DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
----------	)	ISCR Case No. 09-08394
	)	
Applicant for Security Clearance	)	

Appearances

For Government: Braden M. Murphy, Esquire, Department Counsel, &
John Bayard Glendon, Esquire, Deputy Chief Department Counsel
For Applicant: Holly Emrick Svetz, Esquire

09/24/2012

Decision

GALES, Robert Robinson, Administrative Judge:

Applicant mitigated the security concerns regarding personal conduct. Eligibility for a security clearance and access to classified information is granted.

Statement of the Case

On October 25, 2002, Applicant applied for a security clearance and submitted Security Clearance Application (SF 86).[1] On December 31, 2008, he submitted an Electronic Questionnaire for Investigations Processing version of a Security Clearance Application (e-QIP).[2] On an unspecified date, the Defense Office of Hearings and Appeals (DOHA) issued him a set of interrogatories. He responded to the interrogatories on July 13, 2010.[3] On September 21, 2011, DOHA issued a Statement of Reasons (SOR) to him, pursuant to Executive Order 10865, *Safeguarding Classified*

[1] Government Exhibit 1 (SF 86), dated October 25, 2002.

[2] Government Exhibit 2 (e-QIP), dated December 31, 2008.

[3] Government Exhibit 3 (Applicant's Answers to Interrogatories, dated July 13, 2010).

Information within Industry (February 20, 1960), as amended and modified; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended and modified (Directive); and the *Adjudicative Guidelines for Determining Eligibility For Access to Classified Information* (December 29, 2005) (AG) applicable to all adjudications and other determinations made under the Directive, effective September 1, 2006. The SOR alleged security concerns under Guideline E (personal conduct), and detailed reasons why DOHA was unable to find that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. The SOR recommended referral to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked.

Applicant acknowledged receipt of the SOR on September 27, 2011. In a sworn statement, dated October 17, 2011, Applicant responded to the SOR allegations and requested a hearing before an administrative judge. On February 6, 2012, the Government amended the SOR, and on February 24, 2012, Applicant responded to the amended SOR allegations. On June 22, 2012, Department Counsel indicated the Government was prepared to proceed. The case was initially assigned to another administrative judge on June 29, 2012, but reassigned to me on July 2, 2012. A Notice of Hearing was issued on July 18, 2012, and I convened the hearing as scheduled on August 9, 2012.

Rulings on Procedure

After Applicant rested his case, the Government called a "rebuttal" witness to provide testimony "not directly related to an SOR allegation, but it was directly related to Applicant's credibility."[4] That information was essentially that: (1) Applicant lied to the witness and other employees about Applicant's reasons for making plans to transfer the employer's contracts to Applicant's company; (2) the reasons stated by Applicant about the employer's lack of support and cooperation were false; (3) Applicant's testimony regarding the preparation of DoD requirements related to facility security clearances and the guidance he purportedly received from the Defense Security Service (DSS) Industrial Security Representative (IS Rep.) was not credible; (4) Applicant's testimony regarding a particular contract's classification status was false; and (5) Applicant's conduct during the period preceding Applicant's termination was unethical.[5]

Upon the conclusion of the direct presentation, I questioned the Department Counsel regarding the propriety of calling the witness as a rebuttal witness rather than as a witness in the Government's case-in-chief.[6] I asked for briefs on the issue and offered Applicant's counsel the opportunity to object to the testimony or to cross-

[4] Government's Reply Brief in Opposition to Applicant's Motion to Strike, at 9.

[5] Tr. at 312-324; Government's Reply Brief, *supra* note 4, at 5.

[6] A judge "may control the scope of rebuttal testimony [and] may refuse to allow cumulative, repetitive, or irrelevant testimony, and may control the scope of examination of witnesses." *Geders v. United States*, 425 U.S. 80, 86-87 (1974). See also Fed.R.Evid. 403: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

examine the witness. Applicant's counsel chose to proceed with cross-examination of the witness and, after the record was closed, she subsequently submitted a motion to strike. Department Counsel submitted a brief opposing the motion a motion to strike.

It is well-settled that rebuttal testimony should be limited to that which is "precisely directed to rebutting new matter or new theories presented by the [appellant's] case-in-chief."[7] In this instance, the rebuttal witness generally rehashed the evidence presented by the Government witness who had testified in the case-in-chief. The only substantially "new" material evidence presented by the rebuttal witness was related to the witness' impression regarding Applicant's lack of truthfulness. Unresolved during the hearing, was whether the rebuttal witness was called to provide substantive evidence regarding those actions alleged in the SOR, matters already in evidence by virtue of documentation or the testimony of the original Government witness, or to provide evidence to impeach the Applicant's testimony – evidence which was both introduced by the Government in its case-in-chief and by Applicant in his case-in-chief. Department Counsel now seems to assert both.

Impeachment involves evidence that calls into question a witness' veracity. It deals with "matters like the bias or interest of a witness, his or her capacity to observe an event in issue, or a prior statement of the witness inconsistent with his or her current testimony."[8] "[R]ebuttal testimony is offered to explain, repel, counteract, or disprove evidence of the adverse party."[9]

Applicant's position is that the rebuttal witness' testimony should, as a matter of law, be stricken because it should have been presented when the issue it addressed was first presented in the Government's case-in-chief, rather than on rebuttal. Department Counsel urged me to disallow the motion as untimely and as "an improper effort to limit the record evidence based upon an overly restrictive application of . . . technicalities."[10] While Fed. R. Evid. 403 authorizes the exclusion of relevant evidence, the rule favors admission.[11] Moreover, the Directive states: ". . . technical rules of evidence may be relaxed . . . to permit the development of a full and complete record."[12] Based on all of the above, my ruling on the motion to strike is that it is denied.

[7] *Bowman v. Gen. Motors Co.*, 427 F. Supp. 234, 240 (E.D. Pa. 1977); *see also Peals v. Terre Hauge Police Dept.,* 535 F.3d 621, 630 (7th Cor. 2008) ("[T]he proper function of rebuttal evidence is to contradict, impeach or defuse the impact of the evidence offered by an adverse party.") (internal citations omitted); U.S. v. Neary, 733 F.2d 210, 220 (2d Cir. 1984) ("The normal function of rebuttal is to explain or rebut evidence offered by the adverse party.").

[8] *U.S. v. Harris*, 557 F.3d 938, 942 (8th Cir. 2009); *Berry v. Oswalt*, 143 F.3d 1127, 1132 (8th Cir. 1998).

[9] *Harris*, 557 F.3d at 942; *Sterkel v. Fruehauf Corp*., 975 F.2d 528, 532 (8th Cir. 1992).

[10] Government's Reply Brief, *supra* note 4, at 11-15.

[11] Fed.R.Evid. 403, Authors' Comments. ". . . a trial judge's decision to admit or exclude evidence under Fed. R. Evid. 403 may not be reversed unless it is 'arbitrary and irrational.'" *Bhaya v. Westinghouse Electric Corp*., 922 F.2d 184, 187 (3d Cir. 1990), cert. denied, 501 U.S. 1217 (1991).

[12] Directive ¶ E3.1.19.

Nevertheless, while I have permitted the testimony of the witness to stand, the issue as to the weight given to that testimony will be further discussed below.

Findings of Fact

In his Answer to the SOR, Applicant denied all three factual allegations pertaining to personal conduct (¶¶ 1.a. through 1.c. of the SOR). In his Answer to the amended SOR, Applicant admitted two of the factual allegations pertaining to personal conduct (¶¶ 1.a. and 1.d. of the amended SOR). Those admissions are incorporated herein as findings of fact.

Applicant is a 38-year-old owner of a defense contractor, currently serving as its president. A 1992 high school graduate, he earned a Bachelor of Science degree in 1995, a Master of Science degree in 1998, and a doctor of computer science degree in 2001. He has not served in the U.S. military. He was previously employed in a variety of positions by different employers. He was an assistant academic director from 1994 until 1995; an engineer from 1995 until 1996; a regional information technology manager from 1996 until 1998; a senior systems engineer from 1998 until 1999; a senior sales engineer from 1999 until 2002; a member of the technical staff from 2002 until 2006; and a general manager and facility security officer (FSO) from 2006 until 2008. He joined his present employer in 2008. Applicant was married in 1998. He and his wife have two sons, born in 1999 and 2003. Applicant was previously granted a top secret security clearance.

