

DATE: November 24, 2003

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 01-23356

## **APPEAL BOARD DECISION AND REMAND ORDER**

### **APPEARANCES**

#### **FOR GOVERNMENT**

Rita C. O'Brien, Esq., Department Counsel

#### **FOR APPLICANT**

Thomas G. Connolly, Esq.

The Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR) dated August 9, 2002 which stated the reasons why DOHA proposed to deny or revoke access to classified information for Applicant. The SOR was based on Guideline E (Personal Conduct), Guideline D (Sexual Behavior), and Guideline G (Alcohol Consumption). Administrative Judge Paul J. Mason issued an unfavorable security clearance decision dated June 18, 2003.

Applicant appealed the Administrative Judge's unfavorable decision. The Board has jurisdiction under Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, as amended.

The following issue has been raised on appeal: whether the Administrative Judge erred by admitting into evidence, over Applicant's objection, a copy of a Report of Investigation. For the reasons that follow, the Board remands the Administrative Judge's decision for further processing consistent with the rulings and instructions set forth in this Decision and Remand Order.

#### **Scope of Review**

On appeal, the Board does not review a case *de novo*. Rather, the Board addresses the material issues raised by the parties to determine whether there is factual or legal error. There is no presumption of error below, and the appealing party must raise claims of error with specificity and identify how the Administrative Judge committed factual or legal error. Directive, Additional Procedural Guidance, Item E3.1.32. *See also* ISCR Case No. 00-0050 (July 23, 2001) at pp. 2-3 (discussing reasons why party must raise claims of error with specificity).

When the rulings or conclusions of an Administrative Judge are challenged, the Board must consider whether they are: (1) arbitrary or capricious; or (2) contrary to law. Directive, Additional Procedural Guidance, Item E3.1.32.3. In deciding whether the Judge's rulings or conclusions are arbitrary or capricious, the Board will review the Judge's decision to determine whether: it does not examine relevant evidence; it fails to articulate a satisfactory explanation for its conclusions, including a rational connection between the facts found and the choice made; it does not consider relevant factors; it reflects a clear error of judgment; it fails to consider an important aspect of the case; it offers an explanation for the decision that runs contrary to the record evidence; or it is so implausible that it cannot be ascribed to

a mere difference of opinion. *See, e.g.*, ISCR Case No. 97-0435 (July 14, 1998) at p. 3 (citing Supreme Court decision). In deciding whether the Judge's rulings or conclusions are contrary to law, the Board will consider whether they are contrary to provisions of Executive Order 10865, the Directive, or other applicable federal law. Compliance with state or local law is not required because security clearance adjudications are conducted by the Department of Defense pursuant to federal law. *See* U.S. Constitution, Article VI, clause 2 (Supremacy Clause). *See, e.g.*, ISCR Case No. 00-0423 (June 8, 2001) at p. 3 (citing Supreme Court decisions).

When an Administrative Judge's factual findings are challenged, the Board must determine whether "[t]he 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. In making this review, the Appeal Board shall give deference to the credibility determinations of the Administrative Judge." Directive, Additional Procedural Guidance, Item E3.1.32.1. The Board must consider not only whether there is record evidence supporting a Judge's findings, but also whether there is evidence that fairly detracts from the weight of the evidence supporting those findings, and whether the Judge's findings reflect a reasonable interpretation of the record evidence as a whole. Although a Judge's credibility determination is not immune from review, the party challenging a Judge's credibility determination has a heavy burden on appeal.

When an appeal issue raises a question of law, the Board's scope of review is plenary. *See* DISCR Case No. 87-2107 (September 29, 1992) at pp. 4-5 (citing federal cases).

