

DATE: September 10, 1999

In Re:

SSN: -----

Applicant for Security Clearance

CR Case No. 98-0619

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Matthew Malone, Esq., Department Counsel

Carol A. Marchant, Esq., Department Counsel

FOR APPLICANT

David A Bornhorst, Esq.

Administrative Judge Roger C. Wesley issued a decision, dated April 26, 1999, 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.

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

Applicant raises the following issues on appeal: (1) whether the Administrative Judge improperly granted Department Counsel's motion to amend the Statement of Reasons (SOR); (2) whether the Administrative Judge committed harmful error by denying Applicant's motion to dismiss the case; (3) whether Applicant was wrongfully precluded from having a personal representative of his choice represent him at the hearing; (4) whether the Administrative Judge erred by failing to address the fact that a government witness was absent during the second day of the hearing; (5) whether the Administrative Judge committed harmful error when he determined that Applicant was collaterally estopped from asserting that a 1995 conviction for DUI was not alcohol-related; (6) whether the Administrative Judge committed harmful error when he failed to consider that Applicant voluntarily reported derogatory information; (7) whether the Administrative Judge erred by concluding that Applicant could not claim any of the mitigating conditions of the Administrative Guidelines; (8) whether the Administrative Judge erred by considering evidence he previously ruled was excluded from the record, and (9) whether the Administrative Judge's decision was arbitrary, capricious or contrary to law.

Procedural History

The Defense Office of Hearings and Appeals issued a Statement of Reasons (SOR) dated September 18, 1998. The original SOR was based on Criterion G, Alcohol Consumption. Applicant responded on October 3, 1998 and requested a hearing. On December 9, 1998, through a written submission to the Administrative Judge, the government moved to amend the SOR to include Criterion E, Personal Conduct. On December 15, 1998, Applicant responded in writing to the government's motion and asked that it be denied. On December 18, 1998, Applicant moved, again in writing, to have the

entire proceeding dismissed.

A hearing was held on December 22, 1998, at which time Applicant appeared *pro se*. At the outset of the hearing, the Administrative Judge ruled in favor of the government on both of the motions outlined above. The hearing was not completed on December 22, 1998 and had to be resumed on January 26, 1999, at which time Applicant was represented by counsel. On April 26, 1999, the Administrative Judge issued a decision, in which he concluded it was 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 of that unfavorable decision.

Appeal Issues

1. Whether the Administrative Judge improperly granted Department Counsel's motion to amend the SOR. Applicant argues that the process wherein the SOR was amended at the outset of the hearing was a violation of Executive Order 10865 and DOHA procedures and was fundamentally unfair to him.⁽¹⁾ Applicant's argument has some merit. The Directive provides that an SOR may be amended at the hearing "so as to render it in conformity with the evidence admitted or for other good cause."⁽²⁾ There was no basis for granting the amendment to achieve conformity with the evidence as none had been admitted. During argument on the motion, Department Counsel represented to the Administrative Judge that testimony would be elicited at the hearing that would support the motion.⁽³⁾ Such an argument is clearly misplaced as the plain language of the Directive speaks in terms of allowing conformity with the evidence *admitted* (emphasis added). Concerning the "good cause" provision of the Directive, the record is bereft of any discussion of "good cause" either by Department Counsel or the Administrative Judge.⁽⁴⁾ Thus, there is no explanation for why the government chose to add allegations to a four-month old SOR less than two weeks before the hearing. The Administrative Judge committed error by granting the government's motion.

Given the error, it is necessary to inquire as to the prejudicial effect of that error. The prejudicial effect of the error is softened somewhat by the giving of advanced notice by the government and by Applicant's opportunity to respond. Indeed, Applicant's pre-hearing response to the motion, although technically a motion to deny the motion to amend the SOR, contains several paragraphs that are a *de facto* denial of the amended SOR paragraphs. Thus, Applicant had sufficient time to reply in writing to the amended SOR provisions as mandated by Executive Order 10865. Also, the Administrative Judge ultimately found in Applicant's favor on the added subparagraph 2.b., which is the only portion of the SOR amendment that constituted a new allegation based on new information requiring additional evidence. Subparagraph 2.a. only placed already cited conduct (the incidents of alcohol consumption in Criterion G) in the context of Criterion E. Given these factors, the Administrative Judge's error was not ultimately prejudicial to Applicant.

We note the concern expressed in the separate opinion regarding the risk of having SORs amended at hearings with no prior notice and opportunity to prepare. There is no evidence currently before us to justify alarm on this matter. However, we agree that no one should construe the categorization of the error here as harmless as an invitation to repeat or expand the error.

2. Whether the Administrative Judge committed harmful error by denying Applicant's motion to dismiss the case. Applicant asserts that the Administrative Judge should have dismissed the case because the SOR allegations were too old and provisions of the Directive concerning the timely disposition of cases were not followed. Applicant's motion to dismiss was not meritorious and the Administrative Judge committed no error by denying it at the hearing.

