KEYWORD: Guideline E; Guideline F

DIGEST: While a Judge is entitled to ask questions at a hearing, he or she cannot act as a surrogate advocate for either an applicant or Department Counsel. There is nothing in the record that indicates that the fairness or impartiality was missing or impaired, to raise a question of the validity and legitimacy of the security clearance decision in this case. Adverse decision affirmed.

CASENO: 17-04388.a1

DATE: 08/01/2018

DATE: August 1, 2018

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 Department of Defense (DoD) declined to grant Applicant a security clearance. On January 19, 2018, DoD issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline F (Financial Considerations) and Guideline E (Personal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On April 20, 2018, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Edward W. Loughran denied Applicant's request for a security clearance. Applicant appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raised the following issue on appeal: the Judge failed to ask Applicant sufficient questions at the hearing about his conduct and circumstances such that the adverse decision was arbitrary, capricious, or contrary to law. The Judge's favorable findings under Guideline F are not an issue on appeal. Consistent with the following, we affirm.

The Judge's Findings of Fact

Applicant had a checkered work history, with periods of unemployment, disciplinary issues, quitting jobs after short periods, and terminations. Applicant was either disciplined or terminated by his employers in 2007 (damaging company property), 2008 (an allegation of sexual harassment), 2010 (failing a drug test), 2012 (assault/abuse), and 2017 (a confrontation with another employee). Applicant acknowledged his employment issues, and admitted he "messed up with attendance issues in [his] entire career of ten years," and that his current job in information technology was more suited to him than armed security. Decision at 3. Applicant denied the sexual harassment and abuse allegations.

The Judge's Analysis

There was no independent evidence such as employment records, documenting that Applicant had committed the conduct, but Applicant admitted to taking a drug without a prescription; using profanity toward a juvenile and an employee; and having attendance issues for the last ten years. Ultimately the Judge found for Applicant on two of the three drug-related allegations relating to the 2010 termination and on a falsification allegation. Despite the presence of some mitigation evidence Applicant had failed to mitigate the other personal conduct security concerns.

Discussion

Applicant argues the Judge failed to ask him questions at the hearing about what he had done to fix his personal and financial conduct issues. Applicant asserts if he had been given the opportunity he would have explained the changes he made in his life in that: (a) he had sought medical professional help since 2017 for his anger issues; (b) he had been placed on medications which had kept him stable; and (c) he had fixed his financial issues by using a noted commercial financial advisor. The Board construes these assertions as raising the issue of whether the Judge failed to ask Applicant sufficient questions at the hearing about his conduct and circumstances such that the adverse decision was arbitrary, capricious, or contrary to law.

The Judge at the start of the hearing ascertained if Applicant had received a copy of the Directive and that he understood his procedural rights and he felt confident to represent himself. The Judge went on to explain that each party was responsible for producing evidence it wants in the record. When it was Applicant's time to testify, the Judge invited Applicant to tell him whatever he wanted about the allegations.[1] Applicant testified about each employment issue and the Judge asked questions to clarify and followup on the testimonial evidence. Ultimately, the Judge found for Applicant on three of the eight Guideline E allegations. The Judge found for the Applicant on all eighteen Guideline F allegations and the one financial related allegation under Guideline E.

While a Judge is entitled to ask questions at a hearing, he or she cannot act as a surrogate advocate for either an applicant or Department Counsel. *See, e.g.*, ISCR Case No. 96-0869 at 2 (September 11, 1997) (Administrative Judge may ask questions of an applicant or any witness as long as the Judge does so in a fair and impartial manner). There is nothing in the record that indicates that the fairness or impartiality was missing or impaired, to raise a question of the validity and legitimacy of the security clearance decision in this case. *See, e.g.,* ISCR Case No. 98-17522 at 5 (February 9, 1999).

On March 12, 2018, a Notice of Hearing was issued to Applicant and included a prehearing guidance memorandum from the Chief Administrative Judge giving Applicant notice that "The hearing is an adversarial proceeding..." and he was "expected to be prepared to present at the hearing whatever evidence (testimonial, documentary, or both) that [he] intends to offer." Furthermore, at the hearing, the Administrative Judge confirmed that Applicant had received a copy of the Directive and the Chief Administrative Judge's memorandum; that Applicant wanted to represent himself during the hearing; that each party was responsible for producing evidence it wants in the record; that the hearing was Applicant's opportunity to present evidence for his case; and that Applicant had asked for the expedited hearing and was waiving his fifteen day notice. Transcript at 5-9. Finally, when Applicant was asked if he had anything else he would like to present, he indicated that he had no further evidence to present and that he was a good guy. *Id*. at 86. Considering all the circumstances, Applicant was on adequate notice that he was responsible for presenting evidence on his behalf. Applicant cannot fairly complain that neither Department Counsel nor the Judge acted on his behalf to develop the record evidence for his benefit.

To the extent Applicant's brief can be construed as indicating he believes the Judge erroneously reached adverse conclusions about him because the Judge did not ask enough questions to develop the record he fails to show error. As noted in the preceding paragraphs, DOHA hearings are adversarial in nature and Applicant was on adequate notice that he was responsible for presenting evidence on his behalf. A Judge must make findings of fact and reach conclusions based on the evidence before the Judge.

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[1] Applicant's testimony and questions from the Judge went from page 17 through page 29 of the transcript.

Applicant also contends that the Judge erred in concluding that Applicant failed to mitigate the security concerns. In doing so, he notes his testimony that he had worked for a year straight without incident or write-up, no attendance issues, and essentially argues the Judge dismissed his testimony. Applicant's arguments essentially amount to a disagreement with the Judge's weighing of the evidence and are neither sufficient to rebut the presumption that the Judge considered all of the evidence in the record nor enough to establish that the Judge weighed the evidence in a manner that was arbitrary, capricious, or contrary to law. *See, e.g.*, ISCR Case No. 15-06494 at 3 (App. Bd. Oct. 5, 2017).

The Judge examined the relevant evidence and articulated a satisfactory explanation for the decision. The decision is sustainable on this record. "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, Encl. 2, App. A ¶ 2(b): "Any doubt concerning personnel being considered for national security eligibility 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: Charles C. Hale
Charles C. Hale
Administrative Judge
Member, Appeal Board

Signed: James F. Duffy
James F. Duffy
Administrative Judge
Member, Appeal Board