



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



In the matter of:	)	
	)	
-----	)	ISCR Case No. 08-03047
SSN: -----	)	
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: Ray T. Blank, Jr., Esquire, Department Counsel

For Applicant: *Pro se*

December 17, 2008

**Decision**

MARSHALL, Jr., Arthur E., Administrative Judge:

Applicant signed Electronic Questionnaires for Investigations Processing (e-QIP), on June 26, 2007. On July 14, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing security concerns regarding criminal conduct (Guideline J) and financial considerations (Guideline E). The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive), and the revised Adjudicative Guidelines (AG) promulgated by the President on December 29, 2005, and effective within the Department of Defense for SORs issued after September 1, 2006.

On July 23, 2008, Applicant signed a notarized document in which he admitted the allegation raised under Guideline J and admitted two of the three allegations under Guideline F. He also requested a hearing before an Administrative Judge. DOHA received the request on August 8, 2008, and I was assigned the case on August 18, 2008. Department Counsel and Applicant agreed to a September 17, 2008, hearing

date. A notice to that effect was issued by DOHA on August 27, 2008. The hearing was timely convened. Department Counsel introduced five documents, accepted into the record as exhibits (Exs.) 1-5 without objection. Applicant gave testimony and offered no documents. He was given until September 26, 2008, to submit any documents for consideration. Five documents were received by Department Counsel via facsimile transmission on September 30, 2008. Department Counsel forwarded them to me without objection on October 2, 2008. They were accepted into the record as Exs. A-E. The transcript (Tr.) was received on October 3, 2008, and the record was closed. Based upon a review of the limited case file and exhibits presented, Applicant failed to carry his burden and mitigate security concerns. Clearance is denied.

### **Findings of Fact**

Applicant is a 39-year-old currently teaching at a community college. He has a bachelor's degree in Computer Sciences, a master's degree in information technology management, and a master's degree in information security. He served nearly 17 years in the United States Marine Corps. Divorced, he is the father of a 12-year-old daughter.

In 2003, Applicant was still married, in the Marines, and had recently been selected to be a Warrant Officer I in the Marines. One day in November 2003, he got a call from a young female Marine, claiming she had been raped and that the command was not doing anything about it. He had not heard a rape reported, so he started asking questions within the command. She went into hiding. He located her and met her in town. During the time together, they secretly became intimate and violated the Marine Corps fraternization policy. Soon thereafter, he was interviewed about her whereabouts. Applicant, however, felt the investigators were more interested in his involvement with the woman. He was interviewed again. The investigator suggested he might be in violation of the fraternization order. Later, Applicant was interviewed at the local sheriff's department about the missing woman. He made a number of phone calls, resulting in the discovery of her most current location. When it was determined she was unharmed, Applicant assumed the matter was over.

Soon thereafter, Applicant met with investigators from the criminal investigations division (CID). He believed that a number of irregularities were taking place during the investigation. Consequently, he was mistrustful of the military attorneys available to provide guidance and defend him. Borrowing about \$7,500 from his credit union, Applicant hired a private attorney.<sup>1</sup> Eventually, a special court-martial was held. Applicant appeared before a jury and entered not guilty pleas. In April 2004, he was found guilty of three counts under the Uniform Code of Military Justice (UCMJ): Article 86: Unauthorized Absence,<sup>2</sup> Article 92: Violate Lawful General Regulation, and, with some exceptions, Article 134: Adultery. The sentence was reduction to the E-1 pay grade and six months confinement. The case was reviewed and approved. He was not given a bad conduct discharge, but an administrative discharge was arranged.

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<sup>1</sup> TR. 45.

<sup>2</sup> The female Marine's unauthorized absence was imputed on to Applicant as an aider and abetter.

Applicant was discharged in June 2004. He went to live with his mother. He used about \$10,000 from a credit line to pay his bills and transition back to civilian life.<sup>3</sup> He then returned to college, where he recently earned a second master's degree. He was hired for a network administrator job in July 2005, but that job ended in June 2007. Since then, he has been teaching.

Applicant is unsure of what subsequent reviews of his case took place. He solicited assistance from a national legal group, but no progress was made. He then called the Marine Corps, which transferred the matter to the Naval Review Board, where the case now resides. Presently, however, Applicant cannot afford the \$10,000 fee for a private attorney.<sup>4</sup> He is contrite over the incident and recognizes his guilt, but maintains the process used was flawed.

Applicant admits he owes his credit union a balance of \$7,573 for an attorney he hired prior to his court-martial. That account is now handled by a collection agency. Applicant states that he has made regular payments of about \$25 per month on the account since 2007, but concedes there were periods when he was unable to pay.<sup>5</sup>

Also delinquent is a bank card account with a balance of approximately \$10,723. It is the account Applicant used to "help establish [him] back [home] and pay off any loans [he] had from whatever."

