DATE: October 20, 2006

In Re:

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

Applicant for Security Clearance

ISCR Case No. 04-12648

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Eric Borgstrom, Department Counsel

FOR APPLICANT

Pro Se

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On August 11, 2005, DOHA issued a statement of reasons advising Applicant of the basis for that decision--security concerns raised under Guideline E (Personal Conduct) and Guideline J (Criminal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On January 26, 2006, after the hearing, Administrative Judge Charles D. Ablard 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's favorable clearance decision under Guidelines E and J is arbitrary, capricious or contrary to law. We reverse the Administrative Judge's decision to grant the clearance.

Whether the Record Supports the Administrative Judge's Factual Findings

A. The Administrative Judge made the following pertinent findings of fact:

Applicant is a 49-year-old employee of a major defense contractor working in the communications field where he has been successfully employed since 1981 holding a security clearance. He was on active duty in enlisted status in the Army from 1974 until 1981 and since in the reserves with a security clearance. He has held a clearance for over 30 years with no security violations.

Applicant's criminal offense alleged in SOR ¶2.b. occurred in 1998 when he was having financial difficulties. He received a traffic citation with a fine of $130.00, but he paid only $80.00 by creating a new citation and changing the numbers. He was charged with forgery, but the charge was reduced to disorderly conduct to which he pled guilty in 1999. He was sentenced to 25 hours of community service and fined $250.00.

Three different security clearance applications (SF 86) were submitted in evidence. The first dated August 29, 2002, is an abbreviated form omitting questions 8 through 11 and 17 through 42. The second is dated August 29, 2003, and includes answers to those omitted questions. These included Question 26 on arrests during the past seven years to which Applicant answered in the negative. This is the basis for the personal conduct allegation in SOR ¶1.a. The third is dated

July 13, 2000, and contains similar information, but also includes the information at Question 26 about the 1999 conviction for disorderly conduct.

There is confusion concerning the origins of these SF 86s. Applicant submitted a letter from his company attempting to explain the existence of the three documents and the origins of the requests for the documents. Since both the first and second documents are dated the same month and day but with different years, the government contended that they likely were both from the 2002 submission. Thus, the two were treated as being from 2002. Despite the confusion, Applicant did omit the relevant information for Question 26 on the full 2002 SF86 even though he had included the information on his 2000 SF 86. He admitted that he did not want to disclose it for fear of jeopardizing his employment although he couldn't understand why since he had revealed the same information two years before.

Applicant was divorced in 1998 and has been financially responsible for his two children from the marriage. His son is a Ph.D. candidate at a mid-western university and his daughter is an adult practical nurse who lives with him. He has another daughter out of wedlock, age 15, whose mother has cancer. He is bringing their daughter to live with him. He has maintained contact with the daughter and her mother over the past 15 years taking his parental responsibilities seriously.

Applicant is well regarded by his company based on his performance evaluations. He had an excellent record in the Army while on active duty as shown by his evaluations and by his Army Reserve supervisors over the past five years of his service in the reserves. During his Reserve career, he has become a warrant officer and is expected to be promoted to WO6 in July, 2006.

Applicant's salary from his employment is $67,000.00 per annum and he receives approximately $10,000.00 to $13,000.00 per annum for his reserve activities. He is financially stable and has none of the problems that existed in 1998.

B. Discussion

The Judge's findings of fact will be discussed insofar as they relate to the issues presented.

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 the authority delegated to the agency. . ." *Motor Vehicle Mfrs. Ass'n,* 463 U.S. at 42. We review matters of law *de novo.*

Department Counsel argues that the Administrative Judge's favorable security clearance decision is arbitrary and capricious, and unsupported by the weight of the record in its ultimate conclusion that the Guideline J and E security concerns were mitigated. In support of this argument, Department Counsel contends the Judge erred in his favorable application of Guideline J Mitigating Conditions 1, 2 and 6[(1)] by engaging in a piecemeal analysis of the Guideline J concerns. Department Counsel also contends the Judge erred in his favorable application of the "whole person" factors to both the Guideline J and E concerns either by relying on factors which did not constitute evidence of changed circumstances or rehabilitation, or failing to consider significant aspects of the case and articulate a sustainable rationale for his decision. Department Counsel's argument has merit.

