DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
	)	ISCR Case No. 11-03095
	)	
Applicant for Security Clearance	)	

Appearances

For Government: Raashid, Williams, Esq. Department Counsel
John B. Glendon, Esq., Deputy Chief Department Counsel
For Applicant: Sheldon I. Cohen, Esq.

10/02/2012

Decision

MASON, Paul J., Administrative Judge:

Given Applicant's credible explanations of how he has changed some of his business practices and what he would do in the future to change other practices, he has mitigated the security concerns associated with the personal conduct guideline. Applicant's six monthly payments between December 2011 and June 2012 toward the ultimate satisfaction of the civil judgment represents a meaningful track record of payments that mitigates the financial concerns. Eligibility for access to classified information is granted.

Statement of the Case

Applicant certified and signed his Electronic Questionnaire for Investigations Processing (e-QIP) on February 20, 2007. He was interviewed by an investigator from the Office of Personnel Management (OPM) on May 17, 2010. (GE 12) On August 9, 2011, Applicant agreed with and adopted the investigator's interview summary of his May 17,

2010, interview. (GE 11) He indicated the summary could be used at a security clearance hearing to determine his security suitability. (GE 11) In an attachment to GE 11 dated August 8, 2011, Applicant indicated he is currently an independent consultant to DoD. He also provided contact information regarding consulting agreements and points of contact.

On September 20, 2011, DOHA issued a Statement of Reasons (SOR) detailing security concerns under personal conduct (Guideline E) and financial considerations (Guideline F). The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG), effective within the DoD on September 1, 2006..

Applicant submitted his answer to the SOR on October 12, 2011. DOHA issued a notice of hearing on May 9, 2012, for a hearing on June 26, 2012. The hearing was held as scheduled. At the hearing, 10 exhibits (GE 1, 2, 3, 4, 5, 6, 7, 9, 11, and 12) were admitted into evidence in support of the Government's case.[1] Applicant and six witnesses testified. Applicant's 37 exhibits (AE A through AE KK) were admitted into evidence. Parts of AE P were removed before the exhibit was admitted into evidence. There are eight Hearing Exhibits (HE 1 through HE 8) that identify motions filed by the parties before the hearing. HE 9 is a brief from Applicant addressing the financial considerations guideline. DOHA received the transcript on July 3, 2012. The record closed on July 3, 2012.

Rulings on Procedure

Shortly after the hearing began, I reviewed the written and oral motions filed by the parties and reiterated my rulings on the motions for the record. (Tr. 8-15):

On May 18, 2012, Applicant filed a Motion in Limine Regarding Application of Collateral Estoppel and *Res Judicata* in DOHA Cases. (HE 1) In that motion, Applicant referred to ISCR Case No. 04-05712, citing three conditions that must be present to collaterally estop a party from retrying issues litigated in an earlier criminal or civil proceeding. Applicant argued that since two essential witnesses were prevented from testifying in the earlier civil trial (CL - 2008-6380), Applicant was denied a full and fair opportunity (the first prong of the three-prong test) to litigate the breach of contract allegation and interference with contract or business relations allegation in the earlier civil

[1] GE 8 was not admitted in evidence because the same document appears as Exhibit 1 that is attached to HE 2. (Tr. 35) GE 10 was not admitted because the same documents appear as Exhibit 2 that is attached to HE 2. (Tr. 38)

action. (Tr. 8)[2] In Applicant's view, the testimony of the two witnesses could have resulted in a civil verdict in Applicant's favor.

