

DATE: October 7, 2004

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-12199

APPEAL BOARD DECISION AND REMAND ORDER

APPEARANCES

FOR GOVERNMENT

Francisco Mendez, 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. 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 not admitting portions of Government Exhibit 2 based on Directive, Additional Procedural Guidance, Item E3.1.22; (2) in the alternative, even if the Administrative Judge was correct in concluding portions of Government Exhibit 2 were not admissible under Directive, Additional Procedural Guidance, Item E3.1.22, whether the Administrative Judge erred by excluding those portions of Government Exhibit 2 because they are admissible under well-established exceptions to the hearsay rule; (3) whether the excluded portions of Government Exhibit 2 satisfy Department Counsel's burden of proof under the Directive and Applicant failed to refute, explain, or mitigate the security concerns raised by Applicant's conduct; and (4) whether the Administrative Judge's favorable 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. Whether the Administrative Judge erred by not admitting portions of Government Exhibit 2 based on Directive, Additional Procedural Guidance, Item E3.1.22. At the hearing Department Counsel offered a collection of National Security Agency (NSA) documents pertaining to NSA's decision to deny Applicant access to Sensitive Compartmented Information. Those documents were marked as Government Exhibits 2a through 2i. Applicant objected to the admissibility of the NSA documents marked as Government Exhibits 2c, 2d, 2g, and 2i, contending they should be not be admitted as evidence in support of the SOR allegations. The Administrative Judge sustained Applicant's objections to those four documents. ⁽¹⁾ Later in the hearing, the Judge ruled that he would admit those four documents into evidence, but only for limited evidentiary purposes and not as evidence in support of the SOR allegations. The Judge's ruling concerning the limited admissibility of Government Exhibits 2c, 2d, 2g, and 2i is the focus of this appeal. ⁽²⁾

Department Counsel contends the Administrative Judge erred by excluding Government Exhibit 2c based on Directive, Additional Procedural Guidance, Item E3.1.22. In support of that contention, Department Counsel argues: (a) Government Exhibit 2c is the functional equivalent of Applicant's admissions to an NSA investigator and the Board has held that such admissions are not excludable under Directive, Additional Procedural Guidance, Item E3.1.22; and (b) the unavailability of the NSA investigator as a witness was outside the control of Department Counsel. ⁽³⁾

Applicant argues the Judge properly excluded Government Exhibit 2c based on Directive, Additional Procedural Guidance, Item E3.1.22 because: (i) Applicant has never adopted Government Exhibit 2c as his own statement; (ii) the Board decision relied on by Department Counsel is distinguishable on its facts; (iii) Department Counsel's argument about the unavailability of the NSA investigator is not well founded; and (iv) Department Counsel did not obtain an exception for Government Exhibit 2c as authorized by Directive, Additional Procedural Guidance, Item E3.1.22.

Directive, Additional Procedural Guidance, Item E3.1.22 states:

"A written or oral statement adverse to the applicant on a controverted issue may be received and considered by the Administrative Judge without affording an opportunity to cross-examine the person making the statement orally, or in writing when justified by the circumstances, only in either of the following circumstances:

E3.1.22.1. If the head of the Department or Agency supplying the statement certifies that the person who furnished the information is a confidential informant who has been engaged in obtaining intelligence information for the Government and that disclosure of his or her identity would be substantially harmful to the national interest; or

E3.1.22.2. If the [General Counsel], DoD, has determined the statement concerned appears to be relevant, material, and reliable; failure to receive and consider the statement would be substantially harmful to the national security; and the person who furnished the information cannot appear to testify due to the following:

E3.1.22.2.1. Death, severe illness, or similar cause, in which case the identity of the person and the information to be considered shall be made available to the applicant; or

E3.1.22.2.2. Some other cause determined by the Secretary of Defense, or when appropriate by the Department or Agency head, to be good and sufficient."

