

KEYWORD: Personal Conduct

DIGEST: The Army instituted a Special Court-Martial based on Applicant's second violation of its fraternization rules. He was found guilty of two violations and received a bad conduct discharge after eight years of service. Subsequent to his discharge, he violated private company policy on one occasion when he opened an inappropriate e-mail, causing problems with co-workers computers. He has mitigated the government's concerns under Guideline E. Clearance is granted.

CASENO: 05-00374.h1

DATE: 01/30/2006

DATE: January 30, 2006

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 05-00374

DECISION OF ADMINISTRATIVE JUDGE

MARY E. HENRY

APPEARANCES

FOR GOVERNMENT

FOR APPLICANT

Joseph J. DeFrancesco, Esq.

SYNOPSIS

The Army instituted a Special Court-Martial based on Applicant's second violation of its fraternization rules. He was found guilty of two violations and received a bad conduct discharge after eight years of service. Subsequent to his discharge, he violated private company policy on one occasion when he opened an inappropriate e-mail, causing problems with co-workers computers. He has mitigated the government's concerns under Guideline E. Clearance is granted.

STATEMENT OF THE CASE

On August 25, 2005, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Security Clearance Review Program* (Directive), dated January 2, 1992, as amended and modified, issued a Statement of Reasons (SOR) to Applicant. The SOR 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. Specifically, the SOR set forth security concerns arising under Guideline E, Personal Conduct, of the Directive. DOHA recommended the case be referred to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked. On August 30, 2005, Applicant submitted a notarized response to the allegations, and requested a hearing.

This matter was assigned to me on November 21, 2005. A notice of hearing was issued on November 22, 2005, and a hearing was held on December 13, 2005. Seven government exhibits [\(1\)](#) and nineteen Applicant Exhibits were admitted

into evidence. Applicant and two witnesses testified. The hearing transcript was received on January 9, 2006.

FINDINGS OF FACT

Applicant admitted, with explanation, the allegations in subparagraphs 1.a. through 1.d. of the SOR. ⁽²⁾ Those admissions are incorporated here as findings of fact. After a complete review of the evidence in the record and upon due consideration, I make the following additional findings of fact:

Applicant is a 30-year-old training developer for a defense contractor. ⁽³⁾ He has worked for this contractor for over three and one-half years. ⁽⁴⁾ He previously served eight years in the United States Army (Army), with most of his time as an instructor/trainer. ⁽⁵⁾ He was discharged in 2001 for bad conduct. ⁽⁶⁾ He completed a security clearance application (SF 86) in August 2003. ⁽⁷⁾

In February 1993, the Boy Scouts of America elevated Applicant to Eagle Scout. ⁽⁸⁾ He enlisted in the Army eight months later. ⁽⁹⁾ He performed his duties with distinction, earning two Army commendation medals, six Army achievement medals, two good conduct medals, the NATO Medal, the noncommissioned Officer Professional Development Ribbon, Army Service Ribbon, the national Defense Service Ribbon, the M16A2 expert qualifications badge, and the combat medical badge. ⁽¹⁰⁾ His Army performance evaluations routinely rated him successful and among the best for promotion. ⁽¹¹⁾ The Army regularly promoted him up to the rank of Sergeant (E-5). ⁽¹²⁾

The Army charged Applicant with fraternization in November 1998. While a student in a training program, he became friends with a female classmate whom he later learned was an initial trainee soldier, a lower rank than he. ⁽¹³⁾ One evening, he observed her walking away from the post. He initially spoke with her outside his personal vehicle. Because it was cold, he asked her to sit in his private vehicle, even though he knew the act of sitting in his private vehicle was not permitted under the Army's fraternization rules. They were observed by another non-commissioned officer and reported. Although he had no direct line of supervision over her, ⁽¹⁴⁾ both were charged with fraternization under Article 15 of the Uniform Code of Military Justice(UCMJ) and given extra duty as a punishment. ⁽¹⁵⁾