While the Administrative Judge mistakenly stated on the record that DOHA had no involvement in the amount of time it took to process this case (the hearing transcript⁽⁵⁾ makes reference to the case being returned to DSS for additional investigation at DOHA's request), he was correct in stating that DOHA had no control over the initial phase of the DSS investigation which proceeded DOHA's involvement. Applicant has made no showing of prejudice resulting from the delay in processing his case. It is not within the authority of DOHA Judges to "dismiss" a case or an SOR. *See, e.g.*, DOHA Case No. 94-0569 (March 30, 1995) at p. 4.

3. Whether Applicant was substantially prejudiced by the Administrative Judge's failure to grant a continuance in order for Applicant to obtain representation. In his appeal brief Applicant alleges that he requested a continuance in order to

secure representation at the outset of the hearing. As the hearing began Applicant expressed a desire to have his wife represent him. He also intended to call her as a witness. Because of the practice regarding sequestration of witnesses, Applicant was informed that there was a problem with his intention to place his wife in a dual role as witness and personal representative. In fact, the record indicates that pre-hearing discussions took place between Applicant and Department Counsel and Applicant and the Administrative Judge on this subject and that Applicant was informed as to the problems raised by his proposal to have his wife participate in the hearing as witness and representative. Through the vehicle of the written Pre-Hearing Guidance, which the correspondence file indicates was sent to Applicant, Applicant was advised as to DOHA practice concerning sequestration of witnesses.

It is clear from the reading of the record that Applicant made no specific request for a continuance to obtain representation. Because of Applicant's *pro se* status, however, the absence of such a request does not end the inquiry. The entire record must be gleaned to ascertain whether or not Applicant made such a request by implication.

At one point on the record, Applicant indicated that he needed to have his wife represent him. Applicant also indicated that he was not entirely comfortable with the proceedings. At other times, however, he indicated his strong desire to go ahead with the proceedings. At no time did he indicate with any specificity that he was unprepared to proceed because of the lack of a representative or that he felt that he lacked the ability to proceed. On balance, viewing the record of the hearing in its totality, Applicant's actions and statements fall short of an implied request for a continuance to obtain representation.

Moreover, an applicant's right to be represented by counsel (or personal representative) of his choice is not absolute, and an applicant may waive it, for example, by failing to take reasonable steps to exercise it. *See, e.g.* DISCR Case No. 91-0036 (January 27, 1993) at p. 5. Here, as a result of pre-hearing discussions with the other party and the Administrative Judge, plus the receipt of the Pre-Hearing Guidance, Applicant was placed on reasonable notice that there was a potential problem with having his wife represent him. There is nothing in the record to suggest that in the face of such notice, Applicant took steps to secure alternate representation. Applicant's assignment of error regarding lack of a continuance to secure counsel is not persuasive.

4. Whether the Administrative Judge erred by failing to address the fact that a government witness who was present on the first day of the hearing was not present and available for questioning on the second day of the hearing. Applicant argues that on the first day of the hearing he was assured that a certain DSS agent would be available for cross-examination on the second day of the hearing. On the second day of the hearing this witness was not presented. Applicant now complains about this lack of appearance and the fact that the record offers no explanation. In fact, a reading of the record does provide an explanation. A January 12, 1998 letter from the Administrative Judge to counsel for each party (Applicant had by now obtained a lawyer to represent him) memorialized an earlier telephone conference. The letter clearly stated that Applicant saw no need for ensuring the availability of the DSS agent in question. On the second day of the hearing, Applicant's counsel raised no issue as to the fact that the DSS agent was not available. Given these facts, Applicant cannot complain about the absence of this witness on appeal.

5. Whether the Administrative Judge committed harmful error when he determined that Applicant was collaterally estopped from asserting that a 1995 conviction for DUI was not alcohol-related. Applicant argues that the Administrative Judge erred by concluding Applicant was collaterally estopped from asserting that his 1995 arrest, guilty plea and conviction for Driving Under the Influence were not alcohol-related. Applicant's argument has merit, but he does not ultimately demonstrate that harmful error occurred. The record contains evidence that the particular state statute under which Applicant was convicted covers more than driving under the influence of alcohol. Applicant may indeed have been innocent of driving under the influence of alcohol but guilty under other portions of the statute. (6) Unless the record shows unequivocally that his conviction was alcohol-related, it was entirely permissible for Applicant to offer evidence demonstrating the precise manner in which he violated the statute. Ultimately, however, in the context of Applicant's entire history of arrests for alcohol-related crimes, the Administrative Judge's consideration of the 1995 incident as alcohol-related is not outcome determinative and does not constitute harmful error requiring remand or reversal.