In this case, there were two incidents of falsification-related conduct occurring within a four year period--Applicant's 1999 forgery/disorderly conduct incident and his 2002 falsification of his security clearance application. The Administrative Judge essentially considered them separately, concluding that the 1999 incident alone was mitigated under Mitigating Conditions 1, 2, and 6 because the incident was isolated, not recent, and the Applicant had

demonstrated rehabilitation--despite the occurrence of the subsequent similar event.(2) The Judge's piecemeal analysis of the two episodes failed to reflect a reasonable interpretation of the full evidentiary record, which showed a pattern of intentional falsifications, dishonest conduct, and failure to cooperate. *See, e.g.,* ISCR Case No. 03-22563 at 3 (App. Bd. Mar. 8, 2006). By analyzing each incident, one at a time, the Judge failed to consider the significance of Applicant's pattern of conduct. *See, e.g., Raffone v. Adams,* 468 F. 2d 860 (2nd Cir. 1972)(taken together, separate events may have a significance that is missing when each event is viewed in isolation). The Judge's favorable application of Mitigating Conditions 1, 2, and 6 under Guideline J is contrary to the weight of the evidence, and arbitrary and capricious. *See, e.g.,* ISCR Case No. 99-0122 at 3 (App. Bd. Apr. 7, 2000).

The Administrative Judge's favorable application of the "whole person" factors under both Guidelines J and E is similarly flawed. This case involved multiple incidents of serious misconduct of security concern by a mature applicant who had held a clearance for over 30 years. It was not a case involving a youthful indiscretion. Applicant had deliberately and intentionally engaged in the misconduct, motivated by his own self interest. The conduct involved multiple incidents of falsifying government-type documents. The most recent falsification had occurred in 2002 and had not been corrected by the Applicant until 2004. Given those circumstances, the Judge failed to articulate a sustainable rationale for his favorable application of such "whole person" factors as those relating to the nature and seriousness of the conduct, the circumstances surrounding the conduct, including the Applicant's knowledgeable participation, the frequency and recency of the conduct, the Applicant's age and maturity at the time of the conduct, the voluntariness of Applicant's participation, the motivation for the conduct, and the likelihood of continuation or recurrence of the conduct.(3) In reaching his favorable decision, the Judge pointed to such factors as Applicant's successful career, his strong family support, and his expression of contrition, to support a conclusion of changed circumstances and rehabilitation. However, most of those circumstances were also present prior to, or during, the time Applicant engaged in the conduct of security concern, and the others are either of low probative value or standing alone insufficient to support the Judge's favorable conclusion, given the extent of the unanalyzed contrary evidence. Accordingly, the Judge's favorable application of the "whole person" factors under Guidelines J and E is contrary to the weight of the evidence, and arbitrary and capricious.

The errors identified by Department Counsel are harmful and cannot be remedied on remand, given the Administrative Judge's findings of fact and the record in the case. Therefore, the Judge's favorable decision under Guidelines J and E must be reversed.(4)

Order

The Administrative Judge's favorable security clearance is REVERSED.

Signed: Michael Y. Ra'anan

Michael Y. Ra'anan

Administrative Judge

Chairman, Appeal Board

Signed: William S. Fields

William S. Fields

Administrative Judge

Member, Appeal Board

Separate Opinion of Member Mark W. Harvey

I respectfully dissent. I disagree with my colleagues that reversal is warranted. The Administrative Judge's decision was

not arbitrary, capricious, or unlawful. Even if the Judge erred in the application of three mitigating conditions, the case should be remanded to the Judge to permit him to take corrective action, and then to issue a new decision.

Department Counsel raises two issues on appeal relevant to our disposition: (1) Whether the Administrative Judge was arbitrary, capricious, or contrary to law in his conclusion that Guideline J, Mitigating Conditions 1, 2, and 6 [(5)] applied to Applicant's 1999 forgery and (2) Whether the Judge was arbitrary, capricious, or contrary to law in his conclusions with respect to his whole person analysis.

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."[(6)] 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."[(7)] If an appealing party demonstrates error, then the Board determines whether the error is harmful or harmless,[(8)] whether the Judge's decision can be affirmed on alternate grounds,[(9)] 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. The Administrative Judge's findings and conclusions

A. The Judge found the following pertinent facts:

Applicant is a 49-year-old employee of a major defense contractor working in the communications field where he has been successfully employed since 1981 holding a security clearance. He was on active duty in enlisted status in the Army from 1974 until 1981 and since in the reserves with a security clearance. He has held a clearance for over 30 years with no security violations.

