DATE: August 15, 2000

In Re:

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

Applicant for Security Clearance

ISCR Case No. 98-0676

APPEAL BOARD DECISION AND REVERSAL ORDER

APPEARANCES

FOR GOVERNMENT

Matthew E. Malone, Esq., Department Counsel

FOR APPLICANT

Pro Se

Administrative Judge Kathryn M. Braeman issued a decision, dated March 3, 2000, in which she 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 reverses 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 admitting Applicant's post-hearing exhibits into evidence; and (2) whether the Administrative Judge's findings of mitigation are not supported by the record evidence, and are arbitrary and capricious.

Procedural History

The Defense Office of Hearings and Appeals issued to Applicant a Statement of Reasons (SOR) dated November 8, 1999. The SOR was based on Criterion G (Alcohol Consumption), Criterion J (Criminal Conduct), and Criterion E (Personal Conduct). A hearing was held on January 20, 2000. The Administrative Judge issued a written decision, dated March 3, 2000, in which she 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 the Judge's favorable decision.

Appeal Issues

1. Whether the Administrative Judge erred by admitting Applicant's post-hearing exhibits into evidence. Applicant requested a continuance on the evening before the hearing. The Administrative Judge denied Applicant's request for a continuance and the hearing was held as scheduled. Applicant did not offer any exhibits at the hearing. However, over Department Counsel's objection, the Administrative Judge granted Applicant's request to submit documentary evidence after the hearing. Department Counsel contends the Judge erred by allowing Applicant to submit documents after the hearing because: (a) the documents did not exist at the time of the hearing; (b) it was arbitrary and capricious for the Judge to deny Applicant's request for a continuance, yet then allow Applicant to submit hearsay evidence after the

hearing; and (c) the Judge's action denied Department Counsel's right to cross-examination, and the documents submitted by Applicant did not bear indicia of reliability. For the reasons that follow, the Board concludes Department Counsel has failed to demonstrate the Judge acted in a manner that is arbitrary, capricious, or contrary to law.

Nothing in the Directive specifically authorizes or precludes the post-hearing submission of documents. However, the silence of the Directive with respect to authorizing or precluding any specific procedure does not preclude an Administrative Judge from considering other provisions of the Directive or general principles of federal administrative law that may be relevant in deciding whether a particular procedure should be used or not. *See, e.g.*, ISCR Case No. 99-0447 (July 25, 2000) at pp. 4-6. In this case, Item E3.1.10 of the Additional Procedural Guidance ("The Administrative Judge may rule on questions on procedure, discovery, and evidence and shall conduct all proceedings in fair, timely, and orderly manner") is relevant to evaluating Department Counsel's challenge to the Judge's ruling. Specifically, the issue raised by Department Counsel's appeal argument is whether the Administrative Judge's ruling is arbitrary, capricious or otherwise an abuse of her discretion under Item E3.1.10.

(a) Whether the documents involved exist at the time of the hearing is a factor that an Administrative Judge must consider when deciding whether to grant or deny a party's request to make a post-hearing submission. Allowing a party to make a post-hearing submission of documents that do not exist as of the time of the hearing poses some potentially serious drawbacks: (i) documents prepared after a hearing could suffer from the kinds of weaknesses and defects often associated with documents prepared in anticipation of litigation; (ii) admission of such documents could defeat the purposes served by sequestration of witnesses during a hearing; (iii) the other party is deprived of an opportunity to develop the record to place the post-hearing submissions in context or rebut them; (iv) availability of such a practice could encourage a party to seek to be relieved of the consequences of its failure to adequately prepare for a hearing; and (v) allowing post-hearing submissions could needlessly delay the resolution of a case.[(1)] The possibility of such drawbacks does not preclude a Judge from considering whether, under the particular facts and circumstances of a given case (including its procedural history), allowing a party to make a post-hearing submission would be appropriate.

