KEYWORD: Guideline F

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. There is no constitutional right to counsel in civil proceedings and DOHA proceedings are civil in nature. Ineffective assistance of counsel doctrine does not apply to civil proceedings. Adverse decision affirmed.

CASENO: 07-15235.a1

DATE: 10/03/2008

DATE: October 3, 2008

In Re:	)	
----------	)	ISCR Case No. 07-15235
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 December 17, 2007, DOHA issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline F (Financial Considerations) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On July 3, 2008, after the hearing, Administrative Judge Michael H. Leonard denied Applicant's request for a security clearance. Applicant timely appealed pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raises the following issues on appeal: (a) whether he was denied certain procedural rights and information prior to and during the hearing; (b) whether the Judge failed to consider record evidence; and (c) 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 makes numerous references in his appeal brief to alleged facts (some of which concern alleged historical events that post-date the hearing) that are not part of the record below. The Board cannot consider new evidence on appeal. Directive, ¶ E3.1.29.

Applicant contends that he was untrained and was an unknowledgeable person in legal matters and yet was required to represent himself, even though he could not do so effectively. Applicant states that he was unable to afford an attorney, and speculates that, if he had the right to free legal representation by the federal or state governments, he was not informed of any such rights. He also claims that he asked for instructions, information or other advice about preparing for the clearance hearing, but that nothing was provided to him by his superiors. Applicant asserts that this failure to provide requested materials meant that he had no legal guidance concerning what the hearing was all about. Additionally, Applicant claims he was not informed that he could bring character witnesses to the hearing, and was unaware that he could discuss such matters as his military and job performance.

Applicant's efforts on appeal concerning pre-hearing and hearing procedure are hindered significantly by the fact that he made no mention of these alleged irregularities before or during the hearing below. 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 (App. Bd. Dec. 29, 2003). Given the legal maxim that there is no presumption of error below, Applicant's failure to address these matters at the hearing level makes his burden on appeal a particularly challenging one.[1]

Applicants have the right to retain counsel to represent them in these proceedings, Executive Order 10865, Section 3(5); Directive, ¶ 4.3.4 and Additional Procedural Guidance, ¶ E3.1.8. Absent a constitutional right to counsel, Applicant was not entitled to have the government pay for an

[1]Indeed, the Judge specifically instructed Applicant during his opening remarks at the hearing, "If you fail to raise an objection at the hearing today and decide to raise that matter on appeal, the law would likely dictate that you forfeited or waived your objection absent some plain or gross or obvious error."

attorney to represent him. There is no constitutional right to counsel in civil proceedings,[2] and DOHA proceedings are civil in nature. Therefore, in these proceedings an applicant is not entitled to have an attorney appointed to represent the applicant or be reimbursed by the government if the applicant retains an attorney. *See*, *e.g.*, ISCR Case No. 96-0277 at 2 (App. Bd. Jul. 11, 1997). A review of the hearing transcript demonstrates that the Judge took great pains to describe Applicant's administrative rights, especially with regard to his right to representation. Applicant's claims are significantly undermined by the extensive discussion on the record of his rights and his failure to raise any claims or concerns at the hearing.

Applicant's ineffective assistance of counsel argument also lacks merit. The ineffective assistance of counsel doctrine does not apply to civil proceedings. *See*, *e.g.*, ISCR Case No. 96-0127 at 2 (App. Bd. Jul. 29, 1997)(citing federal cases). Thus, the ineffective assistance of counsel doctrine does not apply to DOHA proceedings. Having decided to represent himself, Applicant cannot now complain about the quality of his self-representation. *See*, *e.g.*, ISCR Case No. 97-0752 at 2 (App. Bd. Dec. 4, 1998).

Although he specifically talks about only his superiors' failure to provide him with instructions and information about the hearing, Applicant also states generally that he had no legal guidance concerning what the hearing was all about. The Board will construe Applicant's argument as stating that DOHA failed to provide Applicant with a copy of the Directive and the written instructions that are routinely provided applicants in DOHA proceedings.

There is a rebuttable presumption of regularity in administrative proceedings, and Applicant has proffered no evidence that would justify a conclusion by the Board that Applicant did not receive written pre-hearing instructions. Moreover, at the outset of the hearing, the Judge specifically asked Applicant if he felt he was prepared to proceed with the hearing. Applicant responded unequivocally in the affirmative during questioning of him by the Judge, a course of dialogue clearly intended to illicit feelings of confusion and/or unease on the part of the Applicant. Thus, the record seriously undercuts any argument on appeal that Applicant, at the critical time, considered himself unprepared for the hearing, whether through any omissions by DOHA or otherwise. Similarly, Applicant's assertions about his lack of knowledge concerning the use of character witnesses and the production of other favorable evidence are without merit. The onus was on Applicant to make inquiries and to clear up any doubts he had about these matters prior to and during the hearing.

Applicant argues that numerous facts in evidence were not considered by the Judge. There is a rebuttable presumption that the Judge considered all of the evidence presented unless the Judge specifically states to the contrary. After a review of the record and the Judge's decision, the Board concludes that Applicant has failed to carry the burden of overcoming the presumption. In fact, several of the evidentiary matters Applicant claims the Judge ignored are specifically mentioned in the Judge's decision.

---

[2]*See*, *e.g.*, *Lavado v. Keohana*, 992 F.2d 601, 605-06 (6th Cir. 1993); *United States v. Gosnell*, 961 F.2d 1518, 1521 (10th Cir. 1992).

Implicit in Applicant's appeal is the assertion that the Judge did not give proper weight to matters presented by Applicant in mitigation, and his decision is therefore arbitrary, capricious and contrary to law. In his brief, Applicant summarizes the favorable evidence he presented below and describes his ongoing efforts to resolve his financial problems.[3] Applicant's arguments do not demonstrate that the Judge erred.

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). 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*, *e.g.*, ISCR Case No. 06-17409 at 3 (App. Bd. Oct. 12, 2007). After a review of the entirety of the record, the Board concludes that the Judge's ultimate unfavorable security clearance decision under Guideline F is sustainable.

Order

The decision of the Judge is AFFIRMED.

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

Signed: Jeffrey D. Billett
Jeffrey D. Billett
Administrative Judge
Member, Appeal Board

[3]As indicated in an earlier paragraph, Applicant makes a number of assertions of fact that were not part of the record below, and most of these involve his more recent actions regarding his finances. The Board will not consider these.

Signed: James E. Moody
James E. Moody
Administrative Judge
Member, Appeal Board