KEYWORD: Guideline J; Guideline G; Guideline E

DIGEST: Applicant's argument is insufficient to show that his waiver of representation was other than knowing and intelligent. Adverse decision affirmed.

CASENO: 14-02347.a1

DATE: 08/28/2015

DATE: August 28, 2015

In Re:	)	
	)	
----------	)	ISCR Case No. 14-02347
	)	
Applicant for Security Clearance	)	

APPEAL BOARD DECISION

APPEARANCES

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

FOR APPLICANT
Douglas Applegate, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On

September 17, 2014, DoD issued a statement of reasons (SOR) advising Applicant of the basis for that decision–security concerns raised under Guideline J (Criminal Conduct), Guideline G (Alcohol Consumption), and Guideline E (Personal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On May 26, 2015, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Darlene D. Lokey Anderson denied Applicant's request for a security clearance. Applicant appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raised the following issues on appeal: whether Applicant was denied his right to counsel and whether the Judge's adverse decision was arbitrary, capricious, or contrary to law. Consistent with the following, we affirm.

The Judge's Findings of Fact

Applicant began consuming alcohol in 2003. He advised his clearance investigator that it takes about 10 beers for him to become drunk. He testified that his drinking varied from a couple of times a month to once every two months. He has been arrested twice for DUI. The first time was in early 2004, when he was pulled over by the police after he left a the house of a friend with whom he had been drinking beer. Applicant failed a field sobriety test. He was sentenced to a fine and required to complete a first offenders program.

In late 2005, Applicant was charged with reckless driving as a result of having skidded through a red light. In 2011, Applicant was again arrested and charged a second time with DUI. Convicted in 2012, he was sentenced to a fine, five years probation, and a suspended driver's license. He also had to complete an 18-month alcohol treatment program. In mid-2013, he was arrested and charged with driving under a suspended license. He spent 8 hours in jail before being released on bond.

In April 2013, prior to his latest arrest, Applicant completed a security clearance application (SCA). One question asked if he "had EVER been charged with any offenses related to alcohol or drugs." Decision at 3. Applicant had disclosed his 2011 DUI elsewhere on the SCA, so he answered "no." He did not disclose the 2004 DUI. Applicant testified that he had misunderstood the question, believing that it only wanted him to go back 10 years. He also testified that he took a lot of time filling out his SCA.

Applicant stated that he understands the importance of protecting classified information, because his father and two uncles were graduates of a U.S. military academy. Applicant enjoys an excellent reputation for the quality of his work performance as well as for his trustworthiness and reliability.

The Judge's Analysis

The Judge resolved all of the allegations under each of the Guidelines adversely to Applicant. She stated that he had not been totally candid about the extent of his drinking habit, minimizing the

seriousness of his use of alcohol. She characterized his criminal conduct as "fairly recent" (Decision at 8) and concluded that he is likely still on probation. She found that his omission of the earlier DUI was deliberate, in that the question clearly was not time-limited, for that reason discounting Applicant's claims of honest mistake.

Discussion

Applicant contends that he was denied his right to obtain counsel. In doing so, he asserts matters that are not contained in the record. As a general rule, we cannot consider new evidence on appeal. Directive ¶ E3.1.29. However, we have done so from time to time on threshold issues such as due process. *See, e.g.*, ISCR Case No. 14-02251 at 2 (App. Bd. Jun. 24, 2015). Accordingly we will address Applicant's new evidence in resolving the due process issue that he has raised.

Applicant states that, prior to the hearing, Department Counsel told him that he did not need an attorney. He asserts that Department Counsel stated the following: "I can't advise you not to get an attorney, but [the hearing] is designed so you don't need one. I had a janitor in here last week and he didn't need. one." Declaration of Applicant, attached to Appeal Brief. He argues, in effect, that he relied on this advice to his detriment and, as a consequence, his waiver of his right to hire counsel was not knowing and intelligent.

The record shows that Applicant was provided with a copy of the Directive, which, at Enclosure 1, SECTION 3(5), states that an applicant has a right to be represented by counsel, a right further delineated at ¶ E3.1.8. The Chief Administrative Judge sent Applicant pre-hearing guidance that included the following:

> The hearing is an adversarial proceeding in which the parties have the responsibility to present their respective cases. 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 beginning of the hearing, the Judge engaged in a colloquy with Applicant regarding his representational rights.

> [Judge]: I see that you are here without an attorney. Do you understand that you have the right to bring an attorney if you so desire?
>
> [Applicant]: Yes.
>
> [Judge]: Have you given that any thought?
>
> [Applicant]: Yes.

[Judge]: Are you prepared today to proceed without an attorney?

[Applicant]: Yes.

[Judge]: I want to ask you a couple of questions to satisfy myself that you are capable of representing yourself in this proceeding. First, what is the level of your education?

[Applicant]: I have a high school diploma and an Associates Degree in Marine Technologies.

[Judge]: Have you been able to read and understand all of the documents that were sent to you?

[Applicant]: Yes.

[Judge]: I don't see any reason why you cannot represent yourself. Tr. at 5-6.

The record demonstrates that Applicant received information sufficient to have placed a reasonable person on notice of his or her right to representation. Assuming without deciding that Department Counsel made the statements that Applicant has attributed to him, we conclude that Applicant has not made a *prima facie* showing that the statements were objectively false or that Department Counsel acted in a manner inconsistent with his duties by advising or inducing Applicant to forgo the right to employ counsel. Federal officials are entitled to a presumption of good faith in the conduct of their duties. *See, e.g.*, ISCR Case No. 11-12461 at 5 (App. Bd. Mar. 14, 2013). Applicant's argument is insufficient to rebut this presumption or to constitute a *prima facie* showing that his waiver of his right to representation was other than knowing and intelligent.[1] *See, e.g.*, ISCR Case No. 06-24460 at 2 (App. Bd. Apr. 30, 2008). We find no reason to conclude that Applicant was denied the due process afforded by the Directive.

The Judge examined the relevant data and articulated a satisfactory explanation for the decision. The decision is sustainable on this record. Criminal activity as well as excessive alcohol consumption can raise questions or doubts about an applicant's reliability and trustworthiness. Directive, Enclosure 2 ¶¶ 21, 30. Of special interest in a security clearance adjudication "is any failure to provide truthful and candid answers[.]" The Directive states that "refusal to provide full, frank and truthful answers to lawful questions of investigators, security officials, or other official representatives" is conduct that "will normally result in an unfavorable clearance action[.]"

[1]Applicant cites to portions of the transcript which, he believes, show that he did not understand his rights. For example, he cites to the Judge's statement to him to the effect that she has never had anyone come before her who was as unaware as Applicant regarding such things as the terms of his DUI sentence or even when his driving privileges had been restored. Tr. at 52-54. The evidence that Applicant has cited neither shows nor suggests that he did not understand his right to employ counsel. Applicant may be dissatisfied with the result of his hearing, but, having decided to represent himself, he cannot fairly complain about the quality of his self-representation.

Directive, Enclosure 2 ¶ 15. "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). *See also* Directive, Enclosure 2 ¶ 2(b): "Any doubt concerning personnel being considered for access to classified information will be resolved in favor of the national security."

Order

The Decision is **AFFIRMED**.

Signed: Michael Ra'anan
Michael Ra'anan
Administrative Judge
Chairperson, Appeal Board

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

Signed: James E. Moody
James E. Moody
Administrative Judge
Member, Appeal Board