Applicant's criminal offense alleged in [Statement of Reasons] (SOR) ¶ 2.b. occurred in 1998 when he was having financial difficulties. He received a traffic citation with a fine of $130.00, but he paid only $80.00 by creating a new citation and changing the numbers. He was charged with forgery, but the charge was reduced to disorderly conduct to which he pled guilty in 1999 (Exh. 6). He was sentenced to 25 hours of community service and fined $250.00.

Three different security clearance applications (SF 86) were submitted in evidence. The first (Exh. 1) dated August 29, 2002, is an abbreviated form omitting questions 8 through 11 and 17 through 42. The second (Exh 2) is dated August 29, 2003, and includes answers to those omitted questions. These included Question 26 on arrests during the past seven years to which Applicant answered in the negative. This is the basis for the personal conduct allegation in SOR ¶ 1.a. The third (Exh. 3) is dated July 13, 2000, and contains similar information, but also includes the information at Question 26 about the 1999 conviction for disorderly conduct.

There is confusion concerning the origins of these SF 86s. Applicant submitted a letter from his company attempting to explain the existence of the three documents and the origins of the requests for the documents (Exh. B). Since both the first and second documents are dated the same month and day but with different years, the government contended that they likely were both from the 2002 submission. Thus, I will treat the two as being from 2002. Despite the confusion, Applicant did omit the relevant information for Question 26 on the full 2002 SF 86 even though he had included the information on his 2000 SF 86. He admitted that he did not want to disclose it for fear of jeopardizing his employment although he couldn't understand why since he had revealed the same information two years before.

Applicant was divorced in 1998 and has been financially responsible for his two children from the marriage. His son is a Ph.D. candidate at a mid-western university and his daughter is an adult practical nurse who lives with him. He has another daughter out of wedlock, age 15, whose mother has cancer. He is bringing their daughter to live with him. He has maintained contact with the daughter and her mother over the past 15 years taking his parental responsibilities seriously. Applicant is well regarded by his company based on his performance evaluations (Exh. E-I). He had an

excellent record in the Army while on active duty as shown by his evaluations (Exhs. N-T) and by his Army Reserve supervisors (Exhs. D and J-M) over the past five years of his service in the reserves. During his Reserve career, he has become a warrant officer and is expected to be promoted to [CW4] in July, 2006.

Applicant's salary from his employment is $67,000.00 per annum and he receives approximately $10,000.00 to $13,000.00 per annum for his reserve activities. He is financially stable and has none of the problems that existed in 1998.

Decision at 2-3.

B. The Administrative Judge made the following conclusions:

Upon consideration of all the facts in evidence, and after application of all appropriate adjudicative factors, I conclude the following with respect to all allegations set forth in the SOR:

Applicant's failure to report his police record for his 1999 conviction at Question 26 on his 2002 SF 86 relating to all other offenses during the past seven years raises questions about his personal conduct. Under Guideline E such conduct might indicate questionable judgment, unreliability, and unwillingness to comply with rules and regulations and could indicate that the person may not properly safeguard classified information (E2.A5.1.1.). Specifically, the deliberate omission, concealment, or falsification of relevant and material facts from a personnel security application could raise a security concern and be disqualifying. (E2.A5.1.2.2.) Applicant admitted he deliberately withheld the information, because he feared loss of his security clearance, although [he] could not understand why he was concerned since it had been revealed in 2000 without adverse consequences.

Guideline J (Criminal Conduct) is alleged both as a violation of 18 U.S.C. §1001 by failing to answer Question 26 on his 2002 SF 86 (SOR ¶ 2.a) and as to the conduct itself (SOR ¶ 2.b). The allegations could be mitigated if the criminal behavior was not recent (E2.A10.1.3.1), the crime was an isolated incident (E2.A10.1.3.2.), or there is clear evidence of successful rehabilitation (E2.A10.1.3.6.). I conclude that ¶ 2.b is mitigated for all three conditions.

In all adjudications the protection of our national security is of paramount concern. Persons who have access to classified information have an overriding responsibility for the security concerns of the nation. The objective of the security clearance process is the fair-minded, commonsense assessment of a person's trustworthiness and fitness for access to classified information.

