



**DEPARTMENT OF DEFENSE  
DEFENSE OFFICE OF HEARINGS AND APPEALS**



In the matter of: )  
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----- ) ISCR Case No. 08-07224  
SSN: ----- )  
 )  
Applicant for Security Clearance )

**Appearances**

For Government: Robert E. Coacher, Esquire, Department Counsel  
For Applicant: *Pro Se*

November 17, 2008

**Decision**

HARVEY, Mark W., Administrative Judge:

Applicant committed three alcohol-related criminal offenses between 2001 and 2008. His most recent Driving While Intoxicated (DWI) offense occurred on May 25, 2008, after he applied for a security clearance. Applicant is still on probation and has started, but not completed all court-ordered alcohol treatment. Applicant failed to mitigate security concerns arising from alcohol consumption, personal conduct and criminal conduct. Drug involvement security concerns are mitigated because they are not recent. Clearance is denied.

**Statement of the Case**

On November 9, 2007, Applicant completed an Electronic Questionnaire for Investigations Processing (e-QIP) or security clearance application (Government Exhibit (GE) 1). On August 29, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant (GE 20). The SOR detailed the basis for its preliminary decision to deny Applicant eligibility for a security clearance pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended and modified, and Department of

Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended, modified and revised, and the revised adjudicative guidelines (AG) promulgated by the President on December 29, 2005, and effective within the Department of Defense for SORs issued after September 1, 2006. The SOR alleges security concerns under Guidelines G (alcohol consumption), H (drug involvement), E (personal conduct) and J (criminal conduct) (GE 19). The SOR detailed reasons why DOHA could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue his security clearance, and recommended referral to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked.

Applicant responded to the SOR allegations on October 1, 2008, and the government subsequently requested a hearing before an administrative judge (GE 20). On October 27, 2008, the case was assigned to me. Applicant waived his right to 15-days' hearing notice, and his hearing was held on November 5, 2008 (Transcript (Tr.) 14-15). See ADP Case No. 05-12037 (App. Bd. May 10, 2007) (endorsing process for waiving 15-day notice). Department Counsel offered 17 exhibits (GEs 1-17) (Transcript (Tr.) 21-22), and Applicant did not offer any exhibits. There were no objections, and I admitted GE 1-17 (Tr. 22). Additionally, I admitted the SOR, response to the SOR and Hearing Notice (GE 18-20). I received the transcript on November 12, 2008.

### **Findings of Fact<sup>1</sup>**

Applicant admitted in his response to the SOR the SOR allegations with explanations (GE 20). He admitted he did not include his 2003 DWI conviction on his security clearance application, but said the omission was a mistake and not deliberate (GE 20). His admissions are incorporated herein as findings of fact. After a complete and thorough review of the evidence of record, I make the following findings of fact.

Applicant is 25 years old and has worked for a government contractor for 18 months (Tr. 6, 23, 25). In 2001, he received his graduate equivalency diploma (GED) and he subsequently completed two years of college (Tr. 6). Applicant has been employed in the area of information technology (IT) for three years (Tr. 24) and currently works as a IT help desk coordinator (Tr. 23). He does not hold a security clearance (Tr. 7). He is not married, and has a two-year-old son (Tr. 50).

### **Alcohol Consumption and Criminal Conduct**

On August 25, 2001, Applicant was arrested and charged with driving under the influence of alcohol (DUI). On October 24, 2001, he was convicted of driving after illegal consumption of alcohol (SOR ¶ 1.a, GE 5). He was sentenced to pay a fine and court costs, attend Alcohol Safety Action Program (ASAP), and his license was suspended for six months. *Id.* He paid his fine and court costs on April 26, 2002 (GE 5, 6).

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<sup>1</sup>Some details have not been included in order to protect Applicant's right to privacy. Specific information is available in the cited exhibits. His Response to SOR (GE 20) is the source for the facts in this section unless stated otherwise.

On May 3, 2003, Applicant was arrested and charged with DWI 1<sup>st</sup> Offense. On February 13, 2004, the court found him guilty of DWI and sentenced him 30 days in jail, to attend ASAP, and suspended his license for 12 months (SOR ¶ 1.b). He received a \$100 fine and \$277 in court costs (GE 7). He attended ASAP and some Alcoholics Anonymous meetings after the 2003 DWI (Tr. 47, GE 2).

On February 24, 2004, the court issued a show cause order concerning Applicant's failure to complete ASAP as previously ordered (SOR ¶ 1.c).

