

## HAS THE DEFENSE OFFICE OF HEARINGS AND APPEALS BECOME A STAR CHAMBER COURT?<sup>1</sup>

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Can you imagine losing your clearance based solely on an unsigned, unsworn, document, purporting to quote you during an interview, whose author is unknown, which may or may not have been written by the person who did the interview, or which may be based on the statement or statements of other unknown persons, with major portions of the document being redacted and denied to you, and which was contradicted by other statements in the government's possession? Can you imagine that the interview was recorded, but you are denied a copy of the recording which would prove what you actually said? Can you imagine losing your clearance for not "confessing" to the allegations in the document which you had previously denied because you did not "accept responsibility" for making the statements attributed to you, but if you had admitted to making the statements you would lose your clearance for what you admitted? Can you imagine being told that your clearance would not be based on what another agency decided, but then the other agency's decision was relied on to show "administrative consequences" flowing from the allegations in the unsigned, unsworn document? We are not talking about military tribunals of Guantanamo prisoners - we are talking about contractor security clearance hearings at the Defense Office of Hearings and Appeals (DOHA).

In ISCR Case No. 10-08390 (App. Bd., Mar 30, 2012) this is exactly what the DOHA Appeal Board decided, ignoring its earlier decisions and disregarding supposed Department of Defense policy against giving reciprocal effect to other agencies' adverse clearance determinations. In this case, at some time earlier the employee had been interviewed as part of a polygraph exam by the CIA for eligibility for access to Sensitive Compartmented

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<sup>1</sup> The Star Chamber was an English court of law in the 15<sup>th</sup> Century that was set up to ensure a fair enforcement of laws against prominent people, who were so powerful that ordinary courts could never convict them of crimes. Over time because of abuse it became synonymous with arbitrary rulings and secretive proceedings. *Wikipedia - Star Chamber*. Found at: [En.wikipedia.org/wiki/star\\_chamber](http://en.wikipedia.org/wiki/star_chamber), 4/30/2012. "The Star Chamber has, for centuries symbolized disregard of basic individual rights". *Faretta v. California*, 422 U.S. 806, 821-822(1975).

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Information (SCI). Based on the interview the CIA denied access. During a later interview by an OPM investigator as part of a DoD clearance investigation, the employee explained some of statements attributed to him in a CIA report as misrepresentations of what he actually said, and denied other of the statements.<sup>3</sup>

DOHA proposed to revoke the employee's clearance based on two documents: an unsigned six page report by an unnamed person of his earlier interview by perhaps another unnamed person, four pages of which had been completely redacted; and a letter from the CIA stating it had earlier denied the employee SCI access. Prior to, and again at the DOHA hearing, the employee moved to exclude the CIA's report and letter. Government Counsel opposed both motions, but did however, withdraw the Statement of Reasons (SOR) charge based on the CIA's decision letter, stating:

Although there is no 'negative reciprocity' in security clearance adjudications, the factual matters addressed [in the letter] relative to the Allegation [2.b] are relevant and material parts of the Government's security concerns. However the Government voluntarily withdraws the Allegation.

Paragraph 2.b of the SOR had charged that: "You were disapproved for access to classified information on [date] due, in part, to [conduct charged] as set forth in Subparagraph 1.a. above". (Subparagraph 1.a was based on the statements in the contested report of interview.) Despite there no longer being a charge based on the CIA's decision denying access, the Administrative Judge, without explanation either at the prehearing conference or later in her decision, declined to exclude either the CIA's decision letter or its report of interview.<sup>4</sup> At the DOHA hearing the employee testified that what was reported in the redacted anonymous CIA report misconstrued and misinterpreted what he said during the CIA interview. His sworn affidavit subsequently taken by an OPM investigator and introduced by the Government as part of its evidence corroborated his testimony at the hearing.

Nevertheless, the Administrative Judge accepted as true the redacted anonymous CIA report, and rejected the employee's testimony and his earlier sworn affidavit given to the

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<sup>3</sup> DOHA does not adjudicate SCI "access" decisions, those being left to the agencies which grant or deny such access. DOHA's jurisdiction extends to only Confidential, Secret or Top Secret security clearances (or so-called "collateral" clearances) which do not involve access to SCI or Special Access Program Information. DoD Dir. 5220.6, Par 2.6 (Jan 2, 1992, as amended).

<sup>4</sup> ISCR Case No. 10-08390, p.2, f.n.1 (AJ Dec., Jan 4, 2012).

