DATE: March 17, 1999

In Re:

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

Applicant for Security Clearance

ISCR Case No. 98-0265

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Michael H. Leonard, Department Counsel

FOR APPLICANT

Michael J. Mannisto, Esq.

Administrative Judge Paul J. Mason issued a decision, dated October 30, 1998, in which he concluded it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant. Applicant 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.

Applicant's appeal presents the following issues: (1) whether the Administrative Judge's conclusions under Criterion D are arbitrary, capricious, or contrary to law; (2) whether the Administrative Judge's conclusions under Criterion E are arbitrary, capricious, or contrary to law; and (3) whether the Administrative Judge's adverse security clearance decision is arbitrary, capricious, or contrary to law.

Procedural History

The Defense Office of Hearings and Appeals issued a Statement of Reasons (SOR) dated May 1, 1998 to Applicant. The SOR was based on Criterion M (Misuse of Information Technology), Criterion D (Sexual Behavior), and Criterion E (Personal Conduct). A hearing was held on August 27, 1998.

Administrative Judge's Findings and Conclusions

Applicant used his employer's computer to engage in a variety of misconduct during the period from 1995 to February 1997: (a) installing an email program on his employer's computer in order to allow him to access anonymous email accounts that were not his employer's email address; (b) logging onto sex news groups and pornographic sites on the Internet; (c) downloading pornographic materials; (d) authoring approximately 30 sexually explicit stories which used the names of former coworkers and posting the stories on the Internet; (e) modifying a photograph of a female former coworker in a sexually explicit manner and placing it on the Internet; (f) placing personal ads on the Internet to seek sexual partners; and (g) on four occasions while on business trips, having sexual relations with men who responded to his Internet ads. Applicant continued his misconduct after he was given an oral warning in May 1995 for misusing the employer's computer for personal matters. Applicant was suspended from work in February 1997, and then discharged

in arch 1997 for misuse of the employer's computer.

Applicant engaged in group therapy with a substance abuse counselor from February 1997 to May 1998 to deal with issues arising from his job termination and sexual conduct. Applicant stopped the group therapy because the substance abuse counselor felt he appeared stable in his sexual recovery, and he had renewed his prior commitment to Alcoholics Anonymous and an independent support network. Applicant began treatment for sexually addictive behavior, consulting with a psychologist in April, May and June 1998. The psychologist indicated Applicant's prognosis was fair to good if he continues to maintain and broaden his support network. Applicant regularly attended a sexual compulsive addicts group, missing only three meetings in the 18 months before the hearing. Applicant's sponsor believes Applicant is coming along fine with his recovery. Three participants from Applicant's sexual addiction group believe he is honest in his recovery and demonstrates remorse for his past conduct. Applicant's wife is still in a woman's rehabilitation group, and she and Applicant are looking for additional therapy to work out their sexual issues.

The Administrative Judge concluded: (a) Applicant's misconduct was long-term and serious; (b) the favorable evidence of Applicant's rehabilitation efforts was heartening; (c) Applicant's openness and honesty with others about his misconduct had reduced his vulnerability to coercion; (d) there are some residual questions about the overall status of Applicant's recovery; and (e) the evidence of Applicant's rehabilitation efforts falls short of overcoming the negative implications of his past misconduct. The Judge entered formal findings for Applicant under Criterion M, but against Applicant under Criteria D and E, and concluded it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant.

The case is before the Board on Applicant's appeal from that adverse decision.

Appeal Issues[(1)]

1. Whether the Administrative Judge's conclusions under Criterion D are arbitrary, capricious, or contrary to law. Applicant contends the Administrative Judge erred with respect to his adverse conclusions under Criterion D because: (a) the record evidence does not support the Judge's application of Sexual Behavior Disqualifying Condition 3; (b) the Judge failed to give due weight to the favorable evidence concerning Applicant's rehabilitation efforts; (c) the record evidence as a whole does not support the Judge's adverse conclusions under Criterion D. For the reasons that follow, the Board concludes Applicant has failed to demonstrate harmful error.

(a) Sexual Behavior Disqualifying Condition 3 covers "[S]exual behavior that causes an individual to be vulnerable to undue influence or coercion." Applicant does not contend his misconduct could not be characterized as warranting application of Disqualifying Condition 3 in the past. Rather, Applicant contends the record evidence of his rehabilitation efforts and changed behavior has reduced or eliminated his vulnerability to coercion or blackmail sufficiently to preclude application of Disqualifying Condition 3 to his current situation. This contention fails to demonstrate error by the Administrative Judge.

