DATE: October 19, 2006

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In Re:

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SSN: ----------

Applicant for Security Clearance

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CR Case No. 04-07714

**APPEAL BOARD DECISION**

**APPEARANCES**

**FOR GOVERNMENT**

Ray T. Blank, Jr., Esq., Department Counsel

**FOR APPLICANT**

***Pro Se***

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On March 10, 2005, DOHA issued a statement of reasons advising Applicant of the basis of that decision-security concerns raised under Guidelines G (Alcohol Consumption), E (Personal Conduct) and J (Criminal Conduct), pursuant to Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On February 15, 2006, after the hearing, Administrative Judge David S. Bruce granted Applicant's request for a security clearance.

Department Counsel timely appealed pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.

Department Counsel raised the following issue on appeal: whether the Administrative Judge committed prejudicial error in his conclusions that four mitigating conditions applied.[(1)]

**Whether the Record Supports the Administrative Judge's Factual Findings**

The Administrative Judge made the following pertinent findings:

Applicant, now 46, served in the United States Navy from March 1981 until March 1987, when he was was honorably discharged. He separated from the Navy at his wife's insistence, and laments his decision to leave the Navy as the worst decision he ever made. Since 1987 Applicant has worked continuously for the same contractor since his discharge from active duty, and except for training, he has been assigned to the same base with essentially the same support mission as he had while in the Navy ( intermediate level maintenance and automated testing services). He is highly regarded by his supervisors and command personnel, and is considered reliable and dependable, an outstanding employee, and dedicated to the mission of his work. He married in 1981 and has a 21-year-old son who is presently enrolled in college, and a 16-year-old son in high school. He divorced in 1994 and has not remarried. He also has a seven-year-old son from another relationship who presently resides with him. The child's mother does not reside with them.

He admits he has consumed alcohol, at times in excess to the point of intoxication, from at least 1993 until January 2004, and acknowledges he began drinking beer when he was about 15 or 16 years old. Applicant's beer drinking habits increased significantly in 1993 when he separated from his wife and his two children moved out of his home.

In late summer 1995, Applicant was charged with Driving Under the Influence of Alcohol (DUI), and was found not guilty of the offense following a jury trial. Applicant believed his arrest associated with the incident was expunged from his record as a part of the disposition of the case.

After a motor vehicle incident in September 2000, Applicant refused to submit to a breathalyser test and was charged with DUI. The charge was later reduced to Reckless Driving to which he pled guilty and paid a fine.

In January 2001, Applicant was charged with Driving While Intoxicated (DWI) and refused to take a breathalyser test when arrested for the offense. His driving privilege was suspended for 90 days as a result of his refusal, and he successfully completed a 16-hour alcohol substance abuse education program in order to be re-issued his license. No further treatment or counseling was recommended when he was released from the program in 2002. The DWI charge was later dismissed.

Applicant was arrested in June 2003 for DWI. When he went to court in August 2003, he pled guilty to a lesser alcohol-related driving offense, paid a fine of $385.00 and lost his driver's license for 90 days.

Applicant was charged with public drunkenness in December 2003. The charge was modified to a simple traffic citation and not considered alcohol-related when he appeared in court. He did not contest the lesser modified charge and paid a $128.00 fine.

These findings of facts are not in dispute except as noted hereafter.

**Whether the Record Supports the Administrative Judge's Ultimate Conclusions**

An Administrative Judge is required to "examine the relevant data and articulate a satisfactory explanation for" the decision "including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n of the United States v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)). The Appeal Board may reverse the Administrative Judge's decision to grant, deny, or revoke a security clearance if it is arbitrary, capricious, or contrary to law. Directive ¶ E3.1.32.3. Our scope of review under this standard is narrow and we may not substitute our judgment for that of the Administrative Judge. We may not set aside an Administrative Judge's decision "that is rational, based on consideration of the relevant factors, and within the scope of authority delegated to the agency . . ." *Motor Vehicle Mfrs. Ass'n,* 463 U.S. at 42. We review matters of law *de novo*.

Department Counsel challenges the Administrative Judge's application of Guideline G (Alcohol Consumption) Mitigating Conditions 2[(2)] and 3[(3)], and Guideline J (Criminal Conduct) Mitigating Conditions 1[(4)] and 6.[(5)] Due to the similarity between these particular Guideline G and Guideline J mitigating conditions, the Board will discuss the applicability of all of them simultaneously.

The Administrative Judge concluded that Applicant's extensive involvement with alcohol raised serious concerns about his judgment and reliability. The Judge applied Alcohol Consumption Disqualifying Condition 1[(6)] citing four arrests for alcohol-related driving offenses over the period from summer 1995 through June 2003; two 90-day suspensions of driving privileges as a result of matters that occurred in 2001 and 2003; and an arrest for public intoxication in December 1993. Nevertheless the Judge concluded that Applicant's problem was not recent because: Applicant was acquitted of the1995 drunk driving charge; the offense in 2000 was reduced to a conviction for reckless driving; and the 2001 charges were dismissed because Applicant successfully completed an alcohol education course. These three matters were completely resolved within a short time after each occurred, and none was reflected on Applicant's driving record as alcohol-related. In any event, they were not recent. The Judge acknowledged that "under some circumstances," the two convictions in 2003 "might be considered recent," but the Judge concluded that they were not recent here because: the alcohol-related driving conviction was for a less serious alcohol-related driving offense than the one originally charged; Applicant "successfully endured" the suspension of his driving privilege without incident; and Applicant was not required to attend alcohol education classes, treatment or counseling. The public intoxication charge resulted in a "modest fine on a traffic citation which was not considered alcohol related." Applicant was not involved in any additional incident since 2003. Decision at 6-7.