In April 1999, Applicant's then girlfriend filed a criminal assault charge against him for hitting her. ⁽¹⁶⁾ After hours of no sleep caused by the lengthy discussions and arguments with her and numerous refusals to comply with her request to hit her, he did. ⁽¹⁷⁾ Later, when he told her that he intended to end the relationship, she filed the assault complaint. ⁽¹⁸⁾ The military police took no action on her complaint, although he received a letter of counseling. ⁽¹⁹⁾ He has no contact

with this individual.⁽²⁰⁾

In December 2000, Applicant worked as a training instructor eight miles off the post and also a second job at the PX.⁽²¹⁾ He met a female enlisted person at the PX job, whom he began dating.⁽²²⁾ After they started dating and just before their sexual encounter, he learned that she was a student on the post, but not at his duty station.⁽²³⁾ She was not his student.⁽²⁴⁾ She was in his battalion, but not his company or platoon.⁽²⁵⁾ Their dating relationship lasted three weeks.⁽²⁶⁾

In February 2001, the Army convened a Special Court-Martial, charging Applicant with an Article 92 violation under the UCMJ because of this relationship and the Army rules on fraternization.⁽²⁷⁾ Specifically, the Army charged him with three specifications of failure to obey a lawful order when he engaged in a nonprofessional relationship with students by 1) offering and giving two students a ride (to the movies) in a privately owned vehicle in a non-emergency situation; 2) engaging in sexual intercourse with one of these students on one occasion; and 3) having dinner with the same student on one occasion.⁽²⁸⁾ He pled not guilty to the charges.⁽²⁹⁾ The court found the Applicant not guilty on all three specifications under Article 92 of the UCMJ, but guilty of a disorder to the prejudice of good order and discipline under Article 134 of the UCMJ as to all three specifications.⁽³⁰⁾ The court sentenced him to a reduction in grade to a Private First Class (E3), and a bad-conduct discharge.⁽³¹⁾ The court also recommended that the Convening Authority suspend the adjudged discharge from the service, which it declined to do.⁽³²⁾

Applicant appealed the decision of the Convening Authority to the United States Army Court of Criminal Appeals. In a decision issued on January 22, 2003, this Court declined to affirm the guilty finding under Specification 1, but did affirm the guilty finding under Specifications 2 and 3, and affirmed the penalty imposed.⁽³³⁾ The Army discharged him for bad conduct.

The civilian executive officer to the deputy commanding general at Applicant's current place of employment testified on his behalf.⁽³⁴⁾ The executive officer, who retired from the Army after 22 years of service, worked as an equal employment officer in Applicant's Army brigade and knew about his court-martial and the basis for it.⁽³⁵⁾ He described fraternization as a military offense designed to prevent unauthorized contact between a subordinate and a supervisor which would lead to abuse of authority.⁽³⁶⁾ Over time, the definition of fraternization broadened to apply to inappropriate contact between persons of different ranks.⁽³⁷⁾ Discipline for violation of the fraternization rules differed between brigades and even battalions within a brigade.⁽³⁸⁾

In this case, Applicant did not abuse his authority because he was not in charge of the soldier with whom he fraternized.⁽³⁹⁾ In the executive officer's opinion, the punishment given Applicant was more severe than others.⁽⁴⁰⁾ The executive officer does not view him as a security risk.⁽⁴¹⁾ He has performed his job admirably and without question.⁽⁴²⁾ The executive officer's view regarding his security risk is supported by the command.⁽⁴³⁾

Applicant's current supervisor and his former Army platoon sergeant, now retired, testified on his behalf.⁽⁴⁴⁾ He agreed with the executive officer's initial definition of fraternization.⁽⁴⁵⁾ He also concurred with the executive officer's expanded meaning, which covered the situations leading to Applicant's discipline and discharge.⁽⁴⁶⁾ Following problems with fraternization at the Aberdeen Army base with sergeants taking advantage of their authority, the Army began to enforce its fraternization policies more stringently. The Command at Applicant's duty base made an example of him when it chose to proceed with a Court-Martial for violation of Article 92, UCMJ. While his conduct was incorrect, in his supervisor's opinion, the discipline should have proceeded under Article 15. The punishment should have been very different because the cause and effect did not equate. Applicant had no supervisory relationship with the students with whom he fraternized, thus, he could not take advantage of his authority. Concerning the sexual relationship incident, his supervisor testified that another instructor having an intimate sexual relationship with a student was not kicked out of the Army, and that others accused of similar misconduct were not punished as severely as Applicant.