6. Whether the Administrative Judge committed harmful error when he failed to consider the fact that Applicant voluntarily reported derogatory information. Applicant argues that the Administrative Judge committed harmful error by

failing to consider Applicant's voluntary reporting of a September 1997 assault (subparagraph 1.m. of the SOR). Applicant's argument is unpersuasive. Firstly, there is a presumption that the Administrative Judge considered all relevant evidence in the record. An Administrative Judge is also responsible for applying the "whole person" concept during the course of his deliberations. Error is not established merely because Applicant can cite to a piece of record evidence which the Judge did not specifically discuss. *See, e.g.,* ISCR Case No. 97-0730 (October 21, 1998) at p. 3. There is nothing in the record or in the Administrative Judge's decision that demonstrates the Judge consciously ignored Applicant's reporting of the assault. Inasmuch as there is no presumption of error below, the Board will not assume that the Administrative Judge failed to give this fact due consideration just because it is not mentioned in his decision. Secondly, although Applicant's voluntary reporting of the incident is commendable, it is of limited probative value on this record and does little to diminish the seriousness of the underlying conduct.⁽⁷⁾ The fact that Applicant voluntarily reported the incident to his employer shortly after it occurred is not of such significant magnitude that the Administrative Judge was required to discuss it in his decision.

7. Whether the Administrative Judge erred by concluding that no mitigating conditions applied to Applicant's case.

Applicant argues that the Administrative Judge committed harmful error by concluding that no mitigating conditions apply to Applicant's case. Applicant also argues, in this context, that the Administrative Judge's finding that Applicant had "less than six months" without an alcohol-related incident was contrary to the record evidence.

The Administrative Judge did err when he said Applicant had less than six months without an alcohol-related incident. Applicant had a minimum of 15 months (from the September 1997 assault incident until the close of the record) without an alcohol-related incident. This particular error is harmless, however, when considered in the context of the totality of the Administrative Judge's decision and the record.

Applicant argues that the incidents cited in the SOR do not constitute a pattern and that, accordingly, Mitigating Condition 1⁽⁸⁾ should have been applied. Applicant's argument is not supported by the record evidence. Applicant has a twenty-year history of trouble with alcohol as evidenced by approximately a dozen alcohol-related events. The record would not support application of Mitigating Condition 1 in this case. Applicant argues that Mitigating Condition 3⁽⁹⁾ should have been applied since Applicant has recently married and had no further alcohol-related incidents. Applicant's argument has some merit. However, given the totality of the record, application of Mitigating Condition 3 was not mandated and would not have been ultimately dispositive in this case. Applicant has not shown harmful error on this point.⁽¹⁰⁾

8. Whether the Administrative Judge erred in considering evidence he previously ruled excluded. Applicant argues that the Administrative Judge committed harmful error by considering two pages of a six-page 1987 report (Govt. Exhibit 6) after striking those pages from the record. Applicant fails to demonstrate that the Administrative Judge considered the stricken pages. Applicant specifically complains about the Administrative Judge's reference to, and reliance upon, a 1987 incident which is documented in the excluded portion of the report. A review of Government Exhibit 6 indicates that the 1987 incident is documented in both the excluded portion of the report and the portion that was properly considered. As there is no presumption of error below, no error has been established.

9. Whether the Administrative Judge's decision was arbitrary, capricious or contrary to law. Applicant makes numerous assertions which allege error in the Administrative Judge's findings of fact. The Board interprets these assertions collectively as a claim that the Judge's decision was arbitrary, capricious and contrary to law.

a. The September 1997 assault. Applicant argues that the Administrative Judge committed harmful error by finding that the September 1997 assault was alcohol-related. His argument is rooted in the assertion that the documentary evidence admitted at the hearing provided an insufficient basis for a finding that the incident was alcohol-related and that the testimonial evidence establishing an alcohol component to the incident was unreliable hearsay. Applicant asserts the Judge erred by placing "great weight" on the hearsay evidence.

The only piece of documentary evidence that supported the alcohol link to the September 1997 assault was a checked box on a police report. The testimonial support for the link came in the form of testimony from a DSS agent as to what the arresting officer told her about his observations the evening of the incident. That testimony was certainly hearsay. Nonetheless, the Applicant has failed to demonstrate that the Administrative Judge erred in considering it and has failed

to demonstrate that the Judge's finding of an alcohol-related incident was not supported by substantial evidence.