The Administrative Judge concluded, "[m]ore importantly," that Applicant had "shown positive changes in behavior indicating increased recognition for his personal responsibilities and better judgment, inspiring more reasonable and responsible levels of alcohol consumption." The Judge attributes the moderation in Applicant's drinking habits to Applicant's placing a priority on his responsibilities as a "single dad" to his seven-year-old son who came to live with him. Decision at 7.

Similarly, the Administrative Judge concluded that Criminal Conduct Disqualifying Condition 1 applied to Applicant's conduct because Applicant had four alcohol-related driving offenses, a charge of illegal possession of marijuana in 1997 and the public intoxication charge in 2003. However, the Judge concluded that Criminal Conduct Mitigating Conditions 1 and 6 applied. The Judge found that none of the charges between 1995 and 2001 resulted in a conviction "and all

were resolved in Applicant's favor shortly after they happened." The Judge did not consider the 2003 incidents to be recent and also concluded that Applicant rehabilitated himself for the same reasons as in Guideline G. Decision at 8.

Department Counsel argues that the Administrative Judge's inappropriate piecemeal analysis led him to apply these mitigating conditions and makes the following points: The Judge erred on recency when he shifted the analysis to outcomes of each charge rather than focus on the "whole person" and his repeated pattern of excessive alcohol use and bad judgment that was behind each of the arrests. The Judge's conclusion that the 2003 arrests were not recent is particularly arbitrary and capricious, especially after he stated that in some circumstances they might be considered recent. The Judge minimized the alcohol-related significance of all incidents, and failed to consider the significance of the 2003 incidents, which occurred after Applicant signed the current security clearance application. The Judge overlooked significant facts: Applicant's admitted practice of driving while over the legal alcohol limit even after his January 2004 interview by DSS in which he admitted to doing so approximately 10 times in 2003 and his admission at the hearing that he did so until June or July 2004. Similarly, as to rehabilitation and sobriety, the Judge ignored relevant evidence of continued use of alcohol in a manner which is not supportive of sobriety or successful rehabilitation (*e.g.,* Applicant's continuing consumption of beer as a way to relax and reduce stress and his adherence to the belief that he can safely drive after drinking two beers an hour). Despite the serious difficulties that resulted, Applicant still chooses to make alcohol a part of his life.

In deciding whether the Administrative Judge's rulings or conclusions are arbitrary or capricious, the Board 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 record evidence; or it is so implausible that it cannot be ascribed to a mere difference of opinion. *See* ISCR Case No. 97-0435 at 3 (App. Bd. July 14, 1998) (citing Supreme Court decision). An Administrative Judge is not required to discuss every bit of evidence, but his failure to discuss important aspects of a case is error. *See* ISCR Case No. 03-07874 at 4 (App. Bd. July 7, 2005). The Directive does not define "recent," and there is no "bright-line" definition of what constitutes "recent" conduct, but what is recent or not recent depends on the totality of the record evidence. *See* ISCR Case No. 03-02374 at 5 (App. Bd. Jan. 26, 2006).

Considering the record evidence as a whole, the Board is persuaded that the Administrative Judge could not have reasonably applied the four mitigating conditions in dispute. The key to the Judge's decision is his consideration of Applicant's testimony that around June or July 2004, Applicant reduced his alcohol consumption because he wanted to be a good example to his son. In effect, the Judge erred by relying inordinately on this portion of Applicant's testimony to the exclusion of Applicant's other testimony and other record evidence, and in focusing on the legal disposition of each arrest rather than on the overall behavioral pattern involving excessive use of alcohol and the bad judgment exhibited in each circumstance.

The Administrative Judge considered the first three incidents (1995, 2000 and 2001) together, downplayed the role of alcohol consumption, and concluded that they were not recent. After suggesting that the 2003 arrests "might be considered recent," the Judge concluded they were not recent in this case for the reasons described earlier, including the fact that Applicant was convicted of driving while alcohol impaired instead of driving while intoxicated. Hearing Transcript at 21. The Judge also failed to address the circumstances surrounding the second 2003 arrest: an arrest for public intoxication at a sobriety checkpoint where Applicant claims that he stopped drinking almost 3 ½ hours prior to

his arrest. Government Exhibit 2 at 5. Whatever the ultimate judicial disposition of any of these arrests, each involved the abuse of alcohol in conjunction with the operation of a motor vehicle. As Department Counsel argues, the issue was not the disposition of each arrest, but whether they were part of a long-term pattern of alcohol abuse and bad judgment. [(7)] The Judge's analysis fails to appropriately consider this important aspect of the case. Reason and logic suggest that each of the five incidents were part of a consistent pattern of excessive or abusive alcohol consumption in conjunction with conduct demonstrating such poor judgment and unreliability (*i.e.,* the operation of a motor vehicle) that it resulted in an arrest.

The Administrative Judge also failed to consider other important aspects of the case. The two 2003 incidents, one resulting in a conviction for driving while alcohol impaired, and the other involving an arrest for public intoxication after being pulled over at a sobriety check point, occurred after Applicant "successfully" completed an alcohol education program. Applicant testified that he drove over the legal limit for alcohol prior to his 1995 arrest, 20 or 30 times since his 1995 arrest, and ten times within the year of his January 2004 statement to DSS. Hearing Transcript at 41. Applicant continued to drink and drive over the legal limit for alcohol even after he gave his statement to the investigator. He admittedly continued driving over the legal limit for alcohol until he obtained custody of his son in June or July 2004. Hearing Transcript at 41-42. Applicant testified that he would still drink and drive, not exceeding two beers per hour. Hearing Transcript at 46-47.