Personal Conduct

(SOR ¶ 1.c.): In July 2002, when he was serving as a senior sales engineer, Applicant and his employer (hereinafter referred to as company X) agreed that it would be best for Applicant to leave the company under unfavorable circumstances, as set forth below in Applicant's own words:[13]

> I left [company X] because of an incident involving used equipment. During my tenure at [company X in location A] I was working on an account with some peers that sold a customer a new wireless network to meet the needs of higher security standards. In order to give the customer the price that they wanted we used an internal program called "TMP" or Technology Migration Program. This program gives the customer extra discounts for replacing older equipment. Typically when this program is used the replaced equipment is shipped back to headquarters. However, during the time between the sale and the network migration the TMP program was canceled. When the equipment was ready to ship to headquarters I notified the appropriate business unit and was told since the program was canceled they could not take the equipment. Therefore, I had the equipment shipped to our office in [location B], which we were in the process of moving (we were locating the department and the office

[13] Applicant's Response to the SOR, dated October 17, 2011, at 7; *See also* Tr. at 188-190.

was to remain [company X] leased space). I notified our move coordinator that this equipment needed to stay with the department and move to [location C]. A few weeks later I was notified from facilities that the equipment was not moved and needed to be removed from [location B]. I asked them to ship it and was told it would cost too much so I drove to [location B] loaded my truck and drove it to [location C]. When I got to [location C] I was told there was no room to store the equipment and they would not let me bring it back to [location B] so I put it in my garage. On our next weekly team call I mentioned the predicament I was in with this equipment and my team members said they wanted me to ship some of the equipment to each of them for their use. So I did. [Six] months went by and still had nothing to do with this equipment. At this time I was in the process of building a training lab for our [company X] certification. I purchased some equipment on eBay and noticed that equipment similar to what I had in my garage was selling on eBay, so I sold 5 pieces. I used this money to purchase a piece of test equipment for the training lab. The test equipment was about $2500 and I had only made [about] $1500 from selling that equipment. The last person I sold to had a question about me selling the equipment and sent his inquiries to [company X] which prompted an internal investigation. During the investigation my teammates pleaded ignorance to the whole situation, however I had some documentation to support my case. This documentation was enough to prove that there were breakdowns in the TMP process and I should have never ended up with the equipment. Also it was concluded that I should not have sold that equipment and needed to pay [company X] $1500.00 for the equipment sold, I agreed and paid them.

Applicant also subsequently added additional facts:[14]

The equipment occupied approximately 10-15% of my garage. . . . After over six months had passed I made five different attempts to properly dispose of the [company X] owned equipment, I was left with 95% of it occupying my home garage. . . . Suddenly a [company X] attorney flew out to my . . . home from headquarters in [a state across country], wanting to know about the equipment I sold on eBay and wanting to look at all of my e-mails. I explained the entire story. Despite the fact that I hauled [company X's] equipment around in my own truck and stored it in my own garage and used proceeds from the eBay sale to benefit the [company X] laboratory, the [company X] attorney demanded the following: (i) I turn over any equipment I had left, which I gladly did; (ii) leave the equipment I had purchased for the [company X] laboratory in place, which I did; (iii) pay [company X] $1500, which I did by check; and (iv) submit my resignation, which I did one week later. Sometime later, [company X] returned the check, uncashed, apparently because [company X] could not figure out what to do with it.

[14] Applicant's Response to the SOR, *supra* note 13, at 9.

Applicant disclosed the situation in his 2002 SF 86, in his 2008 e-QIP, in his 2011 responses to interrogatories, in his 2011 Answer to the SOR, in his 2012 Answer to the amended SOR, and during his testimony. Although he is no longer an employee of company X, Applicant continues to work closely with it on a vendor basis, and maintains a good working relationship with company X.[15] Applicant has acknowledged that he should have pursued a higher authority approval to execute the actions he eventually took.

(SOR ¶¶ 1.a. and 1.b.): In January 2006, Applicant was offered a variable employee position as managing partner of the infrastructure/telecom business unit of another corporation (hereinafter referred to as company Z). Company Z was certified as a small, disadvantaged company under the 8(a) program of the Small Business Act by the U.S. Small Business Administration (SBA).[16] The offer was made by Dr. Q, the president and IT management consultant of company Z. In addition to various financial benefits and perks, Applicant was to receive a substantial hourly compensation and a one-third share of the profit from the projects Applicant brought to company Z.[17] According to Dr. Q, Applicant's annual salary came to approximately $200,000 and the combined salary and profit sharing over a two year period was $1,000,000.[18]

In August 2007, Dr. Q was informed by the DSS Chief, Facility Clearance Branch (FCB), that Dr. Q's interim secret personnel security clearance had been withdrawn by the Defense Industrial Security Clearance Office (DISCO). As a result of that action, company Z's interim secret facility security clearance (FCL) was considered defective.[19] On September 4, 2007, in an effort to forestall any lasting damage to company Z's ability to function, company Z's attorneys submitted a proposed mitigation plan to the DSS Industrial Security Field Office (ISFO).[20] The purpose of the proposed mitigation

[15] Government Exhibit 3, *supra* note 3, at 1; Applicant's Response to the SOR, *supra* note 13, at 8.

[16] Company Z was a "minority-owned" business based on Dr. Q's middle-eastern ethnicity. Tr. at 55, 129-130; Applicant's Response to the SOR, *supra* note 13, at 3. The 8(a) program regulations are contained in 13 CFR 124, and regulations concerning performance requirements in "set-aside" awards, including sole-source 8(a) contracts, are contained in 13 CFR 125.6. The SBA enters into federal contracts that are reserved exclusively for companies in the 8(a) program, and subcontracts out to qualified 8(a) participants. According to Federal Acquisition Regulation (FAR) Subpart 1.602-2, contracting officers are responsible for ensuring performance of all necessary actions for effective contracting, ensuring compliance with the terms of the contract, and safeguarding the interests of the United States in its contractual relationships.

[17] Atch. A (Letter from company Z, dated January 31, 2006) to Applicant's Response to the Amended SOR. The letter of engagement did not spell out any "fiduciary duties," and did not include a post- employment non-competition clause. Tr. at 136-137.

[18] Tr. at 82. Applicant contended that the employment letter terms were subsequently verbally modified, and Dr. Q insisted on paying Applicant with a hybrid W2 and 1099 in order to minimize Dr. Q's taxation. Applicant filed his 1099 returns to include the taxes Dr. Q did not want to pay. *See* Government Exhibit 3, *supra* note 3, at 6.

[19] The DISCO action was based on security concerns of foreign influence because of Dr. Q's middle-eastern family connections, as well as possible foreign ownership, control or influence (FOCI) issues. Response to the SOR, *supra* note 13, at 4; Tr. at 51-52.

[20] Government Exhibit 4 (Proposed Mitigation Plan, dated September 4, 2007); Tr. at 53-54. Dr. Q envisioned the mitigation plan to be a permanent arrangement, at least until he received the SOR and documents for his personnel security clearance. Tr. at 54-55.

plan was to ensure that while Dr. Q's personnel security clearance issues were being considered by DOHA, all requirements associated with classified information were fully met. In addition, the proposed mitigation plan acknowledged compliance with all existing DoD contracts that required a facility security clearance as a condition of continuing performance. The proposed mitigation plan included the following provisions:

(a) the current organizational structure of company Z would be altered to remove Dr. Q from "any direct or indirect involvement with [company Z's] DoD contracts which involve classified information";

(b) Dr. Q would relinquish his status as company Z's FSO;

(c) a new, wholly-owned subsidiary (hereinafter referred to as Newco) would be created;

(d) Newco would be "a totally separate business entity with a separate board of directors, separate officers and a separate management structure";

(e) Dr. Q would have no role in Newco;

(f) all of company Z's DoD contracts would be assigned to Newco and placed under the full and direct control of Applicant because he held a top secret security clearance;

(g) a separate FCL would be established for Newco;

(h) Applicant would become the Newco FSO;[21] and,

(i) the mitigation plan would be immediately implemented.

On September 19, 2007, Applicant was designated FSO for company Z, replacing Dr. Q.[22] Nevertheless, on October 2, 2007, the FCB informed the contracting officer representative (COR) of the pertinent military department that company Z's FCL had been invalidated because Dr. Q's interim secret personnel security clearance had been withdrawn.[23] While in the invalidated status, neither company Z nor its employees were eligible to be awarded additional classified contracts, "or have access to additional classified information." Because company Z had two classified contracts, the ISFO was to be given 30 days from that date to determine whether company Z could continue performance on the existing classified contracts pending resolution of the issues. On

[21] "The FSO will supervise and direct security measures necessary for implementing applicable requirements of this Manual and related Federal requirements for classified information." Department of Defense Manual 5220.22-M, *National Industrial Security Program Operating Manual (NISPOM)*, dated February 28, 2006, § 1-201.

