DATE: June 1, 1999

In Re:

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

Applicant for Security Clearance

ISCR Case No. 96-0785

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Michael H. Leonard, Esq., Department Counsel

Melvin A. Howry, Esq., Department Counsel

FOR APPLICANT

James M. Moore. Esq.

Administrative Judge Wilford H. Ross issued a remand decision, dated January 11, 1999, in which he concluded it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant. Applicant appealed. For the reasons set forth below, the Board affirms the Administrative Judge's decision.

This Board has jurisdiction on appeal under Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, as amended.

Applicant's appeal presents the following issues: (1) whether the Administrative Judge erred by ruling polygraph evidence was not admissible in this case; and (2) whether the Administrative Judge's findings and conclusions adverse to Applicant are supported by the record evidence and are not arbitrary, capricious, or contrary to law.

Procedural History

The Defense Office of Hearings and Appeals issued a Statement of Reasons (SOR) dated January 2, 1997 to Applicant. The SOR was based on Criterion E (Personal Conduct). A hearing was held on January 27 through January 29, 1998. The Administrative Judge subsequently issued a written decision in which he concluded it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant. That adverse decision was appealed by Applicant.

On September 3, 1998, the Board issued an Appeal Board Decision and Remand Order (Remand Order). In the Remand Order, the Board concluded that the Administrative Judge had given a legally unsustainable reason for excluding Applicant's polygraph evidence. The Board remanded the case to the Judge with instructions to reopen the record for the limited purpose of giving Applicant the opportunity to offer the previously excluded polygraph evidence and the testimony of Applicant's polygrapher, subject to Department Counsel's right to raise objections to the admissibility of the polygraph evidence and to cross-examine the polygrapher.

On September 10, 1998, Department Counsel submitted a Motion for Reconsideration (Motion). Applicant submitted a

Response to Department Counsel's Motion. On October 5, 1998, the Board issued a decision which rejected Department Counsel's Motion.

On remand, the parties submitted briefs to the Administrative Judge on the matter of Applicant's polygraph evidence. The Administrative Judge held a hearing on December 1, 1998. At that hearing, the Judge listened to legal arguments from counsel, received documentary evidence from both parties, and heard the testimony of two polygraphers (one for each party). The Judge reserved judgment on Department Counsel's motion to exclude the polygraph evidence proffered by Applicant.

The Administrative Judge subsequently issued a written decision (Remand Decision). In the Remand Decision, the Judge ruled that DoD policy precluded the admissibility of evidence concerning polygraph examinations conducted by entities other than federal agencies, and granted Department Counsel's motion to exclude the polygraph evidence presented by Applicant. The Judge also incorporated by reference the findings and conclusions of his April 16, 1998 decision. The Judge finally concluded it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant. The case is before the Board on Applicant's appeal from the Remand Decision.

Appeal Issues[(1)]

1. Whether the Administrative Judge erred by ruling polygraph evidence was not admissible in this case. On remand, Department Counsel presented several documents in support of its contention that DoD policy precluded the use of polygraph examinations conducted by entities other than federal agencies in DoD proceedings. In particular, Department Counsel relied on an October 21, 1992 memorandum signed by the Deputy Assistant Secretary of Defense for Counterintelligence and Security Countermeasures (October 1992 Memorandum), and a proposed revision of DoD Regulation 5210.48-R, "Department of Defense Polygraph Program," dated October 1990 (Proposed Revised Regulation). In the Remand Decision, the Judge ruled the October 1992 Memorandum required him to exclude the polygraph evidence proffered by Applicant at the December 1, 1998 hearing.

On appeal, Applicant incorporates by reference the arguments she raised before the Administrative Judge concerning the admissibility of the polygraph evidence she proffered on remand. In response, Department Counsel contends the Judge properly excluded that polygraph evidence based on DoD policy. Department Counsel argues, in the alternative, that Applicant failed to meet her burden of demonstrating the proffered polygraph evidence was reliable. Taken together, the briefs raise the issue of whether the Judge erred by ruling the polygraph evidence was not admissible. *See* Directive, Additional Procedural Guidance, Item 32 ("The Appeal Board shall address the material issues raised by the parties . . . .").