Applicant's total circumstances here involved a long-term pattern of excessive or abusive alcohol consumption coupled with the exercise of poor judgment. The poor judgment is particularly exhibited through the operation of a motor vehicle after excessive drinking. This pattern of conduct began before 1995 and lasted at least until June or July 2004. Considering that Applicant has expressed an intent to continue to drink and drive, even if he does not exceed two beers an hour, the time between June or July 2004 and the hearing in November 2005 was too brief for a trier of fact to reasonably conclude that the conduct raising the security concern is remote. The Judge had to consider Applicant's testimony that he has reduced his consumption of alcohol because of his son, but in deciding on the credibility of this testimony, the Judge also had to consider Applicant's own admission that he would continue to drink and drive as long as it does not exceed two beers an hour. Moreover, given the significance of Applicant's long-term alcohol problem, the Judge could not have reasonably concluded that Applicant demonstrated a positive change in behavior supportive of sobriety or successful rehabilitation. It is arbitrary and capricious for a Judge to uncritically accept a witness's testimony without considering whether it is plausible and consistent with other record evidence. *See* ISCR Case No. 03-10380 at 6 (App. Bd. July 28, 2006).

Applicant's response brief suggests that the Administrative Judge's decision is sustainable under a "whole person" analysis, and the Judge concluded that it was. However, this part of the Judge's decision is also predicated on the erroneous assumptions that the conduct with security significance is temporally remote and that Applicant made "positive changes" in his life by reducing his drinking to be an example to his son. The Judge also specifically considers Applicant's lengthy work history, while holding security clearances, a history which features "admirable" performance and no security failures. The Judge found that Applicant is a mature individual who has successfully held the same important position with the same contractor for about 19 years after his discharge from the Navy. In his discussion, the Judge considers Applicant's "serious difficulties with respect to his alcohol consumption primarily from 1995 to 2003" but relies on the finding that "Applicant successfully completed an alcohol education program and has never been recommended for further counseling or treatment." Decision at 8.

A whole person analysis is not based on subjective judgment, but, as the Administrative Judge explained in his decision, is measured by principles found in the Directive's Adjudicative Process provision. Directive ¶ E2.2. Some of the principles mentioned by the Judge are the nature, extent and seriousness of the conduct; the frequency and recency of the conduct; the individual's age and maturity at the time of the conduct; the voluntariness of the participation; the presence and absence of rehabilitation and other pertinent behavioral changes; and the likelihood of continuation or recurrence. Decision at 4-5. Also, as the Judge indicated, any doubt as to whether access to classified information is clearly consistent with national security will be resolved in favor of the national security. Directive ¶ E2.2.2. An evaluation of an applicant's security eligibility under the whole person concept complements the Judge's obligation to apply pertinent provisions of the Adjudicative Guidelines. Neither obligation diminishes the other. *See* ISCR Case No. 04-00109 at 5 (App. Bd. July 13, 2006).

There is nothing in the Administrative Judge's whole person analysis that rationally distinguishes "recency" in the context of whole person from whether Applicant's same conduct was considered "recent" under the mitigating conditions in Guidelines G and J. Moreover, there is nothing in the Judge's whole person analysis that adds in any significant way to evidence already considered under Guideline G and J Mitigating Conditions that would show rehabilitation and behavioral changes making a continuation of the security-significant conduct less likely. Applicant's work history is the only substantial additional evidence that the Administrative Judge considered in his whole person analysis. To the extent that it relates to Applicant's character, this is relevant whole person evidence, but it is not sufficiently probative to mitigate the security concerns involved here. However admirable Applicant's work history is, it did not stop him, as a mature individual, from engaging in the security-significant conduct described in the SOR, nor does it demonstrate rehabilitation or other pertinent behavioral changes. *See* ISCR Case No. 98-0676 at 6 (App. Bd. Aug. 15, 2000). The Judge's reliance on Applicant's successful completion in 2002 of an alcohol education program in his whole person analysis is untenable considering the record evidence of Applicant's conduct in 2003, and the decision fails to consider other important aspects of the case, especially Applicant's continued intent to drive after drinking, even if he does not exceed two beers an hour. The Judge's whole person analysis is likewise unsustainable.

When an appealing party demonstrates factual or legal error, the Board must consider whether: (a) the error is harmful or harmless; (b) the non-appealing party made a persuasive argument for how the Administrative Judge's decision can be affirmed on alternate grounds; and (c) if the Administrative Judge's decision cannot be affirmed, should the case be reversed or remanded. In this case, Department Counsel has demonstrated harmful error, and the Judge's decision cannot be affirmed on alternate grounds. Considering the record evidence as a whole, it is unlikely that a favorable clearance decision would be sustainable and that the identified errors could be remedied by remand. *See* ISCR Case No. 03-22861 at 3 (App. Bd. June 2, 2006). Viewed cumulatively, the Judge's errors warrant reversal. *See* ISCR Case No. 03-10380 at 7 (App. Bd. July 28, 2006).

**Order**

The decision of the Administrative Judge granting Applicant a clearance is REVERSED.

