DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
----------	)	ISCR Case No. 08-12061
SSN: ----------	)	
	)	
Applicant for Security Clearance	)	

Appearances

For Government: John Glendon, Esq., Department Counsel

For Applicant: *Pro Se*

October 15, 2009

Decision

LEONARD, Michael H., Administrative Judge:

This is a security clearance case in which Applicant contests the Defense Department's intent to deny or revoke his eligibility for an industrial security clearance. The record shows Applicant engaged in wrongful work-related conduct when (1) he used a company credit card for unauthorized purchases in September 2006, and (2) he failed to return government-issued equipment after he left employment with a defense contractor in about October 2005, and he still possesses the equipment. The facts and circumstances surrounding Applicant's conduct create doubts about his judgment, reliability, and trustworthiness. Applicant did not present sufficient evidence to explain, extenuate, or mitigate the security concerns stemming from these incidents. Accordingly, as explained below in detail, this case is decided against Applicant.

Statement of the Case

Acting under the relevant Executive Order and DoD Directive,[1] the Defense Office of Hearings and Appeals (the Agency) issued a statement of reasons (SOR) to Applicant on March 5, 2009. The SOR is equivalent to a complaint and it details the factual basis for the action. The SOR alleged security concerns under Guideline E for personal conduct. The SOR also recommended submitting the case to an administrative judge for a determination to deny or revoke Applicant's security clearance.

Applicant answered the SOR on March 17, 2009, and stated he did not wish to have a hearing due to his financial situation (Applicant resides overseas in Germany). The Agency submitted its written case consisting of all relevant and material information that could be adduced at a hearing. This so-called file of relevant material was mailed to Applicant and he responded in timely fashion. The case was assigned to me on June 8, 2009. Upon review of Applicant's Answer and his reason for declining a hearing, I contacted Applicant and Department Counsel per e-mail, dated June 25, 2009, and advised Applicant that it was unnecessary to travel to the United States for a hearing because it was possible to conduct the hearing via video teleconference (VTC). Applicant then elected to proceed with a VTC hearing, and the case was converted to a hearing case.

The hearing took place as scheduled on July 28, 2009. The government called no witnesses and offered Exhibits 1–4, which were admitted. Applicant's testimony was taken and Exhibits A–JJ were admitted, except for Exhibits R, S, X, Y, Z, and CC, which were excluded for the reasons stated during the hearing.

The record was left open to allow Applicant to submit additional documentary evidence. Those matters were timely submitted, and they are marked and admitted as follows: (1) Exhibit KK–DD Form 214, date of separation from service December 1986; (2) Exhibit LL–DD Form 214, date of separation from service October 1989; (3) Exhibit MM–memorandum, dated June 21, 2005, concerning contractor letter of accreditation/identification for Applicant; (4) Exhibit NN–report of investigation concerning Applicant (eight pages); (5) Exhibit OO–medical record, dated January 9, 2006 (an English translation and the German original); and (6) Exhibit PP–stipulation of settlement in Applicant's case under The Longshore and Harbor Workers' Compensation Act (LHWCA), 18 pages. In addition, Applicant submitted a three-page letter setting forth facts and arguments. It is marked as Exhibit QQ, but not admitted because the record was not kept open for that purpose. The 224-page hearing transcript (Tr.) was received August 5, 2009.

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[1] This case is adjudicated under Executive Order 10865, *Safeguarding Classified Information within Industry*, dated February 20, 1960, as amended, and DoD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program*, dated January 2, 1992, as amended (Directive). In addition, because the SOR was issued after September 1, 2006, the revised Adjudicative Guidelines for Determining Eligibility for Access to Classified Information (Revised Guidelines) approved by the President on December 29, 2005, then made effective within the Defense Department on September 1, 2006, apply to this case. They supersede or replace the guidelines published in Enclosure 2 to the Directive.