In January 2008, an Office of Personnel Management (OPM) investigator interviewed Applicant (Tr. 30-31). Applicant admitted to the OPM investigator that he had a DUI arrest in 2001, and a DWI arrest in 2003 (Tr. 31). Applicant said he had learned his lesson and that he did not have a problem with alcohol (Tr. 31).

On May 25, 2008, the police arrested Applicant for DWI 2<sup>nd</sup> Offense and Refusal to Provide Blood/Breath Sample and Obstruction of Justice Without Force (SOR ¶ 1.d, GE 15, 16, 17, 20). On September 10, 2008, the court found Applicant guilty of DWI 1<sup>st</sup> Offense, and dismissed the other offenses (Tr. 26). The court adjudged a fine, four days in jail, one year of probation, a restricted driver's license and additional ASAP attendance (Tr. 26-30). Applicant currently attends ASAP once a week for two hours, and must attend ASAP for four months (Tr. 26-27). He is also required to attend ten Alcoholics Anonymous (AA) meetings and to receive outpatient alcohol treatment (Tr. 27). He has not attended any AA meetings, but intends to do so (Tr. 28, 47-48). His initial outpatient alcohol treatment is scheduled for November 18, 2008 (Tr. 28). He expects to learn at that time whether he is classified as alcohol dependent or not (Tr. 49).

Applicant indicated his 2008 DWI offense showed a lapse in judgment and he conceded he made poor decisions (Tr. 32-33). However, he insisted he was not dependent on alcohol and did not have a problem with alcohol (Tr. 33-34). He did not drink alcohol at work (Tr. 41). He said "my judgment at work is completely different from what I do in my—you know, in—in my social environment . . . the way I, you know, the way I conduct business is completely different from what I do outside—you know, outside of work" (Tr. 42).

Applicant is not permitted to drink alcohol as a condition of his probation and he currently is not drinking alcohol (Tr. 34-35). He declined to rule out resumption of alcohol consumption after his probation is concluded in September 2009 (Tr. 35).

### **Drug Involvement and Criminal Conduct**

From approximately January 2000 to May 2005, Applicant used marijuana (SOR ¶ 2.a). From approximately January 2000 to March 2007, he used ecstasy (SOR ¶ 2.b). and cocaine (SOR ¶ 2.c). He purchased marijuana in about April 2002 while on a trip to Jamaica (SOR ¶ 2.d). He described his illegal drug use as experimenting with friends (Tr. 36-37). He does not associate with the cocaine and ecstasy users; however, he continues to associate with marijuana users (Tr. 37). He did not use illegal drugs after

the government contractor hired him on April 16, 2007 (Tr. 38, 44-45). He emphasized that the cut off date for his drug use was April 16, 2007 (Tr. 45-46, GE 2). Before he was hired, he disclosed his drug use to his employer (Tr. 47).

## **Personal Conduct and Criminal Conduct**

In addition to the information in the alcohol consumption and drug involvement sections which pertains to personal conduct under the AGs, on March 22, 2001, Applicant was charged with driving under license revocation/suspension, a misdemeanor (SOR ¶ 3.b). The court found Applicant guilty and sentenced him to 90 days in jail (80 days suspended), to pay court costs, and suspended his license for 90 days.

On October 12, 2003, Applicant was charged with driving on a suspended license, eluding police and reckless driving, all misdemeanors (SOR ¶ 3.c). He received a \$600 fine and \$109 court costs (GE 8, 9, 10). He paid the fine and costs on August 20, 2004 (GE 8, 9, 10).<sup>2</sup> He attributed the multiple traffic infractions to intermittent bad driving (Tr. 39-41).

Applicant listed his 2001 DUI arrest; however, he failed to list his 2003 DWI charge and 2004 DWI conviction in response to Section 23 of his November 9, 2007, security clearance application, which requested information about alcohol charges or convictions (SOR ¶ 3.e). He listed his 2003 eluding police arrest and his extensive drug use on his security clearance application. He also listed an employment ended under adverse circumstances, and alcohol treatment he had received. Applicant explained that his security manager requested that he resubmit his security clearance application and when he resubmitted it he mistakenly failed to list the 2003 DWI arrest, which resulted in a DWI conviction in February 2004 (Tr. 42-43). When an OPM investigator interviewed him about his clearance he freely admitted omission of the 2004 DWI (Tr. 43). After his 2008 DWI, he informed his security manager of his arrest (Tr. 47).