Signed: Michael D. Hipple

Michael D. Hipple

Administrative Judge

Member, Appeal Board

Signed: Jean E. Smallin

Jean E. Smallin

Administrative Judge

Member, Appeal Board

**Separate Opinion of Member Mark W. Harvey**

I respectfully dissent. I disagree with my colleagues that reversal is warranted, and would instead remand the case to the Administrative Judge to permit him to address evidence that materially contradicts his whole person analysis and grant of a clearance. I also disagree with the majority's credibility determination,[(8)] and criticism of the Judge for his description of the disposition of Applicant's criminal offenses.[(9)] I do not agree that the Board is permitted to make credibility assessments.[(10)]

Department Counsel raises the issue[(11)] on appeal of whether the Administrative Judge committed prejudicial error in his conclusions that four mitigating conditions applied.[(12)]

When the rulings or conclusions of an Administrative Judge are challenged, the Board must consider whether they are: (1) arbitrary or capricious; or (2) contrary to law. Directive ¶ E3.1.32.3. When considering a Judge's rulings or conclusions under the arbitrary or capricious standard, the Board reviews the Judge's decision and determines 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."[(13)] We consider whether the Judge's decision, "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."[(14)] If an appealing party demonstrates error, then the Board determines whether the error is harmful or harmless,[(15)] whether the non-appealing party made a persuasive argument for how the Judge's decision can be affirmed on alternate grounds,[(16)] and if the Judge's decision cannot be affirmed, whether the case should be reversed or remanded. ISCR Case No. 04-04008 at 2 (App. Bd. Dec. 29, 2005) (citing Directive ¶¶ E3.1.33.2 and E3.1.33.3)).

**I. Whether the Administrative Judge was arbitrary, or capricious in his conclusions that Guideline G, Mitigating Conditions 2 and 3, [(17)] and that Guideline J, Mitigating Conditions 1and 6[(18)] applied. And if erroneously applied, whether such application was prejudicial**

**A. The Administrative Judge's findings and conclusions in regard to application of Guideline G and J's mitigating conditions**

The Judge concluded in regard to Guideline G (Alcohol Consumption) that Applicant's extensive involvement with alcohol raised serious concerns about his judgment and reliability stating, "Applicant was arrested four times for alcohol-related driving offenses over the nearly eight year period from the summer of 1995 to June 2003. His driver's license was suspended for 90 days on two occasions as a result of the matters that occurred in 2001 and 2003. He was also involved in a fifth incident in late 2003 involving public intoxication." He applied Alcohol Consumption Mitigating Conditions 2 and 3. The Judge explained his conclusion that Applicant's alcohol problem was not recent:

Applicant was found not guilty of his initial drunk driving charge in 1995. His offense in 2000 was reduced to reckless driving which is not considered to be alcohol-related with respect to his driving record. The charge resulting from the 2001 incident was ultimately dismissed upon Applicant's successful completion of an alcohol education course. These three matters were completely resolved within a short time after each occurred, and none of them are reflected on his driving record as alcohol-related. . . . The finding imposed in the [2003 alcohol] driving case was for a less serious offense than originally charged, and disposition of the case was not deferred for any reason. He successfully endured the 90-day suspension of his driver's license without incident, and he was not required to attend alcohol education classes, treatment, or counseling. The later matter that occurred in December 2003 was resolved by Applicant paying a modest fine on a traffic citation which was not considered alcohol-related. There have been no recurring alcohol or other incidents of any kind since 2003.

Decision at 6-7.

In regard his mitigating conclusion that Applicant demonstrated positive changes in behavior supportive of sobriety, the Judge reasoned:

More importantly, Applicant has shown positive changes in his behavior indicating increased recognition for his personal responsibilities and better judgment, inspiring more reasonable and responsible levels of alcohol consumption. Applicant's seven-year-old son came to live with him two years ago when he started kindergarten. He has been raising him as a 'single dad' for the last two years and he has been meaningfully involved in the child's life since birth. The child's mother has been something less than responsible, and Applicant clearly recognized the child's significant needs to undertake this dynamic change in his life. I find credible his claim the responsibilities associated with raising this child have become his top priority. It is reflected in his behavior by successfully moderating his drinking habits to acceptable social levels to no longer be a detrimental influence in Applicant's daily life.

Decision at 7.

The Judge concluded in regard to Guideline J (Criminal Conduct) that Applicant's four arrests for alcohol-related driving offenses from 1995 to 2003, and his possession of marijuana charge in 1997, as well as a public drunkenness citation in 2003 raised security concerns. He noted, however, that Applicant was actually convicted of only the last drunk driving charge and the public drunkenness citation. The Judge applied Criminal Conduct Mitigating Conditions 1 and 6. The Judge found that Applicant's first three driving offenses and the possession of marijuana occurred between 1995 and 2001, and all were resolved favorably shortly after they occurred without convictions. For the same reasons as stated under Guideline G, he determined they were not recent, and he showed clear evidence of rehabilitation, reducing the likelihood that Applicant would commit future criminal conduct.

**B. Discussion of the Judge's application of four mitigating conditions**

The Judge did not adequately discuss or weigh three factors when he concluded that "there is no indication of a recent problem."[(19)] First, the Judge stated that the last incident "occurred in December 2003 [and] was resolved by Applicant paying a modest fine on a traffic citation which was *not considered alcohol-related* (emphasis added)." Actually, Applicant said he that he drank about six beers, but stopped drinking at about 10:30 p.m. At about 2:00 a.m. the police stopped him at a roadblock. Applicant admitted drinking alcohol earlier that evening. The police told him to pull over into a parking lot. He was arrested. Applicant explained, "I do not feel that I should have been charge[d] with anything, but I did not fight the Public Drunkenness charge because I figured it was better than getting a DUI, since it was only considered a traffic citation."[(20)]

Second, the Judge correctly indicated that Applicant's last alcohol counseling occurred in 2001-2002. The Judge did not, however, emphasize that Applicant repeatedly drove while over the legal limit for alcohol in 2003 and 2004 after receiving counseling.

Third, the Judge noted that Applicant continued to drink alcohol and drive, but he did not address Applicant's statement that he repeatedly drove while over the legal limit for alcohol in 2003 and 2004. Applicant's written statement to a Special Agent of the Defense Security Service (DSS), on January 26, 2004, includes the comment:

I have driven 20 to 30 times when I have been over the legal limit for alcohol, since my first arrest in 1995. In the past year, I have probably driven while over the legal limit for alcohol 10 times. I do not think I have an alcohol problem because I just see drinking as a way of life for me. I drink beer because it relaxes me and takes my mind off the stress at work and the problems with my divorce and custody.