[22] Government Exhibit 5 (Letter from Dr. Q, dated September 19, 2007).

[23] Government Exhibit 8 (DSS FCB letter, dated October 2, 2007).

October 3, 2007, a representative of DSS notified Dr. Q and his attorney, but not Applicant, that the proposed mitigation plan had been determined to be "acceptable."[24] The COR contacted Applicant and it was determined that because a mitigation plan had been submitted and approved, Applicant had replaced Dr. Q as FSO, Dr. Q no longer had access to classified information associated with the contract, and Applicant possessed the appropriate security clearance, company Z could continue performance on the existing classified contract pending resolution of the issues associated with its FCL. However, company Z was not eligible for additional classified contracts.[25]

In October 2007, Dr. Q informed Applicant that Newco would be created within the week as Dr. Q and his attorneys had completed drafting the articles, bylaws, and actions of the directors to comply with DSS requirements. Dr. Q advised Applicant to meet with company Z's outside attorney – who was also the secretary-designate of Newco – to review the Newco paperwork in anticipation of Applicant's meeting with DSS to obtain approval for transferring classified contracts to Newco. It was Dr. Q's plan that, after the interim secret FCL was granted, the attorney would work with DSS to satisfy any potential FOCI issues.[26] On December 19, 2007, Dr. Q, as the sole director of company Z, took the following board actions: (a) issued a board resolution excluding company Z from access to classified information in the possession of Newco; (b) issued a board resolution designating the principal place of business for Newco, and increasing the number of directors to three; and (c) elected Applicant, the Newco secretary, and one other individual as directors of Newco.[27] Applicant was designated as chairman of the board of Newco on December 21, 2007.[28]

On February 1, 2008, on behalf of Newco, Applicant leased 1,000 square feet of office space so he could relocate Newco operations out of his residence.[29] One month later, again on behalf of Newco, Applicant increased the leased space to 1,500 square feet.[30]

[24] Applicant Exhibit A (E-mail from DSS, dated October 3, 2007). Despite Dr. Q's contention that the information was forwarded to Applicant "immediately" after the mitigation plan was accepted, the e-mail was not forwarded to Applicant by Dr. Q until March 12, 2008. *See* Applicant Exhibit A (E-mail from Dr. Q, dated March 12, 2008); Tr. at 57. The accuracy and significance of the issue of acceptability has become an issue, for although there is the one e-mail indicating the proposed mitigation plan was deemed acceptable, according to two letters from DSS, dated January 25, 2012 and February 15, 2012, a search of DSS IS records pertaining to company Z revealed no mitigation plan. DSS indicated that the proposed mitigation plan had been located, but there was nothing reflecting an approval of that plan. *See*, Atch. M (Letter from DSS, dated January 25, 2012, and Letter from DSS, dated February 15, 2012) to Response to the Amended SOR.

[25] Government Exhibit 8 (COR letter, dated October 29, 2007).

[26] Applicant Exhibit B (E-mail from Dr. Q., dated October 23, 2007).

[27] Applicant Exhibit C (E-mail, with attachments, dated December 21, 2007).

[28] Government Exhibit 9 (Board Resolution, dated December 21, 2007).

[29] Applicant Exhibit G (Commercial Lease Agreement, dated February 1, 2008); Tr. at 210.

[30] Applicant Exhibit H (Commercial Lease Agreement, dated March 1, 2008).

The record is silent regarding subsequent actions and activities of company Z and Newco with relation to the mitigation plan until February 2008. By then, Applicant had reached a "high level of frustration with the lack of engagement, involvement and momentum."[31] On February 6, 2008, Applicant sent an e-mail to his two Newco board-member colleagues and Dr. Q, stating that DSS had been "turning up the heat" for them to complete the novation of the classified contracts. Applicant urged them to put together a tiger team and meet face to face to work out the details early the following week to expedite things.[32] Newco's secretary acknowledged the suggestion and urged Dr. Q to make completion of the "stand-up" of Newco and the novation of contracts a priority. He added:[33]

> There are a number of tasks involved (inter-company agreement, transfer of employees, transfer of assets, financials, etc.) that, while not difficult, need to be addressed before we can submit the novation request. Novation of contracts was one of the elements of the mitigation plan we submitted to DSS. We need to get this completed before DSS asks us again where the novations are.

Dr. Q delegated the execution of the mitigation plan to his two law firms, and "it was up to the law firms to work with DSS on executing the mitigation plan." Applicant was given no authority to certify that the mitigation plan was being executed, despite the fact that the mitigation plan so states.[34] In other words, Dr. Q ignored Applicant's duties and responsibilities as FSO and simply ignored his advice and requests. Unbeknownst to Applicant, Dr. Q and his attorneys had shifted their focus and strategy from the mitigation plan to getting company Z cleared.[35] Dr. Q did not recall ever advising Applicant of the shift.[36] Furthermore, Dr. Q acknowledged that despite Applicant's urgings and "false sense of urgency" as the FSO that the mitigation plan process be implemented at a faster rate, Dr. Q was getting advice from, and listening to, the more moderate strategies developed by his attorneys.[37] As Dr. Q stated: ". . . the mitigation plan is proceeding according to [Newco], and this is what was approved by the DSS."[38] Further complicating the situation was that Dr. Q's interpretation of the mitigation plan differed from Applicant's interpretation. Dr. Q contended that novation did not have to take place immediately, and it was not company Z's responsibility to do so. He believed the responsibility was with the government contracting officer to novate contracts, not

[31] Tr. at 209.

[32] Applicant Exhibit D (E-mail, dated February 6, 2008).

[33] Applicant Exhibit D (E-mail, dated February 6, 2008).

[34] Tr. at 102, 109-110.

[35] Tr. at 112-113.

[36] Tr. at 113.

[37] Tr. at 142-144.

[38] Tr. at 72.

company Z. Also, DSS had purportedly approved for him to continue to control both companies and authorized company Z to continue operating pending resolution of company Z's FCL.[39]

On February 8, 2008, Dr. Q informed the Newco board that he had opened a Newco bank account with a particular bank (in another state) where company Z already had its accounts. He added:[40]

> I want to emphasize the fact that . . . we need to limit creating a separate infrastructure to ONLY and STRICTLY what DSS requires at this point. Anywhere we have an opportunity to keep shared services, common procedures, shared resources, we really need to do so. We do not have the overhead and the resources at this point to fully support two different infrastructures unless we absolutely must do so.

Applicant responded to Dr. Q on February 12, 2008:[41]

> I disagree, we need to talk before we do this because I cannot continue to try and run a company off my credit cards and minimal support. You and I need to change this, improve communication if we are really going to do this. The common accounts will be at [the selected bank], all the [company Z] accounts will be there, there is no reason that I can't have visibility and full authority of the funds coming into [Newco], then we move the profits and under-runs into a common account.
>
> This is only one of the discussions that we need to have if we are going to establish this as a true partnership, where each of us consults each other on all decisions, information each other with all the ongoing information and direction.

That same day, Dr. Q responded, in part:[42]

> I agree. . . .There is no way you can and will continue to run around with no resources and using your personal credit cards. That is why we have retained [the treasurer and bookkeepers for Newco]. . . . We really need to keep our banking infrastructure consolidated. . . . I won't have visibility to that account wherever it is . . . . but I better have visibility into the accounting reports . . . . that is why it is important to have [the treasurer] doing it consistently for both companies. [The Newco secretary] directed

[39] Tr. at 71, 105, 115-116. According to Dr. Q: "Novation of the contract is not an action that's to be taken by [company Z]. Those contracts belong to the government. They decide whether they want to novate or not." Tr. at 116.

[40] Atch. F (Dr. Q E-mail, dated February 8, 2008) to Applicant's Response to the Amended SOR. *See also*, Tr. at 54-55.

[41] Atch. F (Applicant E-mail, dated February 12, 2008) to Applicant's Response to the Amended SOR.

[42] Atch. F (Dr. Q E-mail, dated February 12, 2008) to Applicant's Response to the Amended SOR.

