Date: November 13, 2023

In the matter of:	)	
-----	)	ISCR Case No. 22-00803
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 August 3, 2022, DoD issued a Statement of Reasons (SOR) advising Applicant of the basis of that decision – security concerns raised under Guideline H (Drug Involvement and Substance Misuse) and Guideline E (Personal Conduct) of the National Security Adjudicative Guidelines (AG) in Appendix A of Security Executive Agent Directive 4 (effective June 8, 2017) and DoD Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). On September 11, 2023, Defense Office of Hearings and Appeals Administrative Judge Carol G. Ricciardello denied Applicant's security clearance eligibility. Applicant appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

The SOR alleged, under Guideline H, that Applicant used marijuana in May 2021 while granted access to classified information; used and purchased cannabidiol (CBD) from 2015 to present while granted access to classified information; and failed two court-ordered drug screens in 2021 for methamphetamines and marijuana. The Government amended the SOR to add "or holding a sensitive position" to these allegations. Under Guideline E, the SOR alleged that Applicant was held in contempt of court in 2021 for "dishonesty to the Court" during testimony

about his drug use. He also sent harassing and/or threatening text messages to his former spouse, resulting in the court issuing an *ex parte* order of protection, and he admitted to being in civil contempt of court for violating a no-contact order for another derogatory text message. The Judge found in favor of Applicant on the CBD allegation and against him on the other allegations.

On appeal, Applicant raises procedural due process challenges pertaining to his right to be represented by counsel and his failure to object to a motion to amend the SOR. He also includes new evidence with his appeal and argues why he should be granted security eligibility. These arguments are without merit.

First, Applicant contends he attempted to contact an attorney or personal representative to assist him at his hearing but was unable to find someone in time and he did not know how to ask for a continuance so that he could engage an attorney. He said he "did [his] best to handle [his] hearing but obviously failed," and had he been able to present his case "completely and with proper procedure, it would prove that [he was] an asset and not a liability." Appeal Brief at 1. He also believes that had he presented additional evidence that he included in his appeal, he would have prevailed. *Id*. Applicant does not dispute the Judge's findings or conclusions and praises the Judge and DC's respectful attitude and help they gave him during the hearing.[1] Appeal Brief at 2. Rather, he argues that had he been represented or was better able to present facts and argue his case, he would have had a favorable outcome.

The Appeal Board does not review cases *de novo* and is prohibited from considering new evidence on appeal. Directive ¶ E3.1.29. In general, Applicant's substantive arguments regarding the unfavorable decision amount to a disagreement with the Judge's weighing of the evidence, which is not sufficient to demonstrate that she weighed the evidence or reached conclusions in a manner that is arbitrary, capricious, or contrary to law. *See, e.g.*, ISCR Case No. 06-17409 at 3 (App. Bd. Oct. 12, 2007).

Applicant's procedural due process challenges are neither persuasive nor supported by record evidence. Regarding these claims, it should be noted that, while *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. 17-02196 at 2-3 (App. Bd. Apr. 27, 2018). Furthermore, having decided to represent themselves during the proceedings below, *pro se* applicants cannot fairly complain about the quality of their self-representation or seek to be relieved of the consequences of their decision to represent themselves. *See, e.g.*, ISCR Case No. 11-08118 at 2-3 (App. Bd. Aug. 12, 2013).

Applicant's claim that he did not understand hearing procedures was not the result of any failure on the part of the Government or the Judge. Rather, Applicant was provided adequate information about hearing procedures. First, when he received the SOR, Applicant was provided a copy of the Directive, which sets forth detailed procedural rules for conducting hearings, including an applicant's right to be represented by counsel or a personal representative and the standard for granting continuance requests. Directive ¶¶ 4.3 and E3.1.8. In September 2022, Department Counsel sent Applicant a letter that contained the DC's contact information, advised

[1] "The judge and defense attorney were respectful and helped me to the limit of their ability." "Judge Ricciardello was respectful and as helpful as she was allowed to be." Appeal Brief at 2.

him to contact DC with any questions, and again informed him of his representational rights at the hearing. When he received the notice of hearing, Applicant was also provided the Chief Administrative Judge's prehearing guidance. This guidance advised that the hearing was an adversarial proceeding, the Government would be represented by counsel, his right to counsel or a non-lawyer representative, how to request a postponement of a scheduled hearing, and other information about hearing procedures, including the right to present and object to evidence.