At his security clearance hearing on November 9, 2005, Applicant testified that his son, who was starting kindergarten moved in with him in June or July 2004 (Hearing Transcript at 42). Applicant reduced his alcohol consumption to a six pack of beer on weekends because of his son (Hearing Transcript at 49). As recently as the week before the hearing, however, Applicant attended a ball game and drank four beers (Hearing Transcript at 48). Applicant did not indicate whether he drove after consuming alcohol at the ball game. As stated previously, the Judge noted in his decision that Applicant continued to drink and drive despite his legal problems. Applicant admitted at his hearing that he drove with alcohol over the legal limit after his January 26, 2004, DSS interview, but not explicitly after June or July 2004 (Hearing Transcript at 41-42). The following colloquy, which

occurred between Applicant and his counsel, is the basis for the majority's factual finding that Applicant "still drinks and drives, not exceeding two beers per hour" (decision at 5):

Q. In your statement you indicated that there was a time that you drank almost every night. Now you do most of your drinking on the weekends?

A. Yes, sir. And it is not like I use[d] to.

Q. Do you have any weekends that you might drink more than some other weekends?

A. No, sir.

Q. So it's only a couple beers watching a football game or something like that?

A. Yes, sir. The past trip I made I was out with Marines and sailors after a meeting I had a couple of beers at a friend[']s house while we were cooking steaks. I[t] wasn't like I drank to the point of intoxication. I just had a couple beers.

Q. Do you consider yourself a social drinker then?

A. Very much so.

Q. And you like to drink with friend[s]?

A. Yes, I don't like to be alone. It just so happens that where ever I go to find people whether they are friends . . .

Q. How do you handle social situations where alcohol is present or be with friends that drink to avoid drinking too much?

A. **If I'm going to drive I use that rule of thumb that two beers per hour is the legal limit.**

Q. Have you ever tried to work with a designated driver when going somewhere?

A. Of course.

Hearing Transcript at 46-47 (emphasis added).

Applicant testified that he now limits himself to drinking a six-pack of beer while he is home on the weekends, if he is going to watch a ball game (Hearing Transcript at 49). In sum, the issue here is whether Applicant's comments about drinking two beers per hour and driving in the context of his overall testimony is past tense or present tense. If Applicant continues to drive while in intoxicated, then I agree with the majority that no reasonable Judge could grant Applicant a security clearance. But this is the type of factual finding that the Judge should be required to make on remand, after re-opening the hearing if necessary.

As the trier of fact, the Administrative Judge had to consider the evidence as a whole (including Applicant's explanations), assess the credibility of Applicant's testimony, and make appropriate findings of fact. A Judge "has broad latitude and discretion in writing a decision to decide an applicant's case" and the "Board does not have to agree with the Administrative Judge's findings and conclusions" to affirm them. ISCR Case No. 03-07075 at 5 (App. Bd. Dec. 2, 2005). There is a rebuttable presumption that an Administrative Judge considered all the record evidence unless the Judge specifically states otherwise. *See* ISCR Case No. 99-9020 at 2 (June 4, 2001). While a Judge need not discuss every piece of evidence, the Judge must confront evidence that does not support the Judge's conclusions. *See Idoranto v. Barnhart*, 374 F.3d 470 (7th Cir. 2004).

"The Appeal Board's review of the Administrative Judge's finding of facts is limited to determining if they are supported by substantial evidence-such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the record." ISCR Case No. 04-11463 at 2 (App. Bd. Aug. 4, 2006) (citing Directive ¶ E3.1.32.1). "This is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent [a Judge's] finding from being supported by substantial evidence." *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620 (1966). "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). An administrative judge receives somewhat greater deference under the "substantial evidence" standard than a trial judge receives under the "clearly erroneous" standard.[(21)] *See Dickinson v. Zurko*, 527 U.S. 150, 155 (1999). Under the substantial evidence standard, the deference is similar to the appellate review of jury findings. *Id*. Whether there is sufficient record evidence to support an Administrative Judge's findings of fact is a question of law, not a question of fact. *See* ISCR Case No. 02-02195 at 8 n. 24 (App. Bd. Apr. 9, 2004). The party challenging the Judge's "credibility determinations has a heavy burden of persuasion on appeal." ISCR Case No. 01-14740 at 7 (App. Bd. Jan. 15, 2003). And a Judge may use his credibility determination to make findings of fact in the face of conflicting record evidence.

However, a Judge cannot rely on his credibility determination to the exclusion of documentary or other objective record evidence that is relevant and pertinent to the Judge's findings of fact. *See* ISCR Case No. 00-0620 at 3 (October 19, 2001) (citing *Anderson v. City of Bessemer*, 470 U.S. 564, 575 (1985)).

In this case, there is important testimonial evidence that undercuts the Judge's determination about when Applicant ended his alcohol abuse that was not discussed in his opinion. The Directive does not define "recent," and there is no "bright-line" definition of what constitutes "recent" conduct.[(22)] The Judge is required to evaluate the record evidence as a whole and reach a reasonable conclusion as to the recency of an applicant's 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)). Accordingly, it would not necessarily be arbitrary, capricious or unlawful for the Judge to have concluded that Applicant's criminal conduct or alcohol-related misconduct was not recent, if the interval between the most recent instance of such conduct is viewed in isolation (approximately 18 months elapsed between Applicant's most recent driving while intoxicated or impaired occurrence and his hearing).[(23)] But under the Board's jurisprudence, this is apparently not how the recency Mitigating Conditions are analyzed. The Board requires a Judge to consider the totality of an applicant's circumstances. In Applicant's case, this includes aspects such as, the seriousness of the alcohol-related misconduct, and the number of violations of the law, regardless of whether the misconduct resulted in an arrest or conviction.

