KEYWORD: Guideline F; Guideline J

DIGEST: 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. Failure to take such steps does not constitute denial of their rights. Although Applicant strongly disagrees with the Judge's conclusions, he has not established that those conclusions are error. Adverse decision affirmed.

CASENO: 06-16704.a1

DATE: 01/30/2008

DATE: January 30, 2008

In Re:	)	
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Applicant for Security Clearance	)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT
Caroline H. Jeffreys, Esq., Department Counsel

FOR APPLICANT
Joni J. Franklin, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On November 17, 2006, DOHA issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline F (Financial Considerations) and Guideline J (Criminal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested the case be decided upon the written record. On August 31, 2007, after considering the record, Administrative Judge Paul J. Mason denied Applicant's request for a security clearance. Applicant timely appealed pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.[1]

Applicant raised the following issues on appeal: whether Applicant was denied due process; whether the Judge's unfavorable clearance decision under Guideline F is arbitrary, capricious, or contrary to law.

(1) Applicant's counsel on appeal argues that Applicant was not an attorney and that he did not know how to collect and present the type of evidence necessary to support his case. He therefore asks that the case be remanded so that Applicant can offer additional evidence with the benefit of representation by counsel. The Board construes Applicant's request as raising the issue of whether Applicant was denied due process.

A review of the record indicates Applicant was provided with the procedural rights set forth in Executive Order 10865 and the Directive. Applicant requested that his case be decided on the written record. He was provided with a copy of the government's file of relevant material (FORM), and given an opportunity to object to those exhibits and provide his own evidence to rebut the government's allegations. Applicant filed a response to the government's FORM, which included a detailed explanation and multiple documentary exhibits.

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, 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). 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. Jul. 24, 2006). Given the record in this case, Applicant has no valid claim for denial of due process under the Directive or Executive Order, and is not entitled to a second opportunity to present evidence on his behalf.

(2) Applicant also contends that the Judge should have concluded, as a matter of law, that the security concerns raised by his history of financial difficulties had been mitigated because his

[1]The Judge found in favor of Applicant as to Guideline J and SOR paragraph 1.e. Those favorable findings are not at issue on appeal.

most recent discharge in bankruptcy[2] occurred almost three years ago in 2005 and his current financial problems are "minor." He also argues that the Judge gave insufficient weight to the fact that he had completed financial counseling. As part of his appeal, Applicant cites to several DOHA Hearing Office decisions in which an applicant in ostensibly similar circumstances was granted a clearance. Given the totality of the record evidence, Applicant's arguments do not demonstrate that the Judge's decision is arbitrary, capricious, or contrary to law.

The Board gives due consideration to the Hearing Office cases which Applicant has cited in his appeal brief. However, such decisions are not binding on Hearing Office Judges or on the Board. *See* ISCR Case No. 05-14853 at 3 (App. Bd. Sep. 24, 2007). They do not demonstrate error in this case. *See* ISCR Case No. 06-18340 at 2 (App. Bd. Oct. 3, 2007).

Once there has been a concern articulated regarding an applicant's security eligibility, there is a strong presumption against the grant or maintenance of a security clearance. *See Dorfmont v. Brown,* 913 F. 2d 1399, 1401 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991). After 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 does not turn simply on a finding that one or more of them apply to the particular facts of a case. Rather, their application requires the exercise of sound discretion in light of the record evidence as a whole. *See* 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. *See* ISCR Case No. 05-02833 (App. Bd. Mar. 19, 2007). 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* ISCR Case No. 05-03143 at 3 (App. Bd. Dec. 20, 2006).

Applicant has not met his burden of demonstrating that the Judge erred in concluding that the Guideline F allegations had not been mitigated. Although Applicant strongly disagrees with the Judge's conclusions, he has not established that those conclusions are arbitrary, capricious, or contrary to law. *See* Directive ¶ E3.1.32.3.

In this case, the Judge found that Applicant had a lengthy history of financial difficulties which had resulted in multiple bankruptcies. The Judge weighed the mitigating evidence offered by

[2]Applicant filed for Chapter 7 bankruptcy in May 1998 and was granted a discharge in November 1998. At that time he had $80,196 in assets and $114,640 in liabilities. In January 2002 he filed for Chapter 13 bankruptcy, but the filing was dismissed in December 2002 because he defaulted on the payment plan. At that time he had $285,386 in assets and $255,496 in liabilities. In September 2002 he filed for Chapter 13 bankruptcy, but the filing was dismissed in May 2003. At that time he had $266,811 in assets and $248,857 in liabilities. In September 2004 he filed for Chapter 7 bankruptcy and was granted a discharge in March 2005. At that time he had $13,080 in assets and $267,481 in liabilities.

Applicant against the length and seriousness of the disqualifying conduct, and considered the possible application of relevant mitigating conditions. He found in favor of Applicant as to SOR paragraph 1.e and the Guideline J allegations. However, he reasonably explained why the evidence which Applicant had presented in mitigation was insufficient to overcome all the government's security concerns. 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. Jun. 29, 2005). The Board does not review a case *de novo*. Given the record that was before him, the Judge's ultimate unfavorable clearance decision under Guideline F is sustainable.

Order

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

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