



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



In the matter of:)
)
-----) ISCR Case No. 11-08735
)
Applicant for Security Clearance)

Appearances

For Government: Braden M. Murphy, Esq., Department Counsel
For Applicant: James M. Beatty, Esq.

04/04/2013

Decision

Harvey, Mark, Administrative Judge:

From 1983 to May 2009, Applicant was charged and convicted six times of driving while intoxicated (DWI), driving under the influence of alcohol (DUI), or refusal to take a breathalyzer test (BAT). In 2010 and 2012, he was diagnosed as alcohol dependent. He is currently on conditions of bail pending adjudication of his appeal on his most recent DUI conviction. After his most recent DUI, he made some very positive changes in his life. On December 31, 2009, he ended his alcohol consumption; in January 2010, he completed a 10-day inpatient alcohol treatment program (IATP); and he receives support from friends and the Department of Veteran’s Affairs (VA). Nevertheless, more time without alcohol consumption and criminal conduct is necessary before security concerns will be fully mitigated. Alcohol consumption and criminal conduct concerns are not mitigated. Eligibility for access to classified information is revoked.

Statement of the Case

On April 12, 2011, Applicant submitted his Electronic Questionnaires for Investigations Processing (e-QIP) version of a security clearance application (SF 86). (GE 1) On September 28, 2012, the Department of Defense (DOD) Office of Hearings and Appeals (DOHA) issued a statement of reasons (SOR) to Applicant, pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated

February 20, 1960, as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended; and the adjudicative guidelines (AG) the President promulgated on December 29, 2005.

The SOR alleged security concerns under Guidelines G (alcohol consumption) and J (criminal conduct). (Hearing Exhibit (HE) 2) The SOR further informed Applicant that DOD adjudicators could not make the preliminary affirmative finding it is clearly consistent with the national interest to grant or continue Applicant's security clearance, and it recommended that his case be submitted to an administrative judge for a determination whether his clearance should be granted, continued, denied, or revoked. (HE 2)

On November 5, 2012, the DOD Hearings and the Appeals Office received Applicant's response to the SOR. (HE 3) Applicant requested a hearing. On December 7, 2012, Department Counsel indicated he was ready to proceed on Applicant's case. On December 13, 2012, Applicant's case was assigned to another administrative judge. On January 8, 2013, DOHA issued a hearing notice, setting the hearing for January 23, 2013. (HE 1A) On February 4, 2013, DOHA issued a new hearing notice, setting the hearing for February 27, 2013. Applicant's hearing was held as scheduled using video teleconference on February 27, 2013. (HE 1B) Department Counsel offered 11 exhibits, and Applicant offered 18 exhibits. (Tr. 15-25; GE 1-11; AE A-R) There were no objections, and I admitted GE 1-11 and AE A-R. (Tr. 16, 25) Additionally, I admitted the hearing notice, SOR, Applicant's response to the SOR, ISCR Case No. 10-11030 (A.J. Dec. 31, 2012); ISCR Case No. 10-03933 (A.J. Dec. 10, 2012); and ISCR Case No. 11-02078 (A.J. Nov. 9, 2012). (HE 1A, 1B, 2-6) On March 7, 2013, I received the transcript.

Procedural Issue

Applicant's counsel contended that ISCR Case No. 10-11030 (A.J. Dec. 31, 2012); ISCR Case No. 10-03933 (A.J. Dec. 10, 2012); and ISCR Case No. 11-02078 (A.J. Nov. 9, 2012) provided persuasive examples of mitigation of alcohol consumption security concerns similar to Applicant's case. (Tr. 15, 103-104; HE 4-6) Those decisions will be discussed in the analysis section of this decision.

Findings of Fact¹

Applicant admitted the conduct alleged in SOR ¶¶ 1.a to 1.f, and he provided some extenuating and mitigating information. (HE 3) His admissions are accepted as findings of fact. After a complete and thorough review of the evidence of record, I make the following additional findings of fact.