OPM investigator.<sup>5</sup> Because the employee did not admit to the statements attributed to him in the CIA report, the Administrative Judge further found that he did “not accept responsibility for his actions”, and that “it is not believable that the agency case notes are fabrications or falsifications”. The initial decision was affirmed by the Appeal Board ignoring its earlier decisions barring the use of such anonymous reports.<sup>6</sup>

In an earlier case the Appeal Board had held that a report of a polygraph interview was a “Report of Investigation” which was inadmissible under the rules of the Department of Defense Directive (the Directive) controlling DOHA proceedings.<sup>7</sup> It held that such a report was inadmissible unless Government Counsel provided an authenticating witness, or unless the document was otherwise admissible under the Federal Rules of Evidence.<sup>8</sup> That was not done in the instant case.<sup>9</sup> Also earlier, the Appeal Board had held the general Rules of Evidence or general principles of law cannot override or supersede specific provisions of the Directive.<sup>10</sup> In another case the Appeal Board had held that to be otherwise admissible, the complete document had to be provided under the “doctrine of completeness” as codified in Rule 106 of the Federal Rules of Evidence.<sup>11</sup> That too was not done in No. 10-08390.

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<sup>5</sup> ISCR Case No. 10-08390, p. 6 (AJ Dec., Jan 4, 2012).

<sup>6</sup> ISCR Case No. 10-08390 (App. Bd, Mar. 30, 2012).

<sup>7</sup> DOD Directive 5220.6, ¶E3.1.20. (Jan 2, 1992, as amended).

<sup>8</sup> ISCR Case No. 02-12199 (App. Bd, Oct. 7, 2004). That case had a long history. There was a first AJ decision on January 29, 2004, a first Appeal Board decision on October 7, 2004, a first “remand” AJ decision on January 3, 2005, a second Appeal Board decision on August 8, 2005, a second remand AJ decision on September 20, 2005, and a third Appeal Board decision on April 3, 2006. A description of the contested exhibits in that case is found in the first remand decision. Government Exhibit 2.c was a report of an interview of applicant written by a polygraph examiner. Government Exhibits 2.d, 2.g and 2.I were initial and appeal decisions denying the applicant’s clearance based on the polygraph examiner’s report.

<sup>9</sup> ISCR Case No. 10-08390 (App. Bd, Mar 30, 2012).

<sup>10</sup> ISCR Case No. 02-12199a.1, p. 5 (App. Bd, Oct. 4, 2004).

<sup>11</sup> ISCR Case No. 08-06997, p. 4, f.n. 6 (App. Bd, Mar. 1, 2011). Federal Rule of Evidence 106 states: “When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it”.

On appeal, the employee argued that the CIA's report of its interview was further inadmissible under Paragraph E3.1.22 of the Directive (which states that an adverse statement controverted by the employee was inadmissible unless the person making the statement was available for cross examination, or the Department or Agency supplying the statement certified that the person was a confidential informant), because the report was a report of an alleged written or oral statement of the applicant adverse to him on a controverted issue.<sup>12</sup> The employee further argued that the anonymous redacted report of interview did not meet the criteria as an official record or evidence compiled or created in the regular course of business, for which, the Appeal Board had earlier held, it would look to Federal Rule of Evidence 803(8), "public Records and Reports," as the "lodestar" of the public records requirement of Paragraph E.3.1.20 of the Directive.<sup>13</sup>

Since the Appeal Board had also held the Fed R. Evid. 803(8) (c) requires evidence of "trustworthiness" before a document is admissible,<sup>14</sup> the employee argued: because the identity of the interviewer was unknown; because it was not known if the person who wrote the report was the same person who conducted the interview; because it was not known whether the report was written contemporaneously with the interview or later; because the report was a purported summary of applicant's words and not a verbatim transcript; because neither the author of the document nor the person who was the source of its content was under oath; and because the employee had always disputed the contents of the report, the report, therefore, was *prima facie* untrustworthy. Nevertheless, the Appeal Board simply ignored its prior precedent and affirmed the admission of the report.

In the most recent case, despite all of the challenges raised by the employee, the Appeal Board found that there was no basis to conclude that the report lacked trustworthiness as required by Federal Rule of Evidence 803(8) and admitted it as an official agency record under Paragraph E3.1.20 of the Directive. With regard to the challenge based on incompleteness under Federal Rule of Evidence 106, because CIA Counsel wrote a letter stating that four pages of the six page report were redacted to protect not only classified information, but also "other information with national security implications as well as extraneous matters", the Board allowed its use without requiring the productions of the rest of the report. Although virtually everything the defense and intelligence agencies do has "national security implications", and although the only type of information that may be

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<sup>12</sup> ISCR Case No. 02-12199a.1(App. Bd, Oct. 7, 2004).

<sup>13</sup> ISCR Case No. 02-12199a.2 (App. Bd, Aug 8, 2005).

