

KEYWORD: Guideline E; Guideline B; Guideline J

DIGEST: There is a rebuttable presumption that federal officials and employees carry out their duties in good faith. DOHA proceedings are civil in nature and applicants are not entitled to the procedural protections afforded to criminal defendants. Adverse decision affirmed.

CASENO: 03-21262.a1

DATE: 07/10/2007

DATE: July 10,2007

In Re:)	
)	
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SSN: -----)	ISCR Case No. 03-21262
)	
Applicant for Security Clearance)	
)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Nichole L. Noel, Esq., Department Counsel

FOR APPLICANT

Pro Se

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On April 20, 2004, DOHA issued a statement of reasons advising Applicant of the basis for that decision—security concerns raised under Guideline E (Personal Conduct), Guideline B (Foreign Influence) and Guideline J (Criminal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On December 29, 2006, after

the hearing, Administrative Judge Christopher Graham denied Applicant's request for a security clearance.¹ 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; whether the Judge erred in concluding Applicant's falsification of his security clearance application was deliberate; whether the Judge's adverse security clearance decision is arbitrary, capricious or contrary to law.

Applicant contends he was denied due process. In that regard, he argues that Department Counsel led him to believe that representation by counsel had little effect in cases such as his and could actually prove to be detrimental.² He also argues that at the hearing Department Counsel raised his voice and acted unprofessionally, and attempted to sway the Judge with emotional arguments.³ Finally, Applicant argues that because of his extreme anxiety at the hearing, he did not notice that Department Counsel had not presented all the evidence relevant to Applicant's case.⁴ Applicant does not specifically identify this evidence but attaches copies of what are presumably the missing items of evidence with his brief. The Board does not find Applicant's arguments 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. Sept. 20, 2001). A party seeking to rebut that presumption has a heavy burden of persuasion on appeal. Applicant has not met that heavy burden. In his brief, Applicant states that his decision to proceed *pro se* was also due to "the financial impossibility of my retaining a lawyer."⁵ The documents which Applicant attaches with his brief were in fact made part of the record of the case. Applicant fails to identify anything in the record below that indicates or suggests a basis for a reasonable person to conclude that Department Counsel had acted improperly, unfairly or unprofessionally. *See, e.g.* ISCR Case No. 05-04923 at 3, n. 4 (App. Bd. Apr. 24, 2007); ISCR Case No. 03-21329 at 2 (App. Bd. Sept. 25, 2006).

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. July 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, as well as prehearing guidance (which advised that Applicant could appear by himself, with an attorney he selected and paid for, or with a personal representative). 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,

¹The Judge found in favor of the Applicant under Guidelines B and J. Those favorable findings are not at issue on appeal. In his appeal brief, Applicant offers new evidence in the form of additional explanations concerning the circumstances in his case. The Board may not consider new evidence on appeal. *See* Directive ¶ E3.1.29. Its submission does not demonstrate error on the part of the Judge. *See, e.g.*, ISCR Case No. 02-12789 at 3 (App. Bd. May 13, 2005).

²Applicant's Brief at 1.

³*Id.* at 3.

⁴*Id.* at 1.

⁵*Id.*

2001). If they fail to take timely, reasonable steps to protect their rights, 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, 2003). Because Applicant did not raise his concerns with the Judge during the hearing, or otherwise object to proceeding, he was not denied due process under the Directive or Executive Order. *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”).

(2) Applicant also contends that he did not deliberately falsify his security clearance application by failing to disclose he had previously been terminated from a job because he had misrepresented his education on an application/resume. In support of this contention, he argues that the omission of the information was due to a misunderstanding on his part, he has openly acknowledged his mistake in that regard, and he subsequently provided the correct information. Applicant’s arguments do not demonstrate error on the part of the Judge.

The Judge had the opportunity to consider Applicant’s explanation for why he failed to disclose the information in question. The Judge was not bound, as a matter of law, to accept or reject Applicant’s explanation. The Judge considered Applicant’s explanation in light of the record evidence as a whole, and concluded there was a sufficient basis to find that Applicant’s omission was deliberate and intentional. On this record, the Judge’s finding of deliberate falsification is sustainable. *See* Directive ¶ E3.1.32.1; ISCR Case No. 04-03849 at 2-3 (App. Bd. Jan. 26, 2006). The security concern raised by Applicant’s falsification was not necessarily overcome by Applicant’s subsequent disclosures to the government. *See* ISCR Case No. 01-19513 at 5 (App. Bd. Jan. 22, 2004).

(3) Finally, Applicant argues that the security concerns raised by his disqualifying conduct under Guideline E are outweighed by the favorable evidence he presented, including his 23 years of faithful and diligent service. Again, Applicant’s argument does not demonstrate error on the part of the Judge.

“[T]here is a strong presumption against granting a security clearance.” *Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991). Once the government presents evidence raising security concerns, the burden shifts to the applicant to establish mitigation. Directive ¶ E3.1.15. The application of disqualifying and mitigating conditions and whole-person factors does not turn simply on a finding that one or more of them apply to the particular facts of a case. *See, e.g.*, ISCR Case No. 01-14740 at 7 (App. Bd. Jan.15, 2003). Thus, 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*. 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.

In this case, the Judge weighed the mitigating evidence offered by Applicant against the recency and seriousness of the disqualifying conduct, and considered the possible application of relevant mitigating conditions and whole-person factors. The Judge found in favor of the Applicant under Guidelines B and J. However, the Judge reasonably explained why the evidence which the

Applicant had presented in mitigation was insufficient to overcome the government's other 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. 02-28041 at 4 (App. Bd. June 29, 2005). Given the record that was before him, the Judge's ultimate unfavorable clearance decision under Guideline E sustainable.

Order

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

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