Applicant is a 59-year-old employee of a defense contractor, who has worked in logistics on a military installation for the last two years. (Tr. 27, 80) He drives

¹The facts in this decision do not specifically describe employment, names of witnesses or locations in order to protect Applicant and his family's privacy. The cited sources contain more specific information.

distinguished visitors, fuel, parts, or garbage. (Tr. 86) He may be unable to retain his employment if his driver's license is downgraded to a restricted driver's license. (Tr. 89) He married in 1998, and he was divorced in 2008. (GE 1) He does not have any children. (GE 1)

Criminal offenses and alcohol consumption

In March 1983, Applicant was charged with DWI and refusal to take a BAT. (SOR ¶ 1.k) He was convicted of refusal to take a BAT. (SOR ¶ 1.f) He was sentenced to a fine and 72 hours of community service.

In September 1986, Applicant was charged with DWI and misconduct involving weapons. (SOR ¶ 1.e) He pleaded no contest, was found guilty, and sentenced to 90 days in jail (suspended), and fined \$500. (SOR ¶ 1.e)

In October 1988, Applicant was charged with DWI, refusal to take a breathalyzer test, and driving a vehicle while his driver's license was revoked. (Tr. 75-76; SOR ¶ 1.d) He was convicted and sentenced to fines and fees of about \$2,500. (SOR ¶ 1.d)

In April 1996, Applicant was charged with DWI. (SOR ¶ 1.c) In June 1996, he was convicted and sentenced to fines and fees of about \$500. (SOR ¶ 1.c)

In October 2004, Applicant was charged with DUI. (SOR ¶ 1.b) He was convicted; his driver's license was revoked for one year; he was fined \$4,000; jailed for 365 days (335 days suspended); and placed on probation for five years. (SOR ¶ 1.b) In May 2009, as a result of a DUI charge, a petition to revoke his probation was filed. (SOR ¶ 1.b)

On May 30, 2009, Applicant was charged with DUI. (SOR ¶ 1.a) His BAC using a breathalyzer was .116. (Tr. 46; AE K at 1) He requested a blood test and the result was .113. (Tr. 58) He pleaded not guilty. (Tr. 52) On August 25, 2011, he was convicted after a bench trial and sentenced to jail for 365 days (182 days suspended), placed on probation for five years, and fined \$4,000. (Tr. 52-53; SOR ¶ 1.a; AE K at 1) He was also required to pay \$2,000 as the cost of confinement as well as some other fees. (AE K at 2) Payment of the fine is due in five years. (AE K at 1) His driver's license was revoked for four years, effective September 23, 2011. (AE K at 1)

After Applicant regains his driving privileges, he must use an interlock device for 18 months. (AE K at 2) He is not permitted to possess or consume alcohol for five years from August 25, 2011. (AE K at 2) On September 13, 2011, Applicant filed an appeal. (Tr. 47; AE L) On September 23, 2011, he received a temporary probation order, which required him not to consume alcohol, obey laws, and maintain an interlock device on his vehicle. (Tr. 48-49, 53-54; AE M) He is not currently on probation; however, his legal status because of his appeal is that he is under conditions of bail. (Tr. 54-56) Applicant expected the appeal would not be decided for six months or so. (Tr. 49) The action suspending his driver's license was stayed. (Tr. 53) Applicant's status is that he is convicted of DUI. (Tr. 59)

Should Applicant's appeal be denied, he will lose his employment because his driver's license will be revoked and holding a driver's license is a condition of his employment. (Tr. 87) When his driver's license is reinstated, he will have an opportunity to apply to return to his employment. (Tr. 88)

Alcohol counseling and treatment

From January 3-13, 2010, Applicant attended an inpatient alcohol treatment program (IATP) in a different state than his state of residence. (Tr. 28; SOR ¶ 1.g; AE A) Applicant tried Alcoholics Anonymous (AA) and a counseling service. (Tr. 29) He described it as "a very successful program," "the best decision I ever made," and "a miracle." (Tr. 28, 30) The IATP involved aversion therapy and reinforcement techniques to reset Applicant's brain so that his alcohol desire was reduced to zero. (Tr. 30-31, 67) He was exposed to his "preferred alcohol mixed with Ipecac to condition a nausea and vomiting response." (AE H at 1) Treatment included "hypnotism and sodium pentothal influenced interviews to emphasize the positive aspects of eliminating alcohol from [his] life." (AE H at 1) The IATP diagnosis was alcohol dependence,² and the IATP clinic recommended that he maintain regular contact with IATP, develop sober activities, and completely abstain from alcohol consumption. (GE 2 at 120; SOR ¶ 1.g) The IATP enrolled him in two-year aftercare program that consists of "call-in meetings," and he can return to IATP, as necessary, for refresher treatment. (Tr. 31-32, 67) The IATP also provides a support system for him. (Tr. 70)