Procedural Matters

Applicant, per e-mail dated July 8, 2009, moved to dismiss the SOR allegations for various reasons (Appellate Exhibit I). The motion was denied because an administrative judge lacks authority to dismiss an SOR (Tr. 22–23). In a subsequent e-mail, dated July 24, 2009, Applicant requested that his security clearance be reinstated immediately on the grounds that he had never committed a breach of national security as well as for additional reasons (Appellate Exhibit III). I construed the request as a motion to dismiss the SOR and denied that motion as well (Tr. 25–26).

A pre-hearing conference was conducted by telephone on July 9, 2009, to discuss certain issues in advance of the hearing. The results of the pre-hearing conference were summarized in writing and made part of the record (Appellate Exhibit II). Neither party had additions, corrections, or objections to the summary (Tr. 22–25).

Findings of Fact

Under Guideline E, the SOR alleged two incidents of work-related conduct summarized as follows: (1) Applicant used a company credit card for unauthorized purchases in September 2006; and (2) Applicant failed to return government-issued equipment after he left employment with a defense contractor in about October 2005. Based on the record as a whole, the following facts are established by substantial evidence.

Applicant is a 50-year-old telecommunications specialist. He is currently unemployed, but a defense contractor is sponsoring him for a clearance with plans to offer him a part-time job should he obtain a clearance.[2] His first two marriages ended in divorce, and he is currently separated from his third wife. He has children from the marriages as well.

1. Applicant's previous employment history.

Because this case involves work-related conduct, Applicant's employment history is set forth in detail.[3] After graduating from high school in 1977, Applicant worked as a laborer in a series of jobs until he enlisted in the U.S. Army in 1979. He completed basic training, and then completed advanced training in telecommunications. He was assigned to Germany in 1980, and he worked in the field of telecommunications until his honorable discharge in December 1986, when he was a sergeant (pay grade E-5).[4] Most, but not all, of that period was served in Germany, and he was separated in Germany.

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[2] Appellate Exhibit II.

[3] Much of this information is found in Exhibit PP.

[4] Exhibit KK.

About three months later in March 1987, Applicant reenlisted in the Army. Again, he worked in telecommunications, but his service was cut short when he was discharged after two years and six months due to alcohol abuse–rehabilitation failure.[5] Despite the reason for separation, his character of service was deemed honorable, and he was discharged as a private first class (pay grade E-3).

In 1990, Applicant began work for a company as a telecommunications network technician working on various military installations in Germany. He remained in this job until about 1993. There was then no work available for Applicant in Germany in his field, so Applicant accepted a job as a manager at a fast-food restaurant in the U.S. In about 1994, he moved to another state in the U.S. and began working as a manager of a gas station. He remained in this job for about a year until 1995, when he returned to Germany.

In about March 1996, Applicant went back to work for a previous employer as a telecommunications network technician. He worked in this position in Germany for about six months. In the summer of 1996, Applicant began work with another company doing satellite installation. He worked throughout Europe for about six months.

In about February 1997, Applicant returned to a previous employer in the same position as a telecommunications network technician. He continued in this job through about September 1998. He then started work for another company as a telecommunications consultant. He worked in this position until about March 2001, when he was laid off due to a decline in the telecommunications field.

Applicant was unemployed until about March 2002, when he accepted a job as a consultant working throughout Europe setting up telecommunications conferences. He left this job about a year later in March 2003. He returned to this employer about one month later and was supposed to work in Iraq, but that mission or job was cancelled about two months later.

In about August 2003, Applicant again started work for a previous employer. He worked as a telecommunications technician in an East African country for about three months. He was then unemployed from the end of 2003 until September 2004. He then accepted a job working on satellite systems in Iraq, and he worked in this job until about February 2005. He began another job about two months later. This job required him to install satellite and wireless systems in Iraq for the U.S. military. He left this job about two months later in June 2005, when he accepted a job with a defense contractor in Iraq (Company A). The circumstances of his employment with Company A and Company B, another defense contractor, are the subject of the SOR allegations and are discussed below.

[5] Exhibit LL.