During the hearing, Applicant acknowledged receiving the Chief Judge's letter and indicated that he intended to represent himself. Tr. at 5. The Judge painstakingly explained the hearing procedures with Applicant, instructed him on objections, requesting clarifications or addressing questions, and made substantial efforts to ensure his testimony was clear and complete. *See, e.g.*, Tr. at 6-15. During the hearing, Applicant did not request an opportunity to retain counsel or request additional time to find someone to represent him or prepare his case. He knew how to contact DC as he testified that he had sent him evidence. Tr. at 14. He noted his past mistakes in his opening statement, and said, "…obviously, I've had plenty of time to think about it and also time to speak with my – with counsel [providing representation in other matters], and I've submitted those documents of all my evaluations, all my mental evaluations, and continuing – continue speaking with the counsel, and also the drug test that I sent in since all that took place should prove that there are not issues with illegal drug use, and it was a bad mistake one time, and it hasn't happened again." *Id*. At one point while trying to explain his past court proceedings to the Judge, he noted he "did try to . . . retain counsel, but . . ." before being cut off with the Judge's attempt to clarify her question. Tr. at 22. However, at no time did Applicant explain that he wanted counsel or a personal representative or request a continuance in order to obtain representation.

Based on our review of the record, we conclude that Applicant was fully apprised of the adversarial nature of the hearing, his right to counsel, and his other rights. Applicant voluntarily decided to represent himself. We find no reason to conclude that Applicant was deprived of the rights afforded him by the Directive to a fair hearing and due process. Applicant received sufficient notice to apprise a reasonable person of his right to counsel. The record provides no reason to conclude that Applicant's decision to represent himself was other than knowing and intelligent. ISCR Case No. 12-08972 at 3 (App. Bd. Apr. 25, 2016). Moreover, there was no reason for the Judge to conclude that Applicant was incompetent or unable to represent himself.

Applicant further argues that he did not understand his right to object to DC's motion to amend the SOR to add language to the two Guideline H allegations to allege use of drugs while holding a "sensitive position" so as to invoke AG ¶ 25(f).[2] Tr. at 100-103. In his appeal, Applicant said "I had no idea that I could object to this motion or even what I was objecting about." Appeal Brief at 2. The hearing transcript shows a different story. Department Counsel explained the motion, and the Judge summarized it for Applicant and explained his right to object. Applicant then appropriately objected to the amendments; however, the Judge overruled the objection.

The Judge explained the Applicant's right to object to testimony or documents during the hearing, the relaxed rules of evidence, and Applicant's obligation to "speak up" if he did not understand something during the proceeding. Tr. at 6-7. The SOR may be amended at the hearing

[2] AG 25(f) any illegal drug use while granted access to classified information or holding a sensitive position.

by Department Counsel, so as to render it in conformity with the evidence admitted or for other good cause. *See, e.g.*, Directive at E3.1.17. The Judge may rule on questions on procedure, discovery, and evidence. *See, e.g.*, Directive E3.1.10. We find the Judge's instructions were consistent with the Directive, and Applicant's objection to the motion to amend the SOR was indicative that he understood his rights. The Judge exercised her prerogative to consider the objection in light of the evidence and overruled the objection. We find no reason in this instance to conclude that Applicant was denied the due process afforded by the Directive. *See, e.g.*, ISCR Case No. 12-10122 at 2-3 (App. Bd. Apr. 22, 2016). In the end, the Judge's conclusion that AG ¶ 25(f) did not apply in this case renders moot Applicant's assertion of error regarding the SOR amendment.

Applicant has not established that the Judge committed harmful error. Our review of the record reflects that the Judge examined the relevant evidence and articulated a satisfactory explanation for the decision, which 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). "Any doubt concerning personnel being considered for national security eligibility will be resolved in favor of the national security." AG ¶ 2(b).

Order

The decision is **AFFIRMED**.

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

Signed: Moira Modzelewski
Moira Modzelewski
Administrative Judge
Member, Appeal Board

Signed: Gregg A. Cervi
Gregg A. Cervi
Administrative Judge
Member, Appeal Board