As a preliminary matter, Applicant's argument fails to take into account the full meaning and scope of Sexual Behavior Disqualifying Condition 3. Vulnerability to undue influence or coercion is *not* limited to situations of possible blackmail. It includes situations where a person is vulnerable to influence, however subtle or noncoercive, that could be exploited to induce a person to act in a manner that is inconsistent with the national security interests of the United States. *See* DISCR Case No. 88-1833 (November 15, 1990) at p. 5 (case involving issue of vulnerability to coercion, influence or pressure under former Criterion K). Applicant's sexual misconduct is illustrative of a kind of behavior that could make a person vulnerable to coercion *or* undue influence within the meaning of Disqualifying Condition 3.

Considering the record as a whole, the Administrative Judge had sufficient basis to conclude that Applicant's misconduct fell under Sexual Behavior Disqualifying Condition 3. The record evidence shows that Applicant engaged in a pattern of misconduct over a period of many months under circumstances that made him vulnerable to undue influence or coercion. The Judge considered the evidence Applicant presented to support his claim of reform and rehabilitation, but concluded it was not sufficient to find that Applicant's rehabilitation was completed or successful and that he was not likely to repeat his past misconduct. Given that conclusion, it was not arbitrary or capricious for the Judge to apply Disqualifying Condition 3 to Applicant's current situation.

(b) The Board does not find persuasive Applicant's contention that the Administrative Judge failed to give due weight to the favorable evidence concerning Applicant's rehabilitation efforts. The Judge is responsible for weighing the record evidence, subject to review on appeal. Directive, Additional Procedural Guidance, Item 25 (setting forth Judge's responsibility to make findings of fact) and Item 32.a. (setting forth Board's authority to review Judge's factual findings). Absent a showing that a Judge weighed the evidence in a manner that is arbitrary, capricious, or contrary to law, the Board will not disturb a Judge's weighing of the record evidence. *See, e.g.*, ISCR Case No. 98-0123 (October 28, 1998) at p. 3. The Judge must consider all the record evidence, not just the favorable evidence or the unfavorable evidence. *See* Directive, Section F.3. In addition, the Judge must consider whether the favorable evidence outweighs the unfavorable evidence or *vice versa*. *See, e.g.*, ISCR Case No. 98-0392 (February 4, 1999) at p. 3. Accordingly, Applicant's ability to canvass the record and cite evidence favorable to his claim of reform and rehabilitation is not enough to demonstrate the Judge erred.[(2)]

Applicant relies heavily on the testimony of two expert witnesses in support of his claim of rehabilitation. In responding to Applicant's appeal brief, Department Counsel points to record evidence that might provide a basis for the Administrative Judge to not give full weight to the testimony given by two expert witnesses on behalf of Applicant. Indeed, the Judge gave some reasons why he gave reduced weight to the testimony of the two expert witnesses. The Judge is not bound to give full or decisive weight to testimony merely because it comes from expert witnesses. The Judge's responsibility to consider and weigh the record evidence as a whole is not diminished by the presence of expert opinions. *See, e.g.*, *Rohm and Haas Co. v. Brotech Corp.*, 127 F.3d 1089, 1092 (Fed. Cir. 1997)(trier of fact not required to accept expert opinion); *Powers v. Bayliner Marine Corp.*, 83 F.3d 789, 797 (6th Cir. 1996)(jury free to weigh expert's testimony and accept it or reject it), *cert. denied*, 117 S.Ct. 481 (1996); *United States v. Jackson*, 19 F.3d 1003, 1007 (5th Cir. 1994) (trier of fact is responsible for considering credibility and weight of expert opinion testimony, and such testimony is not conclusive because it is uncontradicted), *cert. denied*, 513 U.S. 891 (1994). The Judge was not compelled, as a matter of law, to give full or decisive weight to the expert testimony cited by Applicant.

On appeal, Applicant presents arguments for a plausible, alternate interpretation of the record evidence concerning his rehabilitation efforts. However, the ability to interpret record evidence in more than one way is not enough to demonstrate the Administrative Judge's interpretation is arbitrary, capricious, or contrary to law. *See, e.g.*, ISCR Case No. 96-0376 (March 6, 1997) at p. 2 (citing *American Textile Mfrs Institute v. Donovan*, 452 U.S. 490, 523 (1981)). Considering the record as a whole, Applicant has failed to demonstrate the Administrative Judge acted in manner that is arbitrary, capricious, or contrary to law when he weighed the record evidence concerning Applicant's rehabilitation efforts.