I conclude that the Judge's failure to address the fact that Applicant drove while intoxicated or impaired by alcohol on approximately ten occasions after completing alcohol counseling, and within about 18 months of his hearing anywhere in his opinion renders his decision legally arbitrary.[(24)]

**C. Whether the Administrative Judge's failure to address important contrary evidence in his decision is harmless error**

Having concluded that the Judge erred, next we must determine whether under all the facts and circumstances of this case, such error is harmless. The continued vitality of the Judge's favorable conclusions about the Applicant's security eligibility turns on whether the Judge may have been influenced in his "whole person" analysis in light of the record evidence as a whole. The Administrative Judge explained his application on Applicant's behalf of the whole person concept as follows:

Applicant is a mature individual who has successfully held the same important position with the same contractor for about 19 years after his discharge from the Navy. The same exemplary respect and dedication to the soldiers and sailors he supported while in the Navy has followed him in his civilian position. He has held long-time security clearances without infractions while both serving on active duty and as an employee of a defense contractor. He had an admirable record of service in the Navy and Applicant's loyalty to the United States is not in question. Although he encountered serious difficulties with respect to his alcohol consumption primarily from 1995 to 2003, Applicant successfully completed an alcohol education program and has never been recommended for further counseling or treatment. He has also shown a genuine commitment to change his life for meritorious reasons and has not had any recurring difficulties since 2003.

Decision at 8.

Under the whole person concept, an Administrative Judge must apply all relevant and material information about an applicant's conduct and circumstances, and must not do so in a piecemeal or separate manner.[(25)] Whole person analysis includes consideration of pertinent Adjudicative Guidelines disqualifying and mitigating conditions, as well as appropriate information about the applicant, such as age, motivation, and rehabilitative measures, and information about the misconduct, such as its nature, seriousness, recency, and frequency. *See* Directive, Section 6.3 and ¶¶ E3.1.25 and E2.2.1; ISCR Case No. 02-21927 at 5 (App. Bd. Dec. 30, 2005). The obligation to consider these factors "are complementary, not exclusive, in nature." ISCR Case No. 02-09389 at 4 (App. Bd. Dec. 29, 2004) Then the Judge must decide what weight can reasonably be given to the applicable disqualifying or mitigating condition.[(26)] Under appropriate circumstances, the Judge can "render a favorable decision in the absence of an[y] Adjudicative Guidelines mitigating condition."[(27)]

The favorable application of the "whole person" analysis may have been affected by the fact that Applicant drove while intoxicated or impaired on approximately ten occasions after completing alcohol counseling, and within about 18 months of his hearing. Accordingly this error is not harmless.

**II. Whether reversal is required to cure this prejudicial error**

Having determined that harmful or prejudicial error occurred, the Board must determine an appropriate remedy. Remand, rather than reversal, is required for those legal errors that can be corrected on remand.[(28)] Reversal implicitly requires the Board to determine that a "Judge's clearance decision is not sustainable and the identified errors cannot be remedied on remand." *See* ISCR Case No. 03-22861 at 3 (App. Bd. June 2, 2006); ISCR Case No. 03-09053 at 5 (App. Bd. ar. 29, 2006). Remand is consistent with the approach of the Federal Courts. "The Supreme Court has cautioned that when an agency has not considered all relevant factors in taking action, or has provided an insufficient explanation for its action, the appropriate course for a reviewing court ordinarily is to remand the case to the agency." *Ward v. Brown*, 22 F.3d 516, 522 (2d Cir. 1994) (citing *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985)). Remand is the remedy for an inadequate record, not reversal.[(29)]

The majority's decision to reverse this case instead of remanding the case with instructions, results from its own *de novo* review, which includes a determination that Applicant's testimony about changing his lifestyle, and ending his alcohol abuse is not credible. It involves weighing conflicting evidence, that is, determining his past alcohol abuse is more important than his change in circumstances and employment record. Ultimately, the majority is substituting its judgment on the ultimate disposition of the clearance for that of the Judge, who observed the Applicant's testimony, and evidently determined he was credible and not a security risk.

A decision to reverse is effectively a determination that the evidence of record, despite contrary credibility determinations, and regardless of analysis, could never support approval of Applicant's clearance. Stated differently, any decision on remand to approve a clearance, based on the evidence of record would be arbitrary, capricious or an abuse of discretion. In view of the foregoing, the Board's conclusion that the Judge erred in his application of the Adjudicative Guidelines should not foreclose the Judge from deciding on remand that Applicant has mitigated security concerns under either Adjudicative Guidelines or the "whole person" concept.[(30)]

Signed: Mark W. Harvey

Mark W. Harvey

Administrative Judge

Member, Appeal Board

1. The Administrative Judge's formal finding for Applicant with respect to SOR paragraph 2, involving Guideline E, is not at issue on appeal.

2. "The problem occurred a number of years ago and there is no indication of a recent problem," (Directive ¶ E2.A7.1.3.2).

3. "Positive changes in behavior supportive of sobriety," (Directive ¶ E2.A7.1.3.3).

4. "The criminal behavior was not recent." (Directive ¶ E2.A10.1.3.1).

5. "There is clear evidence of successful rehabilitation," (Directive ¶ E2.A10.1.3.6).

6. "Alcohol-related incidents away from work, such as driving while under the influence . . . or other criminal incidents related to alcohol use," (Directive ¶ E2.A7.1.2.1).