If an appealing party demonstrates factual or legal error, then the Board must consider the following questions:

Is the error harmful or harmless? *See, e.g.*, ISCR Case No. 00-0250 (July 11, 2001) at p. 6 (discussing harmless error doctrine);

Has the nonappealing party made a persuasive argument for how the Administrative Judge's decision can be affirmed on alternate grounds? *See, e.g.*, ISCR Case No. 99-0454 (October 17, 2000) at p. 6 (citing federal cases); and

If the Administrative Judge's decision cannot be affirmed, should the case be reversed or remanded? (Directive, Additional Procedural Guidance, Items E3.1.33.2 and E3.1.33.3)

### Appeal Issue <sup>(1)</sup>

At the hearing, Department Counsel offered as evidence a copy of a 1986 Report of Investigation. Applicant objected to that document on the grounds that (1) Department Counsel had failed to provide Applicant with a copy of it before the hearing; and (2) an insufficient foundation had been established for its admission in evidence. The Administrative Judge overruled Applicant's objections and admitted the Report of Investigation into evidence as Government Exhibit 13.

On appeal, Applicant contends the Administrative Judge erred by admitting the Report of Investigation into evidence over his objection. In support of that contention, Applicant makes several, interrelated arguments:

(a) the Administrative Judge's ruling is not consistent with Directive, Additional Procedural Guidance, Item E3.1.13-<sup>(2)</sup>

because Department Counsel did not give Applicant a copy of the Report of Investigation until the hearing and failed to explain why a copy of that document was not provided to Applicant sooner;

(b) by allowing Department Counsel to offer the Report of Investigation under such circumstances, the Administrative Judge acted contrary to law because he failed to adhere to the procedures required by Executive Order 10865 and the Directive;

(c) by admitting the Report of Investigation into evidence as a business record under the business records exception of the Federal Rules of Evidence, the Administrative Judge violated Directive, Additional Procedural Guidance, Item E3.1.20-<sup>(3)</sup>

because the Report of Investigation is not a business record, but rather a public record;

(d) by erroneously admitting the Report of Investigation under the business record exception of the Federal Rules of Evidence, the Administrative Judge's ruling was contrary to law; and

(e) the Administrative Judge's erroneous admission of the Report of Investigation cannot be validated by the exercise of discretion under Directive, Additional Procedural Guidance, Item E3.1.19. [\(4\)](#)

In response, Department Counsel argues:

(i) the Administrative Judge properly admitted the Report of Investigation under Directive, Additional Procedural Guidance, Item E3.1.20 because (a) the Special Agent who wrote the Report of Investigation was cross-examined at the hearing; (b) the Report of Investigation was properly admitted under the business record exception to the Federal Rules of Evidence, and (c) in the alternative, the Report of Investigation is not hearsay under Federal Rule of Evidence 801(d) (2); and

(ii) in the alternative, if the Board concludes that the Administrative Judge erred by admitting the Report of Investigation into evidence, the error was harmless because there is record evidence (other than the Report of Investigation) that supports the Administrative Judge's findings and conclusions under SOR paragraphs 1.d through 1.f.

For the reasons that follow, the Board concludes Applicant has demonstrated harmful error below.

Applicant correctly notes that Department Counsel was legally obligated to provide Applicant with a copy of any proposed documentary evidence "[a]s far in advance as practical." Directive, Additional Procedural Guidance, Item E3.1.13. Absent unusual or unforeseen circumstances, neither party should fail to provide the other party with a copy of a proposed exhibit in a timely manner. Although DOHA proceedings are adversarial in nature, they are not supposed to be "hearing by ambush." When a party fails to provide the other party with a copy of a proposed exhibit before the hearing, and there is an objection to the proposed exhibit based on lateness, the Administrative Judge should require the party offering the proposed exhibit to make an explanation for the party's failure to make the proposed exhibit available sooner. The Judge has an obligation to "conduct all proceedings in a fair, timely, and orderly manner." Directive, Additional Procedural Guidance, Item E3.1.10. When a party raises an objection that raises a serious question as to whether the other party failed to fulfill its legal obligations under Directive, Additional Procedural Guidance, Item E3.1.13, the Judge has a duty to require the nonobjecting party to explain why its action or inaction is not a violation of Item E3.1.13. A Judge should not allow "hearing by ambush" or the appearance of "hearing by ambush." [\(5\)](#)

