KEYWORD: Guideline H

DIGEST: Even pro se applicants are expected to take reasonable and timely steps to protect their rights under the Directive. Adverse decision affirmed

CASENO: 12-00270.a1

DATE: 01/17/2014

DATE: January 17, 2014

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 May 8, 2012, DoD issued a statement of reasons (SOR) advising Applicant of the basis for that decision–security concerns raised under Guideline H (Drug Involvement) of Department of Defense

Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a decision on the written record. On October 25, 2013, after considering the record, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Arthur E. Marshall, Jr., 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 the Judge applied an unreasonably high standard in evaluating the case; whether Applicant was denied due process; 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

Applicant works for a Defense contractor. He began his current employment in September 2011. He holds two master's degrees. He has not served in the military.

Applicant used marijuana and cocaine "with varying degrees of frequency" between May 2006 and "at least" 2011. During that period he also purchased marijuana. Decision at 2. Applicant identified two friends who had used drugs during the same period. He has stated that neither continues to use illegal drugs. Applicant has begun an exercise regiment and recently began work on a doctorate. Applicant has no present intent to return to the use of drugs. "There is scant additional evidence of any professional, social or lifestyle changes that he has accomplished since quitting drugs and beginning his current employment." *Id.*

The Judge's Analysis

The Judge concluded that Applicant's circumstances raised concerns under Guideline H. He cleared Applicant of several allegations regarding drugs other than marijuana or cocaine. However, he concluded that Applicant failed to mitigate concerns arising from his use and/or possession of these two drugs. The Judge stated that there was little evidence in the record to demonstrate that Applicant had significantly matured since his last uses of cocaine and marijuana, that he had a support system should his desire for drugs return, or that his commitment to his job and profession is such that he would refrain from such use.

The Judge stated that Applicant provided "no significant information" about lifestyle changes, that he did not provide a statement of intent to refrain from future drug use, and that he offered no character evidence, to include evidence of accomplishments, community involvement, etc. *Id.* at 4. In the whole-person analysis, the Judge noted evidence that Applicant had used illegal drugs over several years and that he had provided only limited information as to mitigation, having chosen a decision on the written record.

Discussion

Applicant contends that "the Judge has set an arbitrary standard for evidence . . . It is unclear what sort of 'accomplishments' or level of 'community involvement' would meet the [Judge's]

evidentiary standard." Appeal Brief at 2. The standard applicable in a security clearance decision is that articulated by the Supreme Court in *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988): "[A] clearance may be granted only when 'clearly consistent with the interests of the national security.'" Directive ¶ E3.1.25 explicitly requires a Judge to evaluate a case according to this standard. The Directive also requires that "any doubt concerning personnel being considered for access to classified information will be resolved in favor of the national security." Directive, Enclosure 2 ¶ 2(b). In the concluding paragraph of his Decision, the Judge referenced the "clearly consistent" standard in stating his ultimate holding. Decision at 5. In examining the evidence before him, a Judge is required to evaluate the sufficiency or insufficiency of the evidence, and a paucity of record evidence on matters relevant and material to a clearance decision is something a Judge should address, as the Judge did in Applicant's case. Insofar as any doubt must be resolved in favor of national security, evidentiary gaps may impair an applicant's ability to meet his or her burden of persuasion. We find no basis to conclude that, in evaluating Applicant's case, the Judge mis-applied *Egan*, or that he applied some other standard of his own devising.[1]

Applicant contends that it was not clear to him that he could submit character evidence or a statement of intent not to use drugs in the future. The record demonstrates that DOHA provided Applicant with a copy of the FORM, consisting of Department Counsel's summary of the case and supporting documents. Accompanying the FORM was a letter to Applicant, dated July 16, 2013, advising that he could submit objections "or any additional information you wish to be considered." The FORM itself advised Applicant that he had 30 days from receipt to submit a documentary response. DOHA also provided Applicant with a copy of the Directive, which contained an explanation of Applicant's right to provide evidence and a description of the mitigating conditions pertinent to Guideline H, including the one addressing a statement of intent.[2] Applicant acknowledged receipt of the letter and attachments on July 26, 2013. Even *pro se* applicants are expected to take timely, reasonable steps to protect their rights under the Directive. There is no reason to believe that Applicant was not provided with adequate information about his rights, nor is there any reason to believe that a person with Applicant's level of education would not have been able to understand the information. Applicant contends that the Judge, or Department Counsel, should have sought more information if that was desired. However, the Directive does not authorize a Judge to act as investigator in a case, for either side. *See, e.g.*, ISCR Case No. 11-06659 at 4-5 (App. Bd. Oct. 22, 2012). Neither does it authorize a Department Counsel to serve as an investigator for an opposing party, to advise an opposing party on how best to present his or her case for mitigation, or otherwise to act as an advocate for an opposing party. DOHA hearings are adversarial in nature and a Department Counsel must avoid placing himself or herself in a conflict of interest. *See, e.g.*, ISCR Case No. 11-03402 at 2 (App. Bd. Mar. 29, 2012); ISCR Case No. 02-10215 at 4 (App. Bd. Jan. 30, 2004) . We find no reason to conclude that Applicant was denied the due process afforded him by the Directive.

[1]Applicant's reference to "evidentiary standard" might suggest a challenge to the Judge's rulings on evidence. However, the Judge admitted Applicant's response to the File of Relevant Material (FORM) into the record, and Applicant cites to nothing he wished to submit that was excluded.

[2]Directive ¶¶ E3.1.7; Enclosure 2, 26(b)(4).

Applicant challenges the Judge's comment that the record contained insufficient evidence of lifestyle changes to support the granting of a clearance. He cites to his work on a Ph.D. as evidence that he has changed since his undergraduate days. In essence, Applicant is arguing for an alternative interpretation of the record, which is not sufficient to show that the Judge's treatment of the evidence was unreasonable. *See, e.g.*, ISCR Case No. 10-06089 at 3 (App. Bd. Sep. 11, 2013). The Judge made findings about Applicant's graduate work and discussed it in his analysis. Applicant has not rebutted the presumption that the Judge considered all of the evidence in the record. Neither has he demonstrated that the Judge mis-weighed the evidence. *See, e.g.*, ISCR Case No. 12-02141 at 2 (App. Bd. Nov. 13, 2013). Given the record before him, the Judge's conclusions about the paucity of mitigating evidence is supportable.

Applicant's brief contains evidence from outside the record, that we cannot consider. Directive ¶ E3.1.29. After considering the record as a whole, we conclude that the Judge examined the relevant data and articulated a satisfactory explanation for the decision. The decision is sustainable on this record.

Order

The Decision is **AFFIRMED**.

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

Signed: Jeffrey D. Billett
Jeffrey D. Billett
Administrative Judge
Member, Appeal Board

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