(c) In addition to the arguments discussed above, Applicant argues: (1) the Administrative Judge erred by finding that the female former coworker whose photograph Applicant altered in a sexually explicit manner filed a lawsuit against him; (2) the Judge's finding that Applicant used the names of some former coworkers in sexually explicit stories he placed on the Internet ignored the evidence that he did not use the last names of those people and (other than the one woman former coworker) he did not use photographic images to depict them; (3) the Judge's finding about Applicant's sexual encounters with four men demonstrates an impermissible reliance on sexual orientation to render an adverse security clearance decision; and (4) the record evidence as a whole does not support his adverse conclusions under Criterion D.

(c1) The Administrative Judge erred by finding that the female former coworker filed a lawsuit against Applicant based on his unauthorized alteration of her photograph in a sexually explicit manner and posting it on the Internet. The record evidence shows that the woman threatened legal action against Applicant and the matter was settled out of court without a lawsuit being filed. However, this error is harmless because there is not a significant chance that it affected the Judge's ultimate security clearance decision. *See, e.g.*, ISCR Case No. 97-0765 (December 1, 1998) at p. 6 (discussing harmless error doctrine).

(c2) The record evidence shows that Applicant did not list the last names of the former coworkers he used in sexually explicit stories he authored and placed on the Internet. Because of a stipulation by the parties, only two sexually explicit stories written by Applicant and posted on the Internet were introduced into evidence.[(3)] There is insufficient record evidence to determine whether Applicant's sexually explicit stories provided details about his former coworkers (*e.g.*, nicknames, physical descriptions, hobbies, job titles or work experience) that might be linked with their first names to

enable someone to discern their real identities. *Cf. Fitzgibbon v. CIA*, 911 F.2d 755, 763 (D.C. Cir. 1990)(court recognizing that individual pieces of intelligence information may, when put together like a jigsaw puzzle, shed light on other bits of information even though the individual pieces are not of obvious significance by themselves)(Freedom of Information Act case). However, Applicant's brief does not offer any explanation or argument for what is supposed to be extenuating or mitigating about the fact that his unauthorized use of the identities of coworkers in his sexually explicit stories was not worse than it was. Nor does Applicant's brief offer any explanation or argument for how the Judge's finding on this point was error, let alone harmful error. Applicant's use of the first names of former coworkers in his sexually explicit stories was not as serious as his misappropriation of the identity of the female former coworker. However, it demonstrated Applicant placed satisfaction of his sexual desires over the privacy and reputations of his former coworkers.

(c3) Applicant correctly notes that sexual orientation, standing alone, cannot form the basis of an adverse security clearance decision. *See* Executive Order 12968, Section 3.1.(d); Directive, Enclosure 2 at page 2-10 (language of Criterion D itself). However, nothing in the Administrative Judge's decision indicates or suggests that his decision is based on any finding concerning Applicant's sexual orientation. Rather, the Judge's decision is based on consideration of the overall facts and circumstances of Applicant's sexual misconduct. The negative security implications of sexual misconduct do not turn on an applicant's sexual orientation. *See, e.g.*, ISCR Case No. 97-0184 (June 16, 1998) at p. 6 (discussing various Board decisions).

(c4) Notwithstanding Applicant's argument to the contrary, the Administrative Judge's adverse conclusions under Criterion D are supported by the record evidence as a whole. Over a period of many months, Applicant engaged in a broad range of misconduct in order to satisfy his compulsive sexual desires, including: (a) persistent misuse of his employer's computer; (b) ignoring a warning from his employer about his misuse of the employer's computer and failing to abide by his promise to change his conduct; (c) unauthorized use of the identities of former coworkers in sexually explicit stories he posted on the Internet; (d) flagrant disregard of the privacy, dignity, and reputation of a female former coworker by altering a photograph of her to falsely portray her as topless and posting the altered photograph on the Internet, and misappropriating her identity for use in sexually explicit stories posted on the Internet; and (e) misuse of his employer's computer to place ads on the Internet to solicit sex acts, which were consummated on his business trips.

Applicant's misconduct was not merely a personal matter that occurred in the privacy of his home. Applicant's misconduct demonstrated poor judgment and unreliability, involved a failure to fulfill his obligations to his employer, and exhibited a disregard for the rights and dignity of his former coworkers. Applicant's misconduct Applicant's overall misconduct clearly falls under Criterion D. Furthermore, the record evidence as a whole provided the Judge with a rational basis for his adverse conclusions under Criterion D.

