

DATE: July 24, 2006

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-17574

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Edward W. Loughran, Esq., Department Counsel

FOR APPLICANT

Arthur L. Stein, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On April 27, 2005, DOHA issued a statement of reasons advising Applicant of the basis for that decision--security concerns raised under Guideline I (Emotional, Mental, and Personality Disorders) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On January 18, 2006, after the hearing, Administrative Judge Richard A. Cefola denied Applicant's request for a security clearance. Applicant timely appealed pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raised the following issues on appeal: whether Applicant was denied liberty and property without due process of law; and whether the Administrative Judge's adverse clearance decision is arbitrary, capricious, or contrary to law.

(1) Applicant contends she was denied liberty and property, in the form of her employment, without due process of law in contravention of the U.S. Constitution because she was not represented by counsel at the hearing. In support of that contention, Applicant argues that if she was as mentally impaired as the government asserts, then she could not effectively represent herself. The Board does not find this argument persuasive.

The Supreme Court has acknowledged the inherently discretionary nature of security clearance decisions and concluded "[i]t should be obvious that no one has a 'right' to a security clearance." *Department of Navy v. Egan* 484 U.S. 518, 527-28 (1988). Given the inherently discretionary nature of security clearance decisions, no applicant has any reasonable expectation of having a vested interest in or right to a security clearance. Moreover, the federal courts have repeatedly held there is no property right or interest in a security clearance or a job requiring a security clearance. *See Jones v. Navy*, 978 F.2d, 1223 (Fed. Cir. 1992); *Dorfmont v. Brown*, 913 F.2d 1399, 1403-04 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991); *Doe v. Cheney*, 885 F.2d 898, 909 (D.C. Cir. 1989); *Chesna v. U.S. Department of Defense*, 850 F. Supp. 110, 118-19 (D. Conn. 1994); *Williams v. Reilly*, 743 F. Supp. 168, 172 (S.D.N.Y. 1990). DOHA proceedings are civil in nature and applicants are not entitled to the procedural protections afforded to criminal defendants. *See, e.g.*, ISCR Case No. 02-12199 at 5-6 (App. Bd. Oct. 7, 2004). Therefore, claims of ineffective assistance of counsel are of no moment in such proceedings. *See, e.g.*, ISCR Case No. 98-0515 at 3 (App. Bd. Mar. 23, 1999).

Applicant's appellate counsel contested the Administrative Judge's determination that Applicant had a personality disorder and asserted that Applicant's *pro se* representation was ineffective because she did not object to the

admissibility of business records, and she failed to call an expert witness to provide testimony concerning her lack of a personality disorder. However, prejudicial error was not established. There was no showing that the records were inadmissible, or that any particular expert had favorable testimony to present.

A review of the record indicates Applicant was provided with the procedural rights set forth in Executive Order 10865 and the Directive, and that the Administrative Judge conducted the hearing in a professional manner, consistent with his role as an impartial presiding official. Significantly, the Judge diligently inquired as to Applicant's ability and willingness to proceed. At the beginning of the hearing, Applicant stated unequivocally that she understood she had the right to bring an attorney and that she was ready to proceed without one.⁽¹⁾ She also stated unequivocally that she had read and understood the documents the government had sent to her.⁽²⁾ Those documents included such things as the notice of hearing, the government's exhibits, and the Directive which governed the hearing. The record indicates that Applicant answered questions coherently, made an opening and closing statement, questioned witnesses, testified on her own behalf, and offered documentary evidence in support of her case.⁽³⁾ Although *pro se* applicants cannot be expected to act like a lawyer, they are expected to take timely, reasonable steps to protect their rights under the Directive. *See, e.g.*, ISCR Case No. 00-0593 at 4 (App. Bd. May 14, 2001). If they fail to take timely, reasonable steps to protect their rights, that failure to act does not constitute a denial of their rights. *See, e.g.*, ISCR Case No. 02-19896 at 6 (App. Bd. Dec. 29, 2003). Because Applicant did not object to proceeding without counsel or otherwise request a continuance of her case, she was not denied due process under the Directive or Executive Order.

(2) Applicant also argues that the Administrative Judge's adverse clearance decision under Guideline I is arbitrary, capricious and contrary to law. Again, the Board does not find this argument persuasive.

In this case, the Administrative Judge found that the government had produced substantial evidence, in form of the expert opinion of a licensed clinical psychologist, that Applicant had a mental condition indicative of a defect in judgement, reliability and stability. The Judge's decision indicates that the Judge weighed the mitigating evidence offered by Applicant against the seriousness of the disqualifying circumstances and reasonably explained why the evidence which the Applicant had presented in mitigation was insufficient to overcome the government's security concerns. Given the record that was before him, the Judge's ultimate unfavorable clearance decision under Guideline I is not arbitrary, capricious or contrary to law.

Order

The decision of the Administrative Judge denying Applicant a clearance is AFFIRMED.

Signed: Jean E. Smallin

Jean E. Smallin

Administrative Judge

Member, Appeal Board

Signed: William S. Fields

William S. Fields

Administrative Judge

Member, Appeal Board

Signed: Mark W. Harvey

Mark W. Harvey

Administrative Judge

Member, Appeal Board

1. Transcript at 4.

2. *Id.*
3. *Id.* at 4-5, 10-17, 24-26, 50-62, and 65-66. Applicant's Exhibit A (seven character reference letters).