As indicated in the Board's Remand Order, the DoD has the authority to regulate the use of polygraph evidence in DoD proceedings. If the DoD has issued a regulation, directive, or authorized policy guidance concerning the use of polygraph evidence that was applicable to DOHA proceedings, the legal effect of that regulation, directive, or authorized policy guidance would not be waived by the failure of Department Counsel to raise it sooner. *Cf.* ISCR Case No. 98-0320 (April 8, 1999) at pp. 4-5 (Board holding that National Industrial Security Program Operating Manual was applicable despite earlier failure to address its applicability in DOHA proceedings). Accordingly, Applicant's waiver argument lacks merit. The question remains whether the Judge properly ruled that DoD policy precludes Applicant from proffering polygraph evidence in her case. For the reasons that follow, the Board concludes the Judge's ruling is not sustainable based on the record in this case.

First, the Administrative Judge acted in an arbitrary and capricious manner by relying, in part, on the Proposed Revised Regulation. A draft or proposed regulation or directive has no legal force or effect. The Judge's ruling on the admissibility of Applicant's polygraph evidence cannot be sustained to the extent it relied on a document that has no legal force or effect. Directive, Additional Procedural Guidance, Item 32.c. Department Counsel's reliance on the Proposed Revised Regulation, on remand and on appeal, is frivolous.

Second, the October 1992 Memorandum relied on by the Administrative Judge raises problematic issues that were not resolved on the record below. The problematic nature of that memorandum cannot be ignored by the Board because Department Counsel has argued forcefully that it is controlling and was properly relied on by the Judge to exclude

Applicant's polygraph evidence.

DoD Directive 5210.48, "DoD Polygraph Program," dated December 24, 1984 (Polygraph Directive) and DoD Regulation 5210.48-R, "Department of Defense Polygraph Program," dated January 1985 (Polygraph Regulation) are important to the resolution of this appeal issue. Neither the Polygraph Directive nor the Polygraph Regulation specifically addresses the issue of whether the results of Applicant's privately-administered polygraph examination can be offered in DoD proceedings. However, paragraph E.1.a. of the Polygraph Directive grants the Deputy Under Secretary of Defense for Policy [(DUSD(P)] the authority to "[e]stablish policies and procedures for the DoD Polygraph Program." Similarly, paragraph B.1. of Chapter 4 of the Polygraph Regulation state "[t]he DUSD(P) shall provide guidance, oversight, and approval for policy and procedures governing polygraph program matters within the Department of Defense." Significantly, the October 1992 Memorandum was not issued by the Deputy Under Secretary of Defense for Policy. Furthermore, there is no record evidence that the official who signed the October 1992 Memorandum was delegated authority to do so under either paragraph E.1.a. of the Polygraph Directive or paragraph B.1. of Chapter 4 of the Polygraph Regulation. Furthermore, Department Counsel has not cited or referred (below or on appeal) to any other directive, regulation or DoD memorandum that would provide a basis to conclude the official who signed the October 1992 Memorandum received such a delegation of authority or otherwise was assigned, granted, or succeeded to such authority.

The Administrative Judge cited Section E.1. of DoD Directive 5220.6 (Directive) as authority in support of his finding that the October 1992 Memorandum is controlling. Section E.1. of the Directive does not support the Administrative Judge's ruling concerning the October 1992 Memorandum. On remand, Department Counsel did not cite to Section E.1. of the Directive as a source of authority for the October 1992 Memorandum. Nor does Department Counsel do so on this appeal. In addition, the October 1992 Memorandum does not refer to or cite the Directive as a basis for its authority. Indeed, the October 1992 Memorandum contains no reference or citation to what source of authority is being relied on for its issuance. Moreover, the copy of the October 1992 Memorandum submitted by Department Counsel lacks any indication of its distribution; a distribution list might have shed light on the recipient(s) and intended scope of the October 1992 Memorandum. In addition, the Judge's analysis ignores the fact that the wording of the October 1992 Memorandum is ambiguous when it refers to "DoD-affiliated personnel." If read broadly, the phrase could be construed as including military personnel, civilian employees of DoD, and officers and employees of defense contractors. A broad reading of the phrase "DoD-affiliated personnel" would suggest the October 1992 Memorandum could not be based on Section E.1. of the Directive because the Directive does not apply to security clearance decisions involving military personnel or civilian employees of DoD. In addition, even under a broad reading of the term "DoD-affiliated personnel," a question could be raised whether the October 1992 Memorandum would cover applicants who are not DoD-affiliated personnel but who fall under the Directive by virtue of Sections B.2.and C.1. In view of all the foregoing, the record evidence does not provide a rational basis for the Judge to find the October 1992 Memorandum was issued pursuant to Section E.1. of the Directive.

