

KEYWORD: Guideline I

DIGEST: If Applicant wanted the Judge to consider a statement from his human resource specialist or any other evidence, it was his responsibility to provide it to her. Applicant has not alleged that he was misled by any Government official about his rights or responsibilities under the Directive, but rather attributed the evidentiary omissions to his lack of understanding of the adjudicative process. Any incorrect assumptions Applicant may have made or misunderstandings he may have had regarding his rights and responsibilities under the Directive cannot fairly be placed on DOHA or other DoD officials. Having decided to represent himself during the proceedings below, Applicant is not entitled to be relieved of the consequences of his decision. Applicant has failed to establish that he was denied the due process afforded him under the Directive. Adverse decision affirmed.

CASE NO: 19-02819.a1

DATE: 12/21/2020

DATE: December 21, 2020

In Re:	)	
	)	
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	)	
Applicant for Security Clearance	)	

**APPEAL BOARD DECISION**

**APPEARANCES**

**FOR GOVERNMENT**

James B. Norman, Esq., Chief Department Counsel

**FOR APPLICANT**

*Pro se*

The Department of Defense (DoD) declined to grant Applicant a security clearance. On November 29, 2019, 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). Applicant requested a decision on the written record. On September 22, 2020, after considering the record, 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 he was denied due process, whether the Judge erred in her findings of fact, and whether the Judge’s adverse decision was arbitrary, capricious, or contrary to law. Consistent with the following, we affirm.

### **The Judge’s Findings of Fact and Analysis**

Applicant is college graduate in his late 20s and has worked for a defense contractor for about the past five years. In her analysis of the disqualifying conditions, the Judge stated:

As a youth, Applicant was diagnosed with Asperger’s Syndrome (now diagnosed as ASD [Autism Spectrum Disorder] under the DSM-5 [Diagnostic and Statistical Manual of Mental Disorders, 5<sup>th</sup> Edition]), a developmental disorder that is characterized by impaired social interaction, repetitive patterns of behavior, restricted interests, atypical sensory responses, and some pragmatic deficits. He disputes the validity of college reports of his “odd behaviors” and “physical outbursts in class,” and the evidence of that behavior is largely hearsay. However, Applicant did admit to a licensed psychologist in January 2019 that he dominated classes in college by asking questions excessively and that he lacked some control over that behavior, and that he had counseling in college for social anxiety and disinterest in socializing with others. In his present job, his ASD has reportedly manifested itself in head banging, angry outbursts, running throughout the workplace, and emotional dysregulation in front of customers. During his PSI [personal subject interview], he disclosed that he had been reprimanded at work for chronic tardiness, that he intentionally banged his head on a dumpster when he was angry, and that he was suspended from work after he became upset, ran around, and cried about retrieving a [piece of equipment] near his shift’s end. During his January 2019 psychological evaluation, he admitted that he has attempted to injure himself with a sharp object in the past. Disqualifying condition AG ¶ 28(a) under Guideline I has some applicability. It provides:

- (a) behavior that casts doubt on an individual’s judgment, stability, reliability, or trustworthiness, not covered under any other guideline and that may indicate an emotional, mental, or personality condition, including, but not limited to, irresponsible, violent, self-harm,

suicidal, paranoid, manipulative, impulsive, chronic lying, deceitful, exploitative, or bizarre behaviors.

In January 2019, a licensed psychologist diagnosed Applicant with highly-functioning ASD without accompanying intellectual impairment with generalized anxiety. In her opinion, his ASD is a permanent condition that affects his judgment, reliability, and trustworthiness with respect to his psychosocial functioning, perceptions, and decision making. AG ¶ 28(b), “an opinion by a duly qualified mental health professional that the individual has a condition that may impair judgment, stability, reliability, or trustworthiness,” is also established. While Applicant strongly disagrees with the psychologist’s assessment, her clinical opinion is entitled to weight in light of her qualifications and the absence of a contrary assessment by a duly-qualified medical or mental-health professional. [Decision at 8-9]

In her analysis of the mitigating conditions, the Judge noted factors that weighed in favor of Applicant, including that the psychologist found him to be relatively stable at the time of his evaluation and opined he is capable of following directions, but she also opined he is likely to continue having problems with decision-making. The psychologist gave him only a fair prognosis. The Judge concluded that Applicant failed to rebut sufficiently the opinion of the psychologist that his condition affects his judgment, reliability, and trustworthiness. In her whole-person analysis, the Judge also noted that, because Applicant chose to have his security clearance eligibility evaluated without a hearing, she was unable to assess his sincerity or demeanor and cited ISCR Case No. 19-02544 (App. Bd. Aug. 31, 2020) for the proposition that credibility determinations without the benefit of in-person demeanor observations are indistinguishable from a judge’s fact-finding based on purely documentary evidence. Applicant also failed to present any employment or character references attesting to his current judgment or reliability.