Applicant's supervisor has recommended him for several jobs, including his present position.⁽⁴⁷⁾ He is reliable and dependable. He will get the work done.⁽⁴⁸⁾ Because of his dependability, his supervisor asked him to be an assistant baseball and football coach for little league.⁽⁴⁹⁾ He is not a security risk.⁽⁵⁰⁾

In 2002, shortly after Applicant began his first civilian employment, he received verbal counseling about his inappropriate use of a computer.⁽⁵¹⁾ He opened an e-mail which he believed to be from a friend.⁽⁵²⁾ The e-mail, however, contained multiple pop-ups for inappropriate websites.⁽⁵³⁾ When he opened the e-mail, it automatically populated his screen with these sites.⁽⁵⁴⁾ Even though he deleted the items on his computer screen, other office computers were impacted by his actions.⁽⁵⁵⁾ His employer counseled him not to do it again.⁽⁵⁶⁾ No further incidents have occurred.

Witnesses describe Applicant as trustworthy and loyal.⁽⁵⁷⁾ He handles classified materials appropriately.⁽⁵⁸⁾ No violations of the rules regarding the handling of classified materials have been alleged or shown. He has a good work performance and is highly qualified in his field of work. He has a positive attitude, and coaches little league baseball and football.⁽⁵⁹⁾ He has matured and is now married.⁽⁶⁰⁾

POLICIES

Enclosure 2 of the Directive sets forth adjudication guidelines which must be considered in the evaluation of security suitability. An administrative judge need not view the adjudicative guidelines as inflexible ironclad rules of law. Instead,

acknowledging the complexities of human behavior, these guidelines, when applied in conjunction with the factors set forth in the adjudicative process provision in Paragraph E2.2., Enclosure 2 of the Directive, are intended to assist the administrative judge in reaching fair and impartial common sense decisions.

Included in the guidelines are disqualifying conditions and mitigating conditions applicable to each specific guideline. In addition, each security clearance decision must be based on the relevant and material facts and circumstances, the whole-person concept, along with the factors listed in the Directive. Specifically, these are: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct; (3) the frequency and recency of the conduct; (4) the individual's age and maturity at the time of the conduct; (5) the voluntariness of participation; (6) the presence or absence of rehabilitation and other behavioral changes; (7) the motivation for the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence. Although 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.

The sole purpose of a security clearance determination is to decide if it is clearly consistent with the national interest to grant or continue a security clearance for an applicant.⁽⁶¹⁾ The government has the burden of proving controverted facts.⁽⁶²⁾ The burden of proof is something less than a preponderance of the evidence.⁽⁶³⁾ Once the government has met its burden, the burden shifts to the applicant to present evidence of refutation, extenuation, or mitigation to overcome the case against him.⁽⁶⁴⁾ Additionally, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.⁽⁶⁵⁾

No one has a right to a security clearance⁽⁶⁶⁾ and "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."⁽⁶⁷⁾ Any reasonable doubt about whether an applicant should be allowed access to sensitive information must be resolved in favor of protecting such sensitive information.⁽⁶⁸⁾ Section 7 of Executive Order 10865 specifically provides industrial security clearance decisions shall be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." The decision to deny an individual a security clearance is not necessarily a determination as to the allegiance, loyalty, and patriotism of an applicant.⁽⁶⁹⁾ It is merely an indication that the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Based upon a consideration of the evidence as a whole, I find the following adjudicative guideline most pertinent to an evaluation of the facts of this case:

Personal Conduct - Guideline E: Conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulation could indicate that the person may not properly safeguard classified information.