On August 7, 2012, at DOHA's request, Applicant obtained an updated psychiatric examination. (Tr. 40; AE H) The report indicates "documentation of DUIs in May 2009, October 2004, 1998, 1988, 1983, and 1976."³ (AE H at 1) Applicant advised that he has "a history of drinking in a binge type fashion." (AE H at 1) He admitted that alcohol contributed to legal, financial, and relationship problems. (AE H at 1) He had blackouts, but not delirium tremens. (AE H at 2) Prior to 2010, he had been able to discontinue alcohol consumption for months at a time; however, he reported that his most recent alcohol consumption was about 30 months ago on December 31, 2009,

² The IATP diagnosis did not include the qualifications of the person providing the diagnosis.

³ There was no alcohol-related offense in 1976. In September 1975, Applicant was arrested for possession of marijuana, and in July 1980, he was arrested and convicted of disorderly conduct. (GE 4) His marijuana possession offense and his disorderly conduct offense were not included in the SOR. In ISCR Case No. 03-20327 at 4 (App. Bd. Oct. 26, 2006) the Appeal Board listed five circumstances in which conduct not alleged in an SOR may be considered stating:

(a) to assess an applicant's credibility; (b) to evaluate an applicant's evidence of extenuation, mitigation, or changed circumstances; (c) to consider whether an applicant has demonstrated successful rehabilitation; (d) to decide whether a particular provision of the Adjudicative Guidelines is applicable; or (e) to provide evidence for whole person analysis under Directive Section 6.3.

Id. (citing ISCR Case No. 02-07218 at 3 (App. Bd. Mar. 15, 2004); ISCR Case No. 00-0633 at 3 (App. Bd. Oct. 24, 2003)). His marijuana possession offense and his disorderly conduct offense are not considered for any purpose because the circumstances surrounding these two offenses were not well developed at the hearing.

which was prior to attendance at the IATP in January 2010. (Tr. 68, 101; AE H at 2) The report concludes, "While we do not have objective evidence of his maintaining abstinence for the last 2 ½ years, his lack of continued offenses in that time, and his current presentation suggests his reporting is accurate." (AE H at 3) Under Axis I he was diagnosed with "Alcohol Dependence in full remission by patient's report." (AE H at 3; SOR ¶ 1.h) A psychiatrist signed the report. (AE H at 4) The report recommended continued abstinence and consultation with IATP as necessary. (AE H at 4) Applicant concurred with the accuracy of this report. (Tr. 41-42)

A licensed professional and family counselor interviewed Applicant on November 1 and 6, 2012, and thereafter observed him at regularly attended "supportive outpatient counseling." (AE I) She described him as not "engaged in behaviors consistent with alcohol abuse or dependence" for the last three years based on his self-reports. He did not commit alcohol-related criminal events since 2009. She diagnosed him with alcohol dependence "in Full Remission." (Tr. 43-44; AE I)

Applicant attended some AA meetings in the 1980s, around 1999, 2004, and 2005. (Tr. 63) He did not attend any AA meetings after January 2010. (Tr. 64) The AA program did not work for Applicant. (Tr. 72-73) He attended a 40-hour outpatient alcohol-counseling program in 2004 or 2005. (Tr. 63-64) He received some counseling at the VA Center. (Tr. 32, 65) Applicant's friends provide a support system. (Tr. 32) Applicant's father visits with Applicant on a weekly basis, and he has not seen Applicant drink alcohol after January 2010. (Tr. 93-95)

Applicant does not have the desire, need, or intention to ever consume alcohol. (Tr. 28) He describes himself previously as a "social drinker." (Tr. 28, 69) Now, he views himself as a "non-drinker," and he denies that he is an alcoholic. (Tr. 28, 69) He does not believe it is necessary to avoid locations or social events where alcohol is served. (Tr. 68) About a month before his hearing, he was in a bar drinking soda. (Tr. 68) He has never permitted his alcohol use to adversely affect his employment. (Tr. 29) He promised to maintain his sobriety and remain alcohol free. (Tr. 50-51, 70-71, 74, 77)

