

KEYWORD: Guideline G; Guideline H; Guideline E; Guideline J

DIGEST: The Appeal Board can consider evidence outside the record on threshold issues such as due process and jurisdiction. The record, read in conjunction with both parties' appeal submissions, provides no reason to believe that Applicant was denied his right to counsel or that DOHA personnel discouraged him from seeking counsel. Adverse decision affirmed.

CASE NO: 09-05486.a1

DATE: 08/01/2012

DATE: August 1, 2012

In Re:	)	
	)	
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	)	
Applicant for Security Clearance	)	

**APPEAL BOARD DECISION**

**APPEARANCES**

**FOR GOVERNMENT**

Caroline H. Jeffreys, Esq., Department Counsel

**FOR APPLICANT**

David B. Gates, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On October 5, 2011, DOHA issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline G (Alcohol Consumption), Guideline H (Drug Involvement), Guideline E (Personal Conduct) and Guideline J (Criminal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On May 17, 2012, after the hearing, Administrative Judge David M.

White denied Applicant's request for a security clearance. Applicant appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raised the following issues on appeal: whether Applicant was denied his right to counsel and whether the Judge's adverse security clearance decision was arbitrary, capricious, or contrary to law. The Judge's favorable findings under Guideline G are not at issue in this appeal. Consistent with the following, we affirm the Judge's decision.

The Judge made the following pertinent findings of fact: Applicant is a mechanic for a Defense contractor. He received a security clearance in 2006, while working for a previous employer.

Applicant began consuming alcohol at age 18. In 1987, he was arrested and convicted for DUI. He was entered into a five-year deferred prosecution agreement. In 1990 he successfully completed court-ordered alcohol treatment. He was diagnosed as alcohol-dependent and advised to abstain from alcohol consumption. He was abstinent for five years, but resumed drinking. He discontinued attendance at Alcoholics Anonymous.

Applicant began using marijuana in the early 1970s, at 18 years of age. He abstained from drug use for four years around the time of his DUI probation. However, he resumed smoking marijuana in the late 1990s. On one occasion he was arrested for possession of drug paraphernalia. By the mid-2000s, he was using marijuana regularly, around twice a week. He was spending about \$80 per month on marijuana. In April 2007, Applicant was injured at work. After receiving medical treatment, he smoked marijuana to ease the pain. The next month, Applicant submitted to a drug test due to his job-related injury. The test yielded a positive result for marijuana. He was referred to a substance abuse assessment, which diagnosed him with alcohol and marijuana dependence. He was recommended for a six-month outpatient relapse program, which he successfully completed. Applicant was aware that using marijuana after being granted a security clearance raises security concerns.

In 2009, Applicant was interviewed by an OPM investigator. He told the investigator that he had first smoked marijuana in the winter of 2004. He deliberately failed to disclose his use prior to 2004, which had begun in the early 1970s.

In 2005 and again in 2008, Applicant submitted security clearance applications (SCA). Questions on those SCAs asked if he had ever been charged or convicted of offenses related to alcohol or drugs. Applicant answered "no" to these questions. The SCAs also asked about any illegal drug use during the prior seven years. Applicant denied any such use in the 2005 SCA and admitted only three uses in 2007 on his 2008 SCA, although he did admit to having used marijuana while holding a security clearance. During the hearing, Applicant admitted to minimizing and denying the extent of his alcohol-related and drug-related criminal history because he did not want to lose his job.

Applicant submitted performance evaluations and other evidence of good work performance pertaining to the years 2005 and 2006. He also presented letters of recommendation from an employer who had fired him for defective performance. He did not provide evidence of the quality of his recent work performance.

In the Analysis, the Judge concluded that Applicant had succeeded in mitigating the security concerns under Guideline G. He made similar conclusions regarding all but one of the Guideline H allegations, finding against Applicant for an allegation of having used marijuana while holding a clearance. He also cleared Applicant under Guideline J of allegations pertaining to his drug and alcohol charges. However, he concluded that Applicant's false statements, which were alleged both under Guideline E and Guideline J, were not mitigated. He stated that these false statements were both serious and recent, going to the heart of an evaluation of his reliability, trustworthiness, and integrity. The Judge stated that the character evidence that Applicant had submitted was not sufficient to mitigate the concerns arising from his efforts to conceal his past conduct.

Applicant represented himself at the hearing. He contends that he was denied his right to counsel. He asserts that, prior to the hearing, he had asked Department Counsel if he needed a lawyer and was advised that he did not. He asserts on appeal that this response mis-characterized the adversarial nature of the hearing. He states that "[i]t does not appear from the decision that there was anything documented about the desire of the [A]pplicant to have an attorney or that this fact was even made known to the Judge by the Department Counsel." Appeal Brief at 2. Applicant asserts that, had he been represented by a lawyer at the hearing, he could have presented additional evidence of good character and job performance.