Applicant, with the benefit of legal counsel, did not object to the receipt of the hearsay into evidence at the time of the DSS agent's testimony. In fact, the hearsay evidence was elicited by questions posed by the Applicant. Applicant claims that he was denied the right to cross-examine witnesses offering testimony against him in violation of the Directive. Any objections raised on this point were waived by Applicant when he asked the DSS agent questions about what the arresting officer told her.⁽¹¹⁾

Applicant's argument regarding the weight given to the hearsay testimony by the Administrative Judge is not waived by his eliciting of the testimony. However, the amount of weight to be accorded individual pieces of evidence is particularly within the province of the Administrative Judge. While the Judge's discretion in weighing evidence is not unfettered, it is broad and the weight the Judge gives to the evidence will not be disturbed on appeal unless there is a showing that the Judge acted in a manner that was arbitrary, capricious, or contrary to law. *See, e.g.,* ISCR Case No. 98-0055 (December 31, 1998) at p. 3. On this record, the Board concludes that the Judge did not give undue weight to the hearsay testimony.

The Board also concludes that the Administrative Judge's finding of an alcohol link to the September 1997 incident was adequately supported by the evidence of record. On appeal Applicant makes mention of countervailing evidence, including the testimony of Applicant and his wife and an alleged bias of the DSS agent witness against Applicant. The combination of the hearsay testimony Applicant solicited and the documentary evidence admitted provides a sufficient basis for the Judge to find the incident was alcohol-related, notwithstanding some evidence to the contrary.

b. Miscellaneous evidentiary matters. Applicant argues that the Administrative Judge made numerous findings statements and assumptions not supported by the record and that taken together these error would cause a reasonable mind to doubt the conclusions reached in the Administrative Judge's decision. Applicant spends considerable effort disputing the Administrative Judge's findings as to when Applicant's wife changed her version of Applicant's conduct in an assault situation. The Board concludes that this is not in any way dispositive as to the outcome of this case and need not be addressed. The same holds true for the disputed origin of the 911 call made to police during the September 1997 incident, the Administrative Judge's characterization of Applicant's wife's failure to prosecute the June 1997 incident and the Judge's statements regarding when Applicant was initially granted his security clearance.

Applicant asserts that the Administrative Judge disregarded the fact that one set of charges was not pressed at the victim's (Applicant's wife) request. As noted above, an Administrative Judge does not have to refer to each element of each piece of evidence. There is a presumption that the Administrative Judge considered the evidence. Applicant has presented nothing sufficient to rebut that presumption. Applicant's arguments have not demonstrated error on these points.

The separate opinion states the proposition that even if the individual errors described above were harmless, taken cumulatively the errors are harmful. We decline to adopt that proposition here because the record does not reasonably support a different outcome. Based on the record evidence and the portions of the Judge's analysis that are sustainable, we conclude that there is not a significant chance that the identified errors fatally affected an otherwise sustainable decision. *See, e.g.,* ISCR Case No. 98-0380 (March 8, 1999) at p. 4.; ISCR Case No. 97-0765 (December 1, 1998) at p. 6.; *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).

Conclusion

Applicant has failed to demonstrate harmful error by the Administrative Judge in decision below. Accordingly the Board affirms the Administrative Judge's April 26, 1999 decision.

See separate opinion

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

Separate Opinion of Chairman Emilio Jaksetic, concurring in part and dissenting in part

Apart from minor stylistic differences, I concur with my colleagues' statement of the procedural history of the case and with their statement of the issues raised on appeal. As will be discussed later in this separate opinion, I also concur with portions of my colleague's discussion and resolution of the appeal issues. However, I dissent from their decision to affirm the Administrative Judge's decision because I disagree with other portions of their discussion and analysis. For the reasons stated in this separate opinion, I would remand the case for a new hearing and issuance of a new decision.

1. Whether the Administrative Judge improperly granted Department Counsel's motion to amend the SOR. I concur with my colleagues' conclusion that the Administrative Judge erred by granting Department Counsel's motion to amend the SOR. Applicant could have waived any objection to Department Counsel's motion to amend the SOR, but he did not do so.

Department Counsel's motion to amend was made before the hearing was held. Therefore, Department Counsel's motion to amend the SOR could not be based on a claim that it was made to "render [the SOR] in conformity with the evidence admitted." Directive, Additional Procedural Guidance. Item 17. Furthermore, Department Counsel failed to make any proffer of good cause for its motion to amend the SOR. Accordingly, there was no basis for the Judge to grant Department Counsel's motion to amend. Moreover, it was arbitrary and capricious for the Judge to place on Applicant the burden of demonstrating prejudice in opposition to Department Counsel's motion to amend. The absence of prejudice to a nonmoving party is not a substitute for a showing of good cause by the moving party. *See, e.g., Kirkland v. Broitman*, 86 F.3d 172, 176 (10th Cir. 1996)(absence of prejudice to other party, standing alone, does not constitute good cause for excusing late service); *MCI Telecommunications Corp. v. Teleconcepts, Inc.*, 71 F.3d 1086, 1097 (3d Cir. 1995)(same), *cert. denied*, 117 S. Ct. 64 (1996).

