

DATE: October 5, 1998

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 96-0785

APPEAL BOARD DECISION

ON DEPARTMENT COUNSEL'S

MOTION FOR RECONSIDERATION

APPEARANCES

FOR GOVERNMENT

Teresa A. Kolb, Esq., Department Counsel

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

FOR APPLICANT

James. M. Moore, Esq.

On September 3, 1998, the Board issued a Appeal Board Decision and Remand Order (hereinafter "Remand Order") in this case. Department Counsel submitted a Motion for Reconsideration on September 10, 1998. Applicant submitted a Response to Department Counsel's Motion. For the reasons that follow, the Board concludes Department Counsel's motion for Reconsideration is not well-founded.

Nothing in Executive Order 10865 or Department of Defense Directive 5220.6 addresses the question of whether the Board has the authority to reconsider its decisions. However, even in the absence of a pertinent statutory or regulatory provision, an agency has the inherent authority to reconsider its decisions. *Dun & Bradstreet Corporation Foundation v. U.S. Postal Service*, 621 F.2d 1084, 1086 (10th Cir. 1980); *United States v. Sioux Tribe*, 616 F.2d 485, 493 (Ct. Cl. 1980), *cert. denied*, 446 U.S. 953 (1980). Furthermore, the Board has held that it has such authority in industrial security clearance cases, DISCR Case No. 86-1802 (September 23, 1988), and special education cases. DDESS Case No. 97-001 (April 9, 1998). Accordingly, the Board has the authority to consider Department Counsel's Motion for Reconsideration.

Department Counsel contends the Administrative Judge's exclusion of polygraph evidence did not affect a substantive right of Applicant. In support of that contention, Department Counsel argues: (a) Applicant does not have a right to a security clearance; and (b) the Judge's exclusion of Applicant's proffered polygraph evidence did not adversely affect a substantial right of Applicant. The fact that Applicant has no right to a security clearance is irrelevant to her procedural rights under Executive Order 10865 and the Directive to respond to the evidence against her and to have a reasonable opportunity to present evidence in her behalf during the proceedings below. Even in the absence of a substantive right to a security clearance, an applicant has procedural rights under Executive Order 10865 and the Directive which could be impaired to the applicant's prejudice by an erroneous evidentiary ruling.

Department Counsel contends, in the alternative, that the Administrative Judge's exclusion of Applicant's proffered

polygraph evidence was, at most, harmless error. In support of that contention, Department Counsel argues: (a) the Remand Order "does not determine that the exclusion of the polygraph examination report was anything other than a harmless error"; (b) the excluded polygraph evidence was merely cumulative to other evidence presented by Applicant; and (c) it is not likely that the Judge would change his decision even if the polygraph evidence were admitted into evidence.

(a) Department Counsel's first argument lacks merit. The Board has repeatedly declined to reverse or remand cases where identified errors are harmless. *See, e.g.*, ISCR Case No. 97-0707 (September 1, 1998); ISCR Case No. 96-0522 (May 1, 1997); ISCR Case No. 95-0495 (March 22, 1996). If the Board had concluded the Judge's erroneous evidentiary ruling was harmless, then it would not have held that "Applicant has met her burden of demonstrating error that warrants remand" (Remand Order at p. 7).

(b) As the Board noted in the Remand Order (at p. 3), the Federal Rules of Evidence are not strictly applied in DOHA proceedings. Even assuming solely for purposes of addressing Department Counsel's Motion for Reconsideration that the Federal Rules of Evidence were to be strictly applied, Department Counsel's second argument fails. Evidence is not excludable merely because it is cumulative. Rather, the question for the Administrative Judge is whether "[the] probative value [of the evidence] is *substantially outweighed* by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, *or needless presentation of cumulative evidence.*" Federal Rules of Evidence, Rule 403 (italics added). Given the state of the record below, it cannot be fairly concluded by the Board, as a matter of law, that the probative value of Applicant's proffered polygraph evidence "is substantially outweighed by . . . [the] needless presentation of cumulative evidence." Any argument concerning the cumulative nature of the proffered polygraph evidence is more properly raised below for the Administrative Judge's consideration on remand.

(c) Department Counsel's third argument is not persuasive. The Board declines to speculate as to what weight the Administrative Judge might place on the polygraph evidence if the Judge ultimately decides that Applicant has met her burden of establishing its admissibility on remand. Based on the current state of the record below, the Board cannot conclude, as a matter of law, that the proffered polygraph evidence is entitled to little or no weight.

Department Counsel contends a remand is unnecessary in this case. In support of that contention, Department Counsel argues: (a) there is no general consensus that polygraph examinations are scientifically reliable; (b) one federal district court has concluded polygraph evidence is not admissible; and (c) several courts have relied on *United States v. Scheffer*, -- U.S. --, 118 S.Ct. 1261 (1998) for the proposition that polygraph examinations are unreliable.

