KEYWORD: Guideline G

DIGEST: There is a rebuttable presumption that federal officials and employees carry out there duties in good faith. A party seeking to rebut that presumption has a heavy burden of persuasion on appeal. DOHA proceedings are civil in nature and applicants are not entitled to the procedural protections afforded to criminal defendants. Therefore claims of ineffective assistance of counsel are of no moment. Adverse decision affirmed.

CASENO: 06-26704.a1

DATE: 06/19/2008

DATE: June 19, 2008

In Re:	)	
	)	
------	)	ISCR Case No. 06-26704
	)	
	)	
Applicant for Security Clearance	)	
	)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT
James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT
Pro Se

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On August 31, 2007, DOHA issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline G (Alcohol Consumption) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On March 6, 2008, after the hearing, Administrative Judge Elizabeth M. Matchinski 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; and whether the Judge's adverse clearance decision is arbitrary, capricious or contrary to law.

(1) Applicant contends that he was denied due process because he "chose poorly to proceed with a hearing," rather than to have his case decided on the written record. In support of this contention, he argues that Department Counsel acted improperly because she subjected him to an aggressive cross-examination which elicited adverse details about his alcohol use that went beyond the specific facts recited in the SOR and the documentary exhibits, and undermined his credibility with the Judge. The Board does not find this argument persuasive.

There is a rebuttable presumption that federal officials and employees carry out their duties in good faith. *See, e.g.*, ISCR Case No. 00-0030 at 5 (App. Bd. Sep. 20, 2001). A party seeking to rebut that presumption has a heavy burden of persuasion on appeal. Applicant has not met that heavy burden. Applicant fails to identify anything in the record below that indicates or suggests a basis for a reasonable person to conclude that Department Counsel acted improperly, unfairly or unprofessionally. *See, e.g,* ISCR Case No. 03-04927 at 3 (App. Bd. Mar. 4, 2005)(No denial of due process where *pro se* Applicant claimed "she was no match for the 'very serious and prepared professionals' who represented the government"); ISCR Case No. 03-21262 at 2-3 (Jul. 10, 2007)(No denial of due process where *pro se* Applicant claimed that "Department Counsel raised his voice . . . and attempted to sway the Judge with emotional arguments"). Aggressive cross-examination is an ordinary and reasonably foreseeable part of the hearing process.

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. *See, e.g.,* ISCR Case No. 02-17574 at 2 (App. Bd. Jul. 24, 2006). A review of the record indicates that Applicant was provided with the procedural rights set forth in Executive Order 10865 and the Directive. 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 such steps, 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, 2001). Applicant's decision to elect a hearing, rather than a decision on the written record, does not constitute a denial of due process under the Directive or Executive Order.

(2) Applicant argues that the Judge's adverse decision should be reversed because the Judge did not give sufficient weight to Applicant's mitigating evidence, which he contends shows that his current use of alcohol is not of security concern.[1] This argument does not establish the Judge erred.

Once the government presents evidence raising security concerns, the burden shifts to the applicant to establish mitigation. However, the presence of some mitigating evidence does not alone compel the 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*. *See, e.g.,* ISCR Case No. 06-10320 at 2 (App. Bd. Nov. 7, 2007). 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. *See, e.g.,* ISCR Case No. 06-17409 at 3 (App. Bd. Oct. 12, 2007).

In this case, the Judge made sustainable findings that Applicant had a lengthy and serious history of problematic alcohol use. At the time of the hearing, Applicant was still drinking contrary to most of the therapeutic advice he had received, including from his primary care physician. Decision at 8. 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 Applicant as to one of the SOR allegations. However, the Judge reasonably explained why the evidence which Applicant had presented in mitigation was insufficient to overcome the government's security concerns. The Board does not review a case *de novo*. The favorable record evidence cited by Applicant is not sufficient to demonstrate the Judge's decision is arbitrary, capricious, or contrary to law. *See, e.g.,* ISCR Case No. 06-11172 at 2 (App. Bd. Sep. 4, 2007).

The Board has examined the Judge's decision in light of the record as a whole and concludes that the Judge has drawn "a rational connection between the facts found" under Guideline G and her adverse decision. *Motor Vehicle Mfrs. Ass'n of the United States v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)(quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)). "The general standard is that a clearance may be granted only when 'clearly consistent with the interests of the national security.'" *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). Accordingly, the Judge's adverse decision is sustainable.

[1]As part of his brief, Applicant offers new evidence in the form of additional explanations. The Board may not consider that new evidence on appeal. *See* Directive ¶ E3.1.29.

Order

The decision of the Judge denying Applicant a security 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: James E. Moody
James E. Moody
Administrative Judge
Member, Appeal Board