KEYWORD: Guideline I

DIGEST: Applicant cites to Directive ¶ E3.1.22 in arguing that her right of cross-examination was denied because she did not have an opportunity to cross-examine the clinical psychologist who conducted the mental health evaluation reflected in GE 2. This argument lacks merit. First, given Applicant's failure to object to GE 2 when it was offered at the hearing, she cannot now contend its admission into evidence or the Judge's consideration of it was an error. Although *pro se* applicants cannot be expected to act like lawyers, they are expected to take timely, reasonable steps to protect their rights under the Directive. Second, the Appeal Board has consistently held that ¶ E3.1.22 does not provide a right of cross-examination concerning out-of-hearing statements that are admissible under other provisions of the Directive. In this case, GE 2 is an admissible record under Directive ¶ E3.1.20 (official records or evidence compiled or created in the regular course of business). Furthermore, Directive ¶ E3.1.19 provides that the Federal Rules of Evidence (FRE) shall serve as a guide in DOHA proceedings. GE 2 is also admissible into evidence under FRE 803(6)(records of regularly conducted activity). The Judge's admission of GE 2 into evidence did not violate Applicant's right to cross-examination under ¶ E3.1.22.

CASENO: 18-01755.a1

DATE: 07/11/2019

DATE: July 11, 2019

In Re:	)	
----------	)	ISCR Case No. 18-01755
Applicant for Security Clearance	)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT
Erin P. Thompson, Esq., Department Counsel

FOR APPLICANT
Zachary Knipe, Personal Representative

The Department of Defense (DoD) declined to grant Applicant a security clearance. On July 3, 2018, DoD issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline I (Psychological Conditions) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Department Counsel requested a hearing. On March 27, 2019, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Elizabeth M. Matchinski denied Applicant's request for a security clearance. Applicant appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raised the following issues on appeal: whether her right of cross-examination was denied and whether the Judge's adverse decision was arbitrary, capricious, or contrary to law. Consistent with the following, we affirm.

The Judge summarized the case as follows:

> Applicant was evaluated by a duly-qualified clinical psychologist in February 2018 and found to have a poor prognosis for her mental-health stability because of her chronic borderline personality disorder and minimization of her need for ongoing psychotherapy treatment. She exhibited adequate judgment and insight during a brief assessment for medication management with her treating psychiatrist in January 2019, but it was not established that her condition no longer presents a security risk. Clearance is denied. [Decision at 1.]

At the hearing, Department Counsel offered into evidence the report of a mental health evaluation that was conducted by a licensed clinical psychologist, which was marked as Government Exhibit (GE) 2. This evaluation was conducted at the request of the DoD Consolidated Adjudications Facility. Applicant represented herself at the hearing and had no objection to the admission of GE 2 into evidence. Tr. at 22-23.

In her appeal, Applicant cites to Directive ¶ E3.1.22 in arguing that her right of cross-examination was denied because she did not have an opportunity to cross-examine the clinical psychologist who conducted the mental health evaluation reflected in GE 2. This argument lacks merit. First, given Applicant's failure to object to GE 2 when it was offered at the hearing, she cannot now contend its admission into evidence or the Judge's consideration of it was an error. *See, e.g,* DISCR OSD Case No. 92-1606 at 5 (App. Bd. Jan. 5, 1995). Although *pro se* applicants cannot be expected to act like lawyers, they are expected to take timely, reasonable steps to protect their rights under the Directive. *See, e.g.*, ISCR Case No. 12-02371 at 3 (App. Bd. Jun. 30, 2014). Second, the Appeal Board has consistently held that ¶ E3.1.22 does not provide a right of cross-

examination concerning out-of-hearing statements that are admissible under other provisions of the Directive. *See, e.g.*, ISCR Case No. 11-12461 at 3-5 (App. Bd. Mar. 14, 2013). In this case, GE 2 is an admissible record under Directive ¶ E3.1.20 (official records or evidence compiled or created in the regular course of business). *See, e.g.*, ISCR Case No. 09-04696 at 3 (App. Bd. Jul. 3, 2013). Furthermore, Directive ¶ E3.1.19 provides that the Federal Rules of Evidence (FRE) shall serve as a guide in DOHA proceedings. GE 2 is also admissible into evidence under FRE 803(6)(records of regularly conducted activity). The Judge's admission of GE 2 into evidence did not violate Applicant's right to cross-examination under ¶ E3.1.22.

In the decision, the Judge noted that "[t]here is no assessment from a duly-qualified medical professional that classified information would not be at risk should Applicant be placed in a particularly stressful situation in the future." Decision at 14. Applicant argues that her treating psychiatrist's progress note of January 17, 2019 (Applicant's Exhibit A) provides such an assessment. This assignment of error is not persuasive. The scant progress note (relying on a 15-minute appointment) does not discuss whether or not Applicant's psychological conditions present a security risk.

Applicant also contends that the Judge placed undo weight on GE 2, especially in light of evidence that she presented from her treating psychiatrist. The weighing of evidence, however, is a matter within the Judge's special province as the trier of fact in security clearance adjudications. *See*, e.g., ISCR Case No. 18-00857 at 4 (App. Bd. May 8, 2019)(citing *Inwood Laboratories, Inc. v. Ives Laboratories Inc.*, 456 U.S. 844, 856 (1982)). Applicant's arguments are not sufficient to show the Judge weighed the evidence in a manner that was arbitrary, capricious, or contrary to law. *See, e.g.,* ISCR Case No. 15-08684 at 2 (App. Bd. Nov. 22, 2017).

Applicant has failed to establish that the Judge committed any harmful error. The Judge examined the relevant evidence and articulated a satisfactory explanation for the decision. The decision is sustainable on this record. "The general standard is that a clearance may be granted only when 'clearly consistent with the interests of the national security.'" *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). *See also* Directive, Encl. 2, App. A ¶ 2(b): "Any doubt concerning personnel being considered for national security eligibility will be resolved in favor of the national security."

Order

The Decision is **AFFIRMED**.

Signed: Michael Ra'anan
Michael Ra'anan
Administrative Judge
Chairperson, Appeal Board

Signed: James E. Moody
James E. Moody
Administrative Judge
Member, Appeal Board

Signed: James F. Duffy
James F. Duffy
Administrative Judge
Member, Appeal Board