

DATE: September 3, 1998

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 96-0785

APPEAL BOARD DECISION AND REMAND ORDER

APPEARANCES

FOR GOVERNMENT

Melvin A. Howry, Esq., Department Counsel

FOR APPLICANT

James M. Moore, Esq.

Administrative Judge Wilford H. Ross issued a decision, dated April 16, 1998, in which he concluded it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant. Applicant appealed. The Board remands the case to the Administrative Judge for further processing consistent with the rulings and instructions set forth in this Decision and Order for Remand.

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

Applicant's appeal presents the following issues: (1) whether the Administrative Judge erred by excluding a polygraph examination report offered by Applicant; 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 to Applicant a Statement of Reasons (SOR), dated January 2, 1997. 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 decision in which he concluded it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant. The case is now before the Board on Applicant's appeal from that adverse decision.

Appeal Issues

The Board must address material issues raised by the parties. Directive, Additional Procedural Guidance, Item 32. In this case, Applicant's appeal brief is not a model of clarity. However, the Board will not elevate form over substance and refuse to consider a material issue raised on appeal merely because an appeal brief is not a model one. Applicant's brief is sufficient to raise the issue of whether the Administrative Judge erred by excluding the proffered polygraph evidence. [\(1\)](#)

For the reasons that follow, the Board concludes the Administrative Judge gave a legally unsustainable reason for excluding Applicant's proffered polygraph evidence. Because the handling of the case on remand will result in a new decision, which could moot or otherwise affect Applicant's other appeal issue, it would be premature for the Board to address Applicant's non-polygraph appeal issue.

At the hearing, Applicant offered a report of a polygraph examination she underwent.⁽²⁾ Applicant also indicated that she intended to call as a witness the private polygrapher who performed the polygraph examination (Hearing Transcript at pp. 40, 379). Department Counsel objected to the polygraph report and to allowing the polygrapher to testify, claiming: (a) the proffered polygraph evidence would impermissibly introduce evidence that went to the "ultimate issue" in the case; and (b) surprise (Hearing Transcript at pp. 18-20, 380-383). Applicant's counsel responded by arguing that a day earlier Department Counsel knew that Applicant would be offering evidence of a polygraph through a witness, and that absent a showing of actual prejudice to the Government, Applicant's right to a full and fair hearing should result in admission of the polygraph evidence (Hearing Transcript at pp. 19-20, 384).

Responding to Department Counsel's claim of surprise, the Administrative Judge ruled that the polygrapher could testify, but Department Counsel would not be required to cross-examine the polygrapher that day, and Department Counsel would be allowed additional time to prepare for cross-examination of the polygrapher (Hearing Transcript at pp. 385, 386). The Judge further ruled the polygraph report would not be admitted and the polygrapher would not be allowed to testify as to the issue of the truthfulness of Applicant or the results of the polygraph examination because the Judge had the ultimate responsibility to decide whether Applicant was truthful or credible (Hearing Transcript at pp. 385, 386, 388-90, 392).

The Administrative Judge has the authority to rule on evidentiary matters during the hearing. Directive, Additional Procedural Guidance, Item 10. Those rulings are subject to review to determine whether they are consistent with pertinent provisions of Executive Order 10865 and the Directive (Additional Procedural Guidance, Item 32.b.) and whether they are arbitrary, capricious, or contrary to law (Additional Procedural Guidance, Item 32.c.). In reviewing a Judge's evidentiary rulings, the Board recognizes the practical need to give some latitude to the Judge, who often must make evidentiary rulings under the pressure of an ongoing hearing and without the luxury of being able to take those rulings under advisement.

Even if the Board concludes that an Administrative Judge made an erroneous evidentiary ruling, such a conclusion is not dispositive. As a matter of judicial economy, the Board can affirm an evidentiary ruling by a Judge on any proper basis supported by the record, even if the basis was not the one relied on by the Judge. *See, e.g., LaBarre v. Shepard*, 84 F.3d 496, 500 (1st Cir. 1996); *American Home Assurance Co. v. American President Lines, Ltd.*, 44 F.3d 774, 779 (9th Cir. 1994); *Metallurgical Industries, Inc. v. Fourtek, Inc.*, 790 F.2d 1195, 1207 (5th Cir. 1986). For the reasons that follow, the Board concludes the Judge made an erroneous ruling with respect to the proffered polygraph evidence, and the state of the record below does not present the Board with any basis to affirm the Judge's ruling on an alternate ground.