> me to open up that account a while ago and I deposited $10,000 dollars in it and we have [the treasurer] as the signatory on it since he is the treasurer in the bylaws we submitted to DSS. You and [the treasurer] should agree on accounting reports to give you (us) the visibility we need and on the operating procedures so that you are no longer using personal funds. Him and I will work on how we sweep cash to support payroll primarily and overall [company Z] accounting for audit purposes. I hope this clarifies my intent.

Despite the assertion by Dr. Q that he had followed the advice of the Newco secretary to open up the Newco account and designated the Newco treasurer as the signatory on it, in compliance with the bylaws previously submitted to DSS, Applicant disputed those assertions and contended that Dr. Q had remained as the sole signatory on the account.[43] Applicant felt that he had no control over the contracts. Furthermore, according to Applicant, despite the creation of Newco, there was "no entity to speak of, so business as usual went on, with me on the side, trying to get this mitigation plan on the rails."[44] Applicant was aware that mitigation plans are common, and that there were templates available, but he could not get Dr. Q to approve inter-operating agreements.[45]

Applicant contends that Dr. Q was reluctant to comply with the terms of the mitigation plan because he was fearful of losing his 8(a) status because he would lose his control over Newco. Dr. Q acknowledged that the 8(a) status had to be safeguarded.[46] Applicant also stated:[47]

> [Dr. Q] fought against and made every effort to stall the implementation of the necessary steps to remove him from contact, responsibility, and authority over the classified Pentagon contracts which were necessary to implement the DSS mitigation plan. The contracts needed to be novated to the separate legal entity and that entity needed to operate independently. [Dr. Q] refused to let go of the functions that were necessary, such as the establishment of a separate bank account and giving the personnel with security clearances the authority to operate it.

He added:[48]

> According to [company Z's] FOCI Mitigation Plan with the DSS, I had the responsibilities of the FSO for [Newco]. While [Dr. Q] would retain his

[43] Atch. F (Applicant's handwritten notes on Dr. Q E-mail), *supra* note 42, at 1.

[44] Tr. at 206.

[45] Tr. at 211.

[46] Applicant's Response to the Amended SOR, dated February 24, 2012, at 3; Tr. at 55-56, 70-71.

[47] Applicant's Response to the Amended SOR, *supra* note 46, at 3.

[48] Applicant's Response to the SOR, *supra* note 13, at 4.

> ownership interest, the FOCI Mitigation Plan required that new executive management control all business related to the classified work. As the FSO, however, I was concerned that [Dr. Q] was refusing to comply with the FOCI Mitigation Plan and was not relieving control over the classified work to the [Newco] Federal management team. He refused to novate any of the contracts to [Newco] and continued to have uncleared foreign nationals work performing classified work. As the FSO, I was responsible for communicating with DSS regarding the company's progress in putting the FOCI Mitigation Plan in place. The DSS attorney responsible for [company Z's] facility security clearance was very concerned about the delayed execution of the plan. The most I could do was to get [Dr. Q] to agree to allow me to use an external company to control the classified business as this would mean that he would not need to make changes to [company Z].

According to Applicant, he suggested to Dr. Q that since Dr. Q had continuing concerns regarding [Newco] being the entity that performed the classified work, Applicant would offer "an entirely different legal entity" (hereinafter referred to as company S) to handle the classified contracts, and offered the use of a corporate entity that Applicant had formed in May 2005, but had never made operational. Dr. Q denied recalling any such suggestion.[49] Applicant discussed various options with DSS, and on March 28, 2008, following DSS guidance,[50] as FSO for Newco, Applicant submitted a FCL request with an attached DD Form 254, *Department of Defense Contract Security Classification Specification*, to DSS for company S, with the plan to use that company to control the classified business, based on his earlier discussions with Dr. Q. The request indicated it was based on a "bona fide procurement requirement to access classified information," and listed a particular contract number because that was the contract with the longest remaining period of performance, and gave Applicant the best opportunity to work with Dr. Q.[51] On March 31, 2008, a staff specialist at FCB returned the request without final action because, under the NISPOM, prior government agency approval had not been obtained as required when this category of classified information is involved.[52] Applicant and DSS conducted a routine exchange of correspondence on how to correct the DD Form 254, including which blocks to fill, and which blocks to leave blank.[53]

Applicant also stated:[54]

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[49] Applicant's Response to the Amended SOR, *supra* note 46, at 3; Tr. at 66.

[50] Tr. at 221-222.

[51] Applicant's Response to the Amended SOR, *supra* note 46, at 3; Applicant's Response to the SOR, *supra* note 13, at 4; Tr. at 223-224.

[52] Atch. G (FCB letter, dated March 31, 2008) to Applicant's Response to the Amended SOR.

[53] Atch. G (E-mail stream, April 4-8, 2008) to Applicant's Response to the Amended SOR; Government Exhibit 10 (DD Form 254, undated).

[54] Applicant's Response to the Amended SOR, *supra* note 46, at 6; *See also* Tr. at 215-216.

> As [Dr. Q] continued to not make any movement toward the compliance of the mitigation plan, I provided [Dr. Q] with options, one of them being that I could use [company S] . . . and novate the contracts AND the risk (in response to his concern about being left with the liability). [Company S] would perform as a subcontractor to [company Z] and/or [Newco]. [Dr. Q] and I discussed the potential impact of my departure, which he realized would be an issue with his then-invalidated FCL. [Dr. Q] wanted me to assist him with the transition of the work, since a contract termination could be devastating. In the division that I ran, I had about 26 employees that I was concerned for. [Dr. Q] and I discussed how I could transfer the work with me to my new company and how my new company and [company Z] would maintain the profit share agreement . . . for the remainder of the performance. . . . In no way did [Dr. Q] express anything but desires to support a non-disruptive continuation of the existing work.

The novation of government contracts, especially those dealing with classified information, while not an unusually complex process, requires that substantial steps be taken by various entities and individuals, including the corporations or companies involved, and the contracting officers. In this instance, since there was an 8(a) contract involved, the SBA involvement would be required. One party or one individual cannot cause a novation without complying with the established process, a point stated by Applicant.[55] Federal law generally prohibits the transfer of government contracts to a third party.[56] When the government concludes it is not in its interest, the government can refuse to novate a contract and hold the original contractor liable. If the contractor fails to perform, the contract can be terminated for default, and the original contractor held liable for all obligations resulting from the default termination.[57]

However, the government may recognize a third party as the successor in interest to a government contract when the third party's interest in the contract arises out of the transfer of all the contractor's assets or the entire portion of the assets involved in performing the contract.[58] When seeking a novation, the contractor is required to submit the proposed novation agreement and other specified documents to the contracting officer. Among those required documents are: (1) a document describing the proposed transaction; (2) a detailed list of all affected government contracts; (3) evidence of the transferee's capability to perform; (4) certified copies of the resolution of the involved corporate boards of directors authorizing the asset transfer and minutes of each company's stockholder meeting necessary to approve the asset transfer; and

[55] Tr. at 220.

[56] *See* 41 U.S.C. § 15.

[57] *See* FAR 42.1204 (c).

[58] *See* FAR 42.1204 (a).

(5) a legal opinion of counsel for both parties stating that the transfer was properly effected.[59]

Four existing DoD contracts, including three 8(a) contracts, were listed in the proposed mitigation plan in September 2007. They were to be novated from company Z to Newco, "but only with the express approval of the cognizant contracting officer."[60] However, according to Dr. Q, by April 2008, most of them had been closed and there was only one left.[61] Applicant disputed that fact and claimed the one remaining contract was merely a proposed contract which was never awarded to company Z or Newco because of questions regarding company Z's inability to pay bills on time.[62]

Applicant was concerned that he had a conflict because he was put in place to certify the mitigation plan had been implemented, but he was having difficulties motivating Dr. Q to fully do so. DSS advised Applicant to keep pushing forward to find a resolution. Also, DSS, the customer community, and the vendor community were all upset that the contracts had not been novated; invoices were not being paid;[63] and the organization was in disarray. As late as April 2008, Dr. Q still maintained total control over the transferring of assets between company Z and Newco, and he was controlling payment of employees and subcontractors performing work on classified contracts, contending that his role was approved by DSS.[64] Commencing shortly after Dr. Q had lost his interim secret personnel security clearance, and continuing thereafter, Applicant became very frustrated with his futile efforts. Applicant eventually informed Dr. Q that he was leaving the company. Dr. Q requested that he not quit, so they agreed to continue to profit share on the current work that Applicant brought to company Z.[65]

During this entire time, Applicant met with the program management team of Newco and informed them of the continuing problems related to the non-compliance with the mitigation plan as well as the proposal to establish company S as the alternative to Newco to keep the business afloat.[66] Applicant claimed it was "parallel

[59] *See* FAR 42.1204 (e) and (f).