Character evidence

An Air Force lieutenant colonel (Lt. Col.) has known Applicant through his employment and socially for two years. (Tr. 33; AE B) The Lt. Col. was aware of Applicant's history of alcohol consumption and therapy. (Tr. 33-34) On January 13, 2013, he said Applicant "has always been professional and his work ethic has never come into question. I recommend [him for] a secret clearance." (AE B)

Three of Applicant's supervisors at his current employment described him as dependable, professional, loyal, trustworthy, and courteous. (Tr. 35-36, 80-86; AE C, D) He volunteers for extra work. (Tr. 82) His work performance is outstanding. (AE C) None of them described smelling alcohol on his breath or indicated his alcohol consumption adversely affected his employment. (Tr. 88; AE C, D)

On January 16, 2013, Applicant's supervisor at his previous employment wrote that he has worked closely with him for six years and has known him since 1999. (Tr. 36-37; AE E) He described Applicant as a highly-skilled and valued employee with integrity and mature judgment. (AE E) Another coworker and friend, who worked closely with Applicant for four years and has known Applicant since 1996, described applicant as professional, knowledgeable, and ethical. (Tr. 37-38; AE F) He is generous and helpful to a society. (AE F)

A good friend of Applicant's, who has known him for 20 years and was married to him for nine years, states he has been sober now for three years. (Tr. 38; AE G) Applicant's alcohol abuse damaged their marriage, and he became sober after their divorce. (Tr. 39) He has a better relationship with her now than at times during their marriage. (Tr. 39-40) His former spouse describes him as a diligent and trustworthy worker and a great asset to his company. (Tr. 38; AE G)

Applicant was awarded a Certificate of Appreciation for his Army service from December 3, 1971 to June 4, 1973. (AE J) The certificate was signed by Commander In Chief Richard Nixon. The certificate lauds his honorable service, devotion to duty, and spirit of sacrifice as well as his contributions to the national defense. (AE J) Applicant served in Vietnam as an infantry soldier primarily performing duties as a radio telephone operator or RTO. (Tr. 44-45) He was entrusted with classified RTO passwords and codes in Vietnam. (Tr. 45-46)

Applicant honorably served in the infantry in Vietnam and earned the National Defense Service Medal (NDSM), Republic of Vietnam Campaign Medal with 60 device (RVNCM w/60 DEV), Good Conduct Medal (GCM), Bronze Star Medal (BSM), Vietnam Service Medal (VSM) with One Bronze Service Star, and Republic of Vietnam Gallantry Cross with Palm Unit Citation Badge as well as various weapons qualification badges. (GE 2 at 121-22)

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 that, "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 eligibility for access to classified information "only upon a finding that it is 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 meeting the criteria contained in the 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

overarching adjudicative goal is a fair, impartial, and commonsense 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 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. Adverse clearance decisions are made “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. Nothing in this decision should be construed to suggest that I 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 (4th 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 or her] 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

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(e), 22(f), and 22(g) do not apply. Applicant did not have any alcohol-related incidents at work, did not violate any court orders, and did not have a relapse after a diagnosis of alcohol dependence. The credentials of the person diagnosing Applicant with “alcohol dependence” from IATP are not part of the record. His evaluation of alcohol dependence by IATP may not have been by a duly qualified medical professional (e.g., physician, clinical psychologist, or psychiatrist) or a licensed clinical social worker who is a staff member of a recognized alcohol treatment program.

Applicant engaged in binge-alcohol consumption to the extent of impaired judgment on some of the occasions when he was arrested.⁴ His excessive alcohol

⁴Although the term “binge” drinking is not defined in the Directive, the generally accepted definition of binge drinking for males is the consumption of five or more drinks in about two hours. The definition of binge drinking was approved by the National Institute on Alcohol Abuse and Alcoholism (NIAAA) National Advisory Council in February 2004. See U.S. Dept. of Health and Human Services,

consumption resulted in arrests, convictions, and various penalties imposed by the courts. On August 7, 2012, a psychiatrist diagnosed him as alcohol dependent. AG ¶¶ 22(a), 22(c), and 22(d) apply.