7. Even if we assume that the Judge could have considered the 1995 acquittal as mitigation for Guideline J purposes (Directive ¶ E2.A10.1.3.5), as part of a pattern of alcohol abuse the arrest still has significance for Guideline G

purposes. Moreover, the Board finds no basis for the Judge's conclusion that all of the criminal charges "were resolved in Applicant's favor shortly after they happened." A conviction for reckless driving or driving while alcohol impaired is not a resolution in Applicant's favor in the same nature as an acquittal.

8. The majority finds that the Judge "relied inordinately" on Applicant's testimony regarding his reduction in alcohol consumption around June or July 2004 because he wanted to be a good example to his son, to the exclusion of other testimony and record evidence. Appeal Board Decision at 5. The majority believes "the credibility of this testimony is impeached by Applicant's own admission that he continues to drink and drive." *Id*. at 6. Applicant did not state that he continued to drink and drive after June or July 2004. And the majority asserts that the Judge "focus[ed] on the legal disposition of each arrest rather than on the behavioral pattern involving excessive use of alcohol, and the bad judgement exhibited in each circumstance." *Id*. at 5.

9. The majority opinion notes that under Guideline J the disposition of the offenses is relevant information. As such, the Judge's listing of the dispositions of the multiple arrests was not error. *See* Directive ¶ E2.A10.1.3.6 (listing "acquittal" as a mitigating condition). The Judge's opinion does not indicate that he weighed the disposition information as more important than the underlying conduct.

10. In evaluating the Judge's factual findings, The Board is required to give deference to the Judge's credibility determinations. Directive ¶ E3.1.32.1. Indeed, this credibility determination should not be overturned absent "extraordinary circumstances." *Vercillo v. CFTC*, 147 F.3d 548, 555 (7th Cir. 1998). The Board is supposed to give this special deference to credibility determinations because "[f]ew if any of these ephemeral indicia of credibility can be conveyed on a paper record of the proceedings and it would be extraordinary for a reviewing [Board] to substitute second-hand impressions of the [applicant's] demeanor, candor, or responsiveness for that of the [Judge]." *Jibril v. Gonzalez*, 423 F.3d 1129, 1137 (9th Cir. 2005). Appellate courts recognize that "arguments to the effect that the [Judge] should have found certain witnesses to be not credible, are to put it bluntly, almost never worth making." *Beverly Cal. Corp. v. NLRB*, 227 F.3d 817, 829 (7th Cir. 2000).

11. Department Counsel separately challenges the Judge's application of Guideline G, Mitigating Conditions 2 and 3, and Guideline J, Mitigating Conditions 1 and 6. Because Guideline G, Mitigating Conditions 2 and 3 are very similar to Guideline J, Mitigating Conditions 1 and 6, I will merge my discussion of these two issues. *See* notes 17 and 18, *infra*.

12. Department Counsel did not explicitly challenge the Judge's whole person analysis, but did urge reversal in the body of the brief under the "totality of the evidence." Applicant countered with a 1-page letter highlighting the whole person concept as a basis for affirming the Judge. Department Counsel's failure to address the whole person concept is barely sufficient to preserve the issue of whether the Judge's whole person analysis was prejudicially affected by the Judge's error. *See* ISCR Case No. 00-0050 at 2 (App. Bd. July 23, 2001) (listing reasons why claims of error must be raised with specificity, including notice to the opposing party). Applicant's commentary about the whole person concept indicates he was not prejudiced by lack of notice.

13. ISCR Case No. 04-04008 at 2 (App. Bd. Dec. 29, 2005) (citing ISCR Case No. 97-0435 at 3 (App. Bd. July 14, 1998)). *See Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 43 (1983).

14. ISCR Case No. 03-10004 at 1-2 (App. Bd. Jan. 27, 2006) (citing ISCR Case No. 97-0435 at 3 (App. Bd. July 14, 1998)). *See State Farm,* 463 U.S. at 43.

15. ISCR Case No. 03-22912 at 2 (App. Bd. Dec. 30, 2005) (citing ISCR Case No. 00-0250 at 6 (App. Bd. July 11, 2001) (discussing harmless error doctrine)).

16. ISCR Case No. 03-10004 at 2 (App. Bd. Jan. 27, 2006) (citing ISCR Case No. 99-0454 at 6 (App. Bd. Oct. 17, 2000) (citing federal cases)).

17. Guideline G Mitigating Conditions 2 and 3 are: "The problem occurred a number of years ago and there is no indication of a recent problem," Directive ¶ E2.A7.1.3.2; and "Positive changes in behavior supportive of sobriety,"

Directive ¶ E2.A7.1.3.3.

18. Guideline J Mitigating Conditions 1 and 6 are: "The criminal behavior was not recent," Directive ¶ E2.A10.1.3.1; and "There is clear evidence of successful rehabilitation," Directive ¶ E2.A10.1.3.6.

19. *See* Directive ¶¶ E2.A7.1.3.2 and E2.A10.1.3.1, at notes 7 and 8, *supra*.

20. The Judge's erroneous description of the December 2003 incident (resolved by Applicant's guilty plea to public drunkenness) as a not alcohol related traffic citation is a relatively minor error that by itself would not render the Judge's decision arbitrary and capricious.

21. *See* Francis M. Allegra, "Section 482: Mapping the Contours of the Abuse of Discretion Standard of Review," 13 Va. Tax Rev. 423, 460-473 (Winter 1994) (comparing the various standards of review).

22. ISCR Case No. 03- 02374 at 4 (App. Bd. Jan. 26, 2006) (Judge did not err by concluding drug use not recent with passage of slightly less than two and a half years between last drug use and hearing) (citing ISCR Case No. 02-10454 at 4 (App. Bd. Nov. 23, 2004)). *See* ISCR Case No. 98-0611 at 2 (App. Bd. Nov. 1, 1999) (not error for Judge to find that last marijuana use nine months before close of record was not recent)).