<sup>14</sup> ISCR Case No. 02-12199a.3 (App. Bd, Apr. 4, 2006) (approving AJ's reasoning in ISCR Case No. 02-12199h.3 (AJ Dec., Sept. 20, 2005).

withheld is classified information, the representation of CIA Counsel was sufficient for the Appeal Board to allow the redacted report in evidence despite its incompleteness.<sup>15</sup>

With respect to the CIA's decision letter denying the employee SCI access, the Appeal Board had earlier ruled that another agency's clearance revocation decision could not be used unless the Administrative Judge articulated why other agency's decision had "security significance independent of the underlying reasons for the revocation."<sup>16</sup> Nevertheless, over the employee's objection the Appeal Board affirmed the admission of the CIA's letter, despite the purported DoD policy to not to deny a security clearance based on another agency's determination.<sup>17</sup> The Appeal Board held that "despite the withdrawal of the allegation [of SOR, Paragraph 2.b], the letter was "relevant insofar as [it] showed the administrative consequences flowing directly from [sic] Applicant's security significant misconduct . . . .[It is] also relevant to a whole person analysis".<sup>18</sup> Whatever the Appeal Board meant by that enigmatic statement, the result is that another agency's adverse clearance decision would now itself be the basis for denying a DOD clearance, even if contrary to stated DoD policy, and even if not charged in the Statement of Reasons.

While the burden of proof by has always been placed on the employee by the DOHA Appeal Board to show why he or she should be granted a security clearance, until now there was a modicum of a right to confrontation, and a right to challenge the evidence presented by the government. With this most recent case, anonymous redacted reports and other agency's decision are enough to deny or revoke a DoD clearance regardless of contrary evidence.

In another case decided two months later the Appeal Board reversed the Administrative Judge who had granted a clearance, where "the Government's case depended, in large measure, upon the contents of . . . a Clearance Decision Statement issued by AGA [another government agency] in denying Applicant access to SCI".<sup>19</sup> The Appeal Board now declared unequivocally that "Clearance Decision Statements are admissible as substantive evidence in DOHA hearings", on the rationale that "Federal agencies and their employees are entitled to a presumption of good faith and regularity in the performance of their

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<sup>15</sup> ISCR Case No. 10-08390 p. 4 (App. Bd, Mar. 30, 2012).

<sup>16</sup> ISCR Case No. 03-09212, p. 6 (App. Bd, May 10, 2006).

<sup>17</sup> ISCR Case No. 10-08390, pp. 2-3 (AJ Dec., Jan 4, 2012).

<sup>18</sup> ISCR Case No. 10-08390, Id at p3.

<sup>19</sup> ISCR Case No. 11-03452, p. 4 (App. Bd, June 6, 2012).

responsibilities.”<sup>20</sup> Although the Administrative Judge had credited applicant’s version of the disputed facts, the Appeal Board took away from the Administrative Judge his role as a fact finder and relied on the other agency’s Clearance Decision Statement as final and unchallengeable<sup>21</sup>.

The Appeal Board similarly reversed an Administrative Judge’s favorable decision in another case based solely on another agency’s clearance decision even though the events cited in that decision were disputed by the applicant at the hearing.<sup>22</sup> The fact that the other agency’s decision letter was written by one person, based on another person’s report of a third person’s polygraph exam made no difference to the Appeal Board.<sup>23</sup>

With the Appeal Board’s allowing the revocation of a DoD collateral clearance based solely on a contested report of polygraph exam from another agency, with or without a letter from the other agency stating that SCI access had been denied, the consequences of applying for SCI access can go far beyond a decision on SCI access alone. That polygraph exam may result in the denial of a future clearance or the revocation of an existing clearance then held by the employee at another agency or another contractor.<sup>24</sup> If an employee does apply for and is later denied SCI access, the employee should appeal the negative decision, at least to get his or her side of the issues on the record. If confronted at a subsequent security clearance hearing with the earlier decision denial of SCI access, the employee will have his or her version of events on record. Leaving the first agency’s access decision unchallenged will be regarded in any later DOHA hearing as an admission of the truth of the earlier polygraph report, with the result that the employee’s after-the-fact explanation, when weighed against the anonymous polygraph report, will most probably be rejected.

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<sup>20</sup> Ibid.

<sup>21</sup> ISCR No. 11-03452 (AJ Dec., Feb 12, 2012)

<sup>22</sup> ISCR No. 07-18324 (App. Bd, Mar. 11, 2011).

<sup>23</sup> ISCR No. 07-18324, p. 2 (AJ Dec., Oct. 28, 2010).

<sup>24</sup> See, S.I. Cohen, *Applying for SCI Access-Be Forewarned; Problems with Reciprocal Clearances*, found at: [www.sheldoncohen.com/publications/SCI%20Access%20Article%20sec.pdf](http://www.sheldoncohen.com/publications/SCI%20Access%20Article%20sec.pdf)