In this case, Department Counsel did not offer an explanation for why she did not provide Applicant with a copy of the Report of Investigation before the hearing, and the Administrative Judge did not require Department Counsel to give an explanation even though Applicant objected that the Report of Investigation had not been given to him before the hearing. Given Applicant's objection, the Judge's failure to require Department Counsel to give an explanation was arbitrary and capricious and a violation of Item E3.1.10. [\(6\)](#)

The purpose of Directive, Additional Procedural Guidance, Item E3.1.13 is not to ensure that only admissible documents are entered into evidence. Rather, the purpose of Item E3.1.13 is to provide the parties with a reasonable opportunity to prepare for a hearing, and to avoid undue surprise and needless delay. [\(7\)](#)

A party's right to have a reasonable opportunity to prepare for a hearing does not turn on whether the documentary evidence presented by the other party is determined to be admissible. Accordingly, a violation of Item E3.1.13 is not cured by a subsequent ruling (by an Administrative Judge or the Board) that a document not provided to a party in a timely manner is otherwise admissible.

Department Counsel argues that even if the Board were to conclude that the Administrative Judge erred by admitting into evidence the Report of Investigation, the Board should conclude such an error was harmless. The Board rejects that argument for two reasons: (a) although Department Counsel's reliance on record evidence apart from the Report of Investigation is pertinent to its argument about the evidentiary value of that document, it is not relevant to the prejudice Applicant suffered as a result of the violation of Directive, Additional Procedural Guidance, Item E3.1.13 under the

particular facts and circumstances of this case; and (b) given the record evidence in this case, the Board does not conclude that the Administrative Judge's findings and conclusions about SOR paragraphs 1.d through 1.f can be affirmed on the basis of record evidence apart from the Report of Investigation. Our reading of the decision below persuades us that the Administrative Judge's findings and conclusions about Applicant's credibility and SOR paragraphs 1.d through 1.f relied heavily on the Report of Investigation. The Board declines to speculate as to what findings the Judge might have made, or what conclusions the Judge might have reached, if the Report of Investigation had not been admitted into evidence.

Having decided that Applicant's rights under Directive, Additional Procedural Guidance, Item E3.1.13 were violated, the Board must decide whether the error identified by Applicant warrants remand or reversal. Considering the record as a whole, the Board concludes that reversal would not be an appropriate remedy. Rather, the appropriate remedy would be to remand the case to the Administrative Judge with instructions to reopen the record and allow the parties to relitigate those portions of the SOR that were affected by Department Counsel's failure to comply with Item E3.1.13, that is SOR paragraphs 1.d through 1.f. [\(8\)](#)

On remand, the admissibility of Government Exhibit 13 will be again at issue. Although the parties have made arguments on appeal concerning the admissibility of that document, the procedural posture of the proceedings below has left the record insufficiently developed to allow the Board to reach a final conclusion as to the admissibility of that document. However, as a matter of judicial economy, the Board will address those appeal arguments raised by the parties which raise legal questions that can be disposed of now and do not require the further development of the record on remand.

The right to object to a Report of Investigation can be waived by either party. Just as either party can waive a hearing, [\(9\)](#) and just as an applicant can waive the right to cross-examine the author of a written statement adverse to the applicant that is offered as evidence against the applicant, [\(10\)](#)

the parties can choose to waive any objection they might have to the admission of a Report of Investigation into evidence. [\(11\)](#)

However, since this case involves Applicant objecting to the admissibility of a Report of Investigation, there was no waiver. Accordingly, the admissibility of Government Exhibit 13 was an issue before the Administrative Judge in this case and is an issue before the Board in this appeal.