If Department Counsel had presented evidence that Applicant had adopted Government Exhibit 2c as his own, then that document would be admissible without any need to consider its admissibility under Directive, Additional Procedural Guidance, Item E3.1.22.⁽⁴⁾ However, Applicant persuasively argues that Department Counsel did not present such evidence in this case.⁽⁵⁾

To the extent that Department Counsel argues about the unavailability of the NSA investigator to testify, that argument does not show the Administrative Judge erred. If a document objected to by an applicant falls under the terms of Directive, Additional Procedural Guidance, Item E3.1.22,⁽⁶⁾ then the unavailability of a witness to testify about that document is relevant only to the extent such unavailability falls under one of the specific exceptions of Item E3.1.22. Provisions of the Directive should not be construed or interpreted in a manner that renders them meaningless or superfluous.⁽⁷⁾ Furthermore, the Board has ruled that general rules or principles of law cannot be invoked to override or circumvent specific provisions of the Directive.⁽⁸⁾ Accordingly, whatever persuasive authority there is in federal case law about the legal effect of the unavailability of witnesses on the admissibility of evidence, that case law does not supersede or override the specific provisions of Item E3.1.22 that cover situations involving the unavailability of witnesses. Finally, the Board has applied canons of statutory construction when construing or interpreting provisions of the Directive.⁽⁹⁾ It is a canon of statutory construction that when a federal statute sets forth specific exceptions, a court will not construe or interpret the statute to include exceptions beyond those specifically included in the statute.⁽¹⁰⁾ The Board does not have the jurisdiction or authority to revise or expand the specific exceptions set forth in Directive, Additional Procedural Guidance, Item E3.1.22. Applicant correctly notes Department Counsel did not show that any of the exceptions listed under Directive, Additional Procedural Guidance, Item E3.1.22 applies to Government Exhibit 2c.

For all the foregoing reasons, the Board concludes that Department Counsel's appeal arguments in support of this appeal issue are not persuasive.

2. In the alternative, whether the Administrative Judge erred by excluding portions of Government Exhibit 2 because they are admissible under well-established exceptions to the hearsay rule. Department Counsel argues, in the alternative, that the Administrative Judge erred because: (a) the Board has held that documents can be admissible in these

proceedings if they fall under well-established exceptions to the hearsay rule; and (b) Government Exhibit 2c is admissible under Directive, Additional Procedural Guidance, Item E3.1.20 as either a business record or a public record. In response, Applicant argues: (i) the general hearsay exceptions relied on by Department Counsel in this case do not allow it to circumvent the requirements of Directive, Additional Procedural Guidance, Item E3.1.20 with respect to reports of investigation; and (ii) Government Exhibit 2c is not admissible under Directive, Additional Procedural Guidance, Item E3.1.20.

Directive, Additional Procedural Guidance, Item E3.1.20 states:

"Official records or evidence compiled or created in the regular course of business, other than DoD personnel background reports of investigation (ROI), may be received and considered by the Administrative Judge without authenticating witnesses, provided that such information has been furnished by an investigative agency pursuant to its responsibilities in connection with assisting the Secretary of Defense, or the Department or Agency head concerned, to safeguard classified information within industry under E.O. 10865 (enclosure 1). An ROI may be received with an authenticating witness provided it is otherwise admissible under the Federal Rules of Evidence (28 U.S.C. 101 *et seq.* (reference (d))."

Department Counsel correctly notes that the Board has held that an applicant's right to confrontation in these proceedings is not more expansive than a criminal defendant's right to confrontation under the Sixth Amendment of the U.S. Constitution. Relying on that conclusion, the Board has rejected claims by applicants that have the practical effect of asserting a right to confrontation that goes beyond the right of confrontation to which a criminal defendant was entitled under the Sixth Amendment of the U.S. Constitution. However, although the Board has rejected claims by applicants that exceed the outer perimeter of a criminal defendant's rights under the Sixth Amendment of the U.S. Constitution, the Board has not been required to decide whether an applicant's right to confrontation is the same as, or equivalent to, a criminal defendant's right to confrontation under the Sixth Amendment of the U.S. Constitution. Since Applicant's arguments in this case do not make a claim that he has a right of confrontation that is greater than a criminal defendant's right to confrontation under the Sixth Amendment of the Constitution, the Board's prior decisions are not readily dispositive of this appeal. [\(11\)](#)