(b) It is not frivolous for Department Counsel to argue that it was arbitrary and capricious for the Administrative Judge to deny Applicant's request for a continuance, but then give Applicant additional time to submit post-hearing exhibits. However, it is possible to understand a Judge denying a request for a continuance made one day before the hearing because travel plans are locked in, yet trying to make a reasonable accommodation for a party by relaxing technical rules of evidence to allow for development of a full and complete record (Section E3.1.19). *Cf.* DISCR Case No. 94-0084 (December 13, 1994) at pp. 3-4 (discussing some of the factors an Administrative Judge should consider when deciding whether to grant or deny a continuance); DISCR Case No. 91-0036 (January 27, 1993) at pp. 3-4 (same). Considering the record as a whole, Department Counsel's argument falls short of demonstrating the Judge acted in an arbitrary and capricious manner by denying Applicant's request for a continuance but granting his request to make a post-hearing submission.

(c) Department Counsel's hearing objections (TR at 77-78) go more to the weight of the documents than to their admissibility. Even if Department Counsel is correct in asserting the Administrative Judge gave undue weight to the documents Applicant submitted, that error does not mean the Judge erred by admitting them into evidence.

The Board need not agree with the Administrative Judge's ruling to conclude that Department Counsel has failed to demonstrate it was arbitrary, capricious, or contrary to law for the Judge to allow Applicant to make a post-hearing submission under the particular facts and circumstances of this case.

2. Whether the Administrative Judge's findings of mitigation are not supported by the record evidence, and are arbitrary and capricious. Department Counsel contends the record evidence does not support the Administrative Judge's finding of mitigation. In support of that contention, Department Counsel argues: (a) the Administrative Judge misapplied the Alcohol Consumption Mitigating Conditions; (b) the Judge misapplied the Criminal Conduct Mitigating Conditions; and (c) the Judge misapplied the Personal Conduct Mitigating Conditions.

(a) Alcohol Consumption Mitigating Conditions. Department Counsel argues the Administrative Judge should not have applied Alcohol Consumption itigating Condition 1[(2)] because the SOR did not allege a pattern of alcohol-related incidents. The applicability of Mitigating Condition 1 does not turn on whether the SOR alleges a pattern of alcohol-

related incidents. Rather, it turns on whether there is evidence of a pattern of such incidents. *Cf.* DISCR Case No. 88-1198 (November 13, 1992) at p. 8 ("Moreover, not every fact to which the Judge may ultimately attach significance need be set forth in the SOR."). However, Department Counsel's argument has merit to the extent it contends the record shows a history of alcohol abuse by Applicant. It was arbitrary and capricious for the Judge to apply Mitigating Condition 1 based on her reasoning about the 1990 incident without regard to the record evidence of Applicant's alcohol abuse after 1990. *See* Government Exhibit 4 at p. 2 (Applicant admitting he drinks to intoxication about ten times a year). Even though the record evidence does not show Applicant had any alcohol-related incidents (as enumerated in Disqualifying Condition 1[(3)] or Disqualifying Condition 2[(4)]) since 1990, the evidence of Applicant's alcohol abuse after 1990 militates against the Judge giving full or unqualified weight to Mitigating Condition 1. *See, e.g.*, ISCR Case No. 99-0500 (May 19, 2000) at p. 4 ("The mere presence or absence of Adjudicative Guidelines for or against clearance is not solely dispositive of a case. Rather, a Judge must consider applicable Adjudicative Guidelines in light of the record evidence as a whole."). *See also* Directive, Additional Procedural Guidance, Item E3.1.32. ("The Appeal Board shall . . . determine whether or not: E3.1.32.1. The Administrative Judge's findings of fact are supported by such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the same record."). Whatever favorable weight the Judge could give to the evidence that Applicant was not involved in alcohol-related incidents after 1990 had to be balanced against the record evidence that Applicant abused alcohol on various occasions after the 1990 incident.

Department Counsel's argument about Alcohol Consumption Mitigating Condition 2[(5)] has merit. The fact that the other spouse abuse incidents do not appear to be alcohol-related is irrelevant to whether there is record evidence of alcohol abuse by Applicant on other occasions. Given Applicant's admission in 1999 that he drinks to intoxication several times a year (Government Exhibit 4 at p. 2), the Administrative Judge did not have a rational basis for concluding Applicant's alcohol abuse was sufficiently dated to warrant application of Mitigating Condition 2.