[60] Government Exhibit 4, *supra* note 20, at 4-5.

[61] Tr. 118-121.

[62] Government Exhibit 3, *supra* note 3, at 8.

[63] Dr. Q acknowledged that there were a lot of complaints from subcontractors and employees about late payments, but attributed some of the reasons for those complaints to Applicant's "sending out expectations with these vendors without consulting with me, as far as payments." The vendors had been working on classified contracts. Dr. Q's position was that "[w]e paid the vendors, but we paid them in the proper time per their contract and per the government payment requirements." Tr. at 113-114. One witness acknowledged there were payment issues with company Z because payments were not always made on time and the witness' company had additional work to do to collect owed monies. *See*, Tr. at 169.

[64] Tr. at 105-106.

[65] Tr. at 225-228, 267-268; Applicant's Response to the Amended SOR, *supra* note 46, at 3

[66] Government Exhibit 3, *supra* note 3, at 10.

planning," and was discussed as an option to Newco, "depending on how comfortable [Dr. Q] would be with the options, status and briefed to him."[67] One member of that program management team (Mr. G) – hired by Applicant to be a program manager for a particular contract, and subsequently appointed by Dr. Q to be Applicant's successor as president and FSO of Newco – attended several of those meetings and was upset because he felt the meetings were inappropriate. Mr. G subsequently separated himself from the rest of the program management team, and they distanced themselves from him.[68]

According to Dr. Q, Applicant first informed him of his plans to "take the contracts of [Newco] and its employees, and move them to [company S]" on the phone on either April 28, 2008 or April 29, 2008.[69] Dr. Q denied ever discussing the novation process other than one occasion in early February 2008.[70] It was Dr. Q's contention that the mitigation plan was proceeding according to plan, and taking the contracts to company S was unnecessary. Accordingly, Dr. Q immediately called the Newco secretary for advice. He was advised to terminate Applicant for cause. They agreed, and the Newco secretary, in his capacity as company Z's attorney, started drafting the termination letter.[71] On April 29, 2008, as he had previously promised, Applicant furnished Dr. Q with status details pertaining to each of their corporate contracts, and added some comments about his proposed reorganization plan.[72] In turn, Dr. Q forwarded the e-mail to Newco's secretary, treasurer, and company Z's senior vice president.[73]

On May 1, 2008, following earlier discussions with each other, Applicant submitted a more detailed plan to Dr. Q. That plan included, among other steps, expedited submission of invoices; seeking a way to obtain new funds for the staff; and moving forward with plans regarding company S.[74] That same evening, Dr. Q responded:[75]

> I do not concur in any way with your apparent plan to divert these contracts to an entity that you are creating. I am advised by counsel that your planned actions would constitute a misappropriation of corporate assets and would be a breach of your fiduciary duties to the company. . . . [I]mmediately cease and desist all communications with [company Z's]

[67] Government Exhibit 3, *supra* note 3, at 10.

[68] Tr. at 312-317.

[69] Tr. at 67.

[70] Tr. at 68, 119.

[71] Tr. at 72-73.

[72] Applicant Exhibit E (E-mail to Dr. Q, dated April 29, 2008).

[73] Applicant Exhibit E (Dr. Q's e-mail, dated April 29, 2008).

[74] Government Exhibit 11 (E-mail from Applicant, dated May 1, 2008).

[75] Government Exhibit 11 (E-mail from Dr. Q, dated May 1, 2008).

> customers and vendors until you receive further written notice from me. As an employee of [company Z] I expect you to follow through with that request.

That same evening, by email and overnight mail, Dr. Q sent Applicant a letter advising him that his employment with company Z was terminated, effective immediately. The letter said, in part:[76]

> . . . your employment with [company Z] and all association with [Newco] are terminated effective immediately. . . [B]e advised that the termination is for cause.
>
> We have obtained substantial information to support the causes of this termination. If you would like to be advised of the specifics of the causes, please feel free to have your counsel contact the companies' legal counsel [Newco's secretary]. It is sufficient for this action that you be advised that the termination is for cause. The companies are currently investigating your conduct and activities, and will determine whether there is any culpability or liability on your part to the companies. . . .
>
> You are required to remove yourself from the physical premises of the companies' offices. We realize that you work out of your home to a large extent. All of the documents, files, records and assets of the companies in your home are the property of the companies and are not to be removed, destroyed or altered by you. . . .
>
> You may not communicate in any way, directly or indirectly, with any employees of [company Z or Newco] until you have completed the turnover process and are no longer in possession of any company assets.

That same evening, other letters were sent to the customers and all employees informing them of Applicant's termination for cause and advising them that Applicant's planned actions would have constituted a misappropriation of corporate assets and a breach of his fiduciary duties to the company.[77] In addition, one other employee, Applicant's assistant, received a letter temporarily suspending her with pay and benefits, but did not identify any suggested wrong-doing by her.[78] She was eventually reinstated.[79] As a direct result of Applicant's termination, company Z purportedly lost between 60 and 70 percent of its business.[80]

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[76] Applicant's Response to the SOR, *supra* note 13, at 5.

[77] Atch. I (Letter from Dr. Q to all employees, dated May 1, 2008) to Applicant's Response to the Amended SOR; Tr. at 337.

[78] Atch. I (Letter from Dr. Q, dated May 1, 2008) to Applicant's Response to the Amended SOR.

[79] Tr. at 132.

[80] Tr. at 73.

According to Dr. Q, following Applicant's termination, he discovered incidents of "significant wrongdoing" that Applicant had purportedly committed while he was an employee of company Z and Newco:[81] (a) Applicant had falsified the DD Form 254 discussed above; (b) Applicant was closing deals through company S while he was employed at company Z; and (c) Applicant was using company Z resources for the benefit of company S. Dr. Q contended he had no previous knowledge of those three examples of "significant wrongdoing." Applicant denied all of the above, and furnished explanations disputing the allegations.[82]

In June 2008, company Z sued Applicant, company S, another company established by Applicant, and three other individuals (all formerly employees of company Z, but now employees of Applicant's new company) in the federal district court, alleging, in part, that Applicant had: (a) made plans to obtain and misappropriate for himself and his company valuable contracts and business opportunities belonging to company Z; (b) misappropriated for himself proprietary confidential information belonging to company Z; (c) arranged with a DoD employee to improperly acquire contracts for Applicant's benefit, rather than the benefit of company Z; (d) with others, conspired to obtain contract opportunities away from company Z to Applicant's new company; (e) retained possession of valuable propriety confidential business information belonging to company Z; (f) breached his fiduciary duty to company Z by his actions; (g) violated the state business conspiracy act; (h) breached his contract of employment with company Z; (i) engaged in tortious interference with contractual relationships; (j) engaged in tortious interference with business expectations; and (k) stolen valuable property. Company Z sought damages of not less than $10,000,000 for each of the first three counts, plus an unspecified amount for the remaining four counts.[83] Company Z's emergency motion for temporary restraining order and preliminary injunction and motion for leave to conduct expedited discovery were denied on June 11, 2008.[84]

On June 27, 2008 and June 30, 2008, Applicant and one other defendant, respectively, filed counterclaims against company Z, alleging lack of compliance with labor laws and failure to provide consideration. On September 5, 2008, Newco sought leave to intervene as a co-plaintiff in the same case. The litigation was settled on September 26, 2008, releasing all claims against Applicant and the other parties; establishing a confidentiality agreement; requiring company Z to pay Applicant substantial expense reimbursement sums and unpaid salary; and requiring that Dr. Q and his companies and managerial personnel and Applicant and his company and managerial personnel not make any disparaging or derogatory remarks about each

[81] Tr. at 74-81.

[82] Government Exhibit 3, *supra* note 3, at 7-11.

[83] Government Exhibit 12 (Complaint for Damages and Injunctive Relief, filed June 6, 2008).

