

DATE: July 14, 2006

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-25154

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

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

FOR APPLICANT

Pro Se

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On January 6, 2005, DOHA issued a statement of reasons advising Applicant of the basis for that decision--security concerns raised under Guideline D (Sexual Behavior) and Guideline E (Personal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On January 31, 2006, after the hearing, Administrative Judge Michael J. Breslin 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 due process of law; whether the Administrative Judge erred by concluding the security concerns raised under Guidelines E had not been mitigated. [\(1\)](#)

(1) Applicant argues he was denied due process of law because Department Counsel did not call the Defense Security Service investigator as a witness at the hearing. The Board does not find Applicant's argument persuasive.

A review of the record indicates Applicant was provided with the procedural rights set forth in Executive Order 10865 and the Directive. There is no indication from the record that Applicant requested the Defense Security Service (DSS) agent be present at the hearing or objected to proceeding without him. 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, 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 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 E had not been mitigated because Applicant was entitled, as a matter of law, to a favorable application of the 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.

The Judge's decision indicates that the Judge weighed the mitigating evidence offered by Applicant against the nature 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 some of the factual 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 under Guideline E is not arbitrary, capricious, or contrary to law.

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 under Guideline D and SOR paragraph 1.c. Those favorable findings are not at issue on appeal.