DATE: December 15, 2009

In Re:	)	
	)	
----------	)	ISCR Case No. 08-12061
	)	
	)	
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 March 5, 2009, DOHA issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised, Guideline E (Personal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On October 15, 2009, after the hearing, Administrative Judge Michael H. Leonard denied Applicant's request for a security clearance. Applicant appealed pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raises the following issues on appeal: whether he was denied the due process accorded by the Directive and whether the Judge's decision is arbitrary, capricious, or contrary to law. For the following reasons, the Board affirms the Judge's unfavorable decision.

Applicant asserts that he was denied the due process accorded by the Directive. He cites record evidence against him prepared by a former employer and notes that he never had an opportunity to cross-examine the employer. The employer did not appear at the hearing, so testimony and subsequent cross-examination were never at issue. Government Exhibit 4 consists of material prepared by the employer. Applicant was twice asked if he objected to Government Exhibit 4. The first time he said, "No, Your Honor." The second time he said, "I have no objections, Your Honor." (Transcript, p. 42). Furthermore, the Board notes that the Judge asked Applicant several questions regarding his choice to represent himself, his age, and his education, before permitting him to represent himself. At that point the Judge also discussed the process of representing oneself, making objections and speaking up. (Transcript, pp. 11-15). The Judge took reasonable steps to ensure that Applicant would be able to represent himself adequately. 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.[1] *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 a denial of their rights. *See, e.g.,* ISCR Case No. 02-19896 at 6 (App. Bd. Dec. 29, 2003). Accordingly, Applicant's argument in this regard does not persuade the Board that the case should be reversed or remanded. *See, e.g.,* ISCR Case No. 05-03307 at 2 (App. Bd. May 7, 2007).

Applicant alleges for the first time on appeal that the former employer may have been motivated by racism. There is no record evidence to support that allegation.

Applicant points to some mitigating evidence. 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). A party'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 weighed the mitigating evidence offered by Applicant against the seriousness of the disqualifying conduct and considered the possible application of relevant conditions and factors. He concluded that Applicant had engaged in two types of wrongful conduct that call into question his judgment, trustworthiness and reliability. These conclusions are reasonably supported by the record.

To the extent that Applicant's brief challenges some of the Judge's findings, we conclude that Judge's material findings of security concern are based on substantial record evidence and are therefore sustainable. *See, e.g.,* ISCR Case No. 08-04624 at 2 (App. Bd. Oct. 28, 2009).

[1]Applicant claims that he did not receive the investigative file in time to prepare for the hearing. At the beginning of the hearing the Judge asked Applicant if he was "ready to proceed with the hearing today." Applicant replied "Yes, Your honor." (Transcript, pp. 11-12).

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. 06-11172 at 3 (App. Bd. Sep. 4, 2007). After reviewing the record, the Board concludes that the Judge examined the relevant data and articulated a satisfactory explanation for his decision, "including a 'rational connection between the facts found and the choice made.'" *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). Therefore, the Judge's ultimate unfavorable security clearance decision under Guideline E is sustainable.

Order

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

Signed: Michael Y. Ra'anan
Michael Y. Ra'anan
Administrative Judge
Chairperson, 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