DATE: December 1, 1998

In Re:

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

Applicant for Security Clearance

ISCR Case No. 97-0765

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Melvin A. Howry, Esq., Department Counsel

FOR APPLICANT

Richard J. Magee, Esq.

Administrative Judge Jerome H. Silber issued a decision, dated July 6, 1998 in which he concluded it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. Department Counsel appealed. For the reasons set forth below, the Board affirms the Administrative Judge's decision.

This Board has jurisdiction on appeal under Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, as amended.

Department Counsel's appeal presents the following issues: (1) whether the Administrative Judge erred by excluding a edical Information Questionnaire; (2) whether the Administrative Judge's findings are not supported by substantial evidence; and (3) whether the Administrative Judge's decision is arbitrary, capricious, or contrary to law.

Procedural History

The Defense Office of Hearings and Appeals issued a Statement of Reasons (SOR) dated November 19, 1997 to Applicant. The SOR was based on Criterion H (Drug Involvement), Criterion E (Personal Conduct), and Criterion J (Criminal Conduct).

A hearing was held on February 18, 1998. The Administrative Judge subsequently issued a written decision on July 6, 1998 in which he concluded it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. The case is before the Board on Department Counsel's appeal from that favorable decision.

Appeal Issues

1. Whether the Administrative Judge erred by excluding a Medical Information Questionnaire. At the request of the Defense Security Service (DSS), a Medical Information Questionnaire (MIQ) was prepared by a psychologist who had treated Applicant. At the hearing, Department Counsel offered the MIQ as evidence. Applicant objected to the admission of the MIQ. The Administrative Judge sustained Applicant's objection and excluded the MIQ from evidence. On appeal, Department Counsel contends the Judge's exclusion of the MIQ was error because the MIQ would be admissible under Federal Rule of Evidence 807 (FRE 807). For the reasons that follow, the Board concludes

Department Counsel has failed to demonstrate the Judge erred.

As noted by the Administrative Judge below and Department Counsel on appeal, the Board has previously reserved judgment on the question of "whether [a MIQ] would be admissible, over an applicant's objection, if it pertained to a controverted issue and was not duplicative of other admissible exhibits." ISCR Case No. 96-0575 (July 22, 1997) at p. 3. The Board must address and answer that question as it applies to the facts of this case.

Once Applicant objected to the admissibility of the MIQ, Department Counsel had the burden of (a) presenting the testimony of the author of the MIQ, or (b) persuading the Administrative Judge that the MIQ was admissible over Applicant's objection. Department Counsel did not present the testimony of the author of the MIQ.[(1)] Accordingly, Department Counsel had the burden of showing that the MIQ was admissible over Applicant's objection.

Under Executive Order 10865 and the Directive, applicants have the right to cross-examine persons making statements adverse to them. Absent a waiver of that right by an applicant,[(2)] the right to cross-examination is subject only to narrow exceptions: (1) the right to cross-examination pertains only to controverted issues, ISCR Case No. 96-0575 (July 22, 1997) at p. 2; and (2) the right to cross-examination is not violated by the admission of documents that fall within recognized exceptions to the hearsay rule, ISCR Case No. 96-0575 (July 22, 1997) at p. 3; ISCR Case No. 96-0277 (July 11, 1997) at p. 3; DISCR Case No, 90-2069 (March 25, 1992) at pp. 7-8; DISCR Case No. 88-2173 (September 14, 1990) at pp. 4-5. In this case, Applicant did not waive the right to cross-examination with respect to the MIQ. Furthermore, the IQ was offered by Department Counsel as evidence in connection with a controverted issue. Accordingly, Applicant was entitled to cross-examine the author of the MIQ unless it falls within a recognized exception to the hearsay rule.

The Board finds no merit in Department Counsel's argument that the Administrative Judge erred by characterizing the IQ as a third party statement. The author of the MIQ clearly is not Applicant. Furthermore, there is no evidence that Applicant saw the MIQ after it was prepared and adopted or ratified its contents. The fact that the MIQ contains information which purports to have been provided to its author by Applicant does not change its third party character.

If the MIQ were properly proffered as a medical record, it could be admissible as an exception to the hearsay rule. *See, e.g.*, ISCR Case No. 96-0575 (July 22, 1997) at p. 3. However, on its face the MIQ is not such a medical record. oreover, Department Counsel offered no evidence that the MIQ is either a medical record or contains information admissible under FRE 803(4). There remains the question whether the MIQ is admissible under FRE 807, as Department Counsel contends on appeal.