[84] Atch. N (Order, dated June 11, 2008) to Applicant's Response to the Amended SOR.

other to any third party.[85] The agreement was signed by each of the defendants, including Applicant, and each plaintiff, including Dr. Q and Mr. G. As of September 2009, one year after the lawsuit was settled, final payments from company Z to Applicant still had not been made.[86]

Dr. Q had received his SOR from DOHA in March 2008, had his hearing before an administrative judge in August 2008, and received a favorable decision granting his eligibility for a security clearance in October 2008. He was finally granted a security clearance in November 2008.[87]

Based on the evidence produced, I conclude that the mitigation plan submitted by Dr. Q's attorneys and purportedly adopted by DSS, was intentionally never fully or immediately implemented by Dr. Q or his companies. No employees performing services under those contracts had been transitioned from company Z to Newco.[88] The inter-company agreements were never completed, and no contracts were ever novated.[89] Dr. Q continued to exercise direct and indirect control over the activities of both company Z and Newco. He also routinely ignored the advice of Applicant, his FSO. Dr. Q also explained his actions "because the contracting officers decided to keep the operation of these specific contracts under [company Z], per their letter to DSS."[90] In addition, at one point during the hearing, Dr. Q stated that the mitigation plan did not prohibit his management of Newco through at least February 2008.[91] He essentially denied that comment later in the hearing.[92] The evidence also reveals a serious failure in oversight by the CORs and various offices of DSS in failing to insure compliance with the mitigation plan for a period of over one year.

(SOR ¶ 1.d.): In March 2009, Dr. Q was interviewed by an investigator from the U.S. Office of Personal Management (OPM) in relation to Applicant's security clearance review. During that interview, Dr. Q made certain assertions against, and characterizations about, Applicant, all of which Applicant denied, including:[93]

[85] Government Exhibit 3 (Settlement and Release Agreement, dated September 26, 2008); Applicant's Response to the SOR, *supra* note 13, at 5; Applicant's Response to the Amended SOR, at 4.

[86] Government Exhibit 3 (E-mail stream between Applicant and Newco treasurer, various dates).

[87] Tr. at 147.

[88] Government Exhibit 12, *supra* note 83, at 6; Tr. at 128.

[89] Tr. at 336, 349.

[90] Tr. at 134-135.

[91] Tr. at 69.

[92] Tr. at 91.

[93] Applicant's Response to the Amended SOR, *supra* note 46, at 4-12. It should be noted that neither party submitted the full interview appearing in the OPM report of investigation (ROI) to me, and references to Dr. Q's comments refer to extracts quoted by Applicant.

(a) Applicant obtained his PhD online;[94]

(b) It became increasingly difficult for Dr. Q to communicate with Applicant, for Applicant would not return calls, and not discuss various problems with Dr. Q;

(c) Applicant never discussed his plans to leave company Z, take three employees from Newco to company S, and take company Z's contracts with him until one or two days before Applicant was terminated;

(d) Applicant violated his trust and fiduciary duties by falsifying the contractual relationship between company Z and Applicant's company (hereinafter known as company T);[95]

(e) Applicant had destroyed a significant amount of confidential information that was stored on company Z's computers at Applicant's home office;[96]

(f) Applicant was guilty of computer fraud;[97]

(g) Applicant "is very bright but he lacks business sense. He is naïve and does not understand government regulations. . . . As time went on, [Dr. Q] began to question [Applicant's] mental stability. [Applicant] got hysterical when problems developed and became very emotional. . . .[Applicant] did not handle pressure well. . . .";[98]

(h) [Applicant] may have a problem with excessive use of alcohol. . . " citing his belief that Applicant was intoxicated when on conference calls;[99]

(i) Dr. Q has serious concerns about Applicant's judgment in trying to illegally take work from [company Z] and tampering with [company Z's] computers:[100]

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[94] Tr. at 177; Applicant's Response to the Amended SOR, *supra* note 46, at 4. Applicant noted that the campus of the university where he obtained his degree was located only 10-15 minutes from Dr. Q's residence and office.

[95] Applicant's new company, company T, was not established until May 5, 2008, four days after he was terminated by Dr. Q. *See* Atch. 6, Applicant's Response to the SOR, *supra* note 13.

[96] The computers in question were actually government computers, and they were used for testing only, not the storage of confidential company information. *See*, Applicant's Response to the Amended SOR, *supra* note 46, at 8.

[97] Applicant's Response to the Amended SOR, *supra* note 46, at 7-8. According to Applicant, Dr. Q's forensic analyst concluded Applicant's computer use was appropriate and that Applicant's associate had "wiped" his personal information from his personal laptop. No missing data was ever identified by Dr. Q. *See*, Applicant's Response to the Amended SOR, *supra* note 46, at 8.

[98] Applicant's Response to the Amended SOR, *supra* note 46, at 9.

[99] Applicant's Response to the Amended SOR, *supra* note 46, at 10. During the hearing, Dr. Q could not recall saying that Applicant had a problem with alcohol. Tr. at 139.

[100] Applicant's Response to the Amended SOR, *supra* note 46, at 11.

> [Applicant] did not consider the laws he was breaking and exhibited a total lack of integrity. [Dr. Q] has no confidence or trust about [Applicant's] ability to properly handle classified information. [Dr. Q] feels [Applicant] acts in unpredictable ways and could not be trusted with classified information. [Applicant] would put his personal interests first as he has no respect for boundaries and has a total disregard for the law.

In December 2011, when Applicant saw Dr. Q's assertions and characterizations about him, he thought back to the settlement agreement and believed Dr. Q had clearly violated it by constantly "disparaging" him. Applicant did not know how to stop Dr. Q from his actions so he sent Dr. Q two text messages. The first one said: "Bet you didn't know I can get a copy of the lies you told DSS, better call your friends at [Dr. Q's law firm]! Its on baby!!!!"[101] The second message said: "I'll just say my Christmas present may be a little late. . ."[102].[103] Dr. Q's position is that Applicant tried to coerce and threaten him not to cooperate with the OPM investigation.[104] Other than Dr. Q's opinion, there is no evidence that Applicant ever actually tried to coerce or threaten him not to cooperate.

Character References

In addition to Dr. Q's negative characterizations regarding Applicant appearing above, Dr. Q testified that Applicant acted in inappropriate or unpredictable ways, and his reactions tend to be impulsive and based on poor judgment.[105] He added:[106]

> So as far as I'm concerned, if I can't trust him with my business, and I can't trust the fact that he will honor his fiduciary duty to [company Z], I don't see why the federal government should trust him with classified information.

Dr. Q also characterized Applicant as "reckless" and furnished an example of a potential violation of the FAR when Applicant and a government employee supposedly wanted to "funnel some money" to Applicant's wife as a consultant on a particular contract at $300 per hour.[107]

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[101] Government Exhibit 13 (Test message, undated, but listed as being sent at 8:45 am).

[102] Government Exhibit 13 (Test message, undated, but listed as being sent at 9:00 am).

[103] Tr. at 270.

[104] Tr. at 83-85.

[105] Tr. at 84-85, 141. During his later testimony, Dr. Q modified his characterization of Applicant by stating the "pattern of unpredictable behavior" was really a "disagreement" over strategy. Tr. at 143-144.

[106] Tr. at 86-87.

[107] Tr. at 144-145. Applicant denied the accusation, stating that his wife is a stay-at-home mom of two children, and has no interest in working. Tr. at 179.

Mr. G, Applicant's former subordinate, but now his successor as president and FSO of Newco, with a top secret security clearance, joined in the lawsuit against Applicant. Dr. Q brought several facts to his attention after he was promoted regarding the mitigation plan and Applicant. First, "there was a mitigation plan that was in place, and it was in the process of being executed or followed."[108] Second, after his promotion, neither the contracting officers nor DSS ever said anything to him about being concerned over the process of the mitigation plan.[109] Based on the above, he quickly concluded that what Applicant had said about the mitigation plan and DSS concerns was not true.[110] Mr. G's interactions with Dr. Q became more frequent (about two times per week) and Dr. Q "turned out to be a very, you know, genuine gentleman. He was very business-oriented. He was very communicative. He was very supportive."[111] Third, although Mr. G believed what Applicant had said to him about the difficulties in dealing with Dr. Q and the fact that Applicant had been discussing the options with Dr. Q, he no longer believes him.[112] Mr. G maintained his opinion of Applicant as a liar even after being shown e-mails reflecting those discussions, because, as he observed, the e-mails were only dated two days before Applicant was terminated.[113]

A corporate president, with a secret security clearance, who has known Applicant for about ten years, both socially and professionally, is very supportive of Applicant's application. He has seen Applicant in social situations and has seen no evidence of any alcohol problem. When the witness was a subcontractor for company Z, and thereafter in another relationship, in working together professionally, he noted that Applicant "demanded that shortcuts not be taken in the development of the [their work] . . . . [Applicant is] straightforward, a straight shooter."[114] Applicant's reputation in the community, based on observations and discussions, is that Applicant is an honest person, with the utmost integrity.[115] They do not have a current professional relationship.[116]

The chief operating officer of company T, with a top secret security clearance, has known Applicant professionally and socially since approximately 2004. The witness was working inside the Pentagon as a manufacturer representative for another company and Applicant was "the architect and one of the chief influencers for systems

[108] Tr. at 311.

