DATE: December 15, 2003

In Re:

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

Applicant for Security Clearance

ISCR Case No. 02-06478

APPEAL BOARD DECISION AND REMAND ORDER

APPEARANCES

FOR GOVERNMENT

Peregrine D. Russell-Hunter, Esq., Chief Department Counsel

FOR APPLICANT

Neil I. Jacobs, Esq.

The Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR) dated August 22, 2002 which stated the reasons why DOHA proposed to deny or revoke access to classified information for Applicant. The SOR was based on Guideline B (Foreign Influence). Administrative Judge Roger E. Willmeth issued an unfavorable security clearance decision dated May 19, 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 issues have been raised on appeal: (1) whether the Administrative Judge erred by taking official notice of two documents over Applicant's objection; (2) whether the Administrative Judge erred by considering a document that was not offered as evidence by either party; and (3) whether the Administrative Judge's adverse security clearance decision is arbitrary, capricious, or contrary to law. For the reasons that follow, the Board remands the case to the Administrative Judge for further processing consistent with the Board's rulings and instructions.

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 Issues[(1)]

1. Whether the Administrative Judge erred by taking official notice of two documents over Applicant's objection. At the hearing, Department Counsel asked the Administrative Judge to take official notice of three documents: a U.S. State Department Consular Information Sheet on China; a June 24, 1999 op-ed piece entitled "How China Plays the Ethnic Card"; and a September 1999 op-ed piece entitled "China's Subtle Spying." Applicant's hearing counsel[(2)] did not object to the U.S. State Department Consular Information Sheet, but did object to the two op-ed pieces. The Judge ruled that he would consider the two op-ed pieces, but noted that he would take Applicant's objection into account when considering what weight to give to the two op-ed pieces (Hearing Transcript at pp. 11-13).

On appeal, Applicant contends the Administrative Judge erred by taking official notice of the two op-ed pieces over Applicant's objection and considering them in making his decision. In support of that contention, Applicant argues: (a) the op-ed pieces would not be admissible under Rule 702 of the Federal Rules of Evidence; (b) the op-ed pieces are clearly hearsay and do not fall under any hearsay exception in the Federal Rules of Evidence; (c) the op-ed pieces are not admissible even under the relaxed standard of Directive, Additional Procedural Guidance, Item E3.1.19; (d) consideration of the op-ed pieces would deny Applicant of the right to cross-examine the author of those documents; (e) the op-ed pieces do not satisfy the requirements of Directive, Additional Procedural Guidance, Item E3.1.20; and (f) the Judge should have not considered the op-ed pieces because they are not relevant and are inflammatory and racist. The Board will address these arguments in turn.

(a) Applicant's hearing counsel did not raise an objection to the op-ed pieces which reasonably could place the Administrative Judge on notice that counsel was relying on Rule 702 of the Federal Rules of Evidence. Accordingly, any objection to the op-ed pieces on that ground was waived.

(b) Applicant's hearing counsel did not raise an objection to the op-ed pieces which reasonably could place the Administrative Judge on notice that counsel was relying on the hearsay provisions of the Federal Rules of Evidence. Accordingly, any objection to the op-ed pieces on those grounds was waived. Furthermore, there is no general prohibition to the admissibility and consideration of hearsay evidence in federal administrative proceedings. *See, e.g.*, ISCR Case No. 98-0265 (March 17, 1999) at p. 7 (citing federal cases). Accordingly, Applicant's general objection to the op-ed pieces on hearsay grounds fails to demonstrate the Administrative Judge erred.

(c) Although an Administrative Judge has discretion to relax the technical rules of evidence (Directive, Additional Procedural Guidance, Item E.3.1.19), that discretion is not unfettered. *Cf.* ISCR Case No. 98-0611 (June 3, 1999) at p. 2 (Administrative Judge does not have unlimited discretion when applying disqualifying or mitigating conditions of the Adjudicative Guidelines); ISCR Case No. 94-0729 (May 31, 1995) at p. 6 (Administrative Judge abused his discretion when limiting the applicant's ability to respond to an amendment to the SOR). A Judge's exercise of discretion under Item E3.1.19 must be consistent with the Judge's obligation to "conduct all proceedings in a fair, timely, and orderly manner." Directive, Additional Procedural Guidance, Item E3.1.10.

Administrative or official notice is the federal administrative law analogue to judicial notice. *See, e.g., Zubeda v. Ashcroft*, 333 F.3d 463, 479 (3d Cir. 2003); *Llana-Castellon v. Immigration and Naturalization Service*, 16 F.3d 1093, 1096 (10th Cir. 1994). Nothing in Executive Order 10865 or the Directive precludes the application of administrative notice in these proceedings. Indeed, the Board has held that administrative notice may be taken in DOHA proceedings. *See, e.g.*, ISCR Case No. 01-08565 (March 7, 2003) at p. 3 (administrative notice may be taken of any provision of state statute that is pertinent to a case); ISCR Case No. 00-0244 (January 29, 2001) at p. 7 (administrative notice may be taken of pertinent federal court decisions, or pertinent decision by Comptroller General of the United States). However, that conclusion does not end the analysis of whether the Administrative Judge erred in this case. The general proposition that administrative notice may be taken in DOHA proceedings does not answer the question whether a particular document or matter is suitable or proper for taking administrative notice.