(a) The absence of a consensus that polygraph examinations are scientifically reliable does not preclude Applicant, as a matter of law, from trying to offer evidence to persuade the Administrative Judge that her polygraph evidence is sufficiently reliable to be admitted into evidence.⁽¹⁾ Furthermore, Department Counsel's argument ignores the possibility that a party may be able to present evidence that persuades a Judge that polygraph evidence is sufficiently reliable to be admitted. *See, e.g.*, *United States v. Galbreth*, 908 F.Supp. 877 (D. N.M. 1995) (holding that defendant had met his burden, under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993)), sufficiently to warrant admission of polygraph evidence).

(b) Department Counsel cites *United States v. Orians*, 1998 U.S. Dist. LEXIS 10326 (D. Ariz. 1998) for the proposition that "[c]ourts have concluded after conducting a Daubert-type hearing, that polygraph evidence fails to meet four out of the five Daubert factors and is therefore not admissible" (Memorandum in Support of Department Counsel's Motion for Reconsideration at p. 6). The Board is aware of other decisions with similar holdings. *See, e.g.*, *United States v. Cordoba*, 991 F.Supp. 1199 (C.D. Cal. 1998); *Meyers v. Arcudi*, 947 F.Supp. 581 (D. Conn. 1996). However, none of those decisions holds that a person cannot, as a matter of law, establish that polygraph evidence is admissible. The Board, of course, does not express any opinion as to whether, on remand, Applicant will be able to meet her burden of persuading the Judge that her proffered polygraph evidence should be admitted.

(c) The Board has read the four decisions cited by Department Counsel in support of its argument that "courts have relied on [*United States v. Scheffer*] for the proposition that polygraph examinations are unreliable" (Memorandum in Support of Department Counsel's Motion for Reconsideration at pp. 6-7).⁽²⁾ Department Counsel's reliance on the four

cited decisions is misplaced because none of the cited decisions supports Department Counsel's argument. In *United States v. Orians*, 1998 U.S. Dist. LEXIS 10326 (D. Ariz. 1998), the court did not rely on *Scheffer* to reach its conclusion that the defendant had failed to demonstrate that polygraph evidence was admissible; rather, the court reached that conclusion after analyzing the proffered polygraph evidence in light of the analysis required by *Daubert*. In *Sorensen v. Superintendent, Fishkill Correctional Facility*, 1998 U.S. Dist. LEXIS 12124 (E.D.N.Y. 1998), the court cited *Scheffer* for the proposition that it is not unconstitutional for a trial court to exclude polygraph evidence. Nothing in the *Sorensen* decision can fairly be construed as a holding or conclusion that *Scheffer* stands for the proposition that polygraph evidence is unreliable as a matter of law. In *State v. Weatherspoon*, 1998 N.D. LEXIS 166 (N.D. 1998), the state supreme court did not uphold the trial court's exclusion of polygraph evidence because it concluded that *Scheffer* held polygraph evidence was unreliable. Rather, the state supreme court upheld the exclusion of polygraph evidence because the parties did not stipulate to its admissibility and the offering party did not present any scientific evidence of the reliability of the results of polygraph examinations. Nothing in the *Weatherspoon* decision stands for the proposition that polygraph evidence is unreliable as a matter of law. Finally, in *Tran v. State*, 1998 Tex. App. LEXIS 3441, the state appellate court upheld the exclusion of polygraph evidence because "Texas courts have long excluded polygraph evidence because it is inherently unreliable." In support of that ruling, the court cited several state court decisions, not *Scheffer*. The state appellate court cited *Scheffer* only for the proposition that exclusion of polygraph evidence does not violate a defendant's right to present a defense.

Department Counsel's suggestion that the case law concerning the admissibility of polygraph evidence was changed by the *United States v. Scheffer* is not well-founded. To the contrary, decisions issued after *United States v. Scheffer* indicate no such change. In *United States v. Taylor*, 1998 U.S. App. LEXIS 20951 (7th Cir. 1998) and *United States v. Jordan*, 150 F.3d 895 (8th Cir. 1998) both Courts of Appeal reviewed the exclusion of polygraph evidence without any reliance on *United States v. Scheffer*. And, in *Maddox v. Cash Loans of Huntsville II*, 1998 U.S. Dist. LEXIS 14938 (N.D. Ala. 1998), the District Court decided to exclude polygraph evidence on several grounds, none of which was based on a reading of *United States v. Scheffer* similar to that advanced by Department Counsel.

Department Counsel contends the Remand Order "is unnecessarily detrimental to the industrial security clearance program." In support of that contention, Department Counsel argues the Remand Order: (a) "implicitly recogniz[es] a violation of a substantive right when an Administrative Judge excludes a polygraph examination report"; (b) will "open a floodgate" for applicants to offer polygraph evidence; (c) will unduly burden DOHA proceedings by requiring a Judge to "conduct an unnecessary inquiry on the scientific reliability of polygraph examination evidence"; and (d) will result in the DOHA process being overwhelmed whenever an applicant offers polygraph evidence (Memorandum in Support of Department Counsel's Motion for Reconsideration at pp. 7-8).