## **Policies**

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security emphasizing, “no one has a ‘right’ to a security clearance.” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has the authority to control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to have access to such information.” *Id.* at 527. The President has authorized the Secretary of Defense or his designee to grant Applicant’s eligibility for access to classified information “only upon a finding that it is

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<sup>2</sup>Applicant’s friend was with him when he was arrested. Applicant’s friend lied to the police and in court, falsely stating she was driving (SOR ¶ 3.d, GE 20). Applicant’s friend was charged with perjury and convicted of an amended charge of obstruction on February 24, 2004 (GE 11-13). The court fined her \$125 and ordered payment of \$128 in court costs (GE. 11-13).

clearly consistent with the national interest to do so.” Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended and modified.

Eligibility for a security clearance is predicated upon the Applicant meeting the criteria contained in the revised adjudicative guidelines (AG). These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with an evaluation of the whole person. An administrative judge’s over-arching adjudicative goal is a fair, impartial and common sense decision. An administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable.

The government reposes a high degree of trust and confidence in persons with access to classified information. This relationship transcends normal duty hours and endures throughout off-duty hours. Decisions include, by necessity, consideration of the possible risk the Applicant may deliberately or inadvertently fail to protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information. Clearance decisions must be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the [A]pplicant concerned.” See Exec. Or. 10865 § 7. See also Executive Order 12968 (Aug. 2, 1995), Section 3. Thus, nothing in this Decision should be construed to suggest that I have based this decision, in whole or in part, on any express or implied determination as to Applicant’s allegiance, loyalty, or patriotism. It is merely an indication the Applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the government must establish, by substantial evidence, conditions in the personal or professional history of the Applicant that may disqualify the Applicant from being eligible for access to classified information. The government has the burden of establishing controverted facts alleged in the SOR. See *Egan*, 484 U.S. at 531. “Substantial evidence” is “more than a scintilla but less than a preponderance.” See *v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4<sup>th</sup> Cir. 1994). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an Applicant’s security suitability. See ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

Once the government establishes a disqualifying condition by substantial evidence, the burden shifts to the Applicant to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An Applicant “has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance.” ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). The burden of disproving a mitigating condition never shifts to the government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005). “[S]ecurity clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531; see AG ¶ 2(b).

## Analysis

Upon consideration of all the facts in evidence, and after application of all appropriate legal precepts, factors, and conditions, I conclude the relevant security concern is under Guidelines G (alcohol consumption), H (drug involvement), E (personal conduct) and J (criminal conduct) with respect to the allegations set forth in the SOR.

### Alcohol Consumption

AG ¶ 21 articulates the Government's concern about alcohol consumption, "[e]xcessive alcohol consumption often leads to the exercise of questionable judgment or the failure to control impulses, and can raise questions about an individual's reliability and trustworthiness."

Seven Alcohol Consumption disqualifying conditions could raise a security or trustworthiness concern and may be disqualifying in this case. AG ¶¶ 22(a) - 22(g) provide:

- (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 whether the individual is diagnosed as an alcohol abuser or alcohol dependent;
- (b) alcohol-related incidents at work, such as reporting for work or duty in an intoxicated or impaired condition, or drinking on the job, regardless of whether the individual is diagnosed as an alcohol abuser or alcohol dependent;
- (c) habitual or binge consumption of alcohol to the point of impaired judgment, regardless of whether the individual is diagnosed as an alcohol abuser or alcohol dependent;
- (d) diagnosis by a duly qualified medical professional (e.g., physician, clinical psychologist, or psychiatrist) of alcohol abuse or alcohol dependence;
- (e) evaluation of alcohol abuse or alcohol dependence by a licensed clinical social worker who is a staff member of a recognized alcohol treatment program;
- (f) relapse after diagnosis of alcohol abuse or dependence and completion of an alcohol rehabilitation program; and
- (g) failure to follow any court order regarding alcohol education, evaluation, treatment, or abstinence.

AG ¶¶ 22(b), 22(c), 22(d), 22(e), 22(f) and 22(g) do not apply. He did not consume alcohol at work or have any alcohol-related incidents at work. Currently, he does not habitually consume or engage in binge-alcohol consumption to the extent of impaired judgment. Binge drinking is not defined in the Directive and is not established. On February 24, 2004, the court issued a show cause order concerning Applicant's failure to complete ASAP as previously ordered (SOR ¶ 1.c); however, there is no evidence that the court found he actually violated a court order regarding alcohol education, evaluation, treatment or abstinence. Although Applicant believed that he received an alcohol evaluation from an outpatient alcohol treatment facility after his 2003 DWI arrest, the results of this evaluation are not part of the record, and Applicant was not aware of the diagnosis or prognosis.

AG ¶ 22(a) applies. Applicant was arrested for DUI and convicted of driving after illegal consumption of alcohol in 2001. He was convicted of DWI in February 2004 and September 2008.