Department Counsel's arguments on this issue are not persuasive for several reasons. First, Department Counsel relies on arguments based on general principles instead of the plain language of Item 17 of the Additional Procedural Guidance. Although general legal principles can be argued in support of a reasonable construction of Item 17, such general legal principles cannot supplant Item 17. *See, e.g., ISCR Case No. 98-0320* (April 8, 1999) at p. 3 (general legal principles do not apply in lieu of a provision of law that specifically covers an issue in a case). Second, Department Counsel seeks to use absence of prejudice to Applicant as a substitute for its failure to make any proffer at the hearing of good cause for its motion to amend. As noted in the preceding paragraph, the absence of prejudice to the other party is not a substitute for a showing of good cause. Third, Department Counsel's argument fails to take into account the simple fact that an applicant can object to the admission of any evidence that is not relevant to the SOR allegations in the case, the admissibility of evidence, or the credibility of a witness. A logical consequence of accepting Department Counsel's argument would be the following: Department Counsel would have a free hand to offer whatever evidence it wants at a hearing and then could move to amend the SOR to conform to evidence of matters that are not relevant to the SOR

allegations, the admissibility of evidence, or the credibility of a witness.⁽¹²⁾ Permitting such a situation would seriously undermine an applicant's right to receive notice of the SOR allegations and a have a reasonable opportunity to prepare for a hearing.

2. Whether the Administrative Judge erred by denying Applicant's motion to dismiss. The Administrative Judge gave two reasons for denying Applicant's motion to dismiss: (a) lack of authority to dismiss the SOR; and (b) Applicant's case has handled in an expeditious manner after issuance of the SOR in September 1998. The Judge's ruling was correct, but his stated reasoning for that ruling was problematic.

The Administrative Judge was correct in ruling that he lacked authority to dismiss the SOR. *See, e.g.*, DOHA Case No. 94-0569 (March 30, 1995) at p. 4 (Administrative Judge has no authority to strike or dismiss SOR allegations). Lacking authority to dismiss the SOR, it was arbitrary and capricious for the Judge to consider and rely on an irrelevant factor in denying Applicant's motion to dismiss. Furthermore, because the Judge lacked authority to dismiss the SOR, it is irrelevant whether the Defense Office of Hearings and Appeals initiated a request for further investigation of Applicant.⁽¹³⁾ Finally, Applicant has failed to articulate any meaningful way in which he was prejudiced by any delay in the processing of his case. *See, e.g.*, ISCR Case No. 97-0409 (April 29, 1998) at p. 3 ("Absent any showing of harm to an applicant's rights, the mere passage of time in the handling of a case does not constitute error that warrants remand or reversal.")

3. Whether Applicant was prejudiced by the Administrative Judge's failure to grant a continuance in order for Applicant to obtain representation. Although there is no constitutional right to representation in DOHA proceedings, the right to representation is an important one under Executive Order 10865 and the Directive. *See, e.g.*, ISCR Case No. 96-0457 (December 8, 1997) at p. 2. Although an Administrative Judge has broad discretion in deciding how to conduct a hearing "in a fair, timely, and orderly manner" (Directive, Additional Procedural Guidance, Item 10), that discretion must be exercised in a way that does not impair the parties' rights, including an applicant's right to representation.

Even the Sixth Amendment right to counsel in criminal cases is not an absolute one. *See, e.g., United States v. Moore*, 159 F.3d 1154, 1161 (9th Cir. 1998)(defendant's motion for substitution of counsel requires court to balance defendant's right to counsel of his choice against any resulting inconvenience); *United States v. Goldberg*, 67 F.3d 1092, 1098 (3d Cir. 1995)(last minute request by defendant for substitution of counsel must be balanced against factors such as efficient administration of justice, accused's rights, any countervailing government interests, and any indication that request was made in bad faith, for purposes of delay, or to subvert the proceedings). The nonconstitutional right to representation provided for by Executive Order 10865 and the Directive is not entitled to be given greater respect or protection than the Sixth Amendment right to counsel. *Cf.* ISCR Case No. 98-0265 (March 17, 1999) at p. 7 (right to cross-examination in DOHA not greater than Sixth Amendment right to confrontation). Accordingly, I agree with my colleagues that the right to representation is not an absolute one in DOHA proceedings. *See* DISCR Case No. 91-0036 (January 27, 1993) at p. 5 (applicant's right to be represented is not an absolute one). However, although the right to representation can be waived, ISCR Case No. 94-1159 (December 4, 1995) at pp. 3-4, a waiver of that right should not be lightly inferred. DISCR Case No. 91-0036 (January 27, 1993) at p. 5.

Considering the record as a whole, I concur with my colleagues' conclusion that Applicant did not request a continuance in order to obtain an alternate personal representative or a lawyer once it was clear that the Administrative Judge ruled that Applicant's wife could not serve as Applicant's representative and be a witness in the case as well. However, Applicant's failure to ask for a continuance did not render the Judge's handling of the representation issue nonproblematic.

