

DATE: December 13, 2000

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 00-0086

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Peregrine D. Russell-Hunter, Esq., Chief Department Counsel

FOR APPLICANT

Pro Se

Administrative Judge Roger C. Wesley issued a decision, dated August 16, 2000, in which he concluded it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant. Applicant appealed. For the reasons set forth below, the Board affirms the Administrative Judge's decision.

This Board has jurisdiction on appeal under Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, as amended.

Applicant's appeal presents the issue of whether the Board should remand the case to the Administrative Judge so that Applicant can have a new hearing where he is represented by a lawyer.

Procedural History

The Defense Office of Hearings and Appeals issued a Statement of Reasons (SOR) dated March 3, 2000 to Applicant. The SOR was based on Guideline E (Personal Conduct) and Guideline J (Criminal Conduct).

A hearing was held on June 28, 2000. The Administrative Judge issued a decision, dated August 16, 2000, in which he concluded it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant. The case is before the Board on Applicant's appeal from the Judge's adverse decision.

Appeal Issue

On appeal, Applicant does not specifically challenge any of the Administrative Judge's findings and conclusions. Rather, Applicant asserts: (1) he was not properly represented at the hearing; (2) even though he told the Judge at the hearing that he could represent himself, he soon realized that he could not represent himself at all; (3) he felt "very intimidated" by Department Counsel at the hearing; (4) prior to the hearing, he tried to retain legal counsel, but was not successful; and (5) he was left to prepare for the hearing while he was maintaining a household and was between two jobs. Applicant states that he can prove his case with proper counsel. Applicant's assertions raise the issue of whether the Board should remand the case to the Judge so that Applicant can have a new hearing where he is represented by a lawyer.

All applicants are expected to take reasonable steps to protect their rights during DOHA proceedings. An applicant's *pro se* status does not excuse an applicant from the obligation to take timely, reasonable steps to protect his or her rights. *See, e.g.*, DISCR Case No. 90-1727 (November 1, 1991) at p. 2; DISCR Case No. 90-0473 (August 14, 1991) at p. 2. Although the Sixth Amendment right to assistance of counsel does not apply to DOHA proceedings, an applicant has a nonconstitutional right to retain a lawyer at his or her own expense. ISCR Case No. 98-0515 (March 23, 1999) at p. 3. That important right can be waived by an applicant's failure to take timely, reasonable steps to retain a lawyer to represent him or her during DOHA proceedings. *See, e.g.*, ISCR Case No. 98-0619 (September 10, 1999) at p. 4; DISCR Case No. 93-0533 (March 8, 1994) at p. 3.

The record in this case shows the following: Applicant was aware of his right to retain a lawyer, Applicant appeared at the hearing without a lawyer, Applicant told the Administrative Judge that he had decided to represent himself, Applicant never indicated to the Judge during the hearing that he was unable to represent himself, and Applicant did not ask for a continuance so that he could get a lawyer to represent him. Furthermore, there is no indication in the record that Applicant was illiterate, mentally incompetent or mentally disabled, or otherwise unable to understand the SOR allegations against him, the documentary evidence presented by Department Counsel, or the hearing procedures. Considering the record as a whole, Applicant waived his right to be represented by a lawyer at the hearing.

An applicant who decides to represent himself or herself at a hearing cannot later complain about the quality of his or her own representation. *See, e.g.*, ISCR Case No. 98-0515 (March 23, 1999) at p. 3; ISCR Case No. 96-0544 (May 12, 1997) at p. 2. Furthermore, absent harmful error that interferes with an applicant's right to prepare for a hearing or an applicant's right to present evidence, an applicant is not entitled to have a case remanded to give the applicant a second chance to present a case. *See, e.g.*, ISCR Case No. 98-0515 (March 23, 1999) at p. 3; ISCR Case No. 96-0544 (May 12, 1997) at p. 2. A review of the record in this case shows Applicant had a reasonable opportunity to prepare for the hearing and to present evidence on his own behalf. Merely because Applicant has decided, with the benefit of hindsight, that he could have presented a better case if he had been represented by a lawyer, it does not follow that Applicant was denied the opportunity to prepare and present his case. *See Dusanek v. Hannon*, 677 F.2d 538, 542-43 (7th Cir. 1982) ("The availability of recourse to a constitutionally sufficient administrative procedure satisfies due process requirements if the complainant merely declines or fails to take advantage of the administrative procedure."), *cert. denied*, 459 U.S. 1017 (1982).

None of Applicant's assertions on appeal demonstrate that he was denied the opportunity to retain a lawyer to represent him, or that he was denied the opportunity to prepare for the hearing, or that he was denied the opportunity to respond to the evidence presented against him and present evidence on his own behalf.

Conclusion

There is no presumption of error below and the appealing party has the obligation to raise and demonstrate error. Because Applicant has failed to meet his burden of demonstrating error below, the Board affirms the Administrative Judge's August 16, 2000 decision.

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board

Signed: Michael Y. Ra'anan

Michael Y. Ra'anan

Administrative Judge

Member, Appeal Board

Signed: Jeffrey D. Billett

Jeffrey D. Billett

Administrative Judge

Member, Appeal Board