KEYWORD: Guideline E

DIGEST: An applicant who decides to represent himself at a hearing cannot later complain about the quality of his own representation. Applicant has not demonstrated that he was denied a fair opportunity to present his case. Adverse decision affirmed

CASENO: 08-02653.a1

DATE: 03/25/2009

DATE: March 25, 2009

In Re:	)	
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	)	
	)	
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 15, 2008, DOHA issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline E (Personal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992), as amended (Directive). Applicant requested a hearing. On January 14, 2009, after the hearing, Administrative Judge Matthew E. Malone denied Applicant's request for a security clearance. Applicant timely appealed pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raises the following issue on appeal: whether the Judge's decision is arbitrary, capricious, or contrary to law.

Specifically, Applicant contends that he was harmed by his failure to hire an attorney to represent him at the hearing. Applicant also argues that the Judge should have found that the SOR allegations against him were mitigated.

The Judge made the following pertinent findings of fact: Applicant retired from federal civilian employment in 2003 with 32 years of service. In 2005, he obtained a job with a private firm. In July 2007, as part of his job, Applicant purchased three cases of diesel oil. He deposited two cases in the appropriate locker at work. Applicant drove home with one case of the oil still in his truck and put it in his garage. When asked the next day by his supervisor if he had taken the oil, Applicant denied doing so. Applicant later admitted to his supervisor that he had lied and was suspended and later fired. On August 28, 2007, Applicant filled out a security clearance application as part of the application for his current job and intentionally omitted the fact that he had been fired from his previous job. In mid-December, Applicant admitted to his boss that he had lied on his security clearance application. On December 28, 2007, Applicant admitted the lie to a government investigator who was going over the application with him, but not until they reached the appropriate question on the application.

In addition to Applicant's lengthy career as a Federal employee, he also had a successful career in the United States Army and National Guard. Applicant also submitted a letter of recommendation from the boss to whom he admitted that he had lied on his security clearance.

Applicant contends that he was harmed by his failure to hire an attorney to represent him at the hearing. Applicant states that he believed that he was prepared for the hearing, but after the hearing started, he realized that he should have retained an attorney. Since the hearing, Applicant has concluded "the government is heavily favored."

Prior to the hearing, Applicant was sent a memorandum entitled "Preliminary Guidance for DOHA Industrial Security Clearance (ISCR) Hearings and Trustworthiness (ADP) Hearings." The first numbered paragraph of that memorandum advises applicants that "the government is normally represented by an attorney known as a Department Counsel. The Applicant has the option of appearing by himself or herself without an attorney, or being represented by an attorney selected and paid for by the Applicant, or by being represented by a Personal Representative such as a friend, family member, or union representative." At the hearing, Applicant testified that he had completed

high school and earned an Associate's Degree. Transcript at 6. He also testified that he had received a copy of the Directive and the pre-hearing guidance and that he had read and understood them. Transcript at 8. The Judge found that Applicant was able to represent himself. *Id.* The record indicates that Applicant submitted evidence and actively participated in the hearing. During the hearing, Applicant never indicated that he was unable to represent himself. Considering the record as a whole, the Board concludes Applicant waived his right to be represented by an attorney.

An applicant who decides to represent himself at a hearing cannot later complain about the quality of his own representation. *See, e.g.,* ISCR Case No. 00-0086 at 2 (App. Bd. Dec. 13, 2000). A review of the record in this case shows that Applicant had a reasonable opportunity to prepare for the hearing and to present evidence on his own behalf, and Applicant has not demonstrated otherwise. Merely because Applicant has decided , with the benefit of hindsight, that he could have presented a better case if he had been represented by an attorney, it does not follow that Applicant was denied the opportunity to prepare and present his case. Applicant has not demonstrated error in this regard. *See Dusanek v. Hannon,* 677 F.2d 538, 542-43 (7th Cir. 1982), *cert. denied,* 459 U.S. 1017 (1982).

Applicant also argues that the Judge should have found his conduct to be mitigated because he regrets the conduct and is rehabilitated and because the conduct is an isolated incident and is so remote. The Judge considered the considered Applicant's evidence of mitigation. However, the presence of some mitigating evidence does not alone compel the Judge to make a favorable security clearance. 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. *See, e.g.,* ISCR Case No. 07-10454 at 2 (App. Bd. Aug. 12, 2008).

In this case, the Judge weighed the mitigating evidence offered by Applicant against the recency and seriousness of the disqualifying conduct. The Judge considered the possible application of relevant mitigating conditions and discussed why he did not apply them in Applicant's case. The Judge explained why the evidence Applicant presented in mitigation was insufficient to overcome the government's security concerns. The Board does not review a case *de novo.* The favorable 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. 02-28041 at 4 (App. Bd. Jun. 29, 2005). Given the record that was before him, the Judge's ultimate unfavorable clearance decision under Guideline E is sustainable.

Order

The Judge's unfavorable security clearance decision is AFFIRMED.

Signed: Michael Y. Ra'anan
Michael Y. Ra'anan
Administrative Judge
Chairman, Appeal Board

Signed: Jeffrey D. Billett
Jeffrey D. Billett
Administrative Judge
Member, Appeal Board

Signed: Jean E. Smallin
Jean E. Smallin
Administrative Judge
Member, Appeal Board