[109] Tr. at 317-318.

[110] Tr. at 319.

[111] Tr. at 319-320, 340.

[112] Tr. at 351.

[113] Tr. at 352.

[114] Tr. at 155.

[115] Tr. at 159-160.

[116] Tr. at 157-158.

and technologies that were being implemented inside the Pentagon."[117] Over the years, they have partnered on some opportunities together and competed on others. He did not observe Applicant having any problem with alcohol.[118] Applicant is a very trustworthy person and the witness trusts him implicitly.[119] Applicant is compliant in the areas of "security, contractual and financial," and drives the point home all of the time.[120]

Policies

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security emphasizing, "no one has a 'right' to a security clearance."[121] As Commander in Chief, the President has the authority to control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to have access to such information. The President has authorized the Secretary of Defense or his designee to grant an applicant eligibility for access to classified information "only upon a finding that it is clearly consistent with the national interest to do so."[122]

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the AG. In addition to brief introductory explanations for each guideline, the AG list potentially disqualifying conditions and mitigating conditions, which are used in evaluating an applicant's eligibility for access to classified information.

An administrative judge need not view the guidelines as inflexible, ironclad rules of law. Instead, acknowledging the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. The entire 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 meaningful decision.

In the decision-making process, facts must be established by "substantial evidence."[123] The Government initially has the burden of producing evidence to

[117] Tr. at 166.

[118] Tr. at 171, 173.

[119] Tr. at 173, 175.

[120] Tr. at 174.

[121] *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).

[122] Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended and modified.

[123] "Substantial evidence [is] such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all contrary evidence in the record." ISCR Case No. 04-11463 at 2 (App. Bd. Aug. 4,

establish a potentially disqualifying condition under the Directive, and has the burden of establishing controverted facts alleged in the SOR. Once the Government has produced substantial evidence of a disqualifying condition, under Directive ¶ E3.1.15, the applicant has the burden of persuasion to present evidence in refutation, explanation, extenuation or mitigation, sufficient to overcome the doubts raised by the Government's case. The burden of disproving a mitigating condition never shifts to the Government.[124]

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 as well. It is because of this special relationship that the Government must be able to repose a high degree of trust and confidence in those 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 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. Furthermore, "security clearance determinations should err, if they must, on the side of denials."[125]

Clearance decisions must be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned."[126] Thus, nothing in this decision should be construed to suggest that I have based this decision, in whole or in part, on any express or implied determination as to Applicant's allegiance, loyalty, or patriotism. It is merely an indication the Applicant has or has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance. 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.

Analysis

Guideline E, Personal Conduct

I had ample opportunity to evaluate the demeanor of both Applicant and the government's primary witnesses, Dr. Q and Mr. G, observe their respective manner and deportment, appraise the way in which they responded to questions, assess their candor or evasiveness, read their statements, and listen to their testimony. As to Applicant, it is my impression that his explanations regarding his personal conduct are consistent, and considering the quality of the other information before me, have the

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2006) (citing Directive ¶ E3.1.32.1). "Substantial evidence" is "more than a scintilla but less than a preponderance." *See v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994).

[124] *See* ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

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

[126] *See* Exec. Or. 10865 § 7.

solid resonance of truth. On the other hand, as to Dr. Q and Mr. G, my impressions will be discussed further below.

The security concern relating to the guideline for personal conduct is set out in AG ¶ 15:

> 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.

The guideline notes several conditions that could raise security concerns.

Under AG ¶ 16(c), it is potentially disqualifying if there is:

> *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.*

It is also potentially disqualifying under AG ¶ 16(d), if there is:

> *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: (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; . . . (3) a pattern of dishonesty or rule violations; (4) evidence of significant misuse of Government or other employer's time or resources.*

Security concerns may also be raised under AG ¶ 16(e) if there is:

> *personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress, such as (1) engaging in activities which, if known, may affect the person's personal, professional, or community standing. . . .*

In July 2002, Applicant and his employer, company X, agreed that it would be best for Applicant to leave the company under unfavorable circumstances because Applicant had sold equipment owned by company X on an internet website. In March 2008, while serving as the president and FSO of company Z, Applicant submitted a DD Form 254 to DSS based on a "bona fide procurement requirement to access classified information," and listed a particular contract number, when there apparently was no such "bona fide procurement requirement," and there was no contractual relationship between the two companies listed. On May 1, 2008, Applicant's employment at company Z and Newco was terminated for cause. On December 20, 2011, Applicant sent two text messages to his former employer at company Z, expressing anger over Dr. Q's "campaign of constantly disparaging him." AG ¶¶ 16(c), 16(d), and 16(e) have seemingly been established by these situations and actions. However, further review and commentary are necessary.

The guidelines also include examples of conditions that could mitigate security concerns arising from personal conduct. AG ¶ 17(c) may apply if:

> *the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment*.

Also, AG ¶ 17(d) may apply if:

> *the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that caused untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur*.

Similarly, AG ¶ 17(e) may apply if "*the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress.*"

In addition, AG ¶ 17(f) may apply if "*the information was unsubstantiated or from a source of questionable reliability*."

With respect to Applicant's July 2002 issue, based on the evidence, the conduct was relatively minor, ten years have passed since it occurred, the action was isolated, and it happened under such unique circumstances, that it is unlikely to recur. Furthermore, Applicant conceded that he probably should have handled the situation differently. Department Counsel argues that the 2002 episode was merely the first in a pattern of episodes which ended when Applicant was terminated for cause in 2008, but that argument is too simplistic under the circumstances to deserve much weight. True, the 2002 incident resulted in a resignation under unfavorable circumstances, but one is left to ponder the severity of the incident after the employer returned Applicant's check to him. Accordingly, as to the 2002 issue, AG ¶ 17(c) applies.

As to the entire environment and circumstances involving the issues that included Applicant's submission of the DD Form 254, and concluded with his eventual termination for cause, substantial discussion is appropriate. Both facts are established, for Applicant did submit the DD Form 254 and he was terminated for cause. However, as to the remaining allegations and facts leading up to the termination, I conclude the information was unsubstantiated or from sources of questionable reliability. Regarding the circumstances surrounding both incidents, there is conflicting evidence. For the government, there are two witnesses whose conclusions are based largely on their respective interpretations of Applicant's actions. Those interpretations were sometimes supported by documentation, and sometimes not. Dr. Q's allegations against Applicant, made in his letter of termination, his purported subsequent discoveries, the lawsuit filed against Applicant, his statements to the OPM investigator, and his testimony in this hearing, were so strong, and in many ways inconsistent, as well as contrary to documentary evidence, as to generate the impression that they were more revenge-based than based solely on fact. While an employer's decisions and characterizations of events are generally entitled to some deference, I am not bound by those characterizations if they are contradicted by other internally inconsistent or implausible evidence and are erroneous.[127]

It is of substantial significance that Dr. Q settled the lawsuit he filed against Applicant, and was required to pay Applicant; Applicant was not required to pay Dr. Q any sum of money. It is also interesting to examine the various negative allegations Dr. Q made against Applicant, and with the assistance of documentation or prior inconsistent statements, to peel back layers of purported fact, until they were laid bare and proven to be inconclusive or baseless. After reviewing all of the evidence, I conclude that Dr. Q's testimony and negative characterizations against Applicant are largely incredible and not worthy of substantial belief. Throughout the chronology of events leading from the submission of the proposed mitigation plan through the present, Dr. Q's inconsistent statements and actions reflected an individual who was willing to propose changes to the *status quo* to DSS and Applicant, but who in reality chose to ignore the basic requirements of that plan to keep himself in control, in violation of the NISPOM and other DSS requirements. In doing so, he lied to DSS and to Applicant, his FSO. In this regard, it is interesting to note that no DSS or COR was called to furnish evidence against Applicant or to support the many positions furnished by Dr. Q.