The right to representation is specifically referred to in Executive Order 10865 and the Directive. The practice of witness sequestration -- relied on by the Administrative Judge to preclude Applicant's wife to act as his personal representative and be a witness in the case -- is not referred to by either Executive Order 10865 or the Directive. Witness sequestration is a reasonable practice found in many other legal proceedings. I see no reason why it cannot be used in DOHA proceedings by virtue of a Judge's exercise of authority under Item 10 of the Additional Procedural Guidance. However, the Judge's exercise of that authority must be done in a manner that does not impair an applicant's rights under Executive Order 10865 and the Directive. *See* Directive, Additional Procedural Guidance, Item 32.b. (Board must determine whether "Administrative Judge adhered to procedures required by E.O. 10865 and this

Directive") and Item 33.c. (Board must determine whether "Administrative Judge's rulings or conclusions are arbitrary, capricious, or contrary to law").

I respectfully disagree with my colleagues' reasoning that notice to Applicant prior to the hearing provides an escape from the problem. Timely, adequate notice can avoid (and occasionally mitigate) many legal problems; but it is not a legal cure-all. If a practice or ruling by an Administrative Judge is arbitrary, capricious, or contrary to law, it is not rendered less so merely because the Judge gives the parties advance notice of the practice or ruling. Accordingly, if a Judge's practice or ruling infringes an applicant's right to representation, the impairment of the applicant's right to representation is not lessened merely because the applicant received notice of it prior to the hearing.

Even in the absence of a request for a continuance by Applicant, the Administrative Judge had the obligation to ensure that the hearing proceeded in a fair manner (Directive, Additional Procedural Guidance, Item 10), including considering how to balance Applicant's right to choose a personal representative against other legitimate considerations. *Cf.* DISCR Case No. 91-0036 (January 27, 1993) at pp. 3-4 (discussing factors that can be considered by Administrative Judge in connection with ruling on a request for a continuance). In this case, the Administrative Judge failed to explore alternative ways that might have allowed Applicant's wife to represent him, be a witness in the case, and still achieve the laudable purposes of witness sequestration. For example, the Judge could have asked whether the parties would agree to allow Applicant's wife to testify out of turn, at the beginning of the hearing, to prevent her from gaining any advantage from testifying after hearing the testimony of other witnesses. Or, the Judge could have informed Applicant that, if the Judge allowed Applicant's wife to represent Applicant and testify as a witness, Applicant would face the following possibility: the Judge might conclude, based on the totality of the record evidence, that the testimony of Applicant's wife should be given reduced weight because of her opportunity to hear the testimony of other witnesses before she testified. Neither of these possibilities is without its own potential problems, but at least they suggest possible ways to respect an applicant's right to select a personal representative and still satisfy the laudable purposes of witness sequestration.

4. Whether the Administrative Judge erred by not addressing the fact that a government witness was absent during the second day of hearing. I concur with my colleagues' discussion and resolution of this issue.

5. Whether the Administrative Judge erred when he concluded that Applicant was collaterally estopped from asserting that a 1995 DUI incident was not alcohol-related. The Administrative Judge acted reasonably by finding that Applicant was convicted of driving under the influence. However, the Judge erred by finding that conviction collaterally estopped Applicant from contesting that the conviction was alcohol-related. Department Counsel properly concedes that Applicant could collaterally his 1995 conviction in these proceedings. *See, e.g.*, ISCR Case No. 94-1213 (June 7, 1996) at p. 3 (noting person can avoid collateral estoppel effect of criminal conviction in some situations, including when conviction was based on guilty plea to misdemeanor charge). Furthermore, the charge to which Applicant pleaded guilty covered driving under the influence of alcohol *or other substances*. There is no record evidence that indicates Applicant consumed alcohol on that occasion. Moreover, the fact that Applicant was involved in other alcohol-related incidents does not provide reasonable support for a conclusion that the 1995 incident was alcohol-related. *See, e.g.*, Fed. R. Evid. 404(b) and Advisory Committee's Note comments on 404(b). Accordingly, it was arbitrary and capricious for the Judge to find that the 1995 DUI conviction was alcohol-related.

6. Whether the Administrative Judge erred when he failed to consider the fact that Applicant voluntarily reported derogatory information. Applicant correctly notes that: (a) an adjudicator should consider whether an applicant "voluntarily reported the information" (Directive, Enclosure 2 at page 2-3); and (b) the Administrative Judge did not specifically note the fact that Applicant voluntarily reported the September 1997 incident to his company security officer. Those observations, however, do not demonstrate the Judge erred.

As a matter of common sense, the fact that an applicant voluntarily reports adverse information about himself or herself, rather than wait until the adverse information is discovered by government investigators, weighs in an applicant's favor. However, such honesty and candor with the government does not preclude the government from considering the security implications of the admitted adverse information. Taken to its logical extension, Applicant's argument could lead to the absurd result that an applicant could engage in serious misconduct (*e.g.*, deliberate security violations) and escape being held accountable for that misconduct merely by disclosing it voluntarily to the federal government before it is discovered. I decline to interpret a provision of the Directive in a manner that could lead to such an absurd result.

