

DATE: August 8, 2005

In Re:

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SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-12199

**APPEAL BOARD DECISION AND REMAND ORDER**

**APPEARANCES**

**FOR GOVERNMENT**

Francisco J. Mendez, Jr., Esq., Department Counsel

**FOR APPLICANT**

Mark F. Riley, Esq.

The Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR), dated July 17, 2003, which stated the reasons why DOHA proposed to deny or revoke access to classified information for Applicant. The SOR was based on Guideline D (Sexual Behavior) and Guideline E (Personal Conduct). Administrative Judge James A. Young issued a favorable security clearance decision, dated January 29, 2004.

Department Counsel appealed the Administrative Judge's favorable decision. On October 7, 2004, the Board issued a Decision and Remand Order ("Remand Order"). The Administrative Judge subsequently issued a favorable Remand Decision, dated January 3, 2005.

Department Counsel has appealed the Administrative Judge's favorable Remand 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 refusing to reopen the record on remand to allow Department Counsel to present evidence as to the admissibility of Government Exhibit 2c; (2) whether it was arbitrary, capricious, or contrary to law for the Administrative Judge to exclude Government Exhibit 2c under Directive, Additional Procedural Guidance, Item E3.1.20; (3) whether it was arbitrary, capricious, or contrary to law for the Administrative Judge to exclude Government Exhibits 2d, 2g, and 2i as substantive evidence; and (4) whether the Administrative Judge erred by concluding: (a) Department Counsel failed to present substantial evidence that Applicant downloaded child pornography and (b) Department Counsel failed to present substantial evidence that Applicant falsified material facts in his February 2002 written statement. 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. Whether the Administrative Judge erred by refusing to reopen the record on remand to allow Department Counsel to present evidence as to the admissibility of Government Exhibit 2c. Department Counsel contends the Administrative Judge erred by not reopening the record on remand to allow Department Counsel the opportunity to present evidence as to the admissibility of Government Exhibit 2c. This claim of error is not persuasive. Under the terms of the Remand Order, the Judge was not required to reopen the record to allow the submission of additional evidence concerning the admissibility of Government Exhibit 2c. Rather, the Remand Order (at p. 10) stated: "The Judge, in his discretion, may reopen the record to allow the parties to present evidence pertinent to [the admissibility of Government Exhibit 2c] if the Judge determines either party has made a showing of good cause for such additional evidence." Accordingly, the Judge's decision to exclude an NSA affidavit proffered by Department Counsel on remand is subject to review to determine whether the Judge's decision was arbitrary, capricious, or otherwise an abuse of discretion.

Department Counsel's appeal arguments seek to have the Board substitute its judgment for that of the Administrative Judge on the issue of reopening the record evidence on remand. The Board does not have to agree with the Judge's

ruling to conclude it was within the bounds of his discretion to decide to not reopen the record evidence on remand.

2. Whether it was arbitrary, capricious, or contrary to law for the Administrative Judge to exclude Government Exhibit 2c under Directive, Additional Procedural Guidance, Item E3.1.20. Department Counsel claims it was arbitrary, capricious, or contrary to law for the Administrative Judge to exclude Government Exhibit 2c under Directive, Additional Procedural Guidance, Item E3.1.20. However, Department Counsel's arguments in support of this claim of error are predicated on two assumptions: (a) that the Board will hold that the Judge erred by not reopening the record evidence on remand to allow Department Counsel to submit the NSA affidavit as evidence in support of the admissibility of Government Exhibit 2c; and (b) the Board will review the NSA affidavit and hold that it is sufficient, as a matter of law, to establish the admissibility of Government Exhibit 2c.

As discussed earlier in this decision, Department Counsel has not shown that it was arbitrary, capricious, or otherwise an abuse of discretion for the Administrative Judge to decline to reopen the record on remand to accept the NSA affidavit. Since the Board has concluded that Department Counsel failed to show the Judge's ruling was arbitrary, capricious, or otherwise an abuse of discretion, the Board need not address Department Counsel's arguments concerning the sufficiency of the NSA affidavit. The Board does not issue advisory opinions. <sup>(1)</sup> Since the Judge's decision to not reopen the record to allow the NSA affidavit into evidence has not been shown to be arbitrary, capricious, or otherwise an abuse of discretion, the Board does not have to reach any conclusion as to the evidentiary sufficiency of the NSA affidavit.