The Board has held that the right to cross-examination in DOHA proceedings is no greater than a criminal defendant's right to confrontation under the Sixth Amendment of the U.S. Constitution. DISCR Case No. 90-2069 (March 25, 1992) at pp. 7-8. *Accord* ISCR Case No. 96-0277 (July 11, 1997) at p. 3. Evidence admissible under the residual exception rule of the Federal Rules of Evidence can be admitted against criminal defendants. *See, e.g., United States v. Blackburn*, 992 F.2d 666, 672 (7th Cir. 1993), *cert. denied*, 510 U.S. 949 (1993)(applying FRE 803(24), the predecessor to FRE 807). *But see Idaho v. Wright*, 497 U.S. 805, 817-18 (1990)(noting that residual hearsay exception is not a "firmly rooted hearsay exception for Confrontation Clause purposes" and declining to hold admissibility of hearsay under residual hearsay exception automatically satisfies Confrontation Clause). The Board sees no good reason to construe an applicant's right to cross-examination as precluding the admissibility of evidence that could be admissible against a criminal defendant under FRE 807. However, this conclusion does not mean that Department Counsel has demonstrated the Administrative Judge erred in this case.

The Administrative Judge could have admitted the MIQ over Applicant's objection if Department Counsel had demonstrated it satisfied the elements of FRE 807.[(3)] FRE 807 states in relevant part: "A statement not specifically covered by Rule 803 or 804 but having equivalent circumstantial guarantees of trustworthiness, is not excluded by the hearsay rule, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence."[(4)] At the hearing, Department Counsel offered no evidence or argument as to how the IQ demonstrated "equivalent circumstantial guarantees of trustworthiness" as other forms of hearsay admissible

under FRE 803 or 804. Nor did Department Counsel make any proffer or showing that the MIQ was "more probative . . . than any other evidence which [Department Counsel] can procure through reasonable efforts." Under these circumstances, the Judge did not err by sustaining Applicant's objection to the MIQ. The Board expresses no opinion whether Department Counsel can, in a future case, satisfactorily demonstrate an MIQ should be admitted under FRE 807 over an applicant's objection.

Since Department Counsel has failed to demonstrate the Administrative Judge erred, it is not entitled to have the case remanded to allow it another opportunity to persuade the Judge as to the admissibility of the MIQ. *See, e.g.*, ISCR Case No. 96-0871 (January 29, 1998) at p. 2 (absent harmful error, appealing party not entitled to remand so party can present its case once again). Accordingly, the Board declines to accept Department Counsel's suggestion that the case be remanded to the Judge to conduct further proceedings to determine whether the MIQ is admissible under FRE 807.

2. Whether the Administrative Judge's findings are not supported by substantial evidence. Department Counsel makes several arguments to challenge the Administrative Judge's factual findings: (a) the Judge erred by using his positive assessment of Applicant's credibility as a substitute for record evidence; (b) the Judge ignored record evidence that runs contrary to his findings; (c) the Judge erred by finding Applicant used marijuana only three times during the period 1981-1983 and (d) the Judge erred by discounting the testimony of a DSS agent because Department Counsel did not call the DSS agent as a rebuttal witness. For the reasons that follow, the Board concludes Department Counsel has failed to demonstrate the Judge erred.

(a) Department Counsel correctly notes that an Administrative Judge cannot rely on a credibility determination as a substitute for record evidence. *See, e.g.*, ISCR Case No. 97-0727 (August 3, 1998) at p. 3. However, Department Counsel has failed to demonstrate the Judge committed such an error in this case.

(b) There is a rebuttable presumption that the Administrative Judge considered all the record evidence unless the Judge specifically states otherwise. *See, e.g.*, ISCR Case No. 97-0289 (January 22, 1998) at p. 5. The fact that the Judge weighed the record evidence differently than Department Counsel wanted does not demonstrate the Judge ignored the record evidence. *See, e.g.*, ISCR Case No. 96-0544 (May 12, 1997) at p. 3 ("The mere fact that the Judge did not find Applicant's evidence to be persuasive does not demonstrate the Judge failed to consider it."). Furthermore, error is not shown merely because Department Counsel can cite to pieces of record evidence which the Judge did not specifically discuss. *See, e.g.*, ISCR Case No. 97-0730 (October 21, 1998) at p. 3 ("[T]here is no requirement that a Judge mention each and every item of evidence in the record when deciding a case.").