In DOHA proceedings, the Federal Rules of Evidence serve as a guide. Directive, Additional Procedural Guidance, Item 19. The Board has cautioned against a strict application of the Federal Rules of Evidence in these proceedings. *See, e.g., ISCR Case No. 97-0202* (January 20, 1998) at p. 2. Even assuming solely for purposes of deciding this appeal that the Judge could apply the Federal Rules of Evidence strictly to the polygraph evidence proffered by Applicant, the Judge's reason for excluding that evidence is contrary to Federal Rule of Evidence 704. In Rule 704, apart from an exception that has no relevance to DOHA proceedings, "testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." Therefore, even under a strict application of the Federal Rules of Evidence, the Judge erred by excluding the proffered polygraph evidence on the basis that it went to an ultimate issue to be decided by the Judge.

The Board has considered whether the record below presented any proper basis for the Administrative Judge to exclude the proffered polygraph evidence. If such a proper basis existed, the Board could affirm the Judge's challenged ruling on alternate grounds. The Board has found none in the record below. The question is not whether the Boards likes or dislikes polygraph evidence. The question is whether --- within the parameters of Executive Order 10865, the Directive, and applicable principles of law -- an applicant has the right to seek to present polygraph evidence that he or she

believes is relevant and material to a defense to the government's case against the applicant.

This case presents the issue of the admissibility of polygraph evidence in DOHA proceedings. Because of the unique nature of polygraphs, the novelty of the issue to DOHA proceedings,⁽³⁾ and the need to achieve judicial economy whenever practical, the Board will provide guidance to the Administrative Judge and the parties about the kinds of issues that need to be considered on remand in this case. *See also* Directive, Additional Procedural Guidance, Item 33.b. ("If the case is remanded, the Appeal Board shall specify the action to be taken on remand.").

Nothing in Executive Order 10865 or the Directive addresses the issue of the admissibility of polygraph evidence.⁽⁴⁾ Furthermore, Department of Defense Directive 5210.48 ("DoD Polygraph Program," December 24, 1984) limits the use of polygraph test results by the Department of Defense to make a decision adverse to a person, but is silent on the issue of whether a person can offer polygraph test results as a defense to a proposed adverse action by the Department of Defense. Moreover, the once universal bar against the admissibility of polygraph evidence in federal court proceedings is no longer intact. *See generally*, John E. Thomas, "Admissibility in Federal Criminal Case of Results of Polygraph (Lie Detector) Test -- Post-Daubert Cases," 140 ALR Fed 525 (1997). To the extent that federal court decisions can be relied on as persuasive authority in these proceedings, they do not provide a definitive answer to the issue of whether polygraph test results are admissible. However, federal court decisions on the admissibility of polygraph test results provide valuable insight and guidance on the issue.

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. Even in criminal cases, where the defendant faces the possible loss of life or liberty, a defendant does not have a constitutional right to submit polygraph test results in his or her defense. *United States v. Scheffer*, -- U.S. --, 118 S.Ct. 1261 (1998); *Castillo v. Johnson*, 141 F.3d 218, 221-22 (5th Cir. 1998).⁽⁵⁾ The right to due process under Executive Order 10865 and the Directive does not give Applicant a greater right to present polygraph test results than a criminal defendant has under the Fifth and Sixth Amendments of the U.S. Constitution. *Cf.* ISCR Case No. 96-0277 (July 11, 1997) at p. 3 (applicant's right to confront adverse witnesses is not more expansive than the right to confrontation protected by the Sixth Amendment of the U.S. Constitution). Although Applicant does not have an absolute right to submit polygraph test results on her behalf, that does not mean she has no right to offer such evidence. Of course, absent a stipulation by the parties concerning the admissibility of the 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.