Four Alcohol Consumption Mitigating Conditions under AG ¶¶ 23(a)-23(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), 23(b), and 23(d) apply in part. Applicant completed the 10-day IATP. He has not attended any intensive, inpatient alcohol rehabilitation or counseling program for more than three years. He has been 100 percent sober since December 31, 2009. He receives support from family and friends.

Applicant had three alcohol-related arrests and convictions in the 1980s as indicated in SOR ¶¶ 1.d to 1.f. Those three alcohol-related incidents are too temporally remote to have significant security significance other than to show his lengthy history of alcohol-related driving infractions. The qualifications of the person, providing the alcohol-dependence diagnosis on behalf of IATP in 2010, are not part of the record. SOR ¶¶ 1.d to 1.g are mitigated.

Even though he has a lengthy history of alcohol consumption, which resulted in six arrests, enough time has elapsed in sustained abstinence to partially establish his

alcohol consumption is under control; however, his alcohol consumption continues to cast doubt on Applicant's "current reliability, trustworthiness, or good judgment."

AG ¶ 23(c) partially applies. Applicant described some alcohol-related counseling in the 1980s, 1990s, 2004, and 2005, as well as attendance at some AA meetings; however, the details of those counseling sessions were not provided. He currently has contact with IATP and a VA counselor for ongoing support.

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 DOHA 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. 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). 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).

Applicant provided three recent illustrative alcohol-related cases where administrative judges granted access to classified information for those applicants. See ISCR Case No. 10-11030 (A.J. Dec. 31, 2012); ISCR Case No. 10-03933 (A.J. Dec. 10, 2012); ISCR Case No. 11-02078 (A.J. Nov. 9, 2012). These three cases provide persuasive, non-binding discussions of facts and law.

In ISCR Case No. 10-11030 (A.J. Dec. 31, 2012), the applicant was terminated from employment in late 2009 because of his alcohol consumption, and he had a history of multiple alcohol-related treatments and relapses. *Id.* at 2-4. He did not have any alcohol-related arrests. *Id.* He completed 34 months of sobriety, except for one occasion where he had one "swig" of alcohol. *Id.* at 4. He attends two to five AA meetings each week. *Id.*

In ISCR Case No. 10-03933 (A.J. Dec. 10, 2012), the applicant was arrested repeatedly from 2001 to 2007, and in June 2009, he was convicted of driving while privileges were suspended or revoked and placed on three years of probation. *Id.* at 2-

3. He was convicted of DUI twice and public intoxication twice from August 2004 to September 2007. *Id.* He described minimal alcohol-related treatment and counseling; however, his most recent alcohol consumption was in September 2008, more than four years before his hearing. His probation was completed before his hearing. *Id.* at 3-4.

In ISCR Case No. 11-02078 (A.J. Nov. 9, 2012), the applicant had DUI arrests in 2009 and March 2010. *Id.* at 2. The court ordered “five years informal probation,” and his employer placed him on administrative leave because he had an alcohol-related vehicle accident at work. *Id.* at 2. He completed 32 months of sobriety and six months of alcohol-related treatment for six months. *Id.* He continued to be “heavily involved in AA,” has an extensive support group, is involved in an alcohol-related employee assistance program, and engages in alumni activities at an alcohol treatment facility. *Id.*

After careful consideration of the Appeal Board’s jurisprudence on alcohol consumption, and the cases provided by Applicant, I conclude his successful completion of an intensive inpatient alcohol counseling and treatment program and his abstinence from alcohol consumption since December 31, 2009, is not sufficient to completely resolve my doubts about Applicant’s alcohol consumption and to fully mitigate security concerns under Guideline G.

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.”

AG ¶ 31 describes three conditions that could raise a security concern and may be disqualifying in this case, “(a) a single serious crime or multiple lesser offenses,” “(c) allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted,” and “(d) individual is currently on parole or probation.”

AG ¶¶ 31(a) and 31(c) apply. From March 1983 to May 30, 2009, Applicant was arrested six times for alcohol-related offenses, such as DWI, DUI, or refusal to take a BAT. Five offenses resulted in convictions, fines, and other penalties. The sixth offense resulted in a conviction, and it is on appeal. I find that he committed the May 2009 DWI offense based on his BAT results being over .10. AG ¶ 31(d) does not apply because he is not currently on probation. He is under a lesser type of supervision called conditions of bail, and he is driving with an interlock device on his vehicle.