For all the foregoing reasons, there was insufficient information before the Administrative Judge to provide a rational basis for him to conclude the October 1992 Memorandum constitutes DoD policy on the polygraph. The Judge has based his decision to exclude Applicant's polygraph evidence, again, on a rationale that is unsustainable on the record before him. Since the Judge committed an error that is functionally the same as the error that resulted in the first remand of this case, it would seem natural for the Board to remand this case once again. However, the Board need not do so because the Judge's exclusion of Applicant's polygraph evidence can be affirmed on other grounds.

The Board can affirm an evidentiary ruling by a Judge on any proper basis supported by the record, even if the basis is not one relied on by the Judge (Remand Order at p. 3). *See also Johnson Enterprises of Jacksonville, Inc. v. FPL Group, Inc.*, 162 F.3d 1290, 1311 n.50 (11th Cir. 1998) (where judgment below is correct, appellate court can affirm district court on any legal ground regardless of the grounds addressed, adopted, or rejected by the district court); *Payne v. Churchich*, 161 F.3d 1030, 1038 (7th Cir. 1998)(as matter of judicial economy, appellate court should examine record and should affirm decision below on an alternate basis if the record reveals the decision below was correct, even if the district court relied on a wrong reason); *Moreland v. Las Vegas Metropolitan Police*, 159 F.3d 365, 369 (9th Cir. 1998) (decision below can be affirmed on any basis finding support in the record, even of the district court relied on the wrong ground or reasoning). Furthermore, the nonappealing party can argue in favor of affirming a ruling or decision below based on any ground having support in the record, including grounds ignored, overlooked or rejected by the lower

tribunal. *See, e.g., United Food & Commercial Workers Union v. Southwest Ohio Regional Transit Authority*, 163 F.3d 341, 349 n.3 (6th Cir. 1998); *Rodrigues v. Herman*, 121 F.3d 1352, 1355 n.2 (9th Cir. 1997). Department Counsel has done that by offering alternative arguments for why Applicant's polygraph evidence should have been excluded. For the reasons that follow, the Board concludes the polygraph evidence presented by Applicant was excludable. Accordingly, no useful purpose would be served by remanding the case to the Judge for further proceedings.

In its alternative arguments, Department Counsel persuasively contends Applicant failed to meet her burden of demonstrating the polygraph evidence was reliable. Since the Board is resting its conclusion on a legal basis not relied upon by the Administrative Judge, the Board does not have the benefit of findings and conclusions by the Judge concerning the polygraph evidence presented by the parties. As a general proposition, the record evidence should be construed on appeal in a light most favorable to the nonappealing party because there is no presumption of error below. However, for purposes of deciding this appeal only, the Board will assume the following: (a) both polygraphers who testified at the December 1, 1998 hearing were qualified to testify as experts on the issue of polygraphs; (b) both polygraphers were credible witnesses; and (c) Applicant presented sufficient evidence to establish the general validity of polygraph examinations.[(2)] Even given those assumptions, Applicant failed to meet her burden of demonstrating that the results of the polygraph examination she proffered were reliable and should have been admitted into evidence and considered by the Judge.