The "whole person" concept recognizes we should view a person by the totality of their acts and omissions. Each case must be judged on its own merits taking into consideration all relevant circumstances, and applying sound judgment, mature thinking, and careful analysis. Applicant has had a successful career with the same company for almost a quarter century. He has been on active duty and in the Army reserves for nearly 30 years where he is highly regarded for his skill and dedication to his assignments. He has successfully held a security clearance for over 30 years. He has shown strong family support for his older children and the care of his younger daughter as well as concern for her mother. Applicant's expression of remorse both for the criminal conduct and his failure to report the occurrence in 2002 on his SF 86 is persuasive of his changed conduct and rehabilitation. Applying the precepts of the whole person analysis, I conclude that Applicant should be granted a security clearance.

Decision at 4.

II. Whether the Administrative Judge was arbitrary, capricious, and contrary to law in his conclusions that Guideline J, Mitigating Conditions 1, 2, and 6 applied with respect to Applicant's 1999 forgery

The Administrative Judge concluded that Guideline J, Mitigating Conditions 1 (not recent), 2 (isolated incident) and 6 (clear evidence of successful rehabilitation) applied to the 1999 forgery incident (SOR ¶ 2b), but he apparently did not apply these same mitigation conditions in regard to Applicant's 2002 false statement on his SF 86 (failure to disclose his prior arrest and conviction) (SOR ¶ 2a).

Department Counsel contends that the Judge engaged in prohibited piecemeal analysis[(10)] when he applied these three

mitigating conditions to the 1999 forgery without considering Applicant's 2002 false statement on his SF 86. It is apparent, however, from reading the Judge's decision that he did in fact consider both incidents in relation to application of these three mitigating conditions, as both incidents are discussed in the same brief paragraph. The most reasonable interpretation of the Judge's overall decision is that he meant to apply all three mitigating conditions to both incidents.

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).

The Directive does not define "recent," and there is no "bright-line" definition of what constitutes "recent" conduct.[(11)] 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)). In Applicant's case, this includes aspects such as, the seriousness of the misconduct, and the number of violations of the law, regardless of whether the misconduct resulted in an arrest or conviction. Accordingly, it would not be arbitrary, capricious or unlawful for the Judge to have concluded Applicant's 2002 falsification of his SF 86 was not recent.[(12)]

Similarly, the Judge could reasonably conclude that Mitigating Condition 2 ("The crime was an isolated incident") applied to both the 1999 forgery and 2002 falsification of the SF 86. A reasonable Judge could consider two incidents, separated from each other by three years to be sufficiently isolated over Applicant's nearly three decades of government service to merit application of Mitigating Condition 2. In his whole person analysis, the Judge explained why he believes Applicant is rehabilitated,[(13)] thus making a reasonable case for Mitigating Condition 6, for both offenses.[(14)]

Assuming *arguendo*, that the Judge's explicit application of Mitigating Conditions 1, 2 and 6 to the 1999 forgery incident alone was intentional, such decision would be arbitrary because he did not "articulate a satisfactory explanation for [his] action including a rational connection between the facts found and the choice made." *State Farm*, 463 U.S. at 43 (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962). Of course, this possibility is particularly unlikely in regard to Mitigating Condition 2-because there are only two incidents at issue, and logically a Judge in determining whether an incident is isolated or not will always look to the record evidence for other incidents.

III. Whether the Judge was arbitrary, capricious, and contrary to law in his conclusions with respect to his whole person analysis and whether any error was harmless

Department Counsel contends that the Judge's reliance upon Applicant's employment history, military service, possession of security clearance, and support of his family is misplaced. Specifically, these circumstances do not show rehabilitation because they did not change after the criminal offenses. Applicant committed two serious offenses. He did not admit that he lied on his SF 86 until confronted by Special Agent of the Defense Security Service. Moreover, the Judge failed to mention any negative evidence in his whole person analysis. Department Counsel asserts this analysis "is indicative of the misperception that the whole-person analysis is utilized solely for the purposes of mitigation." Department Counsel provides a lengthy description of aggravating features of the nine whole-person factors delineated in the Directive ¶¶ E2.2.1.1 - E2.2.1.9, that the Judge failed to address in his decision.[(15)] All of Department Counsel's significant derogatory comments about Applicant can be gleaned from a careful review of the Judge's overall decision, or are inferences that flow from the Judge's findings of fact. Both incidents pertained to serious legal matters and had serious potential punishments. Directive ¶ E2.2.1.1.[(16)] The two incidents were deliberate, willful, premeditated and knowing. Directive ¶¶ E2.2.1.2 and E2.2.1.5. There are two incidents, with the most recent in 2002. Directive ¶ E2.2.1.3. At the time of the offenses, Applicant was in his 40s, mature, with a lengthy, stable employment record and decades of military service. Directive ¶ E2.2.1.4. Applicant committed both offenses out of self-interest. Directive ¶ E2.2.1.7. There is an absence of record evidence supporting behavior change. Directive ¶¶ E2.2.1.6 and E2.2.1.7. The absence of evidence of widespread knowledge of Applicant's offenses makes him more vulnerable to coercion and blackmail. Directive ¶ E2.2.1.8.