3. Whether it was arbitrary, capricious, or contrary to law for the Administrative Judge to exclude Government Exhibits 2d, 2g, and 2i as substantive evidence. On remand, the Administrative Judge ruled that Government Exhibits 2d, 2g, and 2i were admissible under Directive, Additional Procedural Guidance, Item E3.1.20 as official records created in the regular course of business that were furnished by an investigative agency pursuant to its responsibilities in connection with assisting the Department of Defense to safeguard classified information. However, the Judge also ruled that those three exhibits would be admissible only for the limited purpose of showing that NSA made a decision regarding Applicant's eligibility for SCI access, not as substantive evidence concerning Applicant's conduct. On appeal, Department Counsel contends the Judge erred by admitting those three exhibits only for a limited purpose and not as substantive evidence concerning Applicant's conduct. Applicant contends the Judge acted properly by admitting those three exhibits for a limited purpose only. For the reasons that follow, the Board concludes the Judge properly ruled that Government Exhibits 2d, 2g, and 2i were admissible under Directive, Additional Procedural Guidance, Item E3.1.20, but the Judge erred by admitting them for a limited purpose only.

As noted in the Remand Order (at p. 8), Government Exhibits 2d, 2g, and 2i are not DoD reports of investigation. Accordingly, the evidentiary restrictions concerning DoD reports of investigation do not apply to those three exhibits. Considering the contents of Government Exhibits 2d, 2g, and 2i in light of the record as a whole, the Administrative Judge properly concluded those three exhibits were admissible under Directive, Additional Procedural Guidance, Item E3.1.20. However, having held that Government Exhibits 2d, 2g, and 2i were admissible under Directive, Additional Procedural Guidance, Item E3.1.20, the Judge could not limit their admissibility without good reason. <sup>(2)</sup> The Judge failed to articulate reasons that would constitute good cause for limiting the admissibility of Government Exhibits 2d, 2g, and 2i.

As stated in Directive, Additional Procedural Guidance, Item E3.1.19, "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 to U.S. Code omitted). Government Exhibits 2d, 2g, and 2i do not fall within the "except as otherwise provided herein" language of Directive, Additional Procedural Guidance, Item E3.1.19 because: (a) they are not DoD reports of investigation; and (b) the Judge properly held they are not written statements adverse to Applicant that fall within the scope of Directive, Additional Procedural Guidance, Item E.3.1.22. Accordingly, the Judge had to use the Federal Rules of Evidence as a guide to rule on the admissibility of Government Exhibits 2d, 2g, and 2i.

As noted in the preceding paragraph, the Federal Rules of Evidence serve only as a guide and need not be strictly applied in these proceedings. Even if the Directive required a strict application of the Federal Rules of Evidence, Government Exhibits 2d, 2g, and 2i would not be inadmissible for the reasons stated by the Administrative Judge.

Government Exhibits 2d, 2g, and 2i are NSA documents that fall within the scope of Federal Rule of Evidence 803(8). First, Rule 803(8) assumes that a public record is admissible and places the burden on the party opposing admission of such a record to prove its untrustworthiness.<sup>(3)</sup> Therefore, it was arbitrary, capricious, and contrary to law for the Judge to place the burden on Department Counsel to present evidence to establish the trustworthiness of Government Exhibits 2d, 2g, and 2i. Second, the inability to cross-examine the author of a public record is not a basis by itself for excluding it.<sup>(4)</sup> Therefore, it was arbitrary, capricious, and contrary to law for the Judge to rely on Applicant's inability to cross-examine the author(s) of Government Exhibits 2d, 2g, and 2i as the basis to limit the admissibility of those three documents.<sup>(5)</sup> Third, public records are admissible under Rule 803(8) to present evidence about the findings and conclusions reached by a government entity, not just the fact that the government entity conducted an investigation.<sup>(6)</sup> Therefore, it was arbitrary, capricious, and contrary to law for the Judge to conclude Government Exhibits 2d, 2g, and 2i could not be considered as evidence beyond establishing the fact that NSA conducted an investigation. Fourth, to the extent the Judge relied on an implicit "fruit of the poisonous tree" rationale for limiting the admissibility of Government Exhibits 2d, 2g, and 2i, the Judge erred. As noted in its Remand Order (at p. 7), an applicant is not entitled to invoke or receive the benefit of procedural protections afforded to criminal defendants. The "fruit of the poisonous tree" doctrine arose in criminal law cases and is not appropriate for application in these proceedings.<sup>(7)</sup>

The Board does not find persuasive Applicant's counterargument that the Administrative Judge could decide to not consider Government Exhibit 2d because it relies on the inadmissible Government Exhibit 2c. As noted in the preceding paragraph, the "fruit of the poisonous tree" doctrine is not applicable in these proceedings. Moreover, acceptance of Applicant's counterargument would result in a drastic reduction in the admissibility of public records under Rule 803(8). The admissibility of a public record under Rule 803(8) does not mean that the entire investigatory file underlying the public record would be admissible.<sup>(8)</sup> However, the inadmissibility of an investigatory file does not mean that a public record that relies on an inadmissible investigatory file is therefore inadmissible itself. By analogy, the law recognizes that an expert may testify about his or her expert opinion even if that opinion is based on otherwise inadmissible information that is generally relied upon by experts to form an expert opinion. The Board sees no good reason to conclude that Rule 803(8) permits the admissibility of public records only to the extent that such public records are shown to be based on information that would be admissible in its own right, independent of Rule 803(8).

