

KEYWORD: Guideline H; Guideline E

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. A review of the record shows that Applicant had knowledge of the burden of proof before he stated that he waived the 15 day notice rule. Adverse decision affirmed .

CASENO: 07-13925.a1

DATE: 07/16/2008

DATE: July 16, 2008

In Re:)	
)	
-----)	ISCR Case No. 07-13925
)	
Applicant for Security Clearance)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Francisco Mendez, Esq., Department Counsel

FOR APPLICANT

Gregory M. Van Doren, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On January 8, 2008, DOHA issued a statement of reasons (SOR) advising Applicant of

the basis for that decision—security concerns raised under Guideline H (Drug Involvement) and Guideline E (Personal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992), as amended (Directive).¹ Applicant requested a hearing. On March 28, 2008, after the hearing, Administrative Judge Noreen A. Lynch denied Applicant’s request for a security clearance. 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 procedural due process under the Directive and the Executive Order; and whether the Judge properly applied the whole-person concept to the facts of Applicant’s case. Finding no error, we affirm the Judge’s decision.

The Judge made the following relevant findings of fact: Applicant used marijuana on weekends during high school and occasionally during college. Applicant inherited his grandmother’s house in 1997, and he used marijuana in 1998 “because he was on his own and had the opportunity to do so.” Decision at 2. In August 2006, Applicant was arrested and charged with possession of marijuana while attending a concert. At the time of the incident, Applicant was sitting in a car preparing to smoke marijuana. When the police arrived, he placed the pipe under the car seat and initially denied that it was his, although he eventually admitted that it was. As a first offender, Applicant was ordered to undergo a substance abuse screening and assessment and perform community service. Applicant completed his probation, and the charge was dismissed. On his security clearance application, Applicant indicated that he was motivated to use marijuana in August 2006 by an upsetting incident in his neighborhood in May 2006. However, he listed the dates of his marijuana use as January 2001 to the present. On his application, Applicant also admitted using the prescription drug Adderall without a prescription, obtaining it from a friend who had a prescription. Applicant stated on his application that he used Adderall from January 2006 to the present, but he testified that he did not use it while he was on probation for the marijuana offense. Applicant was “vague and somewhat evasive” in his testimony regarding Adderall. Decision at 3. The Judge stated that Applicant’s testimony “was not credible or reasonable” . . . and that “he often gave different responses to the same question.” *Id.*

Applicant contends that he was denied due process. Specifically, he maintains that he did not understand his burden of proof and was misled by the Judge as to that burden. He argues that if he had properly understood his burden of proof, he would not have waived the 15-day notice requirement and would have spent more time preparing for the hearing. Applicant’s argument is not persuasive.

Applicant represented himself at the hearing. 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; if they fail to take such steps, that failure does not constitute denial of their rights. *See, e.g.,* ISCR Case No. 06-24460 at 2 (App. Bd. Apr. 30, 2008). A review of the record shows that Applicant received a copy of the Directive, and in response to a question by the Judge, indicated that he had read at least a portion of it. Transcript at 49. Paragraph E3.1.15 of the Directive states that “[t]he applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven by Department Counsel, and has the ultimate burden of persuasion as to obtaining a favorable clearance decision.” Moreover, at the

¹The SOR was subsequently amended on the motion of the government.

beginning of the hearing, the Judge made the following statement to Applicant: “The government today has the obligation to prove by substantial evidence any contested facts. However, they have no such obligation as to any facts to which you have already admitted.” Transcript at 5. It was shortly after that explanation that the Judge asked Applicant if he waived the 15-day notice rule. Applicant stated that he had waived it. Transcript at 7. Applicant had knowledge of the burden of proof before he stated that he waived the 15-day notice. If Applicant needed more time to prepare, he could have requested it. Since he did not make the request, he cannot now claim error. Applicant has not shown that he was denied due process.

Applicant also argues that the Judge did not properly apply the whole-person concept to the facts in Applicant’s case. In her decision, the Judge listed factors set forth in the Directive (at ¶ E2.2(a)) as relevant to a whole-person analysis. Throughout her decision, the Judge applied those factors to Applicant’s situation. Applicant contends that the evidence he provided should have led the Judge to reach a favorable security clearance based on the whole-person concept. In making his argument, Applicant weighs the record evidence differently than the Judge and reaches different conclusions. His ability to do so is not sufficient to demonstrate that the Judge did not apply the whole-person concept properly, or weighed the evidence in a way that was arbitrary, capricious, or contrary to law. *See, e.g.*, ISCR Case No. 02-33312 at 4-5 (App. Bd. Oct. 13, 2005). The Judge has a duty to make findings and conclusions that reflect a reasonable interpretation of the record evidence as a whole and adequately take into account an applicant’s overall conduct and circumstances. *See, e.g.*, ISCR Case No. 02-06194 (App. Bd. Jul. 15, 2004). The Judge’s findings and conclusions in this case reflect an interpretation of the record evidence that is consistent with the whole-person concept.

Order

The Judge’s decision denying Applicant a security clearance is AFFIRMED.

Signed: Michael Y. Ra’anan
Michael Y. Ra’anan
Administrative Judge
Chairman, Appeal Board

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

Signed: William S. Fields
William S. Fields
Administrative Judge

Member, Appeal Board