(a) Department Counsel's first argument is based on a misreading of the Remand Order. The Board specifically stated "Applicant's right to a hearing with the opportunity to present evidence on her behalf does not include a right to have polygraph test results admitted unconditionally" (Remand Order at p. 4) and "absent a stipulation by the parties concerning the admissibility of polygraph evidence or a waiver of objection by Department Counsel, Applicant has the burden of establishing its admissibility and meeting any valid objection raised by Department Counsel" (Remand Order at p. 5). Nothing in the Board's decision indicates or suggests that an applicant has an absolute right to have polygraph evidence admitted or that a Judge can never have a legitimate reason to exclude polygraph evidence.

(b) Department Counsel's "floodgate" argument is unpersuasive. Given the multiple issues posed by polygraph evidence (Remand Order at pp. 5-6), it will not be a simple matter for applicants to seek to have polygraph evidence admitted. Department Counsel's assertion that applicants will be able to routinely require *Daubert*-type presentations on the reliability of polygraph examinations ignores the threshold issues that need to be addressed before any decision is made by an Administrative Judge as to whether any such presentation is warranted. *See, e.g.* Remand Order at pp. 5-6 (polygraph issues 1, 2, 3, and 4).

(c) Department Counsel's "unnecessary inquiry" argument reflects an inconsistency in Department Counsel's Motion for Reconsideration. Although Department Counsel states it is not asking the Board to "dictate an absolute bar to the introduction of all polygraph examination reports" (Memorandum in Support of Department Counsel's Motion for Reconsideration at p. 4 n.1), the thrust of Department Counsel's various arguments is aimed at persuading the Board to hold, as a matter of law, that no applicant can ever persuade an Administrative Judge that polygraph evidence is

sufficiently reliable to be admitted into evidence. The Board declines to reach such a holding, directly or indirectly.

Absent imposition of an absolute bar to polygraph evidence (*see* Remand Order at p. 4 n.5), an Administrative Judge will have to consider whether an applicant can meet his or her burden of demonstrating proffered polygraph evidence should be admitted into evidence. Unless Department Counsel wishes to stipulate to the admissibility of polygraph evidence or waive any objection to its admission into evidence, the Judge will have to deal with any valid objections raised by Department Counsel, consistent with the analytical framework set forth in the Remand Order.

(d) Department Counsel's claim that the Board's Remand Order will have a "potentially overwhelming [effect on] the [DOHA] process" is strained and overstated. Department Counsel's claim simply ignores the second issue that an Administrative Judge must consider when an applicant proffers polygraph evidence (Remand Order at p. 5). As Applicant notes (Applicant's Response to Department Counsel's Motion for Reconsideration at pp. 6-7), Department Counsel's claim also seems to assume that a Judge will not be able to "conduct all proceedings in a fair, timely, and orderly manner" (Remand Order at p.7)(quoting Directive, Additional Procedural Guidance, Item 10) when an applicant proffers polygraph evidence. The Board declines to make any such assumption. And, in any event, even if a Judge were to act in a manner that is arbitrary, capricious, or contrary to law in connection with proffered polygraph evidence, the injured party can seek relief through the appeal process. *Cf.* Board decisions cited in Remand Order at p. 4 n.3.

Conclusion

For all the foregoing reasons, the Board concludes Department Counsel's Motion for Reconsideration is not well-founded. The Board's September 3, 1998 Decision and Remand Order stands.

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 concur with the majority's conclusion that the Department Counsel's Motion for Reconsideration is not well founded. I stand by my reasoning in my Dissent in the Appeal Board's September 3, 1998 Decision in this case. It is clear that however certain I may be of my view, my colleagues remain unpersuaded. However, I do not see that the Department Counsel's Motion for Reconsideration adds substantially to resolving the general issue of Applicant-proffered polygraphs, and my colleagues do seem to agree with me on that.

As the Board has previously noted, reconsideration should not be undertaken lightly. Department Counsel's Motion did

not raise any issue warranting reconsideration. The cases cited by the Motion do not in fact set forth a specifically applicable principle that advances resolution of the problem.

Signed: Michael Y. Ra'anan

Michael Y. Ra'anan

Administrative Judge

Member, Appeal Board

1. Applicant states "[p]resumably, much of the parties' argument for or against the use of [polygraph evidence] will be presented in legal argument, with reference to scientific journals or studies" (Applicant's Response to Department Counsel's Motion for Reconsideration at p. 7). While legal argument could be helpful to assist the Administrative Judge in reaching a decision on the admissibility of polygraph evidence, legal argument is not a substitute for the presentation of appropriate evidence to satisfy Applicant's burden of establishing the admissibility of polygraph evidence within the analytical framework discussed in the Remand Order (at pp. 5-6).

2. Department Counsel's reliance on a fifth decision, *Castillo v. Johnson*, 141 F.3d 218 (5th Cir. 1998), adds nothing to its argument for reconsideration. *See* Remand Order at p. 4 (citing *Castillo* decision).