Department Counsel's arguments about Alcohol Consumption Mitigating Condition 3[(6)] have some merit. Department Counsel's "self-serving testimony" argument does not show the Administrative Judge erred. *See, e.g., Winchester Packaging, Inc. v. Mobil Chemical Co.*, 14 F.3d 316, 319 (7th Cir. 1994)(self-serving testimony is not unworthy of belief as a matter of law). *See also* DISCR Case No. 90-1542 (March 26, 1992) at p. 5 (Board rejecting argument that Administrative Judge should have rejected applicant's "self-serving" statements). However, Department Counsel is correct in arguing that the record evidence of Applicant's alcohol abuse after 1990 undercuts the Judge's stated rationale for her application of Mitigating Condition 3. As Department Counsel notes, the arbitrary and capricious nature of the Judge's analysis is shown when the Judge says Applicant has not had any alcohol-related incidents since 1990, yet then notes he was intoxicated in September 1998. Even if Applicant has not had alcohol-related incidents (as enumerated in Disqualifying Condition 1 or Disqualifying Condition 2) since 1990, evidence of subsequent alcohol abuse by Applicant militates against application of Mitigating Condition 3.[(7)] *Cf.* ISCR Case No. 97-0195 (April 2, 1998) at p. 3 ("Even in the absence of alcohol-related incidents, an applicant may be subject to an adverse security clearance decision based on evidence of alcohol dependence."). Reading the decision below in a light most favorable to Applicant (the nonappealing party), the Judge seems to be trying to articulate reasons for deviating from the literal language of Mitigating Condition 3. The Board has held that a Judge has the discretion to deviate from the literal language of an Adjudicative Guideline Disqualifying or Mitigating Condition, but the Judge must articulate a rational basis for doing so. *See, e.g.*, ISCR Case No. 98-0809 (August 19, 1999) at p. 2. In this case, the Judge's articulated rationale concerning Mitigating Condition 3 is not sustainable in light of the record evidence of Applicant's history of alcohol abuse after 1990.

The Administrative Judge correctly noted that Applicant did not satisfy Alcohol Consumption Mitigating Condition 4.[(8)] It was not arbitrary or capricious for the Judge to say that the logic of the Board's decision in ISCR 98-0066 (August 28, 1998) allows her to conclude that Applicant's failure to satisfy Mitigating Condition 4 is not a bar to a favorable security clearance decision. But, Department Counsel is correct in arguing that the Judge still should have considered the evidence of Applicant's failure to complete treatment successfully as part of the overall record of Applicant's alcohol history. As discussed earlier in this decision, given the record evidence of Applicant's post-1990 alcohol abuse, the Judge's reliance on the absence of post-1990 alcohol-related incidents was misplaced.

(b) Criminal Conduct Mitigating Conditions 1 and 4. Department Counsel contends the Administrative Judge erred by applying Criminal Conduct Mitigating Conditions 1, 4, and 6.

Department Counsel argues the Administrative Judge erred by applying Criminal Conduct Mitigating Condition 1[(9)] because she gave undue weight to the fact the 1998 charges were dismissed. Department Counsel's argument is well-founded. The recency of a criminal incident does not increase or decrease as a function of its ultimate disposition. The recency of a criminal incident is measured in terms of when it occurred, not in terms of how it is dealt with by the criminal justice system afterwards. Furthermore, Department Counsel is correct in asserting that the Judge's application of Mitigating Condition 1 is based on her analysis of Applicant's criminal conduct in a piecemeal manner. Such a piecemeal analysis of the facts and circumstances of an applicant's case is contrary to the whole person concept. *See, e.g.*, ISCR Case No. 99-0554 (July 24, 2000) at p.6.

Department Counsel argues the Administrative Judge erred by applying Criminal Conduct Mitigating Condition 4[(10)] because: (i) it is arbitrary and capricious for Judge to give mitigating weight to her conclusion that Applicant is not likely to repeat his beating of his third wife; and (ii) the Judge's reading of the letter from Applicant's second wife is too expansive and not reasonable. The absence of opportunity for Applicant to beat his third wife again does not constitute evidence of reform or rehabilitation. Furthermore, considering the record evidence as a whole, the Judge gave undue weight to the brief, four-sentence fax from Applicant's third wife.

