 2013, she stopped the counseling because she "felt overwhelmed." After receiving the reprimand in December 2013, her employer urged her to continue with the counseling. However, the record does not reflect whether she continued with the counseling or participated in AA following her background interview in March 2014. Consequently, the Judge's finding that she "continues with those resources" (Decision at 3) is not supported by the evidence in the record.

Department Counsel argues that the Judge's mitigation analysis under the alcohol consumption guideline was flawed because it relied heavily upon unsubstantiated findings about Applicant's continued sobriety and her ongoing involvement with counseling and AA. For the same reasons, Department Counsel contends the Judge's mitigation analysis under the criminal conduct guideline was defective. In this regard, Department Counsel also notes that, except for the absence of evidence of any additional arrests, there was no evidence that supported Judge's finding that "[Applicant] now comports her behavior appropriately." Additionally, Department Counsel contends that the Judge erroneously concluded that Applicant finished her probation early. While her supervised probation ended early in about March 2014, she indicated in her Response to the FORM that she remained on probation until December 2014.

In light of the foregoing, we conclude that the Judge's decision fails to articulate a satisfactory explanation for its conclusions, including a rational connection between the facts founds and the choices made; reflects an error in judgment; fails to consider important aspects of the case; offers an explanation for the decision that runs contrary to the weight of the record evidence, and is so implausible that it cannot be ascribed to a mere difference of opinion. *See ISCR Case No. 14-01490 at 3-6 (App. Bd. Apr. 15, 2016).*

**Order**

The Decision is **REVERSED**.

Signed: Michael Ra'anan \_\_\_\_\_

Michael Ra'anan  
Administrative Judge  
Chairperson, Appeal Board

Signed: James E. Moody \_\_\_\_\_

James E. Moody  
Administrative Judge  
Member, Appeal Board

Signed: James F. Duffy \_\_\_\_\_

James F. Duffy  
Administrative Judge  
Member, Appeal Board