Applicant's Appeal Brief, and Department Counsel's Reply Brief, refer to matters outside the record. We are not authorized to consider new evidence on appeal. Directive ¶ E3.1.29. However, we have, in appropriate cases, considered evidence outside the record insofar as it raises threshold issues of due process, jurisdiction, etc. *See, e.g.*, ISCR Case No. 10-09936 at 2 (App. Bd. Feb. 3, 2012). In this case we will consider Applicant's and Department Counsel's assertions for the light they shed on Applicant's claim that he was denied the right to counsel set forth in the Directive.

Department Counsel notes that Applicant was advised of his right to counsel by means of written guidance that DOHA sent to him in anticipation of his hearing. This guidance, which is part of the record, states that the

hearing is an adversarial proceeding in which the parties have the responsibility to present their respective cases. The Government is normally represented by an attorney known as a Department Counsel. The Applicant has the option of appearing by himself or herself without an attorney, or being represented by an attorney selected and paid for by the Applicant . . .

Department Counsel has attached to her Reply Brief a copy of a letter she sent to Applicant prior to the hearing in which she repeats this advice. Moreover, at the beginning of the hearing, the Judge engaged in the following colloquy with Applicant:

[Judge]: And are you aware of your right to have an attorney or someone else here to assist you today?

[Applicant]: Yes.

[Judge]: I see you're here by yourself. Are you planning to represent yourself?

[Applicant]: Yes.

[Judge]: Okay. Let me get some necessary information on the record, then . . . your age and education level?

[Applicant]: My age is 56, and I graduated out of high school.

[Judge]: Okay. And are you able to read and write the English language?

[Applicant]: Yes.

[Judge]: Were you able to review and understand the materials that were sent to you by the Defense Office of Hearings and Appeals?

[Applicant]: Yes.

[Judge]: And do you understand that our purpose today is to determine whether it is clearly consistent with the interest of national security to authorize you access to classified information?

[Applicant]: Yes . . .

After further inquiry as to the extent of Applicant's understanding of the nature of a security clearance and the purposes of the adjudicative process, the Judge stated as follows: "Okay. I find that the Applicant has knowingly decided to represent himself and is able to do so." Tr. at 4-7. After this, the Judge explained the hearing to Applicant in detail, including Applicant's obligations and responsibilities, *e.g.*, Tr. at 8-9, 19-20. He also repeatedly inquired of Applicant if he had any objections, problems, or additional evidence, *e.g.*, Tr. at 12, 16, 19, 20, 28, 30, 45, 73. In her Reply Brief, Department Counsel states that "Applicant never claimed that anything he had been told by Department Counsel was inconsistent with what was being explained to him by the Administrative Judge." Reply Brief at 8.

We find the arguments in Department Counsel's Reply Brief to be persuasive. The Judge engaged in an extensive colloquy with Applicant on the question of his self-representation. At no time did Applicant state or intimate that he wanted a lawyer. Neither did he intimate that Department Counsel had provided him with advice regarding the nature of the proceeding and his right to counsel that was at variance with written guidance he had received, both from DOHA and from Department Counsel herself.

Moreover, although Applicant contends that, had he been represented by counsel, he could have presented more evidence of good work performance and character, he cites to no actual piece of evidence that he would have submitted. It appears that Applicant was fully apprised of the adversarial nature of the hearing, his right to counsel, and to his other rights. It also appears that Applicant voluntarily undertook to represent himself.

After considering the briefs of the parties in light of the record, we find no reason to conclude that Applicant was deprived of the rights afforded him by the Directive to a fair hearing and due process. Applicant has failed to rebut the presumption of good faith and regularity to which Federal employees, such as Department Counsel, are entitled. *See, e.g.*, ISCR Case No. 10-11076 at 4 (App. Bd. Feb. 9, 2012). Applicant was not denied his right to counsel or other due process rights.

Applicant contends that the Judge erred in stating that he had not demonstrated remorse for his drug-related conduct while holding a security clearance. He asserts that lack of remorse is not listed under Guideline H as a mitigating condition. However, a Judge is required to consider the record as a whole in making a clearance decision. *See, e.g.*, ISCR Case No. 10-10612 at 3 (App. Bd. Jul, 9, 2012). "Available, reliable information about the person, past and present, favorable and unfavorable, should be considered in reaching a determination." Directive, Enclosure 2 ¶ 2(a). Remorse or lack thereof was a factor that the Judge could legitimately consider in performing an analysis of security concerns attendant to Applicant's drug use while holding a security clearance. Moreover, we find no reason to conclude that the Judge extended undue weight to this matter.

The record supports a conclusion that the Judge examined the relevant data and articulated a satisfactory explanation for the decision, "including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n of the United States v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)(quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)). The Judge's adverse 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, Enclosure 2 ¶ 2(b): "Any doubt concerning personnel being considered for access to classified information will be resolved in favor of the national security."

**Order**

The Judge's adverse security clearance decision is AFFIRMED.

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

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

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