

DATE: June 13, 2006

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In Re:

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SSN: -----

Applicant for Security Clearance

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CR Case No. 03-23776

## APPEAL BOARD DECISION

### APPEARANCES

#### FOR GOVERNMENT

Robert E. Coacher, Esq., Department Counsel

#### FOR APPLICANT

Bret D. Davis, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On February 11, 2005, DOHA issued a statement of reasons advising Applicant of the basis for that decision--security concerns raised under Guideline F (Financial Considerations) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On December 22, 2005, after the hearing, Administrative Judge James A. Young 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 or property without due process of law in contravention of the Fifth Amendment of the U.S. Constitution; whether the Administrative Judge erred by concluding the security concerns raised under Guidelines F had not been mitigated. [\(1\)](#)

(1) Applicant argues he was denied liberty and property without due process of law in contravention of the Fifth Amendment of the U.S. Constitution because the Defense Security Service (DSS) did not provide him with a copy of his Report of Investigation pursuant to his Freedom of Information Act request, and Department Counsel did not call the DSS investigator as a witness for the government or provide Applicant with his name. The Board does not find Applicant's argument persuasive.

The Supreme Court has acknowledged the inherently discretionary nature of security clearance decisions and concluded "[i]t should be obvious that no 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 (9<sup>th</sup> 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).

A review of the record indicates Applicant was provided with the procedural rights set forth in Executive Order 10865 and the Directive. Prior to the hearing, Department Counsel provided Applicant with copies of all the evidence, subject to the control of DOHA, that the government intended to offer at the hearing. [\(2\)](#) There is no indication from the record that Applicant requested the Defense Security Service (DSS) agent be present at the hearing. Applicant stated at the hearing that he had made a Freedom of Information Act (FOIA) request to the DSS for a copy of his Report of Investigation and had not received it. But he also stated at the hearing that he had not asked Department Counsel to assist him in obtaining it, and he affirmatively stated to the Administrative Judge twice that he was ready to proceed. [\(3\)](#) Also, nothing in the record indicates Applicant had exercised

his appeal rights under the FOIA. The transcript indicates that the Administrative Judge conducted the hearing in a professional manner, consistent with his role as an impartial presiding official, and at several junctures afforded Applicant an opportunity to request a continuance or otherwise object to proceeding.<sup>(4)</sup> The Judge's questions and comments suggest a willingness to favorably entertain such requests or objections, but none were forthcoming from the Applicant.<sup>(5)</sup> Although *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. 00-0593 at 4 (App. Bd. May 14, 2001). If they fail to take timely, reasonable steps to protect their rights, their failure to act does not constitute 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 or otherwise request a continuance of his case, he cannot fairly claim he was denied due process under the Directive or Executive Order.

(2) Applicant also argues that the Administrative Judge erred by concluding the security concerns raised under Guidelines F had not been mitigated because Applicant was entitled, as a matter of law, to a favorable application of the Guideline F Mitigating Conditions and the "whole person" concept. Again, the Board does not find Applicant's arguments persuasive.

The application of disqualifying and mitigating conditions does not turn simply on a finding that one or more of them apply to the particular facts of a case. Rather, their application requires the exercise of sound discretion in light of the record evidence as a whole. *See, e.g.*, ISCR Case No. 01-14740 at 7 (App. Bd. Jan. 15, 2003). Thus, the presence of some mitigating evidence does not alone compel the Administrative Judge to make a favorable security clearance decision. As the trier of fact, the Judge has to weigh the evidence as a whole and decide whether the favorable evidence outweighs the unfavorable evidence or *vice versa*. An applicant's disagreement with the Judge's weighing of the evidence, or an ability to argue for a different interpretation of the evidence, is not sufficient to demonstrate the Judge weighed the evidence or reached conclusions in a manner that is arbitrary, capricious, or contrary to law.

In this case, the Administrative Judge found Applicant had a lengthy and serious history of financial difficulties. The Judge's decision indicates that the Judge weighed the mitigating evidence offered by Applicant against the length and seriousness of the disqualifying conduct, and considered the possible application of relevant mitigating conditions. The Judge found in favor of the Applicant with respect to one of the allegations. However, the Judge articulated a rational basis for not favorably applying any mitigating conditions to the remainder of the allegations, 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 is not arbitrary, capricious or contrary to law.

Finally, Applicant cites to other decisions by DOHA Administrative Judges for the proposition that cases exist where security clearances have been granted to applicants who have financial histories similar to Applicant's. The decision in another DOHA case cited by Applicant on appeal does not demonstrate error by the Judge in this case. A decision by a Hearing Office Judge is not legally binding precedent on that Judge's colleagues in other cases, even if Applicant establishes close factual similarities between the cited cases and the instant case. The cited cases are not legally binding precedent on the Board in any case. *See* ISCR Case No. 01-22606 at 3-5 (App. Bd. Jun. 30, 2003).

### Order

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

Signed: Michael Y. Ra'anan

Michael Y. Ra'anan

Administrative Judge

Chairman (Acting), Appeal Board

Signed: Jean E. Smallin

Jean E. Smallin

Administrative Judge

Member, Appeal Board

Signed: William S. Fields

William S. Fields

Administrative Judge

Member, Appeal Board

1. The Administrative Judge found in favor of Applicant with respect to SOR paragraphs 1.f. That favorable findings is not at issue on appeal.
2. Directive ¶¶ E3.1.7 and E3.1.11; Transcript at 9.
3. Transcript at 6-7 and 9.
4. Transcript at 6-7, 9-10.
5. *Id.*