



**DEPARTMENT OF DEFENSE  
DEFENSE OFFICE OF HEARINGS AND APPEALS**



In the matter of: )  
)  
) ISCR Case No. 07-01097  
)  
Applicant for Security Clearance )

**Appearances**

For Government: Gina Marine, Esq., Department Counsel  
For Applicant: Alan V. Edmunds, Esq.

June 24, 2011

**Decision**

LAZZARO, Henry, Administrative Judge

On February 5, 1998, Applicant, an Army staff sergeant, was sentenced to be discharged with a Bad Conduct Discharge. He was convicted of several charges based on him having sexual relations with two female recruits under his command. Applicant’s overall conduct and reputation, both before and after those offenses, is exemplary. Clearance is granted.

On December 30, 2010, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant stating it was unable to find it is clearly consistent with the national interest to grant or continue a security clearance for Applicant.<sup>1</sup> The SOR alleges a single security concern under Guideline E (personal conduct). On January 13, 2011, Applicant submitted a response to the SOR in which he denied the SOR allegation and requested a hearing.

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<sup>1</sup> This action was taken under Executive Order 10865, DoD Directive 5220.6, dated January 2, 1992, as amended (Directive), and adjudicative guidelines which became effective within the Department of Defense for SORs issued after September 1, 2006.

The case was assigned to me on February 22, 2011. A notice of hearing was issued on April 5, 2011, scheduling the hearing for April 26, 2011. The hearing was conducted as scheduled. The government submitted six documentary exhibits that were marked as Government Exhibits (GE) 1-6 and admitted into the record without objection. Applicant testified, called three character witnesses, and submitted one documentary exhibit containing 24 tabs, that was marked as Applicant's Exhibit (AE) 1. Department Counsel's objection to the admission of the psychological evaluation contained in AE 1, tab B, was overruled except to the opinion contained in that evaluation concerning Applicant's qualification to hold a security clearance. The transcript was received on May 4, 2011.

### **Findings of Fact**

After a thorough review of the pleadings, testimony and exhibits, I make the following findings of fact:

Applicant is a 46-year-old man who has been employed by a succession of defense contractors to train soldiers at an Army Reserve Center since June 1998. He served on active duty in the Army from September 1983, until he was sentenced to be discharged with a Bad Conduct Discharge in February 1998, and placed on appellate leave. Applicant was awarded a bachelor of arts degree in business administration in December 2003. Applicant possessed a security clearance from about 1983 until issuance of the SOR in this case. No prior action was ever instituted to revoke or downgrade Applicant's clearance for adverse reasons, and there has been no allegation ever made that he compromised or risked the compromise of classified information.

Applicant was first married in November 1986. That marriage ended in divorce in June 1994. He remarried in May 1997, and that marriage ended in divorce in June 2001. He has been married a third time since March 2005. Applicant has three adult children and one infant child.

Applicant's military career from 1983 until 1998 included assignments with airborne units, chemical companies, an infantry battalion, and as an instructor at several schools. His personal awards include three Army Commendation Medals, two Army Achievement Medals, four Good Conduct Medals, a Parachutist Badge, a Belgian Armed Forces Parachutist Badge, and the Kuwait Liberation Medal. The many certificates of achievement and course completion he submitted indicate Applicant was an excellent soldier until he committed the offenses that resulted in his court-martial. He was a staff sergeant at the time of the court-martial. The only prior blemish in his record was nonjudicial punishment he received in June 1985, for missing a formation, for which he was awarded a suspended reduction in rank.

On February 5, 1998, Applicant was convicted by members at a special court-martial of two specifications of adultery, one specification of sodomy, three specifications of violating a lawful general order, and one specification of making a false official statement. All of these charges, except the charge of violating a lawful general order, arose from Applicant's engaging in consensual sexual relations with two female recruits under his command when he was assigned as their drill instructor. The violation of a lawful general order arose from a lewd statement Applicant made to a third recruit under his command.

The only sentence imposed by the court-martial was to award Applicant a Bad Conduct Discharge. The sentence was approved by the Convening Authority on July 7, 1998, but was not executed pending appellate review. The Army Court of Criminal Appeals affirmed the findings and sentence on March 29, 2001. The United States Court of Appeals for the Armed Forces affirmed the decision of the Army Court of Criminal Appeals on July 23, 2002, and its mandate was issued on August 22, 2002. The Army ordered the Bad Conduct Discharge executed on September 25, 2003. However, and inexplicably, Applicant was not actually issued the Bad Conduct Discharge until July 28, 2010. Applicant was issued a Certificate of Release or Discharge from Active Duty (DD 214) on July 28, 2010, which records his date of entry on active duty as September 30, 1983, his separation date as July 28, 2010, and his net active service as 26 years, 9 months, and 29 days.

Applicant submitted letters of recommendation providing the following information, opinions, and recommendations:

- AE 1, tab G: An Army lieutenant colonel (promotable) who has known Applicant since 1998, and observed his work performance almost daily since 2004, considers him to be an exemplary person of the highest caliber. She opines that Applicant is trustworthy, mature, and possesses excellent judgment. She wrote that he is "smart, articulate, and well-grounded." She strongly recommends that Applicant be granted a security clearance.