2. Applicant's employment with Company A and the government-issued equipment.

In June 2005, Applicant began employment with Company A as a senior field service technician (VTC) in Iraq.[6] In about October 2005, Applicant had an argument with another employee at the work site and he passed out.[7] He was hospitalized in Iraq and eventually moved to a U.S. military medical facility in Germany. He stayed there until his blood pressure was brought under control. In about March 2006, Applicant was medically cleared to return to work, but did not return to his job with Company A.

Previously, Applicant was issued military equipment (such as TA-50 gear, sleeping bag, sleeping bag line, wet weather gear, poncho line, rubber boots, TA-50 bag, etc.) from a U.S. Army installation.[8] He believes he obtained the equipment in about 2004, when he was working for another employer.[9] Per e-mail, he contacted Company A in about April or May 2005 to arrange a round-trip flight to return the equipment (it had been shipped to him from Iraq). A human resources (HR) specialist replied and advised that the equipment was to be returned to the U.S. Army installation, not a Marine Corps base as indicated by Applicant. The HR specialist offered to provide a one-way economy-class airline ticket to the installation and a one-way economy-class airline ticket to Applicant's home of record in the U.S. Applicant deemed that unacceptable because he wanted a round-trip airline ticket to and from Germany, his place of residence. As a result, the equipment at issue was not returned, and Applicant still has the equipment in Germany.[10]

In addition, Applicant had another dispute with Company A when items of personal property he left behind in Iraq (due to the medical evacuation) were not returned to him in Germany.[11] The dispute became so heated that a senior counsel for Company A, who replied to Applicant on behalf of the HR specialist, characterized an e-mail from Applicant to the HR specialist as "quite simply outrageous," and noted that Applicant's e-mail contained "obscene language but also veiled threats."[12] Also, Applicant took legal action against Company A, when he claimed he was owed compensation benefits and medical benefits due to a work-related injury under the

[6] Exhibit MM.

[7] Exhibit PP at 6.

[8] Exhibit GG.

[9] Tr. 195–198.

[10] Tr. 137, 195–198.

[11] Exhibit 4 (Attachment G).

[12] Exhibit 4 (Attachment G, e-mail dated July 31, 2006).

jurisdiction of the Defense Base Act extension of the LHWCA. It appears the claim was settled for a $40,000 lump-sum payment to Applicant in about August 2008.[13]

3. Applicant's employment with Company B and his misuse of the credit card.

In about June 2006, Applicant began employment with Company B under a one-year contract to work in Iraq.[14] Company B issued to Applicant an American Express credit card for company-related business expenses. Applicant acknowledged in writing the terms associated with using the credit card, which included termination of employment or loss of a U.S. Government security clearance if the card was misused.[15]

Applicant stopped working for Company B in September 2006, when his wife, who was then pregnant (and she had previously suffered a miscarriage in 2005),[16] was sick and demanded Applicant return home to Germany. Applicant departed Iraq on about September 8 and was to return to a Marine Corps base in the U.S. to out-process and return any issued equipment. Company B authorized him to travel to Germany during the trip to visit his spouse, but the detour was at his own expense.[17] Applicant traveled by air from Iraq to London, when he then flew to Frankfurt, rented a car, and drove to his residence in Germany. He dropped off his gear and then returned the rental car to the Frankfurt airport the same day. He charged the airline ticket to Frankfurt and the rental car on the company-issued credit card. He stayed briefly in Germany and then traveled to the U.S. where he returned equipment, but it appears did not complete other out-processing items. He then returned to Germany. Company B had no communication from Applicant from September 8 until Applicant reestablished contact on about September 26, 2006.

When he decided to stop working for Company B in September 2006, Applicant sent a letter of resignation via e-mail to the company president.[18] He explained he was resigning due to his wife's condition and her request that he return to Germany. The company president replied, per e-mail, the same day. He indicated he was sorry to lose Applicant as an employee and said that "I understand that you need to do what you need to do."[19] Applicant, in his hearing testimony, pointed to that language as implicit authorization for him to use the company-issued credit card to pay for the Germany-related travel expenses because the president knew Applicant did not have a personal

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[13] Exhibit PP.