See, e.g., Marques v. Fitzgerald, 99 F.3d 1, 5 (1st Cir. 1996)("[A] statute may not be construed in a manner that results in absurdities or defeats its underlying purpose."); *Yerdon v. Henry*, 91 F.3d 370, 376 (2d Cir. 1996)(court should reject party's interpretation of statute that would lead to absurd or futile results that are plainly at variance with the policy of the statute as a whole).

I concur with my colleagues' discussion about the rebuttable presumption that an Administrative Judge considers all the record evidence.

7. Whether the Administrative Judge erred by concluding that no Alcohol Consumption Mitigating Conditions applied to Applicant's case. I concur with my colleagues' conclusion that the Administrative Judge erred by finding that Applicant had demonstrated he had "less than six months" without an alcohol-related incident. I respectfully decline to concur with my colleagues' conclusion that this error was harmless. Even if an error, standing alone, could be deemed harmless in nature, there remains the question whether several individually harmless errors may cumulatively rise to the level of harmful error. For this reason, I also respectfully disagree with my colleagues' resolution of Applicant's argument concerning Alcohol Consumption Mitigating Condition 3.

I concur with my colleagues' rejection of Applicant's argument concerning Alcohol Consumption Mitigating Condition 1.

8. Whether the Administrative Judge erred by considering evidence he had ruled would be excluded from the record. There is a rebuttable presumption that an Administrative Judge acts in good faith. *See, e.g., ISCR Case No. 97-0765* (December 1, 1998) at p. 5. Because there is record evidence concerning the 1987 incident, not just information contained in the two pages of Government Exhibit 6 excluded by the Judge, Applicant has failed to overcome the rebuttable presumption that the Judge adhered to his evidentiary ruling concerning those two pages.

9. Whether the Administrative Judge's decision is arbitrary, capricious, or contrary to law. I concur with my colleagues' conclusion that Applicant opened the door to the admission of the Special Agent's testimony about what a police officer told her about the September 1997 incident. By asking the Special Agent questions about what the police officer told her, Applicant waived any claim that he was denied the right to cross-examine the police officer. *Cf. Adams v. Laird*, 420 F.2d 230, 237-38 (D.C. Cir. 1969)(right to confrontation can be waived)(industrial security clearance case), *cert. denied*, 397 U.S. 1039 (1970). However, as my colleagues correctly note, Applicant's waiver of an objection to the admissibility of that testimony does not end the analysis. The mere fact that evidence is admitted without objection does not relieve an Administrative Judge of the obligation to consider what weight reasonably can be given to that evidence. *See, e.g., ISCR Case No. 98-0123* (October 28, 1998) at p. 2. As will be discussed later in this separate opinion, there is reason why that evidence is not entitled to much weight.

I respectfully disagree with my colleagues' conclusion that the Administrative Judge did not err by not addressing the significance of the Special Agent's apparent failure to obtain a sworn statement from the police officer. I agree with my colleagues that DOHA Judges and this Board do not have supervisory jurisdiction or authority over the policies and practices of Defense Security Service (DSS) investigations. *See, e.g., ISCR Case No. 95-0594* (August 30, 1996) at p. 3 ("[N]either the Administrative Judge nor the Board has any authority to review the sufficiency of DIS investigations or to order DIS to conduct further investigation of an applicant."). However, a Judge does have jurisdiction and authority to consider whether the failure of a Special Agent to conduct an investigation in accordance with DSS policies or practices has any bearing on the weight that reasonably should be placed on the Special Agent's testimony about what the Special Agent learned during the course of an investigation.

I respectfully disagree with my colleagues' conclusions about Applicant's argument on the issue of when Applicant's wife recanted her earlier statements about Applicant's conduct during the September 1997 incident. The timing of that recantation is relevant to an assessment of the credibility of Applicant's wife.

Applicant persuasively argues that the Administrative Judge erred by finding that it was "not disputed" that Applicant had been drinking prior to the June 1997 incident. A Judge is often required to make factual findings despite the presence of conflicting record evidence. *See, e.g., ISCR Case No. 98-0395* (June 24, 1999) at p. 3. However, when doing so, a Judge cannot simply conclude that there is no dispute on a particular point when there is conflicting record evidence on that point.