The "whole person" concept is the focus of the analysis of whether an applicant is eligible for a security clearance. Directive ¶ E2.2.3. Indeed, the Appeal Board has repeatedly held that a Judge may find in favor of an applicant where no specific mitigating conditions apply. 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); ISCR Case No. 02-09389 at 4 (App. Bd. Dec. 29, 2004); ISCR Case No. 02-32006 at 5 (App. Bd. Oct. 28, 2004). "Under the whole person concept, the Administrative Judge must not consider and weigh incidents in an applicant's life separately, in a piecemeal manner. Rather, the Judge must evaluate an applicant's security eligibility by considering the totality of an applicant's conduct and circumstances." ISCR Case No. 03-04147 at 3 (App. Bd. Nov. 4, 2005) (quoting ISCR Case No. 02-01093 at 4 (App. Bd. Dec. 11, 2003)).

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.[(17)] Whole person analysis is required, and it 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.[(18)] Under appropriate circumstances, the Judge can "render a favorable decision in the absence of an[y] Adjudicative Guidelines mitigating condition."[(19)]

I conclude, based on the Judge's decision, that he "considered relevant factors" delineated in the Directive ¶¶ E2.2.1.1 - E2.2.1.9 in his whole person analysis. *See* ISCR Case No. 97-0435 at 3 (July 14, 1998) (requiring consideration of relevant factors). His overall decision shows consideration of "record evidence as a whole, both favorable and unfavorable." It indicates the Judge concluded that "the favorable evidence outweighs the unfavorable evidence." *See* ISCR Case No. 03-04147 at 3 (App. Bd. Nov. 4, 2005) (citing Directive ¶ E2.A10.1.2.1)). Having concluded that the Judge's whole person analysis was sustainable, the Judge's error, if any was harmless.

IV. Whether reversal is required to cure this "prejudicial error"

Remand, rather than reversal, is required for those legal errors that can be corrected on remand.[(20)] 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. Mar. 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)) (The Second Circuit's remand included modification of the District Court's order, which erroneously limited the discretion of the Veteran's Administration on remand). Remand is the remedy for an inadequate record, not reversal.[(21)]

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 is not credible.[(22)] *De novo* review involves weighing conflicting evidence, that is, determining his 1999 and 2002 misconduct is more important than his remorse 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. In regard to the majority's comments at note 6, I fully support efficient, timely, and practical decisions. I do not urge remand in this case, and have not supported a second remand in any case(s). But reversal here is contrary to the plain language of Directive ¶ E3.1.33.3. The Executive has clearly and explicitly placed the key responsibility for making the ultimate clearance decision outside the authority of the Board, except when an identified error *mandates* such action.

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.[(23)]

Signed: Mark W. Harvey

Mark W. Harvey

Administrative Judge

Member, Appeal Board

1. Directive ¶ E2.A10.1.3.1 ("The criminal behavior is not recent").Directive ¶ E2.A10.1.3.2 ("The crime was an isolated incident").Directive ¶ E2.A10.1.3.6 ("There is clear evidence of successful rehabilitation").

2. Although the Administrative Judge did not favorably apply Mitigating Conditions 1, 2, and 6 to the 2003 incident, he later found that incident to be mitigated under the "whole person" concept.

3. Directive ¶¶ E2.2.1.1 through 9.

4. The Appeal Board rejects the standard of review advocated in the separate opinion. Such an approach is contrary to the "clearly consistent with the national interest" standard for granting a security clearance set forth in *Department of the Navy v. Egan* 484 U.S. 518 (1988). It is also inconsistent with Directive ¶ E3.1.33.3, and with long standing DOHA practice and precedents. DOHA administrative proceedings are inherently executive determinations as to whether an individual should have access to classified information. The Department must provide the applicant with the procedural due process set forth in the Directive and Executive Order 10865. Ultimately, final determinations must be made based upon the substantive merits of the applicant's case. Such determinations must also be made in an efficient, timely, and practical manner--one which avoids the costs and delays that inevitably result from multiple remands based upon theoretical rather than reasonable outcomes.