[14] Tr. 141.

[15] Exhibit 4 (Attachment C).

[16] Exhibit OO.

[17] Exhibit 4 (Attachment A).

[18] Exhibit G.

[19] Exhibit H.

credit card.[20] I find that the particular phrase in the president's e-mail was an expression of empathy or understanding of Applicant's situation; it was not any type of authorization to use the company-issued credit card for personal expenses.

In subsequent and multiple e-mails, the company president informed Applicant that certain charges to the credit card were not authorized and raised other concerns as well.[21] Company B determined Applicant owed the sum of $385.06, and informed Applicant on about September 27, 2006.[22] The next day, Applicant wrote a check for that amount and sent it to Company B, which cashed it.[23] Subsequently, in October 2006, Company B filed an adverse incident report concerning Applicant with an agency of the Defense Department.[24] The report addressed several subjects that are not the basis for the SOR. In hindsight, Applicant acknowledges that he did not handle the situation with Company B well, and that he should have had better communication with the company president.[25]

4. Applicant's subsequent employment and current life situation.[26]

Returning to Germany in October 2006, Applicant did satellite work for a German company for a couple of months. He has been essentially unemployed since about December 2006, which is about when he and his wife separated. Since then, Applicant has been homeless at times, living on the streets and in a homeless shelter. He, like his wife, received welfare money from the German government. He claimed to have attempted suicide in about April 2007, when he overdosed on heart medicine pills. He claimed that he tried to kill himself because of the pressure of not working and other issues. He claimed that he then spent three weeks in a German psychiatric clinic. He is now living in Germany, separated from his wife, where he has the offer of part-time employment with a U.S. defense contractor.

Policies

This section sets forth the general principles of law and policies that apply to an industrial security clearance case. To start, the only purpose of a clearance decision is to decide if an applicant is suitable for access to classified information.

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[20] Tr. 147–151.

[21] Exhibit 4.

[22] Exhibit 3.

[23] Exhibit 3.

[24] Exhibit 4 (Attachment A).

[25] Tr. 194.

[26] Most of this information is based on Exhibit PP.

It is well-established law that no one has a right to a security clearance.[27] As noted by the Supreme Court in the case of *Department of Navy v. Egan*, "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."[28] 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.

A favorable clearance decision establishes eligibility of an applicant to be granted a security clearance for access to confidential, secret, or top-secret information.[29] An unfavorable decision (1) denies any application, (2) revokes any existing security clearance, and (3) prevents access to classified information at any level.[30]

There is no presumption in favor of granting, renewing, or continuing eligibility for access to classified information.[31] The government has the burden of presenting evidence to establish facts alleged in the SOR that have been controverted.[32] An applicant is responsible for presenting evidence to refute, explain, extenuate, or mitigate facts that have been admitted or proven.[33] In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.[34] In *Egan*, the Supreme Court stated that the burden of proof is less than a preponderance of the evidence.[35] The agency appellate authority has followed the Court's reasoning, and a judge's findings of fact are reviewed under the substantial-evidence standard.[36]

The Revised Guidelines set forth adjudicative guidelines to consider when evaluating a person's security clearance eligibility, including disqualifying conditions (DC) and mitigating conditions (MC) for each guideline. In addition, each clearance decision must be a commonsense decision based upon consideration of all the relevant

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[27] *Department of Navy v. Egan*, 484 U.S. 518, 528 (1988) ("it should be obvious that no one has a 'right' to a security clearance"); *Duane v. Department of Defense*, 275 F.3d 988, 994 (10th Cir. 2002) (no right to a security clearance).

[28] 484 U.S. at 531.

[29] Directive, ¶ 3.2.

[30] Directive, ¶ 3.2.

[31] ISCR Case No. 02-18663 (App. Bd. Mar. 23, 2004).

[32] Directive, Enclosure 3, ¶ E3.1.14.

[33] Directive, Enclosure 3, ¶ E3.1.15.

[34] Directive, Enclosure 3, ¶ E3.1.15.