Even reading the evidence in a light most favorable to Applicant, the record shows the following: (a) the questions used by the polygrapher to conduct his polygraph examination of Applicant were prepared by an attorney for Applicant, not the polygrapher; (b) it is unusual for someone other than the polygrapher to prepare the questions for a polygraph examination; (c) the type and format of polygraph examination conducted on Applicant was dictated by the questions written by an attorney for Applicant; (d) the type and format of polygraph examination conducted on Applicant was not appropriate to deal with the issues involved in Applicant's situation; (e) Applicant's polygrapher would have preferred to conduct a different type of polygraph examination on Applicant, but was prevented from doing so by the directions of the attorney; (f) the polygrapher was not provided with basic information concerning the issues to be covered by the polygraph examination, information that is important for the polygrapher to know; (g) all but one of the questions used by Applicant's polygrapher had some flaw or defect that rendered them problematic and not appropriate for use in a polygraph examination; (h) the polygrapher did not follow customary polygraph practice of using a neutral first question and control questions in his examination of Applicant; and (i) there were pieces of information and data concerning the polygraph examination of Applicant that were incomplete, missing or not accounted for. These examples are illustrative, not exhaustive. However, they provide ample basis to conclude that Applicant failed to meet her burden of demonstrating that the results of her polygraph examination (including the polygrapher's opinion as to whether Applicant was truthful or deceptive) were reliable and entitled to be admitted into evidence and considered by the Administrative Judge in this case. Accordingly, the Judge's exclusion of Applicant's polygraph evidence is sustainable on grounds other than the reason given in the Remand Decision.[(3)]

2. Whether the Administrative Judge's findings and conclusions adverse to Applicant are supported by the record evidence and are not arbitrary, capricious, or contrary to law. In this appeal, Applicant incorporates by reference her appeal arguments from the first appeal. Apart from the matter of the polygraph evidence, the Administrative Judge's Remand Decision incorporates by reference his findings and conclusions about the various SOR allegations that were set forth in his April 16, 1998 decision.

Applicant contends the Administrative Judge's adverse decision is arbitrary, capricious, or contrary to law because: (a) the Judge mischaracterized Applicant's testimony; (b) the Judge ignored substantial record evidence favoring Applicant; (c) the Judge erred by discounting the testimony of certain witnesses; and (d) the Judge ignored the significance of the evidence that Applicant's employer did not discipline Applicant for the May 1995 incident that forms the basis for SOR 1.c.[(4)] For the reasons that follow, the Board concludes Applicant has failed to demonstrate the Judge erred.

There is a rebuttable presumption that an Administrative Judge considered all the record evidence unless the Judge specifically states otherwise. *See, e.g.*, ISCR Case No. 98-0350 (March 31, 1999) at p. 3; ISCR Case No. 97-0783 (August 7, 1998) at p. 4. The mere fact that there is conflicting record evidence does not diminish the Judge's primary responsibility to weigh the record evidence and make findings of fact. *See, e.g.*, ISCR Case No. 98-0592 (May 4, 1999) at p. 4. When faced with conflicting record evidence, the Judge must weigh the evidence and decide which evidence is

more credible or persuasive. *See* ISCR Case No. 95-0576 (May 7, 1996) at p. 3. In addition, the Judge is not compelled to accept or reject a witness's testimony in its entirety. *See, e.g.*, DOHA Case No. 94-0569 (March 30, 1995) at p. 5. *See also Jenkins v. Immigration and Naturalization Service*, 108 F.3d 195, 199 (9th Cir. 1997) (administrative law judge not required to accept or reject the testimony of each witness *in toto*); *Kraushaar v. Flanigan*, 45 F.3d 1040, 1054 (7th Cir. 1995)("[A] factfinder may believe some parts of a witness's testimony while rejecting other parts."). Furthermore, the Judge's credibility determinations are entitled to deference on appeal because the Judge has the opportunity to personally observe the witnesses as they testify and assess their demeanor and credibility. The Board will not disturb a Judge's findings of fact unless there has been a showing that the Judge weighed the evidence in a manner that is arbitrary, capricious, or contrary to law. *See, e.g.*, ISCR Case No. 98-0592 (May 4, 1999) at p. 4; ISCR Case No. 97-0630 (May 28, 1998) at p. 2.