Because the Administrative Judge erred by limiting the admissibility of Government Exhibits 2d, 2g, and 2i, the Judge erred by not considering those exhibits as substantive evidence in this case. On remand, the Judge must consider those three exhibits as substantive evidence in this case, consistent with the case law pertaining to Federal Rule of Evidence 803(8). By remanding this case, the Board is not expressing or implying any opinion as to what weight the Judge should give to those three exhibits.

4. Whether the Administrative Judge erred by concluding: (a) Department Counsel failed to present substantial evidence that Applicant downloaded child pornography and (b) Department Counsel failed to present substantial evidence that Applicant falsified material facts in his February 2002 written statement. Because of the Board's resolution of the third appeal issue, it would be premature for the Board to address the merits of this aspect of the case. On remand, the Administrative Judge will have to issue a new decision after considering Government Exhibits 2d, 2g, and 2i as substantive evidence. The Board will not make any assumptions about what findings the Judge will make or what conclusions he will reach after considering Government Exhibits 2d, 2g, and 2i as substantive evidence.

### **Conclusion**

Department Counsel has demonstrated error that warrants remand. Pursuant to Directive, Additional Procedural Guidance, Item E3.1.33.2, the Board remands the case to the Administrative Judge with instructions to issue a new decision (consistent with the requirements of Directive, Additional Procedural Guidance, Item E3.1.35 and Item E3.1.25) after considering Government Exhibits 2d, 2g, and 2i as substantive evidence in this case, consistent with the case law pertaining to Federal Rule of Evidence 803(8).

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board

Signed: Jeffrey D. Billett

Jeffrey D, Billett

Administrative Judge

Member, Appeal Board

Signed: Michael D. Hipple

Michael D. Hipple

Administrative Judge

Member, Appeal Board

1. *See, e.g.*, ISCR Case No. 02-28921 (July 8, 2004) at p. 3.

2. DOHA Administrative Judges do not have unfettered discretion. Rather, they must exercise their discretion in a manner that is not arbitrary, capricious, or contrary to law.

3. *See, e.g., Bridgeway Corp. v. Citibank*, 201 F.3d 134, 143 (2d Cir. 2000); *Complaint of Nautilus Motor Tanker Co., Ltd.*, 85 F.3d 105, 113 (3rd Cir. 1996); *Bank of Lexington & Trust Co. v. Vining-Sparks Securities, Inc.*, 959 F.2d 606, 616 (6th Cir. 1992); *Moss v. Ole South Real Estate, Inc.*, 933 F.2d 1300, 1305 (5th Cir. 1991); *Kehm v. Proctor & Gamble Mfg. Co.*, 724 F.2d 613, 618 (8th Cir. 1983).

4. *See, e.g., Distaff, Inc. v. Springfield Contracting Corp.*, 984 F.2d 108, 112 (4th Cir. 1993); *Hines v. Brandon Steel Decks, Inc.*, 886 F.2d 299, 303-304 (11th Cir. 1989).

5. As a practical matter, the various exceptions to the hearsay rule recognized by the law are based on the principle that the right to cross-examination is not an absolute evidentiary requirement. Furthermore, to the extent that Applicant admitted during his testimony that he made certain statements to the NSA investigator, Applicant's testimony undercuts the Administrative Judge's expressed concern about Applicant's inability to cross-examine that investigator.

6. *See Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 161-170 (1988). *See also Bridgeway Corp. v. Citibank*, 201 F.3d 134, 143 (2d Cir. 2000); *Bank of Lexington & Trust Co. v. Vining-Sparks Securities, Inc.*, 959 F.2d 606, 616 (6th Cir. 1992); *Moss v. Ole South Real Estate, Inc.*, 933 F.2d 1300, 1305 (5th Cir. 1991).

7. *See, e.g.*, ISCR Case No. 97-0184 (June 16, 1998) at p. 2 (exclusionary rule is not applicable in DOHA proceedings). *Cf.* ISCR Case No. 03-09412 (October 26, 2004) at pp. 3-4 (discussing why *Ex Post Facto* Clause of the U.S. Constitution is not applicable to DOHA proceedings); ISCR Case No. 01-07629 (April 5, 2002) at p. 3 (because DOHA proceedings are civil in nature, technical legal defenses that may be appropriate to raise in a criminal prosecution are out of place in industrial security adjudications); ISCR Case No. 99-0710 (March 19, 2001) at p. 2 (an SOR should not be held to the strict requirements of a criminal indictment).

8. *See, e.g., Moss v. Ole South Real Estate, Inc.*, 933 F.2d 1300,1310 (5th Cir. 1991).