(c) Apart from the MIQ, there is conflicting record evidence as to the timing and frequency of Applicant's marijuana use.[(5)] The Administrative Judge was responsible for considering the conflicting record evidence and make findings about Applicant's marijuana use. *See, e.g.*, ISCR Case No. 97-0630 (May 28, 1998) at p. 2 (Judge's responsibility to make findings of fact "is not diminished when there is conflicting or inconsistent information in the record"). Considering the record as a whole, the Judge's findings about Applicant's marijuana use reflect a plausible interpretation of the record evidence. Error by the Judge is not demonstrated merely because Department Counsel can argue for a plausible, alternate interpretation of the record evidence. *See, e.g.*, ISCR Case No. 98-0123 (October 28, 1998) at p. 3. Since Department Counsel has not demonstrated the Judge weighed the evidence in a manner that is arbitrary, capricious, or contrary to law, the Board will not disturb his factual findings. *See, e.g.*, ISCR Case No. 98-0123 (October 28, 1998) at p. 3.

(d) Considering the record as a whole, the Board concludes Department Counsel has failed to demonstrate the Administrative Judge discounted the testimony of the DSS agent for impermissible reasons. There is a rebuttable presumption that a Judge acts in good faith. *See, e.g.*, DISCR Case No. 92-1352 (October 8, 1993) at pp. 6-7. *See also Lenn v. Portland School Committee*, 998 F.2d 1083, 1087-88 (1st Cir. 1993)(party has heavy burden of persuasion on appeal if it asserts the judge below "indulg[ed] in the adjudicatory equivalent of a shell game"). Furthermore, there is no presumption of error below. *See, e.g.*, ISCR Case No. 97-0630 (May 28, 1998) at p. 2. Nothing in the record or the Judge's decision (including the footnote cited by Department Counsel on appeal) indicates the Judge discounted the DSS agent's testimony for impermissible reasons. Department Counsel's strong disagreement with the Judge's weighing of the DSS agent's testimony does not substitute for a showing that the Judge acted in an arbitrary or capricious manner or contrary to law by not accepting that testimony.

3. Whether the Administrative Judge's decision is arbitrary, capricious, or contrary to law. Department Counsel makes several arguments in support of its contention that the Administrative Judge's decision is arbitrary, capricious, or contrary to law: (a) the Judge erred by applying Drug Involvement Mitigating Guideline 1 to Applicant's use of marijuana in 1981-1983; (b) the Judge erred by applying Drug Involvement Mitigating Guideline 2 to Applicant's use of marijuana in May 1997; (c) the Judge erred by concluding there was no current marijuana use by Applicant within the meaning of Drug Involvement Disqualifying Guideline 3; (d) the Judge erred by applying Drug Involvement Mitigating Guideline 3; and (e) the record evidence as a whole does not support the Judge's favorable decision.

(a) The Administrative Judge erred by applying Drug Involvement Mitigating Guideline 1.[(6)] The Judge erred by considering Applicant's 1981-1983 marijuana use in isolation from her 1997 marijuana use. Such a piecemeal analysis of Applicant's marijuana use is not consistent with the "whole person" concept. *See, e.g.*, ISCR Case No. 98-0223 (October 29, 1998) at p. 3. However, the Judge's error in applying Mitigating Guideline 1 is harmless. The mere presence or absence of any Adjudicative Guideline is not solely dispositive of a case. The fact that the Judge could not properly apply itigating Guideline 1 under the particular facts of this case did not preclude the Judge from analyzing Applicant's case under Section F.3. of the Directive. *See, e.g.*, ISCR Case No. 97-0821 (October 15, 1998) at p. 3. Reading the Judge's decision in its entirety, the Board concludes the Judge's favorable security clearance decision does not turn on whether itigating Guideline 1 was applicable. Accordingly, the Judge's error does not warrant remand or reversal. *See NLRB v. American Geri-Care, Inc.*, 697 F.2d 56, 64 (2d Cir. 1982)(remand required only where there is a significant chance that, but for the error, a different result might have been reached), *cert. denied*, 461 U.S. 906 (1983).

