

KEYWORD: Guideline E

DIGEST: The disqualifying conditions listed under each guideline are illustrative only, not exhaustive and exclusive. They provide an analytical framework for decision-making but are not to be applied in the strict manner required of criminal statutes. Indeed, it is not anomalous for a Judge to conclude that none of the listed disqualifying conditions strictly apply yet nevertheless conclude that an applicant’s conduct raises concerns under the guideline at issue. A Judge must bring common sense to his decision making and must place national security over other competing considerations. Adverse decision affirmed.

CASE NO: 14-03701.a1

DATE: 04/12/2017

DATE: April 12, 2017

In Re:	)	
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	)	
Applicant for Security Clearance	)	
	)	

**APPEAL BOARD DECISION**

**APPEARANCES**

**FOR GOVERNMENT**

James B. Norman, Esq., Chief Department Counsel

**FOR APPLICANT**

James D. DelSordo, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On April 6, 2015, DoD issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline E (Personal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On January 26, 2017, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge

Juan J. Rivera 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 the Judge erred in concluding that his conduct raised Guideline E security concerns and whether the Judge's adverse decision was arbitrary, capricious, or contrary to law. Consistent with the following, we affirm.

### **The Judge's Findings of Fact**

Applicant works for a Defense contractor. He served in the U.S. military from 1997 until 2012, rising to the grade of E-6. In 2011, Applicant participated in a hazing incident with five other members, in which the victim was stripped naked, restrained, photographed, and assaulted, including an indecent assault in which one of the assailants placed his genitals on the victim's forehead. At the time of the incident, Applicant was 31 years old and had been in the military for 13 years. He had received yearly training on the military's policies forbidding hazing, sexual harassment, sexual misconduct, and the misuse of alcohol. Applicant knew that hazing was illegal.

As a consequence of his misconduct, Applicant was brought to a summary court-martial, where he pled guilty to violating a general order (hazing), indecent acts, and assault consummated by a battery. After his conviction, the military administratively discharged Applicant under Other Than Honorable Conditions. Between the time of the incident and his discharge in 2012, Applicant continued to perform his duties. The military did not revoke his security clearance.

Applicant had no other infractions or problems with the law after this incident. His current supervisor commended his duty performance and characterized him as reliable and trustworthy. His commanding officer at the time of his misconduct, who is now an O-6, stated that Applicant was an outstanding military member. He considers Applicant to be trustworthy and able properly to handle classified information. He stated that Applicant has paid for his mistake.

### **The Judge's Analysis**

The Judge concluded that Applicant's misconduct satisfies the statement of concern under Guideline E<sup>1</sup> and disqualifying condition 16(d).<sup>2</sup> In evaluating Applicant's case for mitigation, the Judge noted his age and rank at the time of the offense as well as the circumstances underlying it. He cited to evidence that Applicant engaged in his misconduct despite regular training regarding the military's ban on hazing. He also noted that at the time of the incident Applicant was in a position of leadership, responsible for the care of those serving under him and for the enforcement of rules and regulations. Though acknowledging the positive evidence that Applicant submitted, the Judge concluded that abuse of a fellow military member that occurred over a 60 to 90 minute period and that constituted serious criminal misconduct precluded a favorable decision.

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<sup>1</sup> Directive, Enclosure 2 ¶ 15

<sup>2</sup> Directive, Enclosure 2 ¶ 16(d).

## Discussion

Applicant challenges the Judge's application of disqualifying condition 16(d). He contends that none of the criteria set forth in this subparagraph have been satisfied.

We note first of all that the Directive presumes a nexus between admitted or proved conduct under any of the guidelines and an applicant's eligibility for a clearance. *See, e.g.*, ISCR Case No. 15-02903 at 2 (App. Bd. Mar. 9, 2017). In this case, Applicant admitted each allegation set forth in the SOR, thereby giving rise to this presumption. Moreover, the disqualifying conditions listed under each guideline are illustrative only, not exhaustive and exclusive. *See, e.g.*, ISCR Case No. 12-01698 at 4 (App. Bd. Jun. 13, 2014). They provide an analytical framework for decision-making but are not to be applied in the strict manner required of criminal statutes. Indeed, it is not anomalous for a Judge to conclude that none of the listed disqualifying conditions strictly apply yet nevertheless conclude that an applicant's conduct raises concerns under the guideline at issue. A Judge must bring common sense to his decision making and must place national security over other competing considerations. *Id.*

Disqualifying condition 16(d) provides as follows:

[C]redible 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 . . . disruptive, violent, or other inappropriate behavior in the workplace[.]

Applicant argues that this condition does not apply because, among other things, he was not on duty at the time of the offense, as a consequence of which his acts did not occur in the workplace. However, Applicant was a member of the U.S. military in an area subject to military command and control. Applicant and his fellow service members could have been required to perform military operations at a moment's notice, and distinctions between on-duty and off-duty conduct have little purchase under the kind of circumstances that routinely confront members of the armed forces. Moreover, Applicant was expected to enforce standards irrespective of duty status, a requirement of which he was aware, and failed to do so. The seriousness of his infraction can be gauged by his receipt of an Other than Honorable Conditions discharge. Given the totality of the evidence, we find no reason to disturb the Judge's conclusion that Applicant's violent conduct raised serious questions about his willingness to comply with rules and regulations. In particular, we find no reason to disturb the Judge's conclusion that 16(d) provides a suitable framework for addressing the essential nature of Applicant's security-significant conduct. We resolve this assignment of error adversely to Applicant.<sup>3</sup>

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<sup>3</sup>We also note, as stated above, that the Judge cited to the Guideline E statement of concern: "Conduct involving questionable judgment . . . or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness and ability to protect classified information." This language captures

In challenging the Judge's mitigation analysis, Applicant cites to his otherwise clean disciplinary record and to the favorable opinions of his supervisor and his former commander. The Judge made findings about these matters. However, given the seriousness of his misconduct, Applicant has not demonstrated that the Judge weighed the record evidence in a manner that was arbitrary, capricious, or contrary to law. *See, e.g.,* ISCR Case No. 15-08842 at 3 (App. Bd. Feb. 14, 2017).

The Judge examined the relevant evidence and articulated a satisfactory explanation for the decision, both as to the disqualifying conditions and the mitigating conditions. The 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 Decision is **AFFIRMED**.

Signed: Michael Ra'anan

Michael Ra'anan  
Administrative Judge  
Chairperson, Appeal Board

Signed: James E. Moody

James E. Moody  
Administrative Judge  
Member, Appeal Board

Signed: William S. Fields

William S. Fields  
Administrative Judge  
Member, Appeal Board