Department Counsel argues the Administrative Judge erred by applying Criminal Conduct Mitigating Condition 6[(11)] because the letter from Applicant's supervisor and the letter from Applicant's current wife do not provide sufficient information to support the Judge's finding of rehabilitation. The Judge's reliance on Applicant's 20-year work history is misplaced. However favorable Applicant's work history was, it did not stop him from engaging in the criminal incidents covered by the SOR. Applicant engaged in acts of domestic violence despite his work history, and the Judge did not articulate any rational basis for her conclusion that Applicant's work history is proof of rehabilitation. Furthermore, the letter from Applicant's supervisor provides no rational basis for the Judge to conclude Applicant's on-the-job conduct is indicative of reform or rehabilitation with respect to his personal conduct away from the job. Department Counsel is also correct in arguing that the brief letter from Applicant's current wife falls short of providing any details concerning the court-ordered counseling. The evidence relied on by the Judge to apply Mitigating Condition 6 is not sufficient, in light of the record evidence as a whole, to justify the weight placed on it by the Judge.

(c) Personal Conduct Mitigating Conditions. On page 8 of the appeal brief, Department Counsel lists as error "The Administrative Judge misapplied the itigating Guidelines under Guideline E." Yet, Department Counsel's brief makes no argument in support of this sentence. Department Counsel's one-sentence assertion of error fails to raise error with specificity. There is no presumption of error below. Department Counsel's one-sentence assertion of error falls far short of meeting its burden of demonstrating the Judge erred with respect to the Personal Conduct Mitigating Conditions. *See, e.g.*, ISCR Case No. 99-0254 (February 16, 2000) at p. 2.

Conclusion

Department Counsel has met its burden on appeal of demonstrating that the Administrative Judge erred. Considering the Judge's errors in their totality, correction of those errors warrants reversal in light of the negative security implications of Applicant's overall history of alcohol abuse and criminal conduct. Accordingly, pursuant to Item E3.1.33.3 of the Additional Procedural Guidance, the Board reverses the Judge's March 3, 2000 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. This list is illustrative only and should not be construed as relieving an Administrative Judge of the obligation to consider any other factor that may be relevant under the particular facts and circumstances of the case.

2. "The alcohol related incidents do not indicate a pattern"

3. "Alcohol-related incidents away from work, such as driving while under the influence, fighting, child or spouse abuse, or other criminal incidents related to alcohol use.

4. "Alcohol-related incidents at work, such as reporting for work or duty in an intoxicated or impaired condition, or drinking on the job."

5. "The problem occurred a number of years ago and there is no indication of a recent problem."

6. "Positive changes in behavior supportive of sobriety."

7. The Administrative Judge's reliance on the Board decision in ISCR Case No. 98-0066 (August 28, 1998) is misplaced. First, the Board did not reverse the decision in that case. Second, the Board's remand was not based solely on its conclusion that the Judge in that case was improperly trying to require the applicant satisfy a particular Drug Involvement Mitigating Condition before a favorable decision could be made. Rather, the Board found other errors by the Judge in that case. Thus, the remand was not based solely on the one aspect of the Board decision cited by the Judge in this case. Third, even if the Board's reasoning in ISCR Case No. 98-0066 justified the Judge in concluding, by analogy, that satisfaction of Alcohol Consumption Mitigating Condition 4 is not required in order to warrant a favorable security decision, it does not follow that the record evidence in this case provides a rational basis for the Judge to apply Alcohol Consumption Mitigating Condition 3.

8. "Following diagnosis of alcohol abuse or alcohol dependence, the individual has successfully completed inpatient or outpatient rehabilitation along with aftercare requirements, participates frequently in meetings of Alcoholics Anonymous or a similar organization, has abstained from alcohol for a period of at least 12 months, and received a favorable prognosis by a credentialed medical professional or licensed clinical social worker who is a staff member of a recognized alcohol treatment program."

9. "The criminal conduct was not recent."

10. "The person did not voluntarily commit the act and/or the factors leading to the violation are not likely to recur."

11. "There is clear evidence of successful rehabilitation."