- AE 1, tab H: An individual who worked with Applicant as a Battle Simulation Instructor from 1998 to 2002, and who has maintained a friendship with him since, considers Applicant to be professional and inspirational Christian who provides motivation and encouragement to others.

- AE 1, tab I: An Army major who has known Applicant for 11 years considers Applicant a trustworthy person who can be counted on to do what is right. He wrote that Applicant "is known as the Subject Matter Expert (SME) on the Army Battle Command Systems (ABCS)", and that Applicant's opinion is always sought on how to use, train, or employ the ABCS.

- AE 1, tab J: An individual who has known Applicant since 2004, wrote that Applicant "always did what was right and there was never a case of indiscretion, moral turpitude or lack of trustworthiness." He personally trusts Applicant's "judgment, honesty, and integrity emphatically."

- AE 1, tab K: A police officer who has known Applicant for 24 years opines that Applicant is trustworthy, honest, and loyal. He recommends that Applicant be granted a security clearance.

- AE 1, tab L: A retired Army lieutenant colonel who has known Applicant for 11 years, and who has had almost daily contact with him in the workplace, has found Applicant to be an excellent, hardworking, and dependable worker. He opines that Applicant is honest and trustworthy, and he highly recommends that Applicant be granted a security clearance.

- AE 1, tab M: The Deputy Brigade Commander from 1999-2003 for the command where Applicant works had frequent contact with him during that time period and has maintained contact with him since. He found Applicant to be the type of employee who embraced “the Army core values of loyalty, duty, respect, selfless service, honor, integrity, and personal courage.” He vouches that Applicant “earned the highest respect and admiration from the commanding general and other senior principals throughout the organization and units supported throughout the command’s area of responsibility.”

The individuals who authored the letters of recommendation identified as AE 1, tabs I, L, and M, also testified at the hearing that they were aware of the reason why Applicant was court-martialed and discharged from the Army.

Applicant submitted performance appraisals from his employer that establish he routinely meets or exceeds all job requirements. The certificates of training he submitted demonstrate that Applicant continuously seeks to improve himself and enhance his value to his employer.

In 2003, Applicant helped establish the church of which he is a member. He was elected to serve in a leadership position as a Ruling Elder of the church in 2009. Applicant’s wife submitted a letter in which she wrote about his work with the church that has included volunteering as the church administrator, developing computer graphics and sound for worship services, setting up ministry teams, and teaching Sunday school and small group classes.

Applicant provided Affidavits on November 9, 2007, and June 9, 2010, to investigators from the Office of Personnel Management in which he denied committing the offenses of which he was convicted at the court-martial. He testified he did not want to provide a statement to those investigators because it was his understanding the appellate proceedings of his court-martial were still pending. However, he was told by the investigator that he had to provide a statement as part of the process for him to obtain a security clearance. He admitted providing the false statements at the hearing and admitted, somewhat begrudgingly, that he committed the offenses for which he was convicted.

Applicant testified that he obtained counseling from an Army chaplain before and after his court-martial and from a civilian counselor in about 2007. He obtained a psychological evaluation for presentation at the hearing that included a range of psychological testing. Overall, the testing revealed that Applicant is a normally adjusted and healthy individual devoid of any at-risk sexual behaviors. His self-reported history, clinical presentation, and test results did not suggest any form of mental illness. He was found to be psychologically healthy and stable. There was no Axis I or Axis II diagnosis.

### **Policies**

The Directive sets forth adjudicative guidelines to consider when evaluating a person’s eligibility to hold a security clearance. Chief among them are the disqualifying conditions and mitigating conditions for each applicable guideline. Clearance decisions must be fair and impartial decisions that are based upon relevant and material facts and circumstances, the whole person concept, and the factors listed in ¶ 6.3.1 through ¶ 6.3.6

of the Directive. While the presence or absence of a particular condition or factor for or against clearance is not outcome determinative, the adjudicative guidelines should be followed whenever a case can be measured against this policy guidance. Guideline E (personal conduct), with its disqualifying and mitigating conditions, is most relevant in this case.

The sole purpose of a security clearance decision is to decide if it is clearly consistent with the national interest to grant or continue a security clearance for an applicant.<sup>2</sup> The Government has the burden of proving controverted facts.<sup>3</sup> The burden of proof in a security clearance case is something less than a preponderance of evidence,<sup>4</sup> although the government is required to present substantial evidence to meet its burden of proof.<sup>5</sup> “Substantial evidence is more than a scintilla, but less than a preponderance of the evidence.”<sup>6</sup> Once the Government has met its burden, the burden shifts to an applicant to present evidence of refutation, extenuation, or mitigation to overcome the case against him.<sup>7</sup> Additionally, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.<sup>8</sup>

No one has a right to a security clearance<sup>9</sup> and “the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials.”<sup>10</sup> Any reasonable doubt about whether an applicant should be allowed access to classified information must be resolved in favor of protecting national security.<sup>11</sup>

## Analysis

### Guideline E, Personal Conduct

Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual’s reliability, trustworthiness, and ability to protect classified information. Of special interest

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<sup>2</sup> ISCR Case No. 96-0277 (July 11, 1997) at 2.