The Sixth Amendment right to confrontation is limited to criminal cases. [\(12\)](#) Nothing in Executive Order 10865 or the Directive indicates that an applicant is entitled to invoke the protections of the Sixth Amendment of the U.S. Constitution. [\(13\)](#) Furthermore, an applicant is not entitled to receive in these proceedings the procedural protections afforded to criminal defendants. [\(14\)](#) Accordingly, because DOHA proceedings are civil, administrative proceedings, an applicant is not entitled to claim a right of confrontation that is the same as, or equivalent to, a criminal defendant's right to confrontation under the Sixth Amendment of the U.S. Constitution. However, to decide this appeal, the Board need not try to decide what are the general parameters of an applicant's right to confrontation under the Directive. That is because the Board construes Applicant's arguments as basing his right to confrontation claim on specific provisions of the Directive (*i.e.*, Additional Procedural Guidance, Items E3.1.20 and E3.1.22). [\(15\)](#)

There is no general prohibition against the use of hearsay evidence in federal administrative proceedings, including hearings under the industrial security program. [\(16\)](#) However, that general legal principle does not supersede Applicant's right to insist on compliance with the specific provisions of Directive, Additional Procedural Guidance, Items E3.1.20 and E3.1.22. Although general rules of law can be cited as persuasive authority in areas where the Directive is silent or ambiguous, general rules of law do not override or supersede specific provisions of the Directive. [\(17\)](#) Accordingly, the case law indicating that hearsay evidence can be admitted and relied on in federal administrative proceedings can be followed in these proceedings to the extent its application does not run contrary to a specific provision of the Directive that a party does not waive.

Government Exhibit 2c is a report of an NSA investigation of Applicant. Accordingly, Government Exhibit 2c is a report of investigation that falls under Directive, Additional Procedural Guidance, Item E3.1.20 and is not admissible unless: (a) Applicant waives any objection to its admission; or (b) Department Counsel satisfies the requirements of Directive, Additional Procedural Guidance, Item E3.1.20. [\(18\)](#) Since Applicant objected to the admissibility of Government Exhibit 2c, Department Counsel was required to satisfy the requirements of Directive, Additional

Procedural Guidance, Item E3.1.20 before Government Exhibit 2c could be admitted into evidence. However, because Government Exhibits 2d, 2g, and 2i are not reports of investigation,⁽¹⁹⁾ their admissibility under Directive, Additional Procedural Guidance, Item E3.1.20 must be determined separately from the admissibility of Government Exhibit 2c.⁽²⁰⁾

To resolve this appeal, the Board need not decide what is the precise relationship between Directive, Additional Procedural Guidance, Item E3.1.20 and Directive, Additional Procedural Guidance, Item E3.1.22. This case is being remanded to the Administrative Judge for further processing. On remand, the Judge will be faced with a need to consider the admissibility of Government Exhibits 2c, 2d, 2g, and 2i in light of Directive, Additional Procedural Guidance, Item E3.1.20. As noted earlier in this decision, the Directive should not be interpreted or construed in a manner that renders any provision meaningless or superfluous. Accordingly, in making a decision about the admissibility of Government Exhibits 2c, 2d, 2g, and 2i under Directive, Additional Procedural Guidance, Items E3.1.20, the Judge must strive to avoid rendering either Directive, Additional Procedural Guidance, Item E3.1.20 or Directive, Additional Procedural Guidance, Item E3.1.22 meaningless or superfluous. Stated otherwise, a conclusion that a document is not admissible under one of those two provisions does not necessarily mean that a document is not admissible under the other provision.⁽²¹⁾

3. Whether the excluded portions of Government Exhibit 2 satisfy Department Counsel's burden of proof under the Directive and Applicant failed to refute, explain, or mitigate the security concerns raised by Applicant's conduct.

Department Counsel argues that correction of the Administrative Judge's erroneous exclusion of portions of Government Exhibit 2 leads to the conclusion that Department Counsel established a *prima facie* case and that Applicant failed to refute, explain, or mitigate the *prima facie* case against him. This argument lacks merit.

