DATE: November 29, 2004

In re:

SSN: ----------

Applicant for Security Clearance

ISCR Case No. 02-23477

DECISION OF ADMINISTRATIVE JUDGE

MICHAEL H. LEONARD

APPEARANCES

FOR GOVERNMENT

Erin C. Hogan, Deputy Chief Department Counsel

FOR APPLICANT

Richard Murray, Esq.

SYNOPSIS

Applicant has met his ultimate burden by explaining and mitigating the record evidence presented against him suggesting he was terminated in September 2000 for using a company credit card for $1,000 of personal expenses and then making a false entry in his employer's financial records that he had reimbursed the company for the expenditure. Clearance is granted.

STATEMENT OF THE CASE

On August 26, 2003, the Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR) stating the reasons why DOHA proposed to deny or revoke access to classified information for Applicant.[(1)] The SOR, which is in essence the administrative complaint, alleges a security concern under Guideline E for personal conduct. The crux of the allegation is that Applicant was terminated from his employment with a defense contractor in September 2000 for using a company credit card for $1,000 of personal expenses and then making a false entry in his employer's financial records that he had reimbursed the company for the expenditure. Applicant responded to the SOR in writing, dated September 19, 2003, and he denied the SOR allegation without explanation; he also requested a hearing.

Department Counsel indicated she was ready to proceed on June 23, 2004, and the case was assigned to another administrative judge on July 8, 2004. The case was reassigned to me July 15, 2004. With the agreement of counsel, a notice of hearing was issued scheduling the hearing for August 4, 2004. Applicant appeared with counsel and the hearing took place as scheduled. Government Exhibits 1 -5 were admitted and Applicant Exhibits A and B were admitted. Applicant called two character witnesses, one expert witness, and testified himself. I left the record open to allow Applicant the opportunity to submit an additional record, but I received a letter from his counsel explaining the record could not be found. I received the hearing transcript August 20, 2004.

FINDINGS OF FACT

After a thorough review of the record evidence, I make the following essential findings of fact:

Applicant is a 45-year-old man employed as an analyst for a defense contractor. He has worked in the defense industry for many years, and has worked for his current employer since June 2001. Applicant has held a security clearance as both servicemember and a defense contractor employee for many years without an adverse incident or problem.

Applicant is married and has three children. Two of his children are young adults from his first marriage. The third child is a two-year-old daughter from his current marriage.

Applicant enlisted in the U.S. Air Force in 1979 and served on active duty working in missile maintenance and logistics. Upon his discharge from active duty in 1985, Applicant joined the Air National Guard. In July 1986, he applied for and received a commission as an officer. He has since served continuously, being promoted on a regular basis, and now serves at the rank of lieutenant colonel. He was recently selected for promotion to colonel. Currently, he serves as the homeland security planning officer and as inspector general for his air national guard command.

Applicant called two character witnesses who vouched for his security suitability. His second-level supervisor, a company vice-president and member of the board of directors, described Applicant's work performance as excellent. In the witness's opinion, Applicant is a professional, ethical individual whom he has no hesitation in recommending for a security clearance. The other character witness was a two-star general in the Air National Guard. The major general has known Applicant since 1989, and describes Applicant as one of the most trustworthy and reliable officers under his supervision. Indeed, the major general has singled Applicant out as an example of high integrity. Finally, Applicant produced another character witness by letter (Exhibit B). This person knows Applicant in her capacity as the headquarters staff judge advocate (a senior military lawyer) for the air national guard unit. She has known Applicant for about eight years and believes Applicant is an officer of the highest integrity and that he is an excellent candidate for a security clearance.

The SOR allegation stems from Applicant's employment with a closely-held company engaged in defense contracting work. In February 1997, Applicant accepted an offer to do modeling and simulation work for the company, and was offered an ownership stake in the company that after five years would result in his becoming a full partner. He accepted the offer and became one of seven shareholders in the company. The company operated rather loosely or informally with the various shareholders filling the various corporate officers' roles (e.g., CEO, COO, CFO, etc.) in addition to doing the substantive work. After two years or so, Applicant was asked to assume the position of chief financial officer (CFO), because of dissatisfaction with the previous CFO. Applicant was asked since he had a business degree while the other shareholders were engineers without any formal business education. Serving as CFO was an additional duty for Applicant, as he was still working full time for the client doing a study on reducing fratricide or friendly-fire incidents in air strikes. Coupled with his military duty with the Air National Guard, the CFO duties greatly increased Applicant's work load.

Applicant married his current wife on or about October 10, 1999. After the wedding, the couple traveled to Hawaii for their honeymoon for approximately three weeks. During the honeymoon, Applicant ran a little short of money and he used his company credit card to cover about $1,000 of personal expenses. After returning to work, Applicant called the company treasurer and notified him of the expenditure. Applicant was told to pay it back when he could.