A \$94 tele-communications bill remains outstanding in his name. The debt was incurred by his ex-wife. Applicant testified he disputed the account entry on his credit report, but provided no evidence of such dispute.<sup>6</sup>

Applicant shares custody with his daughter. Child support has been his top financial priority and his payments are up to date. Applicant stresses that he is currently undergoing an atypically rough time following his discharge, noting that before his discharge, he was always timely with his bills.<sup>7</sup> He also noted the difficulty in finding work in his region currently.

## **Policies**

When evaluating an Applicant's suitability for a security clearance, the Administrative Judge must consider the revised adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are useful in

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<sup>3</sup> Tr. 26.

<sup>4</sup> Tr. 39.

<sup>5</sup> e.g., Ex. E (Sept. 2008 statement).

<sup>6</sup> Tr. 27.

<sup>7</sup> Tr. 60.

evaluating an Applicant's eligibility for access to classified information. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The Administrative Judge's over-arching adjudicative goal is a fair, impartial and common sense decision. Under AG ¶ 2(c), this process is a conscientious scrutiny of a number of variables known as the "whole person concept." The Administrative Judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that "[a]ny doubt concerning personnel being considered for access to classified information will be resolved in favor of national security." In reaching this decision, I have drawn only those conclusions that are reasonable, logical and based on the evidence contained in the record. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

The Government must present evidence to establish controverted facts alleged in the SOR. An applicant is responsible for presenting "witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel. . . ." <sup>8</sup> The burden of proof is something less than a preponderance of evidence. <sup>9</sup> The ultimate burden of persuasion is on the applicant. <sup>10</sup>

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours. The Government reposes a high degree of trust and confidence in individuals to whom it grants access to classified information. Decisions include, by necessity, consideration of the possible risk the Applicant may deliberately or inadvertently fail to protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information.

Section 7 of Executive Order 10865 provides that 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." See *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information). "The clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."<sup>11</sup> Any reasonable doubt about whether an applicant should be allowed access to sensitive information must be resolved in favor of protecting such sensitive

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<sup>8</sup> See *also* ISCR Case No. 94-1075 at 3-4 (App. Bd. Aug. 10, 1995).

<sup>9</sup> *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988).

<sup>10</sup> ISCR Case No. 93-1390 at 7-8 (App. Bd. Jan. 27, 1995).

<sup>11</sup> *Id.*

information. The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of an applicant.<sup>12</sup> 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.

### **Analysis**

Based upon consideration of the evidence, I find Guideline J (Criminal Conduct) and Guideline F (Financial Considerations) to be the most pertinent to the case.

#### **Guideline J – Criminal Conduct**

Criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. By its very nature, it calls into question a person's ability or willingness to comply with laws, rules, and regulations. With respect to Guideline J (Criminal Conduct), the Government has established its case. Applicant admits he was convicted under three articles of the UCMJ. Criminal Conduct Disqualifying Conditions (CC DC) AG ¶ 31(a) ("a single serious crime or multiple lesser offenses"), and CC DC AG ¶ 31(c) ("allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted, or convicted") apply.

The incidents giving rise to Applicant's conviction before a special court-martial occurred in November 2003. His behavior at the time clearly demonstrated poor judgment, particularly in light of his recent selection for promotion. He has been tried, however, received his sentence, and been penalized. Over five years have passed since the incident occurred. Having been administratively discharged, there is little likelihood such an incident will be repeated. He acknowledges his wrongful behavior and is contrite. There have been no subsequent acts, criminal or otherwise, bringing into question Applicant's judgment, trustworthiness, or reliability. Consequently, Criminal Conduct Mitigating Condition (CC MC) AG ¶ 32(a) ("so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment") applies.

Applicant admits to the conduct alleged and to his military convictions. Therefore, neither CC MC AG ¶ 32(b) ("the person was pressured or coerced into committing the act and those pressures are no longer present in the person's life") nor AG ¶ 32(c) ("evidence the person did not commit the act") apply.

Since the 2003 incident and 2004 military conviction, Applicant has lived a quiet life. No subsequent criminal activity has occurred in the intervening years. He has expressed his contrition over the incident. He returned to graduate school and earned a second master's degree. Applicant is currently teaching at a community college. CC MC AG ¶ 32(d) ("there is evidence of successful rehabilitation, including but not limited to

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<sup>12</sup> Executive Order 10865 § 7.

the passage of time without recurrence of criminal activity, remorse or restitution, job training or higher education, good employment record, or constructive community involvement”) applies.

Applicant’s military conviction occurred about five years ago. He is unlikely to find himself in such an unusual scenario again. Now a civilian, he has moved on and tried to put his past behind him. With his extra graduate degree, he is currently sharing his passion for technological management and security with students. While Applicant remains discontented over his conviction, it is not with regard to his behavior or the conviction, but the process used. There is nothing in the record to suggest he will again engage in activities which bring into question his ability or willingness to comply with the law, rules, or regulations.