Four Alcohol Consumption Mitigating Conditions under AG ¶¶ 23(a)-(d) are potentially applicable:

(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 good judgment;

(b) 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 an alcohol abuser);

(c) the individual is a current employee who is participating in a counseling or treatment program, has no history of previous treatment and relapse, and is making satisfactory progress; and

(d) the individual has successfully completed inpatient or outpatient counseling or rehabilitation along with any required aftercare, has demonstrated a clear and established pattern of modified consumption or abstinence in accordance with treatment recommendations, such as participation in meetings of Alcoholics Anonymous or a similar organization and has received a favorable prognosis by a duly qualified medical professional or a licensed clinical social worker who is a staff member of a recognized alcohol treatment program.

AG ¶ 23(a) does not apply. On May 25, 2008, the police arrested Applicant for DWI 2<sup>nd</sup> Offense (SOR ¶ 1.d). On September 10, 2008, the court found Applicant guilty of DWI 1<sup>st</sup> Offense. This DWI is recent. It is his third alcohol-related arrest in eight years. These three events are relatively frequent and recent. He stopped his alcohol consumption as required by his probation, and accordingly he receives some credit

because his alcohol-related offenses, “happened under such unusual circumstances that it is unlikely to recur or does not cast doubt on the individual’s current reliability, trustworthiness, or good judgment.” AG ¶ 23(a) cannot be fully applied because he continued to consume alcohol up until May 2008. He has not abstained from alcohol consumption for a sufficient period of time. Additionally, he declined to commit to ending his alcohol consumption after his probation is completed.

Security clearance cases are difficult to compare, especially under Guideline G, because the facts, degree and timing of the alcohol abuse and rehabilitation show many different permutations. The Appeal Board has determined in cases of substantial alcohol abuse that AG ¶ 23(b) did not mitigate security concerns unless there was a fairly lengthy period of abstaining from alcohol consumption.<sup>3</sup>

AG ¶¶ 23(b) to 23(d) do not fully apply. Applicant did not acknowledge being alcohol dependent or being an alcoholic. He is minimizing his alcohol consumption problem, refusing to acknowledge that he has an alcohol “problem.” Although he completed an alcohol abuse treatment program after his 2003 DUI, he stopped attending AA meetings. After his 2008 DWI, he started another court-ordered alcohol treatment program. He stopped consuming alcohol in May 2007. His history of alcohol problems, his failure to fully recognize and acknowledge his alcohol problem, his most recent DWI, and his status as being on probation for his 2008 DWI exclude providing full mitigating credit.

After carefully consideration of the Appeal Board’s jurisprudence on alcohol consumption,<sup>4</sup> I conclude his three alcohol-related incidents, his relapse after alcohol counseling in 2004, and his continued alcohol consumption up until May 2008 all raise security concerns. His current alcohol-related therapy is a positive development, showing that he continues to struggle to overcome his alcohol problems; however, his reluctance to commit alcohol abstinence after he completes probation raises continued concerns.

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<sup>3</sup>See ISCR Case No. 06-17541 at 3-5 (App. Bd. Jan. 14, 2008); ISCR Case No. 06-08708 at 5-7 (App. Bd. Dec. 17, 2007); ISCR Case No. 04-10799 at 2-4 (App. Bd. Nov. 9, 2007).

<sup>4</sup>For example, in ISCR Case No. 05-16753 at 2-3 (App. Bd. Aug. 2, 2007) the Appeal Board reversed the administrative judge’s grant of a clearance and noted, “That Applicant continued to drink even after his second alcohol related arrest vitiates the Judge’s application of MC 3.” In ISCR Case No. 05-10019 at 3-4 (App. Bd. Jun. 21, 2007), the Appeal Board reversed an administrative judge’s grant of a clearance to an applicant (AB) where AB had several alcohol-related legal problems. However, AB’s most recent DUI was in 2000, six years before an administrative judge decided AB’s case. AB had reduced his alcohol consumption, but still drank alcohol to intoxication, and sometimes drank alcohol (not to intoxication) before driving. The Appeal Board determined that AB’s continued alcohol consumption was not responsible, and the grant of AB’s clearance was arbitrary and capricious. See also ISCR Case No. 04-12916 at 2-6 (App. Bd. Mar. 21, 2007) (involving case with most recent alcohol-related incident three years before hearing, and reversing administrative judge’s grant of a clearance).



## Drug Involvement

AG ¶ 24 articulates the security concern concerning drug involvement:

[u]se of an illegal drug or misuse of a prescription drug can raise questions about an individual's reliability and trustworthiness, both because it may impair judgment and because it raises questions about a person's ability or willingness to comply with laws, rules, and regulations.