Even if the Board concludes that an Administrative Judge erroneously excluded evidence, it is not the function of the Board to admit that evidence into the record, engage in appellate fact-finding, and reach its own conclusions *de novo* as to an applicant's security eligibility. If the Board concludes that a Judge erroneously excluded evidence, then the proper course of action for the Board would be to decide whether the error was harmful or harmless under the particular facts and circumstances of the case. If the Board decides that the error was harmful, then the proper remedy would be to remand the case to the Judge with instructions. In this case, remand is the appropriate remedy, not reversal.

4. Whether the Administrative Judge's favorable decision is arbitrary, capricious, or contrary to law. In support of this contention, Department Counsel argues: (a) the Administrative Judge erred by concluding that Department Counsel did not establish a *prima facie* case; and (b) Applicant's conduct demonstrates poor judgment under Guideline E even if the Judge were to accept Applicant's explanation. Applicant counters by arguing: (i) Department Counsel failed to establish a *prima facie* case against him; and (ii) there is no nexus between Applicant's conduct and his security eligibility.

Because the Board is remanding this case to the Administrative Judge for further processing, it would be premature for the Board to address this appeal issue.

Conclusion

Department Counsel has met its burden of demonstrating error below that warrants remand. Pursuant to Directive, Additional Procedural Guidance, Item E3.1.33.2, the Board remands the case to the Administrative Judge with the following instructions:

The Administrative Judge must reopen the record to permit the parties the opportunity to submit written argument as to the admissibility of Government Exhibits 2d, 2g, and 2i under Directive, Additional Procedural Guidance, Item E3.1.20 and Directive, Additional Procedural Guidance, Item E3.1.22. As to Government Exhibit 2c, the Judge need not address the admissibility of Government Exhibit 2c under Directive, Additional Procedural Guidance, Item E3.1.22, but must decide whether Department Counsel has satisfied the requirements of Directive, Additional Procedural Guidance, Item E3.1.20 such that Government Exhibit 2c is admissible under that provision of the Directive. The Judge, in his discretion, may reopen the record to allow the parties to present evidence pertinent to this evidentiary issue if the Judge determines either party has made a showing of good cause for such additional evidence.

If the Administrative Judge concludes that any of the four documents are admissible beyond the limited purposes for

which he originally admitted them, then the Judge has the discretion to reopen the record evidence to permit the parties a reasonable opportunity to present additional evidence relevant to the admitted document(s) or the matters covered by the admitted document(s).

The Administrative Judge should then issue a new decision that complies with the requirements of Directive, Additional Procedural Guidance, Item E3.1.35 and Directive, Additional Procedural Guidance, Item E3.1.25.

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. In sustaining Applicant's objection, the Administrative Judge explicitly mentioned and relied on Directive, Additional Procedural Guidance, Item E3.1.22, but did not mention or discuss Directive, Additional Procedural Guidance, Item E3.1.20.

2. Portions of Department Counsel's appeal brief and Applicant's rely brief focus on Government Exhibit 2c, and other portions make arguments that could extend to all four of the Government Exhibits in question. For purposes of deciding this appeal, the Board will construe the arguments of both parties as potentially covering all four of the Government Exhibits in question. To the extent the Board needs to distinguish among the four Government Exhibits to address the issues raised on appeal, it will do so in its discussion of the appeal issues.

3. Department Counsel does not claim that Government Exhibits 2d, 2g, and 2i are statements by Applicant, and that position is understandable given the nature of those three documents. However, the fact that Applicant has not adopted those documents as reflecting statements by him does not foreclose the need for the Administrative Judge to decide whether those three documents are admissible on other grounds. Nothing in Executive Order 10865, the Directive, or generally accepted principles of federal administrative law limits documentary evidence in these proceedings to only those documents created, or adopted, by an applicant.

4. An applicant's right to cross-examination does not extend to an applicant's admissions.

5. The absence of record evidence that Applicant adopted Government Exhibit 2c as his own statement is, logically and legally, separate and distinct from whether there is other record evidence as to what statements Applicant made to the NSA investigator.