Even in those jurisdictions that have rejected a *per se* bar to the admission of polygraph evidence, the federal courts have not simply let it be admitted routinely into evidence. *See, e.g., United States v. Cordoba*, 104 F.3d 225, 228 (9th Cir. 1997); *United States v. Posado*, 57 F.3d 428, 436 (5th Cir. 1995). Because of the unique nature of polygraph evidence, the courts have recognized the need to consider various issues raised by polygraph evidence, when the parties have not stipulated to its admissibility.⁽⁶⁾ Those issues include:

(1) are the results of the polygraph test relevant and material to the issues of the case? *See, e.g., United States v. Pettigrew*, 77 F.3d 1500, 1515 (5th Cir. 1996); *United States v. Kwong*, 69 F.3d 663, 668 (2d Cir. 1995), *cert. denied*, 116 S.Ct. 1343 (1996); *United States v. Posado*, 57 F.3d 428, 432-33 (5th Cir. 1995); *United States v. Lech*, 895 F.Supp. 582, 585 (S.D. N.Y. 1995);

(2) is the probative value of the proffered polygraph evidence outweighed by the amount of time and resources that would be needed to decide its admissibility? *See, e.g., United States v. Gilliard*, 133 F.3d 809, 815 (11th Cir. 1998); *United States v. Urquidez*, 356 F.Supp. 1363, 1367 (C.D. Cal. 1973);⁽⁷⁾

(3) has the party proffering the polygraph evidence given the other party sufficient notice to adequately prepare to respond to the proffered polygraph evidence? *See, e.g., United States v. Gilliard*, 133 F.3d 809, 812 and 816 (11th Cir. 1998); *United States v. Croft*, 124 F.3d 1109, 1120 (9th Cir. 1997); *United States v. Williams*, 95 F.3d 723, 730 (8th Cir. 1996);

(4) has there been a showing that a proffered witness is qualified to give testimony about the reliability of polygraphs?

See, e.g., *United States v. Williams*, 95 F.3d 723, 728-29 (8th Cir. 1996); *United States v. Galbreth*, 908 F.Supp. 877, 882-83 (D. N.M. 1995);

(5) has there been a showing that there is validity and reliability to polygraph examinations? *United States v. Gilliard*, 133 F.3d 809, 812-15 (11th Cir. 1998); *United States v. Posado*, 57 F.3d 428, 433-34 (5th Cir. 1995); *United States v. Dominguez*, 902 F.Supp. 737, 738-39 (S.D. Tex. 1995); *United States v. Galbreth*, 908 F.Supp. 877, 878-81, 890-91 (D. N.M. 1995);

(6) has there been a showing that the polygraph examination in question was conducted by a qualified polygrapher, using proper techniques, in a proper manner? See, e.g., *United States v. Miller*, 922 F.Supp. 495, 503-04 (D. Kan. 1996); *United States v. Galbreth*, 908 F.Supp. 877, 881-82 and 888-89 (D. N.M. 1995); *United States v. Lech*, 895 F.Supp. 582, 586 (S.D. N.Y. 1995); *United States v. Urquidez*, 356 F.Supp. 1363, 1365-67 (C.D. Cal. 1973);

(7) is the proffered polygraph evidence complete? See, e.g., *United States v. Williams*, 95 F.3d 723, 730 (8th Cir. 1996); *Conti v. Commissioner of Internal Revenue*, 39 F.3d 658, 662-63 (6th Cir. 1994), cert. denied, 115 S.Ct. 1793 (1995); *United States v. Galbreth*, 908 F.Supp. 877, 889 (D. N.M. 1995).⁽⁸⁾

This listing is illustrative and not intended to be exhaustive.

Even if an Administrative Judge concludes that polygraph evidence is admissible, the Judge must still consider what weight can be reasonably given to that evidence. See, e.g., ISCR Case No. 97-0727 (August 3, 1998) at p. 4 n. 1 (even when evidence is admitted without objection, Administrative Judge still must weigh that evidence and consider what weight reasonably can be placed on it).

It is important to emphasize the nature and scope of the Board's decision in this case. The Board is *not* holding that polygraph evidence must be admitted into evidence in DOHA proceedings. The Board is *not* expressing any opinion as to what weight, if any, can or should be given to any polygraph evidence that is admitted into evidence. The Board is *not* changing its position or rulings concerning the polygraph-related issues addressed in the cases cited in footnote 3 of this decision. The Board merely concludes that the Administrative Judge erred in excluding the polygraph evidence offered by Applicant on the basis that it goes to an ultimate issue that the Judge has to decide, and the current state of the record does not provide an proper alternate basis upon which the Board can affirm the Judge's exclusion of the polygraph evidence.