### **Guideline F – Financial Considerations**

Failure or an inability to live within one’s means, satisfy debts, and meet financial obligations may indicate poor self-control, lack of judgment, or unwillingness to abide by rules and regulations, all of which can raise questions about an individual’s reliability, trustworthiness and ability to protect classified information. Conversely, an individual who is financially overextended is at risk of having to engage in illegal acts to generate funds.<sup>13</sup> The Regulation sets out several potential disqualifying conditions.

Worried that legal proceedings would be commenced against him, Appellant took borrowed money to hire an attorney. After his discharge, he took a second loan against a credit card to pay off bills and make a fresh start. As well, a minor telecommunications charge appears on an account in his name. All accounts remain substantially unaddressed to date. Consequently, Financial Considerations Disqualifying Condition (FC DC) AG ¶ 19(a) (“inability or unwillingness to satisfy debts”) and .FC DC AG ¶ 19(c) (“a history of not meeting financial obligations”) apply. With such conditions raised, it is left to Appellant to overcome the case against him and mitigate security concerns.

Applicant mistrusted the free military legal aide available to him while he was under investigation, so he hired a private attorney. Later, he took a \$10,000 loan to help him transition back into civilian life after his convictions. Both of these obligations came about as a consequence of the volitional act he performed which led to his court-martial. Therefore, Financial Considerations Mitigating Condition (FC MC) AG ¶ 20(b) (“the conditions that resulted in the behavior were largely beyond the person’s control (e.g., loss of employment, a business downturn, unexpected medical emergency, or a death, divorce or separation) and the individual acted responsibly under the circumstances”) does not apply.

Despite some nominal payments on one account and Applicant’s testimony he has disputed one nominal bill, Applicant has over \$18,000 in delinquent debt which remains largely unaddressed. Therefore, neither Financial Considerations Mitigating

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<sup>13</sup> Revised Adjudicative Guideline (AG) ¶ 18.

Condition (FC MC) AG ¶ 20(a) (“the behavior happened so long ago, was so infrequent, or occurred under such circumstances that it is unlikely to recur and does not cast doubt on the individual’s current reliability, trustworthiness, or good judgment”), FC MC AG ¶ 20(d), (“the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts”), nor FC MC AG ¶ 20(c) (“the person has received or is receiving counseling for the problem and there are clear indications that the problem is being resolved or is under control”) apply.

Little has been done to address Applicant’s debt since it was acquired. Although his employment has been erratic since leaving the military, Applicant has failed to offer evidence of any alternative strategies or approaches he might have made to address his debt, such as utilization of an effective financial counselor, bankruptcy, or comprehensive repayment or consolidation plan. With the balances virtually unchanged and no documentary evidence of efforts to resolve his debt, combined with a failure to outline strategies on how he might address this debt in the near future, financial considerations security concerns remain unmitigated.

### **Whole Person Concept**

Under the whole person concept, the Administrative Judge must evaluate an Applicant’s eligibility for a security clearance by considering the totality of the Applicant’s conduct and all the circumstances. The Administrative Judge should consider the nine adjudicative process factors listed at AG ¶ 2(a): “(1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowledgeable participation; (3) the frequency and recency of the conduct; (4) the individual’s age and maturity at the time of the conduct; (5) the extent to which participation is voluntary; (6) the presence or absence of rehabilitation and other permanent 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.” Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a public trust position must be an overall common sense judgment based upon careful consideration of the guidelines and the whole person concept.

I considered the potentially disqualifying and mitigating conditions in light of the facts and circumstances surrounding this case, as well as the “whole person” factors. Applicant is a mature, intelligent, and affable man whose military career took an unexpected turn. Convicted under the UCMJ nearly five years ago, Applicant was punished and lost his career. Contrite, he has since led a life devoid of crime and conflict. Applicant has mitigated criminal conduct security concerns.

Feeling pushed through the military justice system in a manner Applicant is still convinced was inappropriate, he was discharged with significant legal debt. In turn, debt was incurred to pad his transition back to civilian life. Since that time, there has been virtually no concerted effort to address it in any comprehensive manner. Barring tangible evidence of such efforts, financial considerations security concerns remain unmitigated. Clearance is denied.

### **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 J:	FOR APPLICANT
Subparagraph 1.a:	For Applicant
Paragraph 2, Guideline F:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant
Subparagraph 2.b:	Against Applicant
Subparagraph 2.c:	Against Applicant

### **Conclusion**

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with national security to continue Applicant's eligibility for a security clearance. Clearance is denied.

ARTHUR E. MARSHALL, JR.  
Administrative Judge