Applicant argues that a Report of Investigation is admissible only under Directive, Additional Procedural Guidance, Item E3.1.20 [\(12\)](#)

and that an Administrative Judge cannot rule a Report of Investigation is admissible under Directive, Additional Procedural Guidance, Item E3.1.19. [\(13\)](#)

That argument is persuasive for several reasons. First, as a general principle, a specific legal rule takes precedence over a general legal rule. [\(14\)](#)

Second, Item E3.1.19 expressly indicates that the technical rules of evidence may be relaxed "except as otherwise provided herein." Given the wording of Item E3.1.20, it is an exception to Item E3.1.19 with respect to Reports of Investigation. Third, if a Judge were to apply Item E3.1.19 to avoid or circumvent the stricture of Item E3.1.20 concerning Reports of Investigation, the Judge would be acting inconsistently with Section 5.(a) of Executive Order 10865. Fourth, allowing a Judge to use Item E3.1.19 to admit a Report of Investigation not admissible under Item E3.1.20 would render Item E3.1.20 meaningless, and Board has declined to interpret or construe the Directive in a way that renders any of its provisions meaningless. *See, e.g.,* ISCR Case No. 01-24356 (February 26, 2003) at pp. 4-5. *See also* ISCR Case No. 00-0104 (March 21, 2001) at p.7 ("Provisions of the Directive should not be interpreted and construed in isolation from other pertinent provisions of the Directive.").

Applicant also argues: (a) that a Report of Investigation is not a business record, but a public record; and (b) therefore, a Report of Investigation would be admissible, if at all, under Rule 803(8) of the Federal Rules of Evidence, not Rule 803(6). Department Counsel counters by arguing that a Report of Investigation is admissible as a business record, analogizing a Report of Investigation to an adverse information report. Applicant's argument is the better one. A Report of Investigation by a federal investigator is a government report and hence, a public record. An adverse information report, which is submitted by a defense contractor to the federal government, is a business record of a nongovernmental entity. *See* DISCR Case No. 93-1234 (May 19, 1995) at pp. 3-4 (discussing admissibility of an adverse information report as a business record). Accordingly, if Department Counsel wishes to have an Administrative Judge admit a Report of Investigation prepared by a federal investigator into evidence over the objection of an applicant, Department Counsel must seek to do so under Rule 803(8), not Rule 803(6). [\(15\)](#)

Finally, the Board rejects Department Counsel's alternate argument that the Report of Investigation is not hearsay because it is a statement by the Applicant and, therefore, is admissible under Rule 801(d)(2) of the Federal Rules of Evidence. [\(16\)](#)

There is not a scintilla of record evidence to indicate or suggest that the Report of Investigation satisfies any of the requirements of Rule 801(d)(2). Accordingly, it is untenable for Department Counsel to rely on Rule 801(d)(2).

### **Conclusion**

Applicant has met his burden of demonstrating error below that warrants remand. Pursuant to Item E3.1.33.2 of the Directive's Additional Procedural Guidance, the Board remands the case to the Administrative Judge with the following instructions: (a) the Judge should conduct a supplemental hearing that allows the parties too fully relitigate the matters covered by SOR paragraphs 1.d through 1.f; (b) unless the parties elect to waive their rights under Item E3.1.13, the Judge should ensure that the parties have received copies of any pleading, proposed documentary evidence, or other written communication in a timely manner, consistent with the requirements of Directive, Additional Procedural Guidance, Item E3.1.13; (c) the Judge should allow Department Counsel the opportunity to offer the Report of Investigation as evidence, subject to Applicant's right to object to its admissibility or waive any objection to its admissibility; (d) if Applicant objects to the admissibility of the Report of Investigation, the Judge should rule on the admissibility of the Report of Investigation after the parties have had a reasonable opportunity to present evidence pertinent to the admissibility of the Report of Investigation under Directive, Additional Procedural Guidance, Item E3.1.20; and (e) after completing the supplemental hearing, the Administrative Judge should issue a new written decision consistent with the requirements of Directive, Additional Procedural Guidance, Items E3.1.25 and E3.1.35.