AG ¶ 25 describes eight drug<sup>5</sup> involvement-related conditions that could raise a security concern and may be disqualifying. Two drug involvement disqualifying conditions could raise a security concern and may be disqualifying in this particular case: "any drug abuse,"<sup>6</sup> and "illegal drug possession." AG ¶¶ 25(a) and 25(c) apply. The other disqualifying conditions listed in AG ¶ 25 are not applicable. These disqualifying conditions apply because Applicant used marijuana, cocaine, and ecstasy. He possessed these drugs before he used them.

AG ¶ 26 provides for potentially applicable drug involvement mitigating conditions:

- (a) the behavior happened so long ago, was so infrequent, or happened under such circumstances that it is unlikely to recur or does not cast doubt on the individual's current reliability, trustworthiness, or good judgment;
- (b) a demonstrated intent not to abuse any drugs in the future, such as:
  - (1) disassociation from drug-using associates and contacts;
  - (2) changing or avoiding the environment where drugs were used;
  - (3) an appropriate period of abstinence; and
  - (4) a signed statement of intent with automatic revocation of clearance for any violation;

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<sup>5</sup>AG ¶ 24(a) defines "drugs" as substances that alter mood and behavior, including: (1) Drugs, materials, and other chemical compounds identified and listed in the Controlled Substances Act of 1970, as amended (e.g., marijuana or cannabis, depressants, narcotics, stimulants, and hallucinogens), and (2) inhalants and other similar substances.

Schedules I, II, III, IV, and V, as referred to in the Controlled Substances Act are contained in 21 U.S.C. § 812(c). Marijuana and ecstasy or 3,4 methylenedioxymethamphetamine are Schedule I controlled substances. See Sch. I (c)(9) and I(c)(10), respectively. See also *Gonzales v. Raish*, 545 U.S. 1 (2005) (discussing placement of marijuana on Schedule I); *United States v. Crawford*, 449 F.3d 860, 861 (8<sup>th</sup> Cir. 2006) (ecstasy). Cocaine is a Schedule II Controlled Substance. See Sch. II(a)(4) (cocaine).

<sup>6</sup>AG ¶ 24(b) defines "drug abuse" as "the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction."

(c) abuse of prescription drugs was after a severe or prolonged illness during which these drugs were prescribed, and abuse has since ended; and

(d) satisfactory completion of a prescribed drug treatment program, including but not limited to rehabilitation and aftercare requirements, without recurrence of abuse, and a favorable prognosis by a duly qualified medical professional.

Security concerns can be mitigated based on AG ¶ 26(a) by showing that the drug offenses happened so long ago, were so infrequent, or happened under such circumstances that they are unlikely to recur or does not cast doubt on the individual's current reliability, trustworthiness, or good judgment. There are no "bright line" rules for determining when conduct is "recent." The determination must be based "on a careful evaluation of the totality of the record within the parameters set by the directive." ISCR Case No. 02-24452 at 6 (App. Bd. Aug. 4, 2004). For example, the Appeal Board determined in ISCR Case No. 98-0608 (App. Bd. Aug. 28, 1997), that an applicant's last use of marijuana occurring approximately 17 months before the hearing was not recent. If the evidence shows "a significant period of time has passed without any evidence of misconduct," then an administrative judge must determine whether that period of time demonstrates "changed circumstances or conduct sufficient to warrant a finding of reform or rehabilitation."<sup>7</sup>

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<sup>7</sup> ISCR Case No. 02-24452 at 6 (App. Bd. Aug. 4, 2004). In ISCR Case No. 04-09239 at 5 (App. Bd. Dec. 20, 2006), the Appeal Board reversed the judge's decision denying a clearance, focusing on the absence of drug use for five years prior to the hearing. The Appeal Board determined that the judge excessively emphasized the drug use while holding a security clearance, and the 20 plus years of drug use, and gave too little weight to lifestyle changes and therapy. For the recency analysis the Appeal Board stated:

*Compare* ISCR Case No. 98-0394 at 4 (App. Bd. June 10, 1999) (although the passage of three years since the applicant's last act of misconduct did not, standing alone, compel the administrative judge to apply Criminal Conduct Mitigating Condition 1 as a matter of law, the Judge erred by failing to give an explanation why the Judge decided not to apply that mitigating condition in light of the particular record evidence in the case) with ISCR Case No. 01-02860 at 3 (App. Bd. May 7, 2002) ("The administrative judge articulated a rational basis for why she had doubts about the sufficiency of Applicant's efforts at alcohol rehabilitation.") (citation format corrections added).