A variety of matters can be the proper subject for a federal agency to take administrative notice. *See, e.g., Zubeda v. Ashcroft*, 333 F.3d 463 (3d Cir. 2003)(administrative notice taken of State Department report on country's human rights record); *Llana-Castellano v. Immigration and Naturalization Service*, 16 F.3d 1093 (10th Cir. 1994)(administrative notice taken of April 1990 Nicaraguan election that resulted in Sandinista government being replaced); *Acewicz v. U.S. Immigration and Naturalization Service*, 984 F.2d 1056 (9th Cir. 1993)(administrative notice taken of September 1989 formation of coalition government in Poland with Solidarity movement participating and December 1990 election of Lech Walesa as President of Poland). *Cf. Ohio Bell Telephone Co. v. Public Utilities Commission of Ohio*, 301 U.S. 292, 301-302 (1937)(in reviewing action of public utilities commission in taking notice of matters not in the record before the commission, the Supreme Court discussed examples of matters for which judicial notice properly was taken in other cases and contrasted them with matters not suitable for taking judicial notice). *See also* Richard J. Pierce, Jr., *Administrative Law Treatise* (4th edition, Aspen, 2002), Volume II, §10.6 ("Judicial Notice and Official Notice") at pp. 741-758 (discussing federal case law). The very nature of an op-ed piece runs contrary to the kinds of matters that traditionally have been deemed appropriate subjects for taking administrative notice. Even under the relaxed standards of Directive, Additional Procedural Guidance, Item E3.1.19, the Board concludes it was an abuse of discretion for the Administrative Judge to agree to take administrative notice of the two op-ed pieces identified by Department Counsel at the hearing.

(d) Although the right to cross-examination is an important one, it is not an absolute right and is subject to important exceptions. *See, e.g.*, ISCR Case No. 98-0265 (March 17, 1999) at p. 7; ISCR Case No. 97-0765 (December 1, 1998) at pp. 2-3. If the right to cross-examination were deemed to be absolute, then well-established evidentiary principles concerning exceptions to the hearsay rule and official notice would be rendered meaningless. Furthermore, Applicant's argument relies on an implicit notion of the right to cross-examination that seems to go beyond the language of Executive Order 10865, Section 4.(a), which reads, in pertinent part, as follows: "An applicant shall be afforded an opportunity to cross-examine *persons who have made oral or written statements adverse to the applicant relating to a controverted issue . . . .*" (italics added)(ellipsis discusses exceptions not applicable to this case). Unless an op-ed piece specifically refers to an applicant, it is difficult to see how the op-ed piece can constitute a statement "adverse to the applicant relating to a controverted issue."

(e) Applicant's argument concerning Directive, Additional Procedural Guidance, Item E3.1.20 lacks merit. Item E3.1.20 covers "[o]fficial records or evidence compiled in the regular course of business, other than DoD personnel background reports of investigation" and reports of investigation. On their face, the two op-ed pieces at issue in this case are not official records, evidence compiled in the regular course of business, or reports of investigation. Therefore, Item E3.1.20 is irrelevant to the two op-ed pieces.

(f) The Board finds no merit in Applicant's arguments that the Administrative Judge erred because (i) the op-ed pieces are irrelevant; and (ii) the op-ed pieces are too inflammatory. First, relevance is a broad evidentiary concept, not a narrow one. *See* Federal Rules of Evidence, Rule 401 ("Definition of 'Relevant Evidence'")(including Advisory Committee's Note to Rule 401). Given the SOR allegations in this case, the contents of the two op-ed pieces are relevant. Second, evidentiary rules aimed at preventing or reducing the possibility that certain types of evidence might unduly influence or prejudice lay jurors are not necessary or appropriate in DOHA proceedings because these proceedings are conducted by Judges, not lay jurors. *See* ISCR Case No. 99-0019 (November 22, 1999) at p. 5; ISCR Case No. 97-0299 (December 11, 1997) at p. 2.

2. Whether the Administrative Judge erred by considering a document that was not offered as evidence by either party. In the decision being appealed, the Administrative Judge cited the following: Director of Central Intelligence/Director of the Federal Bureau of Investigation, *Report to Congress on Chinese Espionage Activities Against the United States* (Dec. 12, 1999). Applicant contends that because neither party offered that document as evidence the Judge erred by considering it and argues that the Judge's consideration of the document is "contrary to the Federal Rules of Evidence and Procedure, as well as the requirements of E3.1.19 of [the Directive], and the general requirements of Constitutional Due Process."

As discussed earlier in this decision, the Federal Rules of Evidence are not strictly applied in these proceedings. And, in any event, Applicant fails to identify what provision of the Federal Rules of Evidence the Administrative Judge's action supposedly violated. An appealing party has the obligation to raise claims of error with sufficient specificity to enable the nonappealing party and the Board to know what legal error the appealing party is claiming occurred. The Board is not obligated to act as a surrogate advocate for the appealing party, nor is it obligated to search the Federal Rules of Evidence and guess at what provision(s) of those Rules Applicant has in mind when making this claim of error.