CONCLUSIONS

Upon consideration of all the facts in evidence, and after application of all appropriate adjudicative factors, I conclude the following with respect to the allegations set forth in the SOR:

The government has established its case as to allegations 1.a. through 1.d. under Guideline E. Personal Conduct Disqualifying Conditions (PC DC) E2.A5.1.2.1. (*Reliable, unfavorable information provided by associates, employers, coworkers, neighbors, and other acquaintances*) and

PC DC E2.A5.1.2.5. (*A pattern of...rule violation...*) apply. The Army disciplined Applicant under Article 15, UCMJ in 1998 for fraternization and counseled him in 1999 following an allegation of assault. In February 2001, the Army convened a special court martial proceeding under its fraternization policies and charged him with an Article 92, UCMJ violation. The Army found him guilty of an Article 134 violation, reduced him in rank and discharged him for bad conduct. His conduct in the Army reflects a pattern of rule violation. In his first civilian job, he inappropriately accessed pornography on his government computer in violation of company policy.

I considered all the Personal Conduct Mitigating Conditions (PC MC), and conclude that PC MC E2.A5.1.3.5. (*The individual has taken positive steps to significantly reduce or eliminate vulnerability to coercion, exploitation, or duress*) applies. Applicant has a stellar work record while in the Army and since his discharge. He is respected by his past and current superiors for his skills and unique abilities as a trainer and developer of training manuals. He has never violated security procedures. In the work place, he has made appropriate decisions and exercised good judgment. However, as a younger man, he made poor judgments regarding his personal dating relationships. These judgments violated existing fraternization rules, but were not an abuse of his authority. Two witnesses testified to his character and their belief that his discharge from the Army was too severe a penalty for his second fraternization violation. Both opined that he was treated differently than others whose conduct was more egregious, particularly since he had no supervisor/student relationship with the women involved in his infractions. Both have strong confidence in him as a person and believe that he presents no security risk. The view of the executive officer is supported by his military superiors at Applicant's current place of employment.

I have weighed Applicant's past poor judgment in personal relationships, which led to his bad conduct discharge against his excellent work record, the lack of abuse of his authority, and the fact that his superiors support granting him a clearance. While his past conduct raises some concern about his judgment, I find the positive statements of confidence in him, the changes in his life, and his overall work performance outweigh his past poor judgment in one type of situation. In addition, he has matured and is now married, thus, eliminating the need to make poor dating decisions.

The inappropriate use of a government computer occurred one time, almost four years ago, as the result of Applicant

opening an e-mail which contained access to pornography websites. He never opened the websites, but deleted this information from his screen. Even though he deleted the web sites, his act of opening the e-mail caused others at the office to receive the same websites on their computers. This type of incident has not occurred again.

Finally, I have considered the "whole person" concept in evaluating Applicant's risk and vulnerability in protecting our national interests. Despite his bad conduct discharge, he has an excellent performance record while in the military. He continues to perform at the same high level. His superiors have confidence in him and believe him to be an asset in the work place. He made some bad choices when dating, and lost his military career because of his choices. He has learned from these mistakes. He is now married and has financial stability. He contributes to the community. His positive changes have eliminated his vulnerability to coercion, exploitation, or duress. Applicant has mitigated the governments concerns under Guideline E. Accordingly, for the reasons stated, I find that it is clearly consistent with the national interest to grant a security clearance to 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 (Personal Conduct): FOR APPLICANT