## **Discussion**

In his appeal brief, Applicant highlights the Judge’s findings that noted he failed to present certain evidence, such as failing to provide corroboration of some of his assertions and failing to submit character reference statements. He notes that he had an understanding that he should keep his employment relationship with a particular Government agency strictly confidential. He states, “. . . I must confess that there was a terribly strong, unspoken assumption on options were strictly limited when it came to the question of whom I could communicate my clearance predicament to.” Appeal Brief at 2. He further argues there was little opportunity to reach out to his management “even if [he] seriously considered to” due to Coronavirus 2019 (COVID-19) workplace restrictions as well as personnel turnovers at work. *Id.* at 2-3. Furthermore, he asserts that he thought DOHA would contact his company’s human resource specialist to obtain corroborating evidence or testimony. We interpret these assertions as raising the issue of whether Applicant was denied due process.

Applicant was provided a copy of the Directive when he received the SOR. Directive ¶

E3.1.15 provides “[t]he applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven by Department Counsel, and has the ultimate burden of persuasion as to obtaining a favorable clearance decision.” In Department Counsel’s File of Relevant Material (FORM) and its forwarding letter, Applicant was informed that, unless he presented additional information, the Judge would base her decision solely upon the information contained in the FORM. Applicant was given 20 days from receipt of the SOR and 30 days from receipt of the FORM to respond to those documents. There is no indication in the record that Applicant requested an extension of time to respond to either document. Neither Department Counsel nor the Judge had a duty to obtain or present mitigating evidence. *See, e.g.*, ISCR Case No. 12-10335 at 4 (App. Bd. Dec. 29, 2017). If Applicant wanted the Judge to consider a statement from his human resource specialist or any other evidence, it was his responsibility to provide it to her. Applicant has not alleged that he was misled by any Government official about his rights or responsibilities under the Directive, but rather attributed the evidentiary omissions to his lack of understanding of the adjudicative process. Any incorrect assumptions Applicant may have made or misunderstandings he may have had regarding his rights and responsibilities under the Directive cannot fairly be placed on DOHA or other DoD officials. *See, e.g.*, ISCR Case No. 15-03168 at 3 (App. Bd. Jul. 21, 2017). Having decided to represent himself during the proceedings below, Applicant is not entitled to be relieved of the consequences of his decision. *See, e.g.*, ISCR Case No. 03-04779 at 3 (App. Bd. Jul. 20, 2005). Applicant has failed to establish that he was denied the due process afforded him under the Directive.

As a related matter, Applicant highlights the Judge’s citation to ISCR Case No. 19-02544 (App. Bd. Aug. 31, 2020) and her comment that she was unable to assess his sincerity and demeanor because he chose to have his security eligibility evaluated without a hearing. He contends that he was unaware of “a government preference for one way of decision-making over another” (Appeal Brief at 4) and further states:

The Appeal Board may have recently stressed the effective benefit of in-person demeanor observations for credibility determinations, but I never had this understanding, much less the foresight to anticipate such a standard in an August 31, 2020 decision regarding a separate case—over a month after I wrote my July letter [FORM Response] to contribute to the written record. Naturally ignorant of such credibility determinations, I felt no obligation to defend my method of communication or stress a sincerity that I assumed to be self-evident. [*Id.*]

First, there is no Government preference as to whether an applicant requests a hearing or a decision on the written record. Directive ¶¶ E3.1.4 and E3.1.7 (Department Counsel may, however, request a hearing if applicant does not elect one). Second, the Appeal Board decision cited above did not establish a new precedent. In fact, the language in question in that decision is a direct quote from ISCR Case No. 01-12350 at 3 (App. Bd. Jul. 23, 2003). The Board has long held that when an applicant waives a hearing and chooses to have his or her case decided by a Judge based on a written record, the Judge has no ability to make a credibility determination based on observation of the applicant’s demeanor. Accordingly, a credibility determination based solely on a written record is not entitled to the same deference on appeal as a credibility determination based on observation of

a witness's demeanor. *See, e.g.*, ISCR Case No. 97-0625 at 2-3 (App. Bd. Aug. 17, 1998). As noted above, an applicant, even if *pro se*, is generally responsible for the consequences of his or her decisions. Applicant has not established any error in the way in which the Judge analyzed the evidence.

Applicant challenges that Judge's finding that he was "not specific as to the source or nature of the counseling" he planned to seek after the COVID-19 pandemic was resolved. Appeal Brief at 3, quoting from Decision at 6-7. He notes that he provided information reflecting he and his family obtained family counseling from a specific organization for an intrafamily conflict and essentially argues the source and nature of the counseling he planned to seek was adequately identified. His argument has merit. The Judge cites to Applicant's Exhibit (AE) A as the evidence supporting the challenged finding. A review of AE A reveals the counseling Applicant indicated he intended to seek after resolution of the COVID-19 pandemic was the family counseling for the intrafamily conflict as opposed to counseling for his mental health condition. Although the Judge erred in this challenged findings, it was a harmless error because it did not likely affect the outcome of the case. *See, e.g.*, ISCR Case No 19-01220 at 3 (App. Bd. Jun. 1, 2020).

Applicant further challenges the Judge's conclusions that he has a permanent development disorder that affects his judgment, reliability, and trustworthiness. He also contends that he has mitigated the Guideline I security concerns. His arguments amount to a disagreement with the Judge's weighing of the evidence, which is not enough to show that the Judge reached conclusions that are arbitrary, capricious, or contrary to law. *See, e.g.*, ISCR Case No. 18-02239 at 3 (App. Bd. Jul. 20, 2020).

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