To the extent that Applicant's reference to the "Federal Rules of Evidence and Procedure" can be construed as claiming that the Administrative Judge's action violated the Federal Rules of Civil Procedure, it fails to raise any colorable claim of error. The Federal Rules of Civil Procedure do not apply to federal administrative proceedings. *Kelly v. U.S. Environmental Protection Agency*, 203 F.3d 519, 523 (7th Cir. 2000). *Accord* ISCR Case No. 02-15935 (October 15, 2003) at p. 4 (discussing why Federal Rules of Civil Procedure do not apply in DOHA proceedings).

Applicant cites no legal authority and makes no specific argument in support of his conclusory claim that the Administrative Judge's action violated constitutional due process. Such a generalized claim lacks sufficient specificity for the Board to address it. The Board is not obligated to act as a surrogate advocate for the appealing party, research federal case law on constitutional due process, and decide whether that federal case law provides any support for the appealing party's general claim that there has been a violation of due process.[(3)]

What remains of Applicant's contention raises the issue of whether the Administrative Judge's consideration of the report was arbitrary, capricious, or an abuse of the Judge's discretion to relax the rules of evidence under Directive, Additional Procedural Guidance, Item E3.1.19. For the reasons that follow, the Board concludes the Judge's action was an abuse of discretion.

As discussed earlier in this decision, administrative notice may be taken of various kinds of matters. However, whether a particular matter is a proper subject for taking administrative notice cannot be decided in the abstract. In this case, the record does not contain a copy of the report cited by the Administrative Judge in his decision. Without a copy of that report in the record or a reference in the Judge's decision as to where the report could be accessed online,[(4)] the parties and the Board are unable to ascertain the nature or contents of that report, including whether the Judge was relying on a complete copy of the report or just a portion of the report. Without that information, the parties are denied the ability to make reasoned arguments about whether the report cited by the Judge in the decision below was appropriate for taking

administrative notice, and the Board is unable to decide whether the Judge erred by taking administrative notice of that report. Furthermore, without the ability to review the report cited by the Judge (either in the record or online), the parties are denied the ability to make reasoned arguments as to whether the Judge drew reasonable inferences or conclusions from the report, and the Board is unable to decide whether the Judge's inferences or conclusions are supported by the report. Finally, without the ability to review the report cited by the Judge (either in the record or online), the parties are denied the ability to make reasoned arguments as to whether the manner in which the Judge took administrative notice of the cited report had any prejudicial effect on Applicant's right to prepare for the hearing and present evidence on his behalf. *Cf. Gebremichael v. Immigration and Naturalization Service*, 10 F.3d 28, 38-39 (1st Cir. 1993)(even when a document or matter is a proper subject for taking administrative or official notice, the manner in which administrative or official notice is taken could adversely affect a party's right to due process).

3. Whether the Administrative Judge's adverse security clearance decision is arbitrary, capricious, or contrary to law. Applicant also contends the Administrative Judge's decision is arbitrary, capricious, or contrary to law because: (a) the Judge improperly considered two op-ed pieces, as well as a report that was not offered as evidence at the hearing; (b) the Judge improperly engaged in conjecture and speculation; and (c) the Judge held Applicant to an unreasonable and arbitrary burden of persuasion.

Applicant's arguments concerning the admissibility of evidence have already been addressed by the Board and need not be discussed again. It would be premature for the Board to address the rest of Applicant's arguments at this time. The Board is remanding the case to the Administrative Judge for further proceedings and issuance of a new decision. The Judge's new decision will be subject to appeal. Directive, Additional Procedural Guidance, Item E3.1.35.

Conclusion

Applicant has demonstrated 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: (1) on remand, the Judge should disregard the two op-ed pieces; (2) the Judge should make available to the parties a copy of the report cited in footnote 25 of his May 19, 2003 (if the report is available online, the Judge can provide the parties with the URL or other information necessary to allow them to access the report online); (3) the Judge should allow the parties a reasonable opportunity to be heard on the propriety of admitting the report into evidence; (4) if a party objects to the admission of the report into evidence, the Judge should rule on that objection; and (5) the Judge should issue a new decision, consistent with the requirements of Items E3.1.35 and E3.1.25 of the Directive's Additional Procedural Guidance.

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. Since Department Counsel did not submit a reply brief, the Board must consider Applicant's appeal issues without the benefit of Department Counsel's views.

2. Applicant is represented by a different counsel on appeal.

3. Significantly, the Supreme Court has noted that determining what procedures satisfy constitutional due process is not reducible to a simple formula. *See Gilbert v. Homar*, 520 U.S. 924, 930 (1997)("It is by now well established that 'due process,' unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances. '[D]ue process is flexible and calls for such procedural protections as the particular situation demands.'") (citations omitted). Because of the flexible, situational nature of due process, and the presumption that there is no error below, a party making a due process claim on appeal has the obligation of raising such a claim with particular specificity.

4. The Administrative Judge's decision does not indicate whether the report he referred to was available online or was available only in a printed form.