The dissent warrants some remarks. First, the Supreme decision in *United States v. Scheffer* does not have the significance the dissent suggests. Although the Supreme Court noted the controversy surrounding polygraphs, the Court did not pass judgment on the accuracy, reliability, or fairness of polygraph tests.⁽⁹⁾ In a highly divided decision, the Court upheld the right of the President of the United States, acting pursuant to statutory authority, to promulgate a *per se* bar to the admissibility of polygraph evidence in court martial proceedings.

Second, as noted in footnote 5 of this decision, the Secretary of Defense has the right to institute a absolute bar to the admissibility of polygraph evidence in these proceedings. Alternatively, short of a *per se* bar, the Secretary of Defense could amend the Directive to regulate or restrict the use of polygraph evidence in these proceedings.

Third, the dissent alludes to an "anomalous [result]" that would arise if Department Counsel is barred from offering polygraph evidence due to DoD Directive 5210.48 while an applicant is not barred from offering polygraph evidence. Short of usurping the authority of the Secretary of Defense or infringing the right of applicants to offer evidence in their behalf, the Board cannot unilaterally rectify that anomaly. And, in any event, if DoD decides that the lack of symmetry concerning polygraph evidence is troublesome, then the matter can be addressed by the Secretary of Defense. See discussion in preceding paragraph.

Fourth, the dissent alludes to the "risk of burdensome sideshows that polygraph evidence could engender." The Board's decision explicitly recognizes that risk and specifically lists it as a factor that the Administrative Judge must consider when faced with a proffer of polygraph evidence. See polygraph issue 2 at page 5, above. See also polygraph issue 1 at page 5, above. Of course, this decision will require Administrative Judges to perform their responsibilities to "rule on

questions on procedure, discovery, and evidence and . . . conduct all proceedings in a fair, timely, and orderly manner." Directive, Additional Procedural Guidance, Item 10. Furthermore, this decision will also require the parties to exercise diligence in preparing for hearings and zealously representing the interests of their respective clients in connection with polygraph evidence.

Conclusion

Applicant has met her burden of demonstrating error that warrants remand. Pursuant to Item 33.b., the Board remands the case to the Administrative Judge for further proceedings. On remand, the Administrative Judge must reopen the record for the limited purpose of giving Applicant the opportunity to offer the previously excluded polygraph report and the testimony of the polygrapher. Unless the parties stipulate to the admissibility of that evidence, the Judge must permit Department Counsel a reasonable opportunity to cross-examine the polygrapher and raise objections to the admissibility of the polygraph evidence. When deciding whether to admit the proffered polygraph evidence, the Judge must evaluate the proffered evidence in light of the issues noted in this decision. If the Judge concludes the polygraph evidence is admissible, he should give Department Counsel a reasonable opportunity to cross-examine the polygrapher and present rebuttal evidence. Finally, the Judge must issue a new decision that sets forth findings and conclusions as required under Items 35 and 25 of the Additional Procedural Guidance.

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board

See dissenting opinion

Michael Y. Ra'anan

Administrative Judge

Member, Appeal Board

Signed: Jeffrey D. Billett

Jeffrey D. Billett

Administrative Judge

Member, Appeal Board

Dissenting Opinion of Administrative Judge Michael Y. Ra'anan

The majority's decision in this case is quite troubling. I fear that this decision will have unfortunate and preventable repercussions.

I start from the legal environment in which this decision is placed. The Department of Defense is not normally permitted to introduce polygraph results into DOHA proceedings even though the Department's polygraphs are performed under a set of intricate standards designed to ensure fairness, accuracy and reliability (see, DOD Directive 5210.48). Earlier this year the Supreme Court, in *US v Scheffer*, concluded that a *per se* bar against polygraph evidence was constitutional and did not abridge a criminal defendant's right to put on a defense. In that case the defendant was seeking to introduce the results of a polygraph administered by DOD under DOD standards as exculpatory evidence in a criminal case and the Supreme Court said no.

It is also worthy of note that in *Scheffer*, the Court acknowledged the controversy regarding reliability of polygraphs

and the risk of burdensome sideshows that polygraph evidence could engender.