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 entered favorable formal findings with respect to SOR subparagraphs 1.a through 1.c, 2.a, and 3a through 3.c. Those favorable formal findings are not at issue on appeal.
2. "As far in advance as practical, Department Counsel and the applicant shall serve one another with a copy of any pleading, proposed documentary evidence, or other written communication to be submitted to the Administrative Judge."
3. "An ROI [Report of Investigation] may be received with an authenticating witness provided it is otherwise admissible under the Federal Rules of Evidence."
4. "The Federal Rules of Evidence shall serve as a guide. Relevant and material evidence may be received subject to rebuttal, and technical rules of evidence may be relaxed, except as otherwise provided herein, to permit the development of a full and complete record" (citation omitted).
5. Even if a party gives a reasonable explanation for its failure to provide the other party with a copy of documents at an earlier time, the Administrative Judge should ascertain whether the other party is unduly surprised or hampered in its ability to proceed with the hearing.
6. Given the procedural posture of this case, it is not possible to determine whether Department Counsel could have provided a reasonable explanation for its failure to give Applicant a copy of the Report of Investigation before the hearing. The Board will not speculate as to the reason(s) why Department Counsel did not provide Applicant with a copy of the Report of Investigation before the hearing.
7. When a party has been unfairly surprised, the party's ability to adequately prepare for a hearing may be prejudiced, and a continuance may be required to avoid prejudicing the surprised party's right to have a reasonable opportunity to present its case. Whether a continuance would be necessary or appropriate will depend, of course, on the Administrative Judge's exercise of sound judgment and discretion after careful consideration of the situation. *See* DISCR Case No. 91-0036 (January 27, 1993) at pp. 3-4 (discussing factors that Administrative Judge should consider in deciding whether to grant a continuance).
8. Department Counsel did not cross-appeal the Administrative Judge's findings and conclusions concerning the rest of the SOR allegations. Nor did Department Counsel argue on appeal that the Judge's adverse decision should be affirmed on alternate grounds. Since there is no presumption of error below and the Judge's findings and conclusions about the SOR paragraphs other than 1.d through 1.f were not challenged on appeal, the Judge need not allow the parties to relitigate the other SOR paragraphs on remand.
9. Directive, Additional Procedural Guidance, Item E3.1.7.
10. *Adams v. Laird*, 420 F.2d 230, 237-238 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 1039 (1970). *Accord* ISCR Case No. 96-0277 (July 11, 1997) at p. 3.
11. The Bill of Rights of the U.S. Constitution contains important constitutional rights which the federal courts have indicated can be waived by the persons entitled to invoke those rights, even though the Bill of Rights is silent on the matter of waiving constitutional rights. Since a person can choose to waive his or her constitutional rights even though there is no constitutional provision expressly providing for such a waiver, it would be unwarranted to conclude that a party cannot waive his or her rights under Executive Order 10865 or the Directive just because neither document expressly provides for such a waiver.
12. In pertinent part, Directive, Additional Procedural Guidance, Item E3.1.20 states: "An ROI may be received with an authenticating witness provided it is otherwise admissible under the Federal Rules of Evidence." Although Item E3.1.20 requires an authenticating witness, the Board need not decide, for purposes of addressing this appeal, who can qualify as such an authenticating witness. However, the Board notes that Department Counsel's proffer about the Report of

Investigation (Hearing Transcript at p. 27) is not sufficient to meet the requirement for an authenticating witness. Department Counsel is an advocate, not an authenticating witness.

13. "The Federal Rules of Evidence shall serve as a guide. Relevant and material evidence may be received subject to rebuttal, and technical rules of evidence may be relaxed, except as otherwise provided herein, to permit the development of a full and complete record" (citation omitted).

14. *Cf.* ISCR Case No. 00-0433 (August 8, 2002) at p. 6 n.3 (a general legal rule cannot be relied on without considering whether specific language in pertinent provision of the Directive is applicable to the particular facts and circumstances of a case).

15. On remand, the Administrative Judge and the parties should consider whether, or how, Rule 901 ("Requirement of Authentication or Identification") of the Federal Rules of Evidence affects or interacts with Rule 803(8) in connection with the admissibility of a Report of Investigation.

16. Under the Federal Rules of Evidence, a statement is not hearsay if it is an admission by a party-opponent. Rule 801(d)(2). For purposes of these proceedings, an applicant is a party-opponent within the meaning of Rule 801(d)(2).