<sup>3</sup> ISCR Case No. 97-0016 (December 31, 1997) at 3; Directive, Enclosure 3, Item E3.1.14.

<sup>4</sup> *Department of the Navy v. Egan* 484 U.S. 518, 531 (1988).

<sup>5</sup> ISCR Case No. 01-20700 (December 19, 2002) at 3 (citations omitted).

<sup>6</sup> ISCR Case No. 98-0761 (December 27, 1999) at 2.

<sup>7</sup> ISCR Case No. 94-1075 (August 10, 1995) at 3-4; Directive, Enclosure 3, Item E3.1.15.

<sup>8</sup> ISCR Case No. 93-1390 (January 27, 1995) at 7-8; Directive, Enclosure 3, Item E3.1.15.

<sup>9</sup> *Egan*, 484 U.S. at 528, 531.

<sup>10</sup> *Id.* at 531.

<sup>11</sup> *Egan*, Executive Order 10865, and the Directive.

is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process. (AG 15)

In February 1998, Applicant was convicted by members at a special court-martial of various offenses and sentenced to be discharged with a Bad Conduct Discharge. His offenses consisted of engaging in consensual sexual conduct with two female recruits under his command, and making lewd remarks to a third female recruit. His convictions and sentence were affirmed by the Army Court of Criminal Appeals in 2001, and the United States Court of Appeals for the Armed Forces in 2002. Appellant was finally issued the Bad Conduct Discharge in July 2010. Applicant's offenses, committed while he was serving as a drill instructor, were a serious violation of the trust that was placed in him by the Army.

Applicant's criminal conduct, at the time it was committed, warranted application of Disqualifying Condition (DC) 16(e): *personal conduct, or concealment or information about one's conduct, that creates vulnerability to exploitation, manipulation, or duress, such as (1) engaging in activities which, if known may affect the person's personal, professional, or community standing.* . . . However, his conviction at a court-martial of those offenses, and his disclosure of the underlying conduct to at least some of his coworkers negates its present applicability.

Applicant's 1998 criminal conduct, combined with the false statements he provided in 2007 and 2010, warrants application of DC 16(d): *credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information. This includes but is not limited to consideration of: (2) disruptive, violent, or other inappropriate behavior in the workplace.*

Applicant has worked at the same Army Reserve Center for a succession of defense contractors since June 1998. He has earned a reputation for being a hardworking employee and a subject matter expert. People who know him well and have worked with him for many years, including senior Army officers, vouch for his honesty, reliability, trustworthiness, and overall integrity. Many of them specifically recommend that Applicant be granted a security clearance.

Applicant had a very successful Army career before he committed the offenses that resulted in the court-martial. His only prior offense was a relatively minor charge for missing a formation that was adjudicated at a nonjudicial punishment at which he was awarded a suspended reduction in rank. The awards he received and the certificates he submitted establish that he was a professional and dedicated soldier.

Applicant sought counseling from an Army chaplain at the time of his court-martial and from a civilian therapist a number of years later. He obtained a psychological evaluation for submission at the hearing that indicates he is a mentally healthy and stable person who is devoid of any mental disease or defect. Applicant has been happily married

since 2005, and he and his wife have an infant child. Applicant is active in his church where he was elected to a leadership position in 2009.

The following mitigating conditions apply: MC 17(c): . . . *so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment*, MC 17(d): *the individual has acknowledged the behavior and obtained counseling to change the behavior or taken positive steps to alleviate the stressors, circumstances, or factors that caused the untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur*, and MC 17(e): *the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress*.

The false information Applicant provided in the affidavits he submitted in 2007 and 2010 is of concern. However, it is understandable how he would not want to admit he committed criminal conduct while he reasonably believed the appellate process was continuing from his court-martial. Having most certainly been instructed by his military attorney to not discuss the case with anyone, Applicant found himself placed between the proverbial "rock and a hard-place" when he was told he had to provide a statement that, if he admitted he committed the criminal conduct, could be used against him in a retrial if one were ordered. On balance, and considering these unique circumstance and the whole-person concept, Applicant's falsifications are not sufficient to negate the effect of the mitigating conditions that exist.

Considering all relevant and material facts and circumstances present in this case, the whole-person concept, the factors listed in ¶ 6.3.1 through ¶6.3.6 of the Directive, and the applicable disqualifying and mitigating conditions, I find Applicant mitigated the personal conduct security concern. He has overcome the case against him and satisfied his ultimate burden of persuasion. It is clearly consistent with the national interest to grant Applicant a security clearance. Guideline E is decided for Applicant.

### **Formal Findings**

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline E:                   FOR APPLICANT

    Subparagraph 1.a:                   For Applicant

### **Conclusion**

In light of all the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. Clearance is granted.

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Henry Lazzaro  
Administrative Judge