As CFO, Applicant was responsible for paying the company credit card bill. In that position, Applicant observed that at least one other shareholder used the company credit card for personal expenses and repaid the company by having the money taken from the person's paycheck. After returning from the honeymoon in November 1999, Applicant received the company credit card bill with the $1,000 in charges he made in Hawaii. During November or December 1999, Applicant created an account, using an accounting software program, called "Money [Applicant] Owes" or "Money People Owe." The idea was the account would contain entries that were a projection or budget entry for money that would be incoming--essentially an account receivable for nonbusiness reasons.

In about May 2000, Applicant was feeling overwhelmed with his work responsibilities and his duties as CFO, along with his national guard duties. Applicant elected to step down as CFO and, in doing so, prepared the books for turnover to the next CFO. During this process Applicant noticed

he had not repaid the money to the company. Applicant informed the incoming CFO he would repay the money when he received his state income tax refund. Although Applicant had more than sufficient funds, he elected to put off paying it until receiving the refund. Applicant's state income tax return was delayed in processing, and the result was Applicant did not receive the refund check until September 2000. He deposited the check and waited for it to clear before writing the check to the company. But before he could do so, he was fired on or about September 22, 2000.

On that day he was asked to attend a meeting at the company office. Applicant left the off-site location and went to the company office where he was asked to resign. The company did not offer a reason other than the state was a right-to-work-state and they thought it best he resign. Applicant refused and was fired. In the termination letter (Exhibit 4) signed by the CEO, the company explained Applicant's termination as follows:

Your employment with [the company] is terminated effective as of 5:00 p.m. today. You have been an "at-will" employee, as to which the company has been advised may be terminated at any time with or without cause. However, the company considered several reasons for its decision. A significant reason was your use of the company [credit] card for personal expenses and your false entry into the financial records that you reimbursed the company for this expense.

In addition, the letter informed Applicant the money he owed would be deducted from his final pay. The first time any shareholder of the company confronted Applicant about the credit card charges and the accounting entry was the day he was fired (Transcript at p. 130). Thereafter, on or about October 4, 2000, the company submitted an adverse information report to government security officials indicating Applicant had been terminated and the reasons therefor (Exhibit 3). The language used in the section six of the report is similar to the language in the termination letter quoted above.

Exhibit A is a letter from an active duty Air Force officer, rank of lieutenant colonel, who was the branch chief responsible for supervising the study Applicant was conducting. The letter is the officer's recollection of the events surrounding the day Applicant was fired and is set forth, in relevant part, as follows:

[Applicant] worked for me on a daily basis and he consistently provided the highest caliber of support. He was near the end of a particular study when the existing funding for that task ran out. On that day, he told me that he had a meeting at [the company's] office, which was located across the street from [the Air Force office] and that he would return when the meeting was over.

After [Applicant] had left, [a company member], whom I knew to be a senior member of [the company] came to my office and told me that [Applicant] had resigned from the company.

[Applicant] returned shortly thereafter and informed me that he had been let go by [the company]. He said that he knew the study was not yet complete and that he would be willing to make arrangements to return in his capacity as a National Guard member to work until the study was completed.

[The company member] returned to discuss the study and asked me if I would approve [the company] bringing [Applicant] on as consultant to complete the study. I agreed with that proposal, but [the company] did not follow up on that offer. Instead, they provided several less capable personnel to finish the study, resulting in a three week delay in the final product and a less robust analysis.

In addition, a short time later, [the company] let go of [another company member], whose funding ran out at approximately the same time.

Applicant believes the reason he was fired was because the funding ran out for the work he was doing, and the company would have had to carry him on full salary until funding resumed several months later. He understands now that, given the applicable employment law, he could have been fired for any reason or no reason, but believes the company used the credit card incident as an excuse to fire him.

Applicant called an accounting and financial consultant, who has worked with large corporations and closely-held companies, to provide expert testimony. The witness, who has 33 years of experience in accounting and financial work, provided the following opinions:

- Concerning the subject of personal finance, Applicant and his spouse are on solid financial footing.
- In closely-held companies, it is not uncommon for shareholders to use the company credit card for personal expenses with the expectation the money will be repaid in a timely fashion, normally within 30 to 60 days.
- Applicant did not create a false accounting entry; instead, Applicant's purpose in making the accounting entry was part of preparing projections and budgets for management to use and to show that particular money would be coming in when Applicant reimbursed the company.

POLICIES

The Directive sets forth adjudicative guidelines to consider when evaluating a person's security-clearance eligibility, including disqualifying conditions (DC) and mitigating conditions (MC) for each applicable guideline. In addition, each clearance decision must be a fair and impartial commonsense decision based on the 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. 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.

BURDEN OF PROOF

The only 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.(2) There is no presumption in favor of granting or continuing access to classified information.(3) The government has the burden of proving controverted facts.(4) The U.S. Supreme Court has said the burden of proof in a security-clearance case is less than the preponderance of the evidence.(5) The DOHA Appeal Board has followed the Court's reasoning on this issue establishing a substantial-evidence standard.(6) "Substantial evidence is more than a scintilla, but less than a preponderance of the evidence."(7) Once the government meets its burden, an applicant has the burden of presenting evidence of refutation, extenuation, or mitigation sufficient to overcome the case against them.(8) In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.(9)

As noted by the Court in *Egan*, "it should be obvious that no one has a 'right' to a security clearance," and "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."(10) Under *Egan,* Executive Order 10865, and the Directive, any doubt about whether an applicant should be allowed access to classified information will be resolved in favor of protecting national security.