23. *See generally, e.g.* ISCR Case No. 03-22912 at 2 (App. Bd. Dec. 30, 2005) (not arbitrary or capricious for Judge to decide that maintenance of sobriety for 21 months satisfied Mitigating Condition 3); ISCR Case No. 02-23133 at 3 (App. Bd. June 9, 2004) (holding it was not arbitrary, capricious, or contrary to law for a Judge to conclude applicant's two-year period of abstinence and his completion of alcohol treatment programs were sufficient to overcome the government's security concerns involving nearly a twenty-year history of alcohol related incidents); ISCR Case No. 98-0394 at 4 (App. Bd. June 10, 1999) (Although the passage of three years since Applicant's last act of misconduct did not, standing alone, compel the Judge to apply Criminal Conduct Mitigating Condition 1, as a matter of law, the Judge erred by failing to give an explanation why he did not apply that mitigating condition.).

24. These 10 incidents surfaced during Applicant's testimony and were not alleged in the Statement of Reasons. This information may be considered "to evaluate an applicant's evidence of extenuation, mitigation, or changed circumstances" and to show "whether an applicant has demonstrated successful rehabilitation" among other reasons. ISCR Case No. 02-07218 at 3 (App. Bd. Mar. 15, 2004) (citing ISCR Case No. 98-0582 at 9 (App. Bd. Nov. 12, 1999)).

25. ISCR Case No. 03-04147 at 3 (App. Bd. Nov. 4, 2005); ISCR Case No. 02-01093 at 4 (App. Bd. Dec. 11, 2003).

26. ISCR Case No. 02-21927 at 5 (App. Bd. Dec. 30, 2005) (citing ISCR Case No. 02-05110 4-6 (App. Bd. Mar. 22, 2004); ISCR Case No. 01-08565 at 5 (App. Bd. Mar. 7, 2003)).

27. ISCR Case No. 02-09389 at 4 (App. Bd. Dec. 29, 2004). *See* ISCR Case No. 02-32006 at 5 (App. Bd. Oct. 28, 2004); ISCR Case No. 02-30864 at 4 (App. Bd. Oct. 26, 2005); ISCR Case No. 03-11448 at 3-4 (App. Bd. Aug. 10, 2004).

28. Directive ¶ E3.1.33.3 states that the Appeal Board shall have authority to: "Reverse the decision of the Administrative Judge if correction of the identified error mandates such action." Clearly the Judge can take corrective action and there is no need to reverse the Judge's decision. Reversal should be limited to situations where a Judge has failed to comply with a previous remand, or where a statute or other regulatory requirement mandates a particular disposition. *See, e.g.*, 10 U.S.C. § 986.

29. Appellate courts occasionally reverse an Administrative Judge's (AJ) decisions (or they may remand without reversing the AJ's decision), but then the appellate court directs issuance of a new decision consistent with the appellate court's opinion. *See* Administrative Law § 6-51, Matthew Bender and Co. (2006). I was unable to locate any federal appellate court decisions where an AJ presiding at a formal administrative hearing was reversed, and then the appellate court directed the result. Reversal and remand, or remand without reversal are both consistent with the process outlined in Directive ¶ E3.1.35, where remand by the Board automatically requires the Judge to issue a new clearance decision. I conclude that the Board should follow the same process as appellate courts, unless specifically authorized to do

otherwise. A sample of cases from the Supreme Court and most of the circuits illustrates the strong preference for remand. *See, e.g., Camp v. Pitts*, 411 U.S. 138 (1973); *Sierra Club v. Army Corps of Eng'r*, 772 F.2d 1043 (2d Cir. 1985); *Alvarado Community Hosp. v. Shalala*, 155 F.3d 1117, 1125 (4th Cir. 1998); *Medrano-Villatoro v. INS*, 866 F.2d 132 (5th Cir. 1989); *Chemical Mfrs. Ass'n v. EPA*, 885 F.2d 253, 265 (5th Cir. 1989); *Nielsen Lithographing Co. v. NLRB*, 854 F.2d 1063 (7th Cir. 1988); *Corning Sav. & Loan Ass'n v. Federal Home Loan Bank Bd.*, 736 F.2d 479 (8th Cir. 1984); *Reyes v. Bowen*, 845 F.2d 242, 245 (10th Cir. 1988); *Owens v. Heckler*, 748 F.2d 1511, 1514 (11th Cir. 1984); *Sierra Club v. EPA*, 294 F.3d 155, 163 (D.C. Cir. 2002); *Air Transp. Ass'n of Canada v. FAA*, 254 F.3d 271, 278 (D.C. Cir. 2001); *USIA v. FLRA*, 960 F.2d 165 (D.C. Cir. 1992); *National Org of Veterans' Advocates, Inc. v. Secretary of Veterans Affairs*, 260 F.3d 1365 (Fed. Cir. 2001).

30. The Majority's standard for reversal in lieu of remand is "Considering the record evidence as a whole, it is unlikely that a favorable clearance decision would be sustainable and that the identified errors could be remedied by remand." Decision at 7. Theoretically, the Judge could again conclude that Applicant had made a change in his lifestyle and had not abused alcohol after June or July 2004. Re-applying the same information about the whole person concept, he could issue a reasonable clearance decision, approving Applicant's clearance. Even if the Board disagrees with this result, the issue is whether the decision is rational, the most deferential of standards. Respectfully, the standard does not hinge on whether a particular result is likely or unlikely to be subsequently sustained after a *de novo* review. The standard is whether a particular result would in all cases be "arbitrary, capricious, or unlawful." Under the circumstances, the Board should permit the Judge to address the errors, take corrective action, and come to his own conclusions.