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.

Although none of the mitigating conditions fully apply, there are important mitigating factors. The most recent offense occurred on May 30, 2009, and is not particularly recent. He complied with all the terms of his most recent probation. He has been continuously employed for two years. He expressed regret and remorse concerning his alcohol-related offenses.

Three of Applicant's six alcohol-related arrests and convictions were in the 1980s as indicated in SOR ¶¶ 1.d to 1.f. Those three alcohol-related criminal offenses are too temporally remote to have significant security significance other than to show his lengthy history of alcohol-related driving crimes. SOR ¶¶ 1.d to 1.f are mitigated as they relate to SOR ¶ 2.a.

Significant factors weighing against mitigating criminal conduct concerns remain. He will remain on conditions of bail, and if his appeal is unsuccessful, he will be on probation for several years. The state has determined that the passage of more time under the limitations of bail or probation and without any criminal misconduct is necessary to protect society and establish rehabilitation. More time must elapse before there is enough assurance that criminal conduct and other behavior raising security concerns is unlikely to recur. Applicant is not ready to be entrusted with access to classified information at this time.

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. My comments under Guidelines G and J are incorporated into my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under those guidelines, but some warrant additional comment.

There is considerable evidence supporting continuation of Applicant's access to classified information. Applicant is a 59-year-old employee of a defense contractor, who has worked in logistics on a military installation for the last two years. Applicant honorably served in the infantry in Vietnam and earned the NDSM, RVNCM w/60 DEV, GCM, BSM, VSM with One Bronze Service Star, and Republic of Vietnam Gallantry Cross with Palm Unit Citation Badge as well as various weapons qualification badges. He did not consume alcohol at work. He attended IATP for 10 days in 2010. He abstained from alcohol consumption since December 31, 2009. His former spouse and father attest to his abstinence from alcohol consumption for more than three years. His family, friends, coworkers, and supervisors are very supportive of Applicant's rehabilitative efforts. They describe him as dependable, professional, loyal, trustworthy, courteous, generous, diligent, productive, and as a highly-skilled and valued employee with integrity, skills, and mature judgment. He intends to continue to abstain from alcohol consumption, and to seek help from IATP and his VA counselor if necessary. There is no evidence at his current employment of any disciplinary problems. There is no evidence of disloyalty or that he would intentionally violate national security.

The evidence supporting revocation of Applicant's clearance is more substantial than the evidence supporting continuation of his security clearance. From 1983 to May 2009, Applicant was charged and convicted six times of DWI, DUI, or refusal to take a BAT. The offenses in the 1980s have minimal whole-person security significance because they were so long ago. He is currently on conditions of bail pending adjudication of his appeal on his most recent DUI conviction. Even though his May 2009 DUI is on appeal, I find that he committed the DUI as he had a BAT and blood test that were both above .10, which is above the lawful level of blood-alcohol content for a driver. Moreover, each and every time he drove while impaired or intoxicated is a serious criminal offense in which he endangered himself and others. Excessive alcohol consumption followed by driving a motor vehicle shows a lack of judgment, rehabilitation, and impulse control. "By its very nature, [criminal conduct] calls into question a person's ability or willingness to comply with laws, rules and regulations." (AG ¶ 30) Alcohol consumption and criminal conduct concerns are not mitigated. More time without any alcohol-related criminal offenses must elapse to fully mitigate security concerns.

I have carefully applied the law, as set forth in *Department of Navy v. Egan*, 484 U.S. 518 (1988), Exec. Or. 10865, the Directive, and the AGs, to the facts and circumstances in the context of the whole person. I conclude continuation of Applicant's access to classified information is not warranted at this time.

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 to 1.c:	Against Applicant
Subparagraphs 1.d to 1.g:	For Applicant
Subparagraph 1.h:	Against Applicant
Paragraph 2, Guideline J:	AGAINST APPLICANT
Subparagraph 2.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 continue Applicant's security clearance. Eligibility for access to classified information is revoked.

MARK HARVEY
Administrative Judge