Subparagraph 1.a: For Applicant

Subparagraph 1.b: For Applicant

Subparagraph 1.c: For Applicant

Subparagraph 1.d: For Applicant

DECISION

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

Mary E. Henry

Administrative Judge

1. Government Exhibit 6 contains pages one through three of the decision of the United States Army Court of Criminal Appeals on Applicant's appeal of his court-martial conviction. Applicant submitted pages one, three and four of this decision with his response to the SOR. Since the decision totals four pages, I have completed Government Exhibit 6 by adding the final page of the decision from Applicant's submission.
2. Applicant's response to SOR with attachments, dated August 30, 2005. Applicant submitted as evidence most of the attachments to his SOR. The only documents not submitted separately are a letter dated February 9, 2000, a memorandum of achievement dated August 1, 2000, and the instructions for completing the SF-86.
3. Government Exhibit 1 (Applicant's security clearance application, dated August 6, 2003) at 1-2.
4. *Id.* at 2.
5. *Id.* at 3-4; Tr. at 23, 61.
6. *Id.* at 6; Government Exhibit 4 (Certificate of Release or Discharge From Active Duty) at 1.
7. *Id.* at 1.
8. Applicant Exhibit N (List of important dates in life of Applicant).
9. Government Exhibit 1, *supra* note 3, at 4.
10. Applicant Exhibit Q (Post-Trial Recommendation Memorandum, dated June 11, 2001) at 2.
11. Applicant Exhibit R (Performance Evaluations from 1998-2000).
12. Government Exhibit 2 (Applicant's statement, dated March 11, 2004) at 2; Applicant Exhibit R (performance evaluations and documentation related to his Army career) at 1, 3, 5, 7, 9, 12-15.
13. Government Exhibit 2, *supra* note 12, at 2.
14. Tr. at 27.
15. *Id.*; Government Exhibit 2, *supra* note 12, at 2.

16. Government Exhibit 3 (Commander's Report of Disciplinary Action, dated July 17, 1999) at 1.
17. Government Exhibit 2, *supra* note 12, at 2; Tr. at 93-96.
18. Tr. at 97-98.
19. *Id.* at 79; Government Exhibit 3, *supra* note 16, at 2.
20. *Id.* at 79; Government Exhibit 2, *supra* note 12, at 2.
21. Tr. at 63-64.
22. *Id.*
23. *Id.* at 39, 63-64.
24. *Id.*
25. *Id.*
26. *Id.*
27. Government Exhibit 6 (Documents related to Applicant's court-martial) at 4; Tr. at 24, 62.
28. *Id.*
29. *Id.*
30. *Id.*; Applicant Exhibit Q (Exert from sentencing phase of court-martial); Tr. at 40-41.
31. Applicant Exhibit Q, *supra* note 30, at 1.
32. *Id.*; Government Exhibit 6, *supra* note 27, at 6; Tr. at 67.
33. Government Exhibit 6, *supra* note 27, at 4.
34. Tr. at 45.
35. *Id.* at 47-48.
36. *Id.* at 49-50, 59.
37. *Id.* at 59.
38. *Id.* at 48-49.
39. *Id.* at 50.
40. *Id.* at 49.
41. *Id.* at 52.
42. *Id.*
43. *Id.*
44. *Id.* at 22-23.

45. *Id.* at 24-25.
46. *Id.*
47. *Id.* at 30-31.
48. *Id.*
49. *Id.* at 33.
50. *Id.* at 31.
51. *Id.* at 80.
52. *Id.* at 79-80, 98-100.
53. *Id.*
54. *Id.*
55. *Id.*
56. *Id.* at 81.
57. *Id.* at 30-31, 33-34, 52.
58. *Id.* at 30-31, 52.
59. *Id.* at 29, 33-34.
60. *Id.* at 61, 82.
61. ISCR Case No. 96-0277 (July 11, 1997) at 2.
62. ISCR Case No. 97-0016 (App. Bd., December 31, 1997) at 3; Directive, Enclosure 3, ¶ E3.1.14.
63. *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).
64. ISCR Case No. 94-1075 (App. Bd., August 10, 1995) at 3-4; Directive, Enclosure 3, ¶ E3.1.15.
65. ISCR Case No. 93-1390 (App. Bd. Decision and Reversal Order, January 27, 1995) at 7-8; Directive, Enclosure 3, ¶ E3.1.15.
66. *Egan*, 484 U.S. at 531.
67. *Id.*
68. *Id.*; Directive, Enclosure 2, ¶ E2.2.2.
69. Executive Order No. 10865 § 7.