In ISCR Case No. 05-11392 at 1-3 (App. Bd. Dec. 11, 2006) the Appeal Board, considered the recency analysis of an administrative judge stating:

The administrative judge made sustainable findings as to a lengthy and serious history of improper or illegal drug use by a 57-year-old Applicant who was familiar with the security clearance process. That history included illegal marijuana use two to three times a year from 1974 to 2002 [drug use ended four years before hearing]. It also included the illegal purchase of marijuana and the use of marijuana while holding a security clearance.

Applicant's last drug use was on April 17, 2007, about 18 months ago. AG ¶ 26(a) fully applies despite Applicant's last illegal drug use being relatively recent. His overall illegal drug use lasted approximately seven years (2000 to 2007), and involved numerous uses of marijuana, ecstasy and cocaine. AG ¶ 26(a) applies because his past drug use does not cast doubt on his current reliability, trustworthiness, or good judgment.<sup>8</sup> Because of his abstention from drug use for about 18 months, and his recognition of the adverse impact on his life of drug abuse, there is reasonable certitude that he will continue to abstain from drug use. I am reasonably confident his illegal drug possession and use will not recur. Because he will not use illegal drugs in the future and is subject to drug testing at his employment, confidence in his current reliability, trustworthiness and good judgment with respect to drug use is restored.

AG ¶ 26(b) lists four ways Applicant can demonstrate his intent not to abuse illegal drugs in the future. He has somewhat disassociated from his drug-using associates and contacts. He stopped associating with cocaine and ecstasy users; however he continues to associate with marijuana users. He has broken his patterns of drug abuse, and changed his life with respect to drug use. He has abstained from drug abuse for about 18 months. However, he did not provide "a signed statement of intent with automatic revocation of clearance for any violation." AG ¶ 26(b) partially applies.

AG ¶¶ 26(c) and 26(d) are not applicable because Applicant did not abuse prescription drugs. The marijuana, cocaine and ecstasy were never prescribed for him. He did not satisfactorily complete a prescribed drug treatment program, including rehabilitation and aftercare requirements.

In conclusion, Applicant ended his drug abuse on April 17, 2007, about 18 months ago. The motivations to stop using drugs are evident.<sup>9</sup> He understands the adverse results from drug abuse. He has shown or demonstrated a sufficient track record of no drug abuse to eliminate drug involvement as a bar to his access to classified information.

## **Personal Conduct**

AG ¶ 15 expresses the security concern pertaining to personal conduct:

Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. . . .

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<sup>8</sup>In ISCR Case No. 02-08032 at 8 (App. Bd. May 14, 2004), the Appeal Board reversed an unfavorable security clearance decision because the administrative judge failed to explain why drug use was not mitigated after the passage of more than six years from the previous drug abuse.

<sup>9</sup>Approval of a security clearance, potential criminal liability for possession of drugs and adverse health, employment, and personal effects resulting from drug use are among the strong motivations for remaining drug free.

AG ¶ 16 describes conditions that could raise a security concern and may be disqualifying:

(a) deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities; and,

(b) deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority, or other official government representative.

(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 person may not properly safeguard protected information;

(d) credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information 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 person may not properly safeguard protected information. This includes but is not limited to consideration of:

(1) untrustworthy or unreliable behavior . . . . ; and (3) a pattern of . . . rule violations; and

(e) personal conduct . . . that creates a vulnerability to exploitation, manipulation, or duress, such as (1) engaging in activities which, if known, may affect the person's personal, professional, or community standing.

SOR ¶ 3.a re-alleges the drug and alcohol-related misconduct discussed previously. With respect to the personal conduct concerns involving this misconduct, the pertinent disqualifying conditions are AG ¶ 16(d)(3), a pattern of rule violations and AG ¶ 16(e)(1), which states, "personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress, such as (1) engaging in activities which, if known, may affect the person's personal, professional, or community standing." Certainly, drug and alcohol abuse as well as DUI and DWI offenses violate important civil and criminal rules in our society, and a lengthy history of such misconduct is conduct a person might wish to conceal, as it adversely affects a person's professional and community standing. The mitigating condition outlined in AG ¶ 17(e)

applies to this misconduct. Applicant's supervisor and security officials are well aware of this misconduct. Through the security process this misconduct has been disclosed, eliminating any vulnerability to exploitation, manipulation or duress. I do not believe this Applicant would compromise national security to avoid public disclosure of this misconduct. These personal conduct security concerns, pertaining to alcohol consumption and drug involvement, are mitigated.