6. An applicant can waive his or her objection to the admissibility of evidence even though the Directive is silent on the matter of waiver. *See* ISCR Case No. 01-23356 (November 24, 2003) at pp. 6-7. However, absent such a waiver, an

applicant can insist on compliance with provisions of the Directive that specifically pertain to the admissibility of evidence.

7. *See, e.g.*, ISCR Case No. 02-11454 (June 7, 2004) at p. 4.

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

9. *See, e.g.*, ISCR Case No. 02-24254 (June 29, 2004) at p. 5 n. 7.

10. *See, e.g.*, ISCR Case No. 01-00407 (September 18, 2002) at pp. 4-5.

11. Department Counsel and Applicant cite to Board decisions that are the progeny of the Board decision in ISCR Case No. 88-2173 (September 14, 1990). In that decision, the Board relied on *Ohio v. Roberts*, 448 U.S. 56 (1980). Earlier this year, the Supreme Court overruled *Ohio v. Roberts*. *See Crawford v. Washington*, 541 U.S. -- (slip op., March 8, 2004). Given that change in Supreme Court precedent, the continued viability of the Board decision in ISCR Case No. 88-2173 cannot be taken for granted. *Cf.* ISCR Case No. 02-24254 (June 29, 2004) at p. 7 (no one should assume that the precedential value of a Board decision issued before a change in the law is the same after the change in the law). However, to resolve this appeal, the Board need not decide whether its decision in ISCR Case No. 88-2173 should be distinguished, overruled, modified, or followed for alternative reasons.

12. *SEC v. Jerry T. O'Brien, Inc.*, 467 U.S. 735, 742 (1984).

13. *See also* ISCR Case No. 00-0519 (December 7, 2001) at p. 3 (Double Jeopardy Clause of Fifth Amendment of U.S. Constitution does not apply to security clearance cases); ISCR Case No. 99-0424 (February 8, 2001) at p. 7 (Ex Post Facto Clause of the U.S. Constitution does not apply to security clearance cases).

14. *See, e.g.*, ISCR Case No. 01-07629 (April 5, 2002) at p. 3; ISCR Case No. 98-0529 (June 15, 1999) at p. 2.

15. The Board must assume that, in promulgating the Directive to implement Executive Order 10865, appropriate DoD officials made a determination that Directive, Additional Procedural Guidance, Items E3.1.20 and E3.1.22 are compatible with the provisions of Executive Order 10865. Under the Directive, such a determination is not reviewable in DOHA proceedings.

16. *See, e.g.*, *Hoska v. U.S. Department of Army*, 677 F.2d 131, 138-139 (D.C. Cir. 1982). *See also* ISCR Case No. 98-0265 (March 17, 1999) at p. 7; Directive, Additional Procedural Guidance, Item E3.1.19.

17. *See* footnote 8 of this decision. Although federal courts have indicated that they will not review the merits of a security clearance decision, they have held that they will entertain claims that a federal department or agency has not complied with its regulations when making a security clearance decision. *See, e.g.*, *Jamil v. Secretary, Department of Defense*, 910 F.2d 1203, 1208 (4th Cir. 1990); *Hill v. Department of Air Force*, 844 F.2d 1407, 1412 (10th Cir. 1988), *cert. denied*, 488 U.S. 825 (1988).

18. *See* ISCR Case No. 01-23356 (November 24, 2003) at pp. 6-8.

19. The arguments made by both parties occasionally seem to overlook or blur important differences among the four documents (Government Exhibits 2c, 2d, 2g, and 2i).

20. Because Government Exhibits 2d, 2g, and 2i are NSA documents, not business records, Applicant's contention about the applicability of Federal Rule of Evidence 803(8) instead of Federal Rule of Evidence 803(6) also applies to those three documents. *See* ISCR Case No. 01-23356 (November 24, 2003) at p. 8 (report by a federal investigator is a government record, not the business record of a nongovernmental organization or entity).

21. Given the procedural posture of this appeal, the Administrative Judge need not address on remand the admissibility

of Government Exhibit 2c under Directive, Additional Procedural Guidance, Item E3.1.22. But, the Judge must consider whether Department Counsel has satisfied its burden of showing that Government Exhibit 2c is admissible under Directive, Additional Procedural Guidance, Item E3.1.20.