Nevertheless, that having been said, Applicant did submit the DD Form 254. There is unrebutted evidence that Applicant discussed various options with DSS, and, following DSS guidance, as FSO for Newco, Applicant submitted a FCL request with an attached DD Form 254 to DSS for company S, with the plan to use that company to control the classified business, based on his earlier discussions with Dr. Q. Dr. Q. denied any such discussions. As noted above, the request indicated it was based on a "bona fide procurement requirement to access classified information," and listed a particular contract number because that was the contract with the longest remaining period of performance, and gave Applicant the best opportunity to work with Dr. Q. A staff specialist at FCB returned the request without final action because, under the

[127] *See, e.g.*, *Anderson v. Bessemer City*, 470 U.S. 564 at 575 (1985); ISCR Case No. 10-03886 at 3-4 (App. Bd. April 26, 2012); ISCR Case No. 09-02839 at 4 (App. Bd. May 17, 2010).

NISPOM, prior government agency approval had not been obtained as required when this category of classified information is involved. It is unrebutted that Applicant and DSS conducted a routine exchange of correspondence on how to correct the DD Form 254, including which blocks to fill, and which blocks to leave blank. This is not to say that I have uncritically accepted Applicant's version of what had taken place. However, under the circumstances presented by the evidence, Applicant's version seems more reasonable than the mere allegation of evil intent.

Dr. Q and the government contend that Applicant's actions constituted an attempt to steal a particular contract, but there is evidence that the contract had not been awarded to company Z. As noted above, the novation of government contracts, especially those dealing with classified information, while not an unusually complex process, requires that substantial steps be taken by various entities and individuals, including the corporations or companies involved, and the contracting officers. In this instance, since there was purportedly an 8(a) contract involved, the SBA involvement would also be required. Since one party or one individual cannot cause a novation without complying with the established process, it would have been impossible for Applicant to steal or even attempt to steal any contracts from company Z or Newco without Dr. Q's knowledge and approval.

Mr. G, the second government witness (who was called as a rebuttal witness), offered a conclusion against Applicant based on input from Dr. Q and his own interpretations of Applicant's actions, generally unsupported by documentation. Mr. G had joined in the lawsuit against Applicant, but he too had to settle the matter. Mr. G's allegations against Applicant, made in the lawsuit filed against Applicant, and his testimony in this hearing, were strong and unshakable. Even when he was offered the opportunity to review documentation which would seem to support Applicant's honesty regarding one issue, he chose to ignore the documentation and reiterate his conclusion that Applicant was dishonest regarding that issue. Mr. G stated that since DSS had not complained to him after Applicant had been terminated, there was no truth to Applicant's statements that they had done so when Applicant was still the president and FSO of Newco. One such fact does not serve as proof of the other fact. While I have considered Mr. G's comments, I have chosen to give them reduced weight due to Mr. G's interest as an employee of Dr. Q and his own possible bias in the matter.

There is substantial evidence, including documentation and testimony from Applicant and Dr. Q supporting Applicant's explanations regarding his frustrations over Dr. Q's refusal to abide by the mitigation plan. That frustration was exacerbated by Dr. Q when he continued to exercise direct and indirect control over the activities of both company Z and Newco. Dr. Q also routinely ignored the advice of Applicant, his FSO. Dr. Q explained his actions "because the contracting officers decided to keep the operation of these specific contracts under [company Z], per their letter to DSS." No DSS personnel testified to confirm or support Dr. Q's stated position which stands starkly at odds with the purportedly accepted mitigation plan. There is no "questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that Applicant may not properly safeguard protected information." To the contrary, there is abundant evidence that

Applicant possesses characteristics directly opposite to those characterizations. Based on all of the above, AG ¶¶ 16(c) and 16(d) have not been established.

In December 2011, when Applicant saw Dr. Q's assertions and characterizations about him, he thought back to the settlement agreement and believed Dr. Q had clearly violated it by constantly "disparaging" him. Since Applicant did not know how to stop Dr. Q from his actions, he sent Dr. Q the two text messages. As noted above, in sending those texts, Applicant simply wanted Dr. Q to cease lying about him, especially after the settlement agreement, and did not intend to harm or threaten him. Applicant denied any intention of keeping Dr. Q from cooperating with the OPM investigation, he simply wanted Dr. Q to stop his campaign of constantly disparaging him, and to tell the truth. It is interesting to note that the communications occurred *after* the OPM interview and not *before* it. Dr. Q's position that Applicant tried to coerce and threaten him not to cooperate with the OPM investigation is unsupported by any other evidence, and is merely Dr. Q's opinion. Nevertheless, while the texts may not have been intended to threaten Dr. Q, they were rather juvenile and unwise. AG ¶ 16(e) has been established.

The disparaging remarks and negative characterizations by Dr. Q and Mr. G stand in stark contrast to the positive characterizations made by Applicant's character witnesses – individuals who have known and worked with him over a number of years. They describe Applicant as a straightforward, straight shooting, honest person, with the utmost integrity. As to SOR ¶ 1.d., AG ¶¶ 17(c) and 17(e) apply.

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 security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept.

There is some evidence against mitigating Applicant's conduct. As noted above, Appellant was suspected of a lengthy litany of personal and corporate misconduct, initially in 2002, and subsequently during the period 2008 through 2011. In July 2002, Applicant and his then-employer agreed that it would be best for Applicant to leave the

company under unfavorable circumstances because Applicant had sold equipment owned by the employer on an internet website. In March 2008, while serving as the president and FSO of another company, Applicant submitted a form to DSS based on a "bona fide procurement requirement to access classified information," and listed a particular contract number, when there apparently was no such "bona fide procurement requirement," and there was no contractual relationship between the two companies listed. On May 1, 2008, Applicant's employment was terminated for cause. In December 2011, Applicant sent two text messages to his former employer expressing anger over the employer's campaign of constantly disparaging him.

The mitigating evidence under the whole-person concept is much more substantial. Applicant was appointed an FSO when Dr. Q lost his personnel security clearance and the corporation was threatened with losing the FCL. Despite assurances by Dr. Q that the proposed mitigation plan would be immediately implemented as required by DSS once the plan was accepted, he refused to do so. He stalled. Instead of accepting his FSO's advice, Dr. Q relied on his two teams of attorneys and ignored his obligations and responsibilities in an effort to maintain control over his companies. Applicant's frustrations increased over Dr. Q's refusal to abide by the mitigation plan. As the FSO and a business partner, Applicant offered Dr. Q some options, and commenced working on those options. Unhappy with Applicant's efforts either to force him to relinquish control over his companies or cede control over classified contracts to a company established by Applicant, Dr. Q terminated Applicant for cause. Dr. Q sued Applicant, but that lawsuit was settled, and Dr. Q was required to pay Applicant a substantial sum of money. Although the settlement stipulated that Dr. Q and his companies and managerial personnel and Applicant and his company and managerial personnel not make any disparaging or derogatory remarks about each other to any third party, Dr. Q commenced a **c**ampaign of constantly disparaging Applicant. Applicant finally had enough of Dr. Q's actions, and in December 2011, sent Dr. Q two texts to get Dr. Q to cease lying about him, especially after the settlement agreement. Applicant did not intend to harm or threaten Dr. Q, and had no intention of keeping Dr. Q from cooperating with the OPM investigation regarding Applicant's security clearance review.

In evaluating this case, I have considered Applicant's actions and efforts under the concept of a "meaningful track record" of security consciousness, compliance, honesty, and integrity. Appellant has offered substantial evidence of those characteristics. The negative evidence from Dr. Q, as well as Mr. G, is in large measure self-contradictory and largely based upon speculation and conjecture. The conclusion that Appellant lied or tried to steal contracts is based upon false premises. After weighing the disqualifying and mitigating conditions, and all the facts and circumstances, in the context of the whole-person, I conclude Applicant has mitigated the handling protected information and personal conduct conditions security concerns. *See* AG ¶¶ 2(a)(1) through 2(a)(9).

Overall, the record evidence leaves me without substantial questions and doubts as to Applicant's eligibility and suitability for a security clearance. After weighing the disqualifying and mitigating conditions, and all the facts and circumstances, in the

context of the whole person, I conclude he has mitigated the personal conduct security concerns.

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:	FOR APPLICANT
Subparagraph 1.a:	For Applicant
Subparagraph 1.b:	For Applicant
Subparagraph 1.c:	For Applicant
Subparagraph 1.d:	For Applicant

Conclusion

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

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ROBERT ROBINSON GALES
Administrative Judge