SOR ¶¶ 3.b and 3.c allege two misdemeanor traffic offenses. Applicant committed these offenses and AG ¶¶ 16 (e)(1) and (e)(3) apply. SOR ¶ 3.d alleges Applicant and his friend attempted to falsely convince the police and court that he was not driving, which was a violation of his probation. His friend was convicted of obstruction.

AG ¶ 17 provides four conditions that could mitigate security concerns in this case:

(a) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts;

(b) the refusal or failure to cooperate, omission, or concealment was caused or significantly contributed to by improper or inadequate advice of authorized personnel or legal counsel advising or instructing the individual specifically concerning the security clearance process. Upon being made aware of the requirement to cooperate or provide the information, the individual cooperated fully and truthfully.

(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;

(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 caused untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur;

(e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress; and

(f) the information was unsubstantiated or from a source of questionable reliability; and

(g) association with persons involved in criminal activity has ceased or occurs under circumstances that do not cast doubt upon the individual's reliability, trustworthiness, judgment, or willingness to comply with rules and regulations.

AG ¶ 17(f) applies to Applicant's failure to disclose his 2003 DWI on his security clearance application (SOR ¶ 3.e). This failure was not deliberate, and the allegation of falsification is unsubstantiated.<sup>10</sup>

AG ¶ 17(c) theoretically could mitigate SOR ¶ 3.b and 3.c because his two traffic violations in 2001 and 2003 are relatively minor misdemeanors. They are not recent and infrequent. However, the Appeal Board's jurisprudence requires consideration of all such offenses in a non-piecemeal fashion. The Judge is required to evaluate the record evidence as a whole and reach a reasonable conclusion as to the recency of his conduct. ISCR Case No. 03-02374 at 4 (App. Bd. Jan. 26, 2006) (citing ISCR Case No. 02-22173 at 4 (App. Bd. May 26, 2004)). Because of his overall conduct, especially the 2008 DWI, none of the offenses are mitigated under guideline AG ¶ 17(c).

AG ¶¶ 17(c), 17(d) and 17(g) all apply in part. His criminal offenses cannot be fully mitigated for the reasons stated previously. See Discussion in Alcohol Consumption Section, *supra*. There is still a risk that Applicant will return to alcohol abuse and that more alcohol-related offenses will occur. There are some positive signs of rehabilitation. He admitted his misconduct. No allegations of problems at his employment have surfaced. He has ceased his associations with those persons who used cocaine and ecstasy. See AG ¶ 17(g). He is in the process of completing his most recent probation, and he paid his fines and court costs. He has demonstrated remorse, an important step toward his rehabilitation. He received job training and has a good employment record. He disclosed his 2001 alcohol-related offense, his illegal drug use, and an adverse termination from employment on his November 9, 2007, security clearance application (GE 1). He disclosed his 2003 DWI to an Office of Personnel Management (OPM) investigator, and told his security manager about his 2008 DWI. His security manager is well aware of his alcohol-related problems and drug abuse problems. Disclosure has eliminated his "vulnerability to exploitation, manipulation, or duress."

## **Criminal Conduct**

AG ¶ 30 expresses the security concern pertaining to criminal conduct, "Criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. By its very nature, it calls into question a person's ability or willingness to comply with laws, rules and regulations."

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<sup>10</sup>The Appeal Board has cogently explained the process for analyzing falsification cases, stating:

(a) when a falsification allegation is controverted, Department Counsel has the burden of proving falsification; (b) proof of an omission, standing alone, does not establish or prove an applicant's intent or state of mind when the omission occurred; and (c) a Judge must consider the record evidence as a whole to determine whether there is direct or circumstantial evidence concerning the applicant's intent or state of mind at the time the omission occurred. [Moreover], it was legally permissible for the Judge to conclude Department Counsel had established a prima facie case under Guideline E and the burden of persuasion had shifted to the applicant to present evidence to explain the omission.

AG ¶ 31 describes two conditions that could raise a security concern and may be disqualifying, ¶ 31(a), “a single serious crime,” and ¶ 31(c), “allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted.” The allegations of criminal conduct listed in SOR ¶¶ 1.a, 1.b, 1.d, 2.a, 2.b, 2.c, 3.b, 3.c and 3.d are all established. He admitted all offenses.

AG ¶ 32 provides four conditions that could potentially mitigate security concerns:

- (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;
- (b) the person was pressured or coerced into committing the act and those pressures are no longer present in the person's life;
- (c) evidence that the person did not commit the offense; and
- (d) there is evidence of successful rehabilitation; including but not limited to the passage of time without recurrence of criminal activity, remorse or restitution, job training or higher education, good employment record, or constructive community involvement.