The fact that Applicant's employer did not discipline her for the May 1995 incident does not preclude the Administrative Judge from considering the record evidence, making findings of fact about that incident, and deciding whether Department Counsel met its burden of proving the controverted allegation set forth in SOR 1.c. *Cf.* ISCR Case No. 97-0606 (April 20, 1998) at p. 3 (government can prove, and Administrative Judge can find, applicant engaged in criminal conduct even though Internal Revenue Service has not sought to criminally prosecute applicant for his willful failure to file federal income tax returns); DOHA Case No. 96-0152 (January 14, 1997) at pp. 4-5 ("An employer's opinions about the seriousness of an applicant's conduct are not binding on the Judge."). The actions or inactions of private employers with respect to applicants are not binding on the government in carrying out its responsibilities under the industrial security program.

Considering the record as a whole, the Board concludes Applicant has failed to overcome the rebuttable presumption that the Administrative Judge considered all the record evidence. The Judge's challenged findings reflect a reasonable, plausible interpretation of the conflicting record evidence in this case. Applicant's ability to argue for an alternate interpretation of the record evidence is not sufficient to demonstrate the Judge's challenged findings are not sustainable. *See, e.g.*, ISCR Case No. 98-0445 (April 2, 1999) at p. 2; ISCR Case No. 98-0380 (March 8, 1999) at p. 5.

Conclusion

There is no presumption of error below and the appealing party has the burden of demonstrating error that warrants remand or reversal. Applicant has failed to demonstrate the Administrative Judge committed harmful error. Accordingly, the Board affirms the Judge's January 11, 1999 Remand Decision.

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board

See concurring opinion

Michael Y. Ra'anan

Administrative Judge

Member, Appeal Board

Signed: Jeffrey D. Billett

Jeffrey D. Billett

Administrative Judge

Member, Appeal Board

Concurring Opinion of Administrative Judge Michael Y. Ra'anan

I still adhere to the analysis expressed in my dissenting opinion of September 3 1998. However, at this point in the case history that analysis is not pertinent. The majority's September 3, 1998 remand decision is now the governing law for the purposes of deciding this case.(5) In any future case raising similar issues I expect I will vigorously assert my analysis again.

Given the current law of the case, I concur with my colleagues as to the analysis and disposition of the matter in the attached majority opinion.

Signed: Michael Y. Ra'anan

Michael Y. Ra'anan

Administrative Judge

Member, Appeal Board

1. Department Counsel contends Applicant's February 23, 1999 appeal brief lacks sufficient specificity and fails to raise any identifiable material issue for the Board to consider. Department Counsel's contention lacks merit. Department Counsel's alternative arguments in support of the Administrative Judge's Remand Decision show that Department Counsel was able to identify Applicant's appeal issues sufficiently to present counterarguments.

2. Because these assumptions are being made solely in an effort to expedite consideration and resolution of this appeal, the Board's discussion does not constitute any express or implied holding on who qualifies as an expert witness with respect to polygraph evidence, or that polygraph examinations have general validity.

3. We disagree with our colleague's suggestion that the first remand resulted in a "sideshow." Absent a legally sustainable basis for excluding Applicant's polygraph evidence, the Administrative Judge was obligated to allow Applicant the opportunity to show the admissibility of such evidence subject to any valid objection raised by Department Counsel. Exclusion of evidence without a legally sustainable basis for doing so would violate Applicant's right to respond to the government's case against her and to present evidence on her behalf.

4. The Administrative Judge's findings and conclusions about the other SOR allegations were not appealed or cross-appealed. Furthermore, neither party relied on those findings and conclusions in support of their appeal arguments. Therefore, the Board will not address those findings and conclusions.

5. I note that the law of the case has produced a situation in which 1) there has been a day-long hearing solely on the subject of admissibility of applicant's polygraph, 2) the Administrative Judge then did not consider the bulk of that hearing, 3) the Appeal Board is now left having to adjudicate the applicability of a proposed regulation and a copy of a seven year old Memorandum for Distribution (relied on by both Judge and Department Counsel) that was drafted by an office which appears based on the record before us to be without subject-matter jurisdiction (Even more troubling is the fact that the record copy of that Memorandum for Distribution does not contain the distribution list, that is the intended recipients of the Memorandum), 4) after all is said and done both the Administrative Judge and the Board are excluding the Applicant's polygraph. I can make no claim to having foreseen the specifics of our current situation. My dissent on September 3, 1998, did cite to the Supreme Court in US v Scheffer acknowledging the "risk of burdensome sideshows that polygraph evidence could engender."