5. Guideline J, Mitigating Condition 1 provides, "The criminal behavior was not recent." Directive ¶ E2.A10.1.3.1. Guideline J, Mitigating Condition 2 states, "The crime was an isolated incident." Directive ¶ E.2.A10.1.3.2. Guideline J, Mitigating Condition 6 is, "There is clear evidence of successful rehabilitation." Directive ¶ E.2.A10.1.3.6.

6. 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).

7. 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.

8. 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)).

9. 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)).

10. *See* ISCR Case No. 04-10454 at 4 (App. Bd. Aug. 11, 2006); ISCR Case No. 00-0628 (App. Bd. Feb. 24, 2003); ISCR Case No. 99-0601 at 6 (App. Bd. Jan. 30, 2001); ISCR Case No. 99-0597 at 10 (App. Bd. Dec. 13, 2000), *but see, e.g.*, ISCR Case No. 03-07826 at 4 (App. Bd. June 17, 2005) (upholding Judge's conclusion under Guideline J that a 1988 criminal incident was not recent, isolated, and that Applicant showed some rehabilitation, but 2002 clearance falsification nevertheless properly resulted in adverse finding).

11. 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 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)).

12. *See generally, e.g.* 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.).

13. "If the record evidence shows that a significant period of time has passed without evidence of misconduct by an applicant, then the Judge must articulate a rational basis for concluding why that significant period of time does not demonstrate changed circumstances or conduct sufficient to warrant a finding of reform or rehabilitation." ISCR Case No. 02-08032 at 5 (App. Bd. May 14, 2004) (citations omitted).

14. The majority opinion at 4 cites two ISCR decisions. ISCR Case No 03-22563 (App. Bd. Mar. 8, 2006) involves an Applicant who had one special court-martial conviction, an other than honorable discharge from the service, a post-military service felony arrest, two misdemeanor arrests, and filed a false security clearance application and lied to an investigator concerning his clearance application. ISCR Case No. 99-0122 (App. Bd. Apr. 7, 2000) involves an Applicant with three security violations and six domestic incidents. In both cases, the Appeal Board reversed the hearing Judge's decision citing peacemeal analysis. These two cases are quite dissimilar to Applicant's case.

15. At the conclusion of Applicant's hearing, the Judge asked Department Counsel why the whole person concept should not work in Applicant's favor (Hearing Transcript at 52). Department Counsel responded that Applicant had no criminal record up to the two offenses at issue, was a good employee, and a honorable reservist. But he was a mature person with a family, who knew better. He urged the Judge to "consider why he would risk all the good to do these two acts." (Hearing Transcript at 53). Waiver is appropriate because Department Counsel's failed to address the nine factor analysis in Directive ¶¶ E2.2.1.1 - E2.2.1.9 at the hearing when he had an opportunity to do so.

16. "Falsification of a security clearance application raises serious questions about the person's trustworthiness and reliability." ISCR Case No. 02-12329 at 3 (citing *Harrison v. McNamara*, 228 F.Supp. 406, 408 (D.Conn. 1964), *aff'd*, 380 U.S. 261 (1965)).

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

18. 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))

19. 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).

20. 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, where a statute or other regulatory requirement mandates a particular disposition, or where all reasonable judges would come to the same decision. Remand allows the Judge to address the application of Mitigating Conditions, and administrative economy, fairness, and efficiency will be enhanced by the Judge's reconsideration of his whole person analysis. *See generally Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 349-350 (1988) (discussing the promotion of judicial efficiency, fairness, comity and economy resulting from remand to state court).

21. 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* ADMINISRATIVE 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).

22. 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)). Department Counsel has not alleged that the Judge failed to consider any documentary or other objective evidence.

23. I respectfully disagree with the majority's standard for reversal. The majority is not supposed to review a case to see whether a clearance is "clearly consistent with national security." That is the responsibility of the Judge who conducts the hearing. Theoretically, the Judge could issue a non-piecemeal decision, and the Judge could again conclude that Applicant should receive a clearance under the whole person concept. Even if the Board disagrees with this result, the issue is whether the decision is rational, the most deferential of standards. The majority is engaging in *de novo* review, which requires that 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.