[35] *Egan*, 484 U.S. at 531.

[36] ISCR Case No. 01-20700 (App. Bd. Dec. 19, 2002) (citations omitted).

and material information, the pertinent criteria and adjudication factors, and the whole-person concept.

A person granted access to classified information enters into a special relationship with the government. The government must be able to have a high degree of trust and confidence in those persons to whom it grants access to classified information. The decision to deny a person a security clearance is not a determination of an applicant's loyalty.[37] Instead, it is a determination that an applicant has not met the strict guidelines the President has established for granting eligibility for access.

Analysis

Personal conduct under Guideline E[38] includes issues of false statements and credible adverse information that may not be enough to support action under any other guideline. In particular, security concerns may arise due to:

> Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness, and ability to protect classified information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.[39]

Both the disqualifying and mitigating conditions should be analyzed in light of the record as a whole. And unique to this case is the nature of the difficult work conditions in Iraq, the potential danger of working in Iraq, and the associated stress. Accordingly, I have considered these matters in reaching my decision.

The record shows Applicant engaged in wrongful work-related conduct that calls into question his reliability, trustworthiness, and judgment. The record establishes that Applicant: (1) used a company credit card for unauthorized purchases in September 2006; and (2) failed to return government-issued equipment after he left employment with a defense contractor in about October 2005, and he still possesses the equipment. These two matters are substantially narrower issues than the several issues raised in the adverse information report submitted by Company B, and my decision is limited to the SOR.

The two incidents of wrongful work-related conduct raise security concerns under the following disqualifying conditions:

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[37] Executive Order 10865, § 7.

[38] Revised Guidelines, ¶¶¶ 15, 16, 17 (setting forth the security concern and the disqualifying and mitigating conditions).

[39] Revised Guidelines, ¶ 15.

> ¶ 16(c) credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, 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; and
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> ¶ 16(d) credible 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:
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> (1) untrustworthy or unreliable behavior to include breach of client confidentiality, release of proprietary information, unauthorized release of sensitive corporate or other government protected information:
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> (2) disruptive, violent, or other inappropriate behavior in the workplace;
>
> (3) a pattern of dishonesty or rule violations; and
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> (4) evidence of significant misuse of Government or other employer's time or resources.

Taken together, the two incidents show inability or unwillingness (or both) to abide by workplace rules and norms. This raises questions or doubts about Applicant's ability to properly handle and safeguard classified information.

I considered the mitigating conditions under Guideline E and conclude none apply in Applicant's favor. Concerning SOR ¶ 1.a, Applicant's use of the company-issued credit card was improper, and I am persuaded that Applicant knew that when he used it. To his credit, he promptly paid Company B the money they demanded. But his attempt to justify his misuse by pointing to the company president's e-mail ("you need to do what you need to do") is misplaced. It is nothing more than a transparent rationalization used in an attempt to conceal the truth. Concerning SOR ¶ 1.b, the government-issued equipment is not of great monetary value, but Applicant continues to possess the equipment. His long-term retention of the equipment likely amounts to wrongful appropriation or larceny of the equipment. Given his disingenuous explanation for using the credit card and his ongoing possession of the government-issued equipment, Applicant does not receive the benefit of any mitigating conditions. Accordingly, Guideline E is decided against Applicant. In reaching this conclusion, I

gave due consideration to the nine-factor whole-person concept,[40] and none of those factors is sufficient to change the outcome of the case.

To conclude, Applicant did not present sufficient evidence to explain, extenuate, or mitigate the security concerns under Guideline E. Applicant did not meet his ultimate burden of persuasion to obtain a favorable clearance decision. This case is decided against Applicant.

Formal Findings

The formal findings on the SOR allegations, as required by ¶ E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline E:	Against Applicant
Subparagraphs 1.a–1.b:	Against Applicant

Conclusion

In light of the record as a whole, it is not clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

Michael H. Leonard
Administrative Judge

[40] Revised Guidelines, ¶ 2(a)(1) – (9).