None of the mitigating conditions fully apply to the offenses listed in SOR ¶¶ 1.a, 1.b, 1.d, 2.a, 2.b, 2.c, 3.b, 3.c and 3.d. There is still a risk that Applicant will return to alcohol abuse and that more offenses will occur. See Discussion in Alcohol Consumption Section, *supra*. There are some positive signs of rehabilitation. He admitted his misconduct and said he ceased his alcohol consumption after his May 25, 2008, DWI arrest. He has performed well at his employment. He has stopped associating with his friends who use ecstasy and cocaine, reducing the associations that enabled and facilitated some of his drug problems. He has articulated remorse and is received alcohol counseling and treatment. There is a sufficient evidentiary record in this case of his rehabilitation to merit a clearance eventually, provided his good behavior and alcohol abstinent behavior continue.

### **Whole Person Concept**

Under the whole person concept, the administrative judge must evaluate an Applicant's eligibility for a security clearance by considering the totality of the Applicant's conduct and all the circumstances. The administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(a):

- (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowledgeable participation; (3) the frequency and recency of the conduct; (4) the individual's age and maturity at the time of the conduct; (5) the extent to which participation is voluntary; (6) the presence or absence of

rehabilitation and other permanent behavioral changes; (7) the motivation for the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence.

Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole person concept.

There is considerable evidence supporting approval of Applicant's clearance. When Applicant's government contractor employer hired him approximately 18 months ago, he stopped using illegal drugs. He has always been candid concerning derogatory information. He revealed one of his DUIs and some of his alcohol treatment and therapy on his 2007 security clearance application. He provided more detailed information about his alcohol problems to an OPM investigator. He admitted in his SOR response and at his hearing complete information to the best of his recollection. After his May 25, 2008, DWI, he stopped consuming alcohol. He knows the consequences if he is caught with alcohol on his breath at work or has another DWI. He is currently receiving alcohol treatment and will start attending Alcohol Anonymous meetings. Applicant is a valued employee, who contributes to his company and the Department of Defense. There is no evidence at work of any disciplinary problems. There is no evidence of disloyalty or that he would intentionally violate national security. His character and good work performance shows some responsibility, rehabilitation and mitigation. His supervisors evidently support him or he would not have been able to retain his employment after his security clearance was called into question. I am satisfied that if he continues to abstain from alcohol consumption, and avoids future offenses he will have future potential for access to classified information.

The evidence against approval of Applicant's clearance is more substantial. Applicant had a substantial problem with alcohol as shown by three alcohol-related traffic offenses between 2001 and 2008. He received some alcohol-related treatment and attended Alcoholics Anonymous meetings after his 2003 DWI arrest. Then he had a relapse as shown by his 2008 DWI arrest and conviction. His problems with alcohol cannot be mitigated at this time. His decision to continue to drink alcohol over the years was knowledgeable, voluntary, and intentional. He was sufficiently mature to be fully responsible for his conduct. Excessive alcohol consumption shows a lack of judgment and/or impulse control. Such conduct raises a serious security concern, and a security clearance is not warranted at this time. After weighing the disqualifying and mitigating conditions, and all the facts and circumstances, in the context of the whole person, I conclude he has not mitigated the security concerns pertaining to alcohol consumption, personal conduct, and criminal conduct. Drug involvement is mitigated because it is not recent.

I take this position based on the law, as set forth in *Department of Navy v. Egan*, 484 U.S. 518 (1988), my "careful consideration of the whole person factors"<sup>11</sup> and supporting evidence, my application of the pertinent factors under the Adjudicative

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<sup>11</sup>See ISCR Case No. 04-06242 at 2 (App. Bd. June 28, 2006).



Process, and my interpretation of my responsibilities under the Guidelines. Applicant has not mitigated or overcome the government's case. For the reasons stated, I conclude he is not currently eligible for access to classified information.

### **Formal Findings**

Formal findings For or Against Applicant on the allegations set forth in the SOR, as required by Section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline G:	AGAINST APPLICANT
Subparagraphs 1.a and 1.b:	Against Applicant
Subparagraph 1.c:	For Applicant
Subparagraph 1.d:	Against Applicant
Paragraph 2, Guideline H:	FOR APPLICANT
Subparagraphs 2.a to 2.d:	For Applicant
Paragraph 3, Guideline E:	AGAINST APPLICANT
Subparagraph 3.a:	For Applicant
Subparagraphs 3.b to 3.d:	Against Applicant
Subparagraph 3.e:	For Applicant
Paragraph 4, Guideline J:	AGAINST APPLICANT
Subparagraph 4.a:	Against Applicant

### **Conclusion**

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with national security to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

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Mark W. Harvey  
Administrative Judge