Applicant argues that the police report concerning the September 1997 incident (Government Exhibit 10) is insufficient to support the Administrative Judge's finding that the incident was alcohol-related. That argument is persuasive. Police reports are admissible in these proceedings as an exception to the hearsay rule. *See, e.g.,* ISCR Case No. 96-0461 (December 31, 1997) at p. 4 n.2. Furthermore, Applicant did not object to the admissibility of Government Exhibit 10. However, as I have already discussed, the admission of evidence without objection does not relieve a Judge of the obligation to consider what weight reasonably can be given to that evidence. On its face, nothing in Government Exhibit 10 indicates that the police officer writing the report relied on his personal observations of Applicant to mark the box indicating the suspect (*i.e.*, Applicant) had used alcohol. Experience in this program shows police officers often describe a suspect's appearance or behavior in a police report to document any indicia of alcohol use or abuse. Government Exhibit 10 is conspicuous in the total absence of any such description by the police officer in connection with the September 1997 incident. Accordingly, Government Exhibit 10 was entitled to no weight, independent of the statements of Applicant's wife, on the issue of whether the September 1997 incident was alcohol-related. Furthermore, the failure of the police officer to document any such indicia of alcohol use or abuse by Applicant in the September 1997 report undercuts what weight reasonably can be given to the Special Agent's testimony about what the police officer later told her about that incident.

Applicant also contends the Administrative Judge erred by failing to find that Applicant's security file was closed in September 1997 after the government had received and considered information about the June 1997 incident. Applicant's contention fails to demonstrate the Judge erred. Applicant's argument fails for two reasons. First, Applicant's argument is based on reliance on a DD Form 1879 that was not made part of the record below. As discussed earlier, the Board cannot consider new evidence on appeal. Second, Applicant's argument fails in the face of the simple fact that information about the September 1997 incident constituted new derogatory information that warranted reconsideration of his security eligibility. If an applicant has received a favorable security clearance adjudication, then the applicant's security eligibility should not be reopened based on the adverse information that was adjudicated in the applicant's favor. *See* ISCR Case No. 98-0320 (April 8, 1999) at pp. 3-5 (discussing applicability of National Industrial Security Program Operating Manual's Section 2-203 to DOHA proceedings). However, an applicant's security eligibility can be reconsidered in light of new adverse information that is brought to the attention of the government. *Id.* Even if there had been record evidence that a favorable clearance decision had been made after receipt of information about the June 1997 incident, information about the September 1997 incident would have been sufficient to warrant reconsideration of Applicant's security eligibility under the terms of Section 2-203 of the NISPOM.

I need not decide whether the various errors Applicant has identified are harmful when viewed individually. Taken in their totality, the Administrative Judge's errors are harmful and warrant remand. Furthermore, the Judge's errors with respect to (a) Department Counsel's motion to amend, and (b) Applicant's desire to have his wife represent him raise questions as to whether Applicant received a fair hearing. Accordingly, I would remand the case with instructions that the Judge issue a new decision after conducting a new hearing in this case.

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board

1. The amendment consisted of the addition of two subparagraphs under Criterion E (Personal Conduct). The first subparagraph merely referenced all the substantive allegations of Criterion G and made them cognizable under Criterion E (subparagraph 2.a.). The second subparagraph consisted of a single allegation of refusal to cooperate with an agent of the Defense Security Service (subparagraph 2.b.).
2. See Directive, Additional Procedural Guidance, paragraph 17.
3. Hearing Transcript (Tr.) at p. 16.

4. Given this fact, it was not proper for the Administrative Judge to make a finding of "good cause" when citing his acceptance of the amendment in his decision.
5. For the limited purpose of reviewing this assignment of error, the Board will view this portion of the record in a manner most favorable to Applicant.
6. Evidence offered by Applicant at the hearing indicated that Applicant ingested prescribed medications on the date in question that may well have impacted upon his ability to drive a car.
7. Falsification was not alleged in the SOR.
8. "[T]he alcohol-related incidents do not indicate a pattern."
9. "[P]ositive changes in behavior supportive of sobriety."
10. In the "Conclusion" section of his brief, Applicant also asserts that the two 1997 incidents were "isolated." Given the totality of the record evidence and the numerous alcohol-related incidents described therein, Applicant's characterization is not supportable.
11. In a related argument, Applicant claims that the DSS agent who elicited the hearsay statement from the officer violated procedures by not obtaining a sworn statement from the officer. Applicant also claims the Administrative Judge erred by not addressing the DSS agent's breach of procedure. As a general proposition, the internal policies and practices of DSS investigations are not matters within the purview of DOHA judges. *See e.g.*, DISCR Case No. 95-0178 (March 29, 1996) at p. 4.
12. For a brief discussion of the complex nature of relevancy, *see, e.g.*, Fed. R. Evid. 401, Advisory Committee's Note.
13. On appeal, Applicant relies on a DD Form 1879 that was specifically cited in his Motion for Dismissal, but was not attached to that motion and was not offered as a separate exhibit during the proceedings below. Accordingly, that DD Form 1879 constitutes new evidence, which cannot be considered on appeal. Directive, Additional Procedural Guidance, Item 29.