2. Whether the Administrative Judge's conclusions under Criterion E are arbitrary, capricious, or contrary to law. Applicant contends the Administrative Judge erred with respect to his adverse conclusions under Criterion E because: (a) there is no evidence that Applicant mishandled classified information; (b) apart from Applicant's "battle with sexual addiction" there is no evidence of questionable judgment, untrustworthiness, unreliability, or unwillingness to comply with rules and regulations; (c) there is insufficient record evidence to support the Judge's finding that Applicant's misuse of his employer's computer violated rules and regulations; (d) the Judge's finding that Applicant violated rules and regulations is based on consideration of evidence for which Applicant was not afforded an opportunity for cross-examination; and (e) the record evidence as a whole does not support the Judge's adverse conclusions under Criterion E.

(a) The absence of evidence that Applicant mishandled classified information did not render the Administrative Judge's decision arbitrary, capricious, or contrary to law. Security clearance decisions are not an exact science, but rather are predictive judgments about a person's security suitability in light of that person's past conduct and present circumstances. *Department of Navy v. Egan*, 484 U.S. 518, 528-29 (1988). The federal government need not wait until a person actually mishandles classified information before it can deny or revoke that person's access to classified information. *Adams v. Laird*, 420 F.2d 230, 238-39 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 1039 (1970). All that is necessary is proof of facts and circumstances that indicate an applicant is at risk for mishandling classified information, or that an applicant does not demonstrate the high degree of judgment, reliability, or trustworthiness required of persons handling classified information. *See, e.g.*, ISCR Case No. 98-0392 (February 4, 1999) at p. 2. Accordingly, the absence of security violations by Applicant did not preclude the Judge from making an adverse security clearance decision based

on Applicant's overall history of sexual misconduct.

(b) Applicant's brief does not offer any explanation or argument for what is supposed to be extenuating or mitigating about the fact that there is no evidence of questionable judgment, untrustworthiness, unreliability, or unwillingness to comply with rules and regulations apart from his "battle with sexual addiction." The Administrative Judge's adverse decision is not made arbitrary, capricious, or contrary to law merely because Applicant's misconduct was not more serious or widespread than it was.

(c) Applicant's employer may not have had a clear and precise policy on whether employees could use the employer's computers to access the Internet for personal reasons. However, there is record evidence that Applicant was aware that his use of the employer's computer to satisfy his sexual desires was inappropriate, especially after Applicant was cautioned by his supervisor that he was spending too much time using the employer's computer to access the Internet. Furthermore, as a matter of common sense, a reasonable employee knows or should know that his or her employer is not paying employees to use company resources and work time to satisfy their sexual desires through pornography, whether it is online or in some other format.[(4)] Applicant has failed to demonstrate the Judge's finding on this point is arbitrary, capricious, or contrary to law.

(d) At the hearing, Applicant objected to the admissibility of Government Exhibit 2 on the grounds that it was hearsay under the Federal Rules of Evidence and Applicant did not have an opportunity to cross-examine its author. The Judge overruled Applicant's objection, noting that Government Exhibit 2 was an adverse information report and referring to Board decisions that adverse information reports were admissible as an exception to the hearsay rule. On appeal, Applicant asserts that Applicant was not afforded the opportunity to cross-examine the author of that document or another person referred to in the document. Applicant also argues that the Administrative Judge failed to mention in his decision that Applicant did not have the opportunity to cross-examine any person who made statements adverse to him, in violation of Section 4 of Executive Order 10865. Applicant's cross-examination argument lacks merit.

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 Constitution. *See, e.g.*, ISCR Case No. 97-0765 (December 1, 1998) at p. 3. The right to cross-examination is not violated by the admission of documents that fall within recognized exceptions to the hearsay rule. *Id.* at pp. 2-3. Business records are a recognized exception to the hearsay rule, and an adverse information report is admissible as a business record. *See* ISCR Case No. 96-0277 (July 11, 1997) at p. 3 n.4. Accordingly, the Judge did not err when he overruled Applicant's objection to Government Exhibit 2. Furthermore, there is no general prohibition against using hearsay evidence in making a security clearance decision. *Hoska v. U.S. Department of Army*, 677 F.2d 131, 138-39 (D.C. Cir. 1982). *See Kewley v. Department of Health and Human Services*, 153 F.3d 1357, 1364 (Fed. Cir. 1998)(agency may rely on hearsay evidence to reach a decision). Furthermore, a Judge is not obligated to discuss every piece of evidence or provide a commentary on how the Judge viewed or characterized each piece of evidence.

