

DATE: February 28, 2002

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 01-17852

**DECISION OF ADMINISTRATIVE JUDGE**

**JOSEPH TESTAN**

**APPEARANCES**

**FOR GOVERNMENT**

Martin H. Mogul, Department Counsel

**FOR APPLICANT**

Matthew W. Borowiec, Esq.

**STATEMENT OF THE CASE**

On October 15, 2001, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, issued a Statement of Reasons (SOR) to applicant which detailed reasons why DOHA could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for applicant and recommended referral to an Administrative Judge to determine whether clearance should be denied or revoked.

Applicant responded to the SOR in writing on November 12, 2001. The case was assigned to the undersigned on January 2, 2002. A Notice of Hearing was issued on January 18, 2002, and the hearing was held on February 12, 2002. The transcript was received on February 20, 2002.

**FINDINGS OF FACT**

Applicant is forty-two years of age. He has been offered a job with a defense contractor on the condition that he first receive a security clearance.

Appellant went on active duty with the United States Army as an officer in 1982 following graduation from a university. The evidence establishes that he served honorably and with distinction<sup>(1)</sup> until November 1995. Based on an early morning incident at a friend's house in November 1995,<sup>(2)</sup> applicant was charged with (1) Rape, a violation of Article 120 of the Uniform Code of Military Justice (UCMJ), (2) Sodomy by force and without consent, a violation of Article 125 of the UCMJ, and (3) Indecent Assault, a violation of Article 134 of the UCMJ. Based on a false statement he made about the incident, he was also charged with Conduct Unbecoming an Officer, a violation of Article 133 of the UCMJ. After a trial by general court-martial in 1996, he was found guilty of all four offenses. In April 1996, he was sentenced to forfeiture of all pay and allowances, confinement for nine years, and dismissal. The convening authority upheld the sentence except for the period of confinement, which was reduced to thirty months. With the reduction in the period of confinement, applicant became eligible for parole after serving ten months. He was granted parole at his first parole

hearing in April 1997.

Although it is obvious that applicant believes he was unjustly convicted, he is legally barred from challenging his conviction during the DOHA hearing.

Applicant offered into evidence over 100 letters of support from various people including family members, acquaintances, neighbors, close friends, and fellow Army officers. I have carefully reviewed these letters. To the extent some of these letters claim that applicant was innocent of the charges, they were not considered. The remainder of the letters were considered, and in essence, they describe applicant as a truly incredible individual in terms of his good judgment, reliability and trustworthiness (Exhibits B, C, D and E). Many of these letters claim that the conduct applicant was charged with and convicted of is completely out of character for him. Of particular significance were the recently written letters of support recommending that he be granted a security clearance from the two retired colonels and three lieutenant colonels who served with applicant, and the letters attesting to applicant's current good judgment, reliability and trustworthiness from his current supervisor, a fellow member of the high school booster club, and a member of the local school board (Exhibit E).

An Army officer who has known applicant for fifteen years appeared at the hearing and testified that he "would stake his life on (applicant's) character" (TR at 15).

## **POLICIES**

Enclosure 2 of the Directive sets forth Guidelines (divided into conditions that could raise security concerns and conditions that could mitigate security concerns) which must be followed by the Administrative Judge. Based on the foregoing Findings of Fact, the following Guidelines are applicable:

### **Criminal Conduct**

#### Disqualifying Conditions

1. E2.A10.1.2.1: Criminal conduct.
2. E2.A10.1.2.2: A single serious crime or multiple lesser offenses.

#### Mitigating Conditions

1. E2.A10.1.3.1: The criminal behavior was not recent.
2. E2.A10.1.3.4: The factors leading to the violation are not likely to recur.

In addition to the formal Guidelines discussed above, the Enclosure 2 of the Directive provides that each decision should take into consideration the following factors:

The nature, extent and seriousness of the conduct;

The circumstances surrounding the conduct, to include knowledgeable participation;

The frequency and recency of the conduct;

The individual's age and maturity at the time of the conduct;

The voluntariness of participation;

The presence or absence of rehabilitation and other pertinent behavioral changes;

The motivation for the conduct;

The potential for pressure, coercion, exploitation, or duress; and

The likelihood of continuation or recurrence.

## CONCLUSIONS

The evidence establishes that applicant went on active duty with the United States Army as an officer in 1982. His Officer Evaluation Reports and numerous letters of support admitted into evidence establish that he served honorably and with distinction until that fateful night in November 1995. Despite the fact that applicant and many of his supporters felt he was not treated fairly by the military justice system, the fact remains that he was convicted of four very serious charges.

Applicant's conduct during the night in question, and his unwillingness to initially tell the truth about the incident, <sup>(3)</sup> are inexcusable. Even if he sincerely believed the woman was interested in him, he had no right to take advantage of her when he knew she was too intoxicated to resist his sexual advances. By doing so, he exercised extremely poor judgment, and he compounded the poor judgment when he failed to tell the truth about his actions when interviewed in January 1996.

Although applicant's criminal conduct militates against the granting of a security clearance, his long track record of good judgment, reliability and trustworthiness, both before and after the incident, which has been so clearly demonstrated by the evidence in the record, must be considered under the "whole person" concept discussed in the Directive. <sup>(4)</sup> In short, applicant's lapses in judgment relating to the incident, albeit major lapses, must be considered in the context of his otherwise twenty years of highly responsible conduct. And, when applicant's conduct is viewed in this context, it becomes apparent that his criminal conduct was completely out of character for him.

Given this fact, the isolated nature of the conduct, the fact that it occurred over six years ago, and the fact that applicant has led an exemplary lifestyle since being released from prison in 1996, I conclude that there is little or no chance that applicant will exercise such poor judgment in the future. If it were not for 10 U.S.C. 986, I would conclude that it is clearly consistent with the national interest to grant applicant access to classified information at the present time. However, in light of this statute, I must conclude that it is not clearly consistent with the national interest to grant applicant a security clearance. However, I recommend further consideration of this case for a waiver of 10 U.S.C. 986.

## FORMAL FINDINGS

### PARAGRAPH 1: AGAINST THE APPLICANT

## DECISION

In light of all the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant or continue a security clearance for applicant.

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Joseph Testan

Administrative Judge

1. *See*, Exhibit A.

2. Applicant and an acquaintance spent the night at the house of mutual friends. They fell asleep in the same bed. Applicant awoke during the night and engaged in sexual acts with the woman who was too intoxicated to stop him. A more detailed factual summary of the incident can be found in Exhibit 2.

3. *See*, Exhibit 2, page 5, footnote 1.

4. Directive, Section E2.2.1., "The adjudicative process is the careful weighing of a number of variables known as the whole person concept. Available, reliable information about the person, past and present, favorable and unfavorable, should be considered in reaching a determination."