CONCLUSIONS

Personal conduct under Guideline E is always a security concern because it asks the central question if a person's past conduct justifies confidence the person can be trusted to properly safeguard classified information. The concern includes conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations that could indicate that the person may not properly safeguard classified information.

Given the relatively low standard of proof--the substantial-evidence standard--that applies to this proceeding, the government has established a prima-facie case under Guideline E. The government has presented sufficient evidence of reliable, unfavorable information from Applicant's former employer to show Applicant engaged in conduct involving questionable judgment, and thus DC 1(11) applies. In particular, the record evidence clearly shows that in 1999 Applicant used the company credit card for about $1,000 in personal expenses and then was less than diligent, or lacked a sense of urgency, in reimbursing the company. Using the company credit card for personal expenses and then needlessly delaying reimbursing the company does indicate questionable judgment. The record evidence is less than clear, however, that Applicant made a false accounting entry to show he had reimbursed the company. Applicant's testimony on this point, coupled with the testimony of the expert witness, shows just the opposite; namely, Applicant did not try to defraud or deceive the company or evade payment, but instead made an accounting entry to show this particular money would be incoming.

In mitigation, Applicant receives credit under MC 1,[(12)] because the information suggesting he made a false accounting entry is unsubstantiated. First, this allegation is based primarily on Exhibits 3 and 4, the only company records admitted into evidence. These two documents--not subject to cross-examination--were generated by the company to support its decision to fire Applicant. Given these circumstance, I have given Exhibits 3 and 4 some weight, but not great weight. Second, of some concern here is the absence of the pertinent company accounting or financial record showing the accounting entry at issue. In other words, in deciding this case, it would be helpful to have the company record that goes to the heart of the dispute. Third, the fact Applicant reported the credit card charges when he returned from his honeymoon in November 1999 and again when he turned the books over to the incoming CFO in ay 2000 undercuts the allegation he made a false accounting entry. Those are not the actions of a man intent on concealing or covering up. Taken together, these matters persuade me the information suggesting he made a false accounting entry is unsubstantiated.

Applicant also receives credit in mitigation for at least five other reasons not specified in the formal mitigating conditions. First, the nature, extent, and seriousness of the conduct involving questionable judgment are not particularly significant. It did not involve a large sum of money. Using a company credit card for personal expenses in a closely-held company is not uncommon, and that money was repaid. Applicant was not attempting to defraud or deceive the company or evade payment, although he certainly procrastinated far too long in paying the money back. Second, the conduct appears to be an isolated incident or one-time error in judgment in an otherwise successful career as a defense contractor, active duty servicemember, and air national guard member. Third, the conduct took place about four years ago and is not recent. Fourth, the likelihood of recurrence of the conduct appears to be quite remote. And fifth, I have given substantial weight to Applicant's favorable character evidence, especially the strong endorsement of Applicant's integrity by the two-star general. Cumulatively, these five reasons mitigate Applicant's conduct involving questionable judgment.

To conclude, based on the record evidence as a whole, Applicant has met his ultimate burden by explaining and mitigating the record evidence presented against him. Accordingly, Guideline E is decided for Applicant. In reaching my decision, I have considered the whole-person concept, the clearly-consistent standard, and other appropriate factors and guidelines in the Directive.

FORMAL FINDINGS

The following are my conclusions as to each allegation in the SOR:

SOR ¶ 1-Guideline E: For the Applicant

Subparagraph a: For the Applicant

DECISION

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

Michael H. Leonard

Administrative Judge

1. This action was taken under Executive Order 10865, dated February 20, 1960, as amended, and DoD Directive 5220.6, dated January 2, 1992, as amended and modified (Directive).

2. ISCR Case No. 96-0277 (July 11, 1997) at p. 2.

3. ISCR Case No. 02-18663 (March 23, 2004) at p. 5.

4. ISCR Case No. 97-0016 (December 31, 1997) at p. 3; Directive, Enclosure 3, Item E3.1.14.

5. *Department of Navy v. Egan*, 484 U.S. 518, 531 (1988).

6. ISCR Case No. 01-20700 (December 19, 2002) at p. 3 (citations omitted).

7. ISCR Case No. 98-0761 (December 27, 1999) at p. 2.

8. ISCR Case No. 94-1075 (August 10, 1995) at pp. 3-4; Directive, Enclosure 3, Item E3.1.15.

9. ISCR Case No. 93-1390 (January 27, 1995) at pp. 7-8; Directive, Enclosure 3, Item E3.1.15.

10. *Egan*, 484 U.S. at 528, 531.

11. E2.A5.1.2.1. Reliable, unfavorable information provided by associates, employers, coworkers, neighbors, and other acquaintances.

12. E2.A5.1.3.1. The information was unsubstantiated or not pertinent to a determination of judgment, trustworthiness, or reliability.