To be sure, the instant case is not squarely addressed either by the DoD Directive on polygraphs, which is concerned with government administered polygraphs or by the Supreme Court, in *US v. Scheffer*, which had a *per se* bar of polygraph evidence to confront. Nonetheless, I believe that both the Directive and the Supreme Court decision are instructive for our concerns. The Board majority's decision is now opening the door for one party to admit polygraph evidence in a non-criminal proceeding when DoD has not been able to guarantee the standard under which that polygraph was performed, while the other party may not admit polygraph evidence that was administered according to DoD standards⁽¹⁰⁾ and while a criminal defendant may not produce such evidence. Such a result is, at best, anomalous. Avoiding such an anomaly, in my opinion, is not a matter of usurping the Secretary of Defense's authority but implementing that authority which has been delegated by the Secretary to the Board.

I do recognize that the Administrative Judge's reasoning below for rejecting the polygraph was explicitly rejected by five justices in the *Scheffer* case and could not be upheld by this body. However, I must dissent from the result of this decision.

Signed: Michael Y. Ra'anan

Michael Y. Ra'anan

Administrative Judge

Member, Appeal Board

1. Department Counsel's reply brief is silent on the polygraph issue.
2. The Administrative Judge initially marked the document as "App.Ex. 'D' for ID." He later marked it as "Appelatte (sic) Ex. I." *See* Hearing Transcript at pp. 40, 392-393.
3. In ISCR Case No. 95-0178 (March 29, 1996) at p. 4, the Board ruled that "the mere fact that an applicant is given a polygraph test is not *per se* coercive and does not render admissions made during or after it involuntary." In ISCR Case No. 94-1057 (August 11, 1995) at pp. 5-6, the Board held that DoD Directive 5210.48 did not exclude an applicant's post-polygraph statements to a polygrapher. Those cases did not involve the issue presented by this case.
4. The term "polygraph evidence" does not include the statements made by the subject of a polygraph examination. The oral or written statements made by the subject of a polygraph examination are not the same as the polygraph charts, the polygraph report, or the polygrapher's opinion whether the subject's statements are truthful or deceptive. *See Wyrick v. Fields*, 459 U.S. 42, 48 n.* (1982)("Although the results of the polygraph examination might not have been admissible evidence, the statements [the defendant] made in response to questioning during the course of the polygraph examination surely would have been."). *Accord* ISCR Case No. 94-1057 (August 11, 1995) at p. 6.
5. Under the reasoning of the Supreme Court's decision in *United States v. Scheffer*, the President of the United States or the Secretary of Defense could institute an absolute bar to the admissibility of polygraph test results in these proceedings. However, neither the Administrative Judge nor the Board has the authority to do so through an evidentiary ruling.
6. Even courts that have resisted admitting polygraph evidence have indicated a willingness to allow it when the parties have stipulated to its admissibility. *See, e.g., United States v. Sherlin*, 67 F.3d 1208, 1216-17 (6th Cir. 1995), *cert. denied*, 116 S.Ct. 795 (1996).
7. Some courts have indicated a concern that polygraph evidence may confuse or mislead juries. *See, e.g., United States v. Call*, 129 F.3d 1402, 1406 (10th Cir. 1997); *United States v. Kwong*, 69 F.3d 663, 668 (2d Cir. 1995), *cert. denied*, 116 S.Ct. 1343 (1996). However, those concerns are based on considerations that do not apply to Administrative Judges. *See United States v. Posado*, 57 F.3d 428, 435 (5th Cir. 1995)(noting judges less likely than jurors to give undue weight to polygraph evidence). *Cf.* ISCR Case No. 97-0299 (December 11, 1997) at p. 2 (in DOHA proceedings, "there is no

need to apply rules of evidence and procedures intended to protect lay jurors from being confused or improperly influenced by arguments made by lawyers").

8. *Cf.* ISCR Case No. 95-0817 (February 21, 1997) at p. 7 (discussing principle of fairness in connection with proffer of partial copy of document by one party).

9. And, in any event, the Board's decision requires the Administrative Judge to consider whether an applicant seeking to present polygraph evidence demonstrates its accuracy, reliability, and fairness. *See* polygraph issues 3, 4, 5, 6, and 7 at pages 5-6, above.

10. It is not difficult to imagine a case where two polygraphs have in fact been conducted with contradictory results and only the side with the less rigorous standards would be permitted to introduce its result and its expert witness.