(b) The Administrative Judge gave a somewhat cryptic explanation for why he applied Drug Involvement Mitigating Guideline 2.[(7)] However, the Board does not measure a Judge's decision against a standard of perfection. *See, e.g.*, ISCR Case No. 98-0223 (October 29, 1998) at p. 3. Even though the Judge erred to the extent he suggested that Applicant's ay 1997 marijuana use was "isolated" (*see* Board's discussion of Mitigating Guideline 1), it would be permissible for the Judge to conclude Applicant's use of marijuana was "infrequent" within the meaning of Mitigating Guideline 2. At most, Department Counsel has demonstrated harmless error on this point.

(c) The Administrative Judge did not act in an arbitrary or capricious manner or contrary to law by concluding Applicant's ay 1997 marijuana use was not "current drug involvement" within the meaning of Drug Involvement Disqualifying Guideline 3.[(8)] The Judge's characterization of Applicant's May 1997 marijuana use was a permissible one in light of the record evidence as a whole.

(d) Department Counsel has failed to demonstrate the Administrative Judge erred by applying Drug Involvement itigating Guideline 3.[(9)] Whether an applicant has met his or her burden of presenting evidence that warrants application of Mitigating Guideline 3 will depend on the particular facts and circumstances of each case. A review of the record evidence shows that Applicant presented evidence, in addition to her testimony, to support her claim that she would not abuse marijuana in the future. The Judge had the primary responsibility of weighing that evidence. Department Counsel's appeal argument fail to demonstrate the Judge acted in an arbitrary or capricious manner or contrary to law in weighing that evidence.

(e) An Administrative Judge's decision must be a common sense one based on consideration of all the available information and application of pertinent Adjudicative Guidelines. Directive, Section F.3. *See, e.g.*, ISCR Case No. 97-0625 (August 17, 1998) at p. 7. Although a Judge has discretion under Section F.3. that discretion is not unlimited or unfettered. *See, e.g.*, ISCR Case No. 96-0869 (September 11, 1997) at p. 4. Here, the Board need not agree with the Administrative Judge to conclude that his favorable security clearance decision is one that falls within the bounds of his discretion under Section F.3. and pertinent provisions of the Adjudicative Guidelines. Department Counsel's strong disagreement with the Judge's decision is not a sufficient basis for the Board to conclude the Judge's decision is arbitrary, capricious, or contrary to law.

Conclusion

Department Counsel has failed to meet its burden of demonstrating error that warrants remand or reversal. Accordingly, the Board affirms the Administrative Judge's July 6, 1998 decisions.

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board

Signed: Michael Y. Ra'anan

Michael Y. Ra'anan

Administrative Judge

Member, Appeal Board

Signed: Jeffrey D. Billett

Jeffrey D. Billett

Administrative Judge

Member, Appeal Board

1. The absence of subpoena power in DOHA proceedings may complicate Department Counsel's task. However, the absence of subpoena power does not nullify an applicant's right to cross-examination.

2. The right to cross-examination can be waived. *Adams v. Laird*, 420 F.2d 230, 237-38 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 1039 (1970). *Accord* ISCR Case No. 96-0461 (December 31, 1997) at p. 2.

3. The Board recognizes the general proposition that the Federal Rules of Evidence are only a guide and need not be strictly applied. *See, e.g.*, Directive, Additional Procedural Guidance, Item 19. However, an applicant's right to cross-examination is a very important right under Executive Order 10865 and the Directive. Given the broad range of recognized exceptions to the hearsay rule and the somewhat open-ended nature of FRE 807, strict compliance with the requirements of FRE 807 is necessary to ensure that an applicant's right to cross-examination is not rendered empty or meaningless.

4. Because the last sentence of FRE 807 is not relevant under the particular facts of this case, the Board need not discuss it to resolve this appeal.

5. As discussed earlier, the Administrative Judge did not err by excluding the MIQ. Accordingly, the Judge properly did not consider the MIQ in making his findings of fact. To the extent that Department Counsel's appeal argument about the Judge's factual findings is based on information in the MIQ, it fails to demonstrate the Judge erred.

6. "[T]he drug involvement was not recent."

7. "[T]he drug involvement was an isolated or infrequent event."

8. Department Counsel's argument appears to refer to the following passage from Disqualifying Guideline 3: "Current drug involvement, especially following the granting of a security clearance, or an expressed intent not to discontinue use, will normally result in an unfavorable determination."

9. "[A] demonstrated intent not to abuse any drugs in the future."