

KEYWORD: Guideline H; Guideline E

DIGEST: The ineffective assistance of counsel doctrine is not applicable in a DOHA proceeding. An examination of the record shows that Applicant received from DOHA the due process afforded by the Directive. Adverse decision is affirmed.

CASE NO: 18-02398.a1

DATE: 05/11/2020

DATE: May 11, 2020

In Re:	)	
	)	
-----	)	ISCR Case No. 18-02398
	)	
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 9, 2018, DoD issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline H (Drug Involvement and Substance Misuse) and Guideline E (Personal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On February 5, 2020, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Caroline E. Heintzelman denied Applicant’s request for a security clearance. Applicant appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

The SOR alleged, and the Judge found, that Applicant had used marijuana once each in 2011 and 2012 and again ingested marijuana in early 2016; that he purchased and used MDMA (ecstasy) in 2017, and sold ecstasy at a party in 2017; and that Applicant had deliberately failed to disclose his security significant conduct on his security clearance application and during a clearance interview.

Applicant was represented at the hearing by an attorney. Applicant’s Appeal Brief lists several things that his attorney did, or that he failed to do, that Applicant believes impaired a full and effective presentation of his case for mitigation. For example, he argues that an affidavit submitted on his behalf contained errors. Much of Applicant’s brief consists of new evidence, which we generally cannot consider, although we will consider new evidence insofar as it bears upon jurisdiction or due process. Directive ¶ E3.1.29. *See* ISCR Case No. 18-01764 at 1-2 (App. Bd. Jun. 4, 2019). Having said that, the ineffective assistance of counsel doctrine is not applicable in a DOHA proceeding. *See, e.g.*, ISCR Case No. 15-07941 at 2-3 (App. Bd. Nov. 29, 2018).<sup>1</sup> An examination of the record shows that Applicant received from DOHA the due process afforded by the Directive. *See* Directive ¶ E3.1.8 *et seq.*

Applicant’s brief cites to his good duty performance. He also contends that he omitted his drug involvement due to fear, something that he had testified about at the hearing. However, Applicant’s argument is not enough to show that the Judge weighed the evidence in a manner that was arbitrary, capricious, or contrary to law. *See, e.g.*, ISCR Case No. 18-02581 at 4 (App. Bd. Jan. 14, 2020).

Applicant’s brief does not raise an issue of harmful error by the Judge. The Judge examined the relevant evidence and articulated a satisfactory explanation for the decision. Failure or refusal to provide truthful answers during the security clearance process “will normally result in an unfavorable clearance action[.]” Directive, Enclosure 2 ¶ 15(b). *See also* ISCR Case No. 15-08255 at 3 (App. Bd. Aug. 22, 2017). 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.”

---

<sup>1</sup>Applicant argues that he did not know that he could have provided additional evidence until December 2, suggesting that his lawyer withheld that from him. It was discussed at his hearing. Tr. pp 80-81.

**Order**

The Decision is **AFFIRMED**.

Signed: Michael Y. Ra'anan  
Michael Y. 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