3. Whether the Administrative Judge's adverse security clearance decision is arbitrary, capricious, or contrary to law. Applicant contends the Judge's adverse decision is arbitrary, capricious, or contrary to law and should be reversed because: (a) the Judge's conclusions under Criteria D and E are arbitrary, capricious, or contrary to law; (b) the Judge's decision is not consistent with other decisions made by Hearing Office Administrative Judges; and (c) the record evidence does not support the Judge's adverse security clearance decision.

(a) The Board will not repeat its discussion of Applicant's appeal arguments concerning the Administrative Judge's conclusions under Criteria D and E.

(b) Just a trial judge is not bound by the decisions of another trial judge, a DOHA Administrative Judge is not bound to follow the decisions of his or her colleagues in the Hearing Office. Accordingly, the Judge's decision in this case is not made arbitrary, capricious, or contrary to law merely because Applicant believes that other Judges' decisions in different cases indicate the other Judges might have ruled in Applicant's favor. Furthermore, just as an appellate court is not bound by the decisions of a trial court, the Appeal Board is not bound to follow the decisions of Hearing Office Administrative Judges. Accordingly, the Board need not consider or address the Administrative Judge decisions cited by Applicant on appeal to decide whether the Judge's decision in this case is sustainable. *See, e.g.*, ISCR Case No. 98-0123 (October 28, 1998) at p. 4.

(c) The federal government must be able to repose a high degree of trust and confidence in persons granted access to classified information. *Snepp v. United States*, 444 U.S. 507, 511 n.6 (1980); *Cafeteria & Restaurant Workers Union, Local 473 v. McElroy*, 284 F.2d 173, 183 (D.C. Cir. 1960), *aff'd*, 367 U.S. 886 (1961). As discussed earlier in this decision, the absence of security violations by Applicant did not preclude the Judge from making an adverse security clearance decision based on Applicant's overall history of sexual misconduct. What remains are two questions: (1) does the record evidence of Applicant's misconduct demonstrate facts and circumstances that indicate he is at risk for mishandling classified information, or that he does not demonstrate the high degree of judgment, reliability, or trustworthiness required of persons handling classified information? and (2) did Applicant meet his burden under Item 15 of the Additional Procedural Guidance of presenting evidence "to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven by Department Counsel, and [meet his] ultimate burden of persuasion as to obtaining a favorable clearance decision"?

The record evidence concerning Applicant's overall history of misconduct provided a rational basis for the Administrative Judge to conclude the answer to the first question is "yes." The Judge considered the Applicant's evidence of reform, rehabilitation and changed circumstances, found it to be favorable, but concluded it was not sufficient to warrant a favorable security clearance decision. Applicant's appeal arguments fail to demonstrate the Judge acted in a manner that is arbitrary, capricious, or contrary to law with respect to this aspect of the case. Reading the decision below, it is clear the Judge had some doubts about the long-term success of Applicant's rehabilitation efforts. The Judge properly resolved those doubts, which had a rational basis in the record evidence, in favor of the national security. *See Department of Navy v. Egan*, 484 U.S. 518, 531 (1988).

Conclusion

Applicant has failed to demonstrate harmful error below. Accordingly, the Board affirms the Administrative Judge's October 30, 1998 decision.

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 Administrative Judge's formal findings under Criterion M are not at issue on appeal.

2. Applicant correctly notes that "[t]he government offered no rebuttal evidence to counter any evidence produced by Applicant/Appellee" (Appeal Brief at p. 19). However, an Administrative Judge is not required to accept unrebutted evidence uncritically or without considering it in light of the record evidence as a whole. *See, e.g.*, ISCR Case No. 97-

0440 (November 23, 1998) at p. 3.

3. Department Counsel inaccurately describes, in its appeal brief, Applicant's acknowledgment as to the significance of two pieces of evidence. Applicant did admit in answer to questions that Government Exhibits 4 and 5 were examples of Applicant's sexually explicit stories. He was not asked and did not address whether they were "representative examples."

4. An employer need not promulgate rules and procedures that cover every conceivable contingency in order to expect its employees will not engage in conduct that a reasonable person knows or should know is improper or inappropriate in the workplace.