On June 18, 2012, Applicant submitted a request by email for a pre-hearing conference to determine the Government's position regarding his Motion in Limine. He wanted to inform two of his witnesses whether to appear for the June 26, 2012 hearing. (HE 2)

On June 19, 2012, the Government filed a Brief in Opposition to the Motion in Limine, arguing that collateral estoppel applies to preclude re-litigation of issues already decided in the earlier civil action. (HE 3) The Government argued that Applicant's civil trial afforded him a complete opportunity to litigate the issues that he should not be allowed to re-litigate in the DOHA security clearance hearing. (Tr. 9-10)

On July 19, 2012, Applicant's counsel filed a Motion to Reconsider the Government's Brief in Opposition to Applicant's Motion in Limine. (HE 4) Applicant reiterated his claim of being denied a full and fair opportunity to present his case at the civil trial. The testimony of the two witnesses, referred to in Applicant's earlier Motion in Limine, would have testified that Applicant did not interfere with contractual relations of the plaintiff in the civil trial, and their testimony could have resulted in a civil judgment in his favor. Applicant claimed that a third witness (Applicant's civil trial counsel) should be allowed to testify that he could not subpoena either of the two witnesses (referred to in Applicant's earlier motion) because one was a federal government employee and the other was outside the jurisdiction.[3] Applicant also argued that the civil trial plaintiff's refusal to accept a settlement or payment plan to resolve the civil judgment was designed to contribute to a denial of Applicant's security clearance.

On June 20, 2012, at 11 a.m., a telephone conference was conducted with Applicant's counsel, the Government's counsel, and myself. After hearing the positions of both parties on Applicant's written motion in Limine, along with an oral motion by the government to postpone the case to a future date, I denied Applicant's Motion in Limine. I decided the doctrine of collateral estoppel applied to preclude re-litigation of those issues already decided in earlier civil case. (Tr. 11) I denied the Government's motion to postpone the case.

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[2] One witness was a federal government employee who was told by his government counsel that as a government employee, he did not have to honor a subpoena in the civil trial. He did not appear. The second employee could not be subpoenaed to testify because he was outside the jurisdiction. (HE 1 at 2)

[3] The deposition of this witness was entered into the civil trial record by Applicant. (HE 4, Exhibit 5 at 1094, AE HH at 1474-1475)

On June 20, 2012, at 2:15 p.m., I received an email from Applicant's counsel averring that I reconsider my collateral estoppel ruling in light of the remand decision of the ISCR Case No. 11-00180 (App. Bd. June 19, 2012), and allow three witnesses to testify about the interference of contractual claims against Applicant in the earlier civil trial. (HE 5) The cited Appeal Board decision was provided to Applicant by the Government earlier in the afternoon of June 20, 2012. (HE 6) In the cited decision, the DOHA Appeal Board remanded the case to the Administrative Judge to allow the parties to present "any additional evidence regarding the civil trial and [Applicant's] underlying conduct for the Judge's consideration." (*Id*. at 8)

Later in the afternoon of June 20, 2012 (5:33 p.m.), the Government submitted an email to me indicating that the Appeal Board's remand decision in ISCR Case No. 11-00180 (App. Bd. June 19, 2012) did not affect my earlier collateral estoppel ruling. Rather, according to the Government, the Appeal Board case allowed Applicant an opportunity to present evidence in mitigation. The Government argued that Applicant's Motion for Reconsideration be denied. (HE 7)

In an email dated June 22, 2012, I denied Applicant's Motion to Reconsider my ruling made at the end of the telephone conference on June 20, 2012. Collateral estoppel applies to preclude a re-litigation of the issues already decided in the earlier civil action. I indicated that following the guidance of the foregoing Appeal Board decision, I would relax the third prong of the collateral test (the unfairness prong), and allow the parties to introduce additional evidence from the civil trial record, including additional evidence in explanation or mitigation by Applicant. (HE 8) The Board's guidance is as follows:

> It is the conclusion of the Board that the case should be remanded to the Judge for further proceedings. The parties should be afforded an opportunity to present any additional evidence regarding the civil trial and [Applicant's] underlying conduct for the Judge's consideration. These matters should include, but are necessarily limited to, the civil trial pleadings, opening and closing statements of the attorneys, direct and cross-examination of Applicant, and any special findings of the jury. Any additional evidence submitted by a party is subject to review and objection by the party opponent, with the limitation the Board has concluded that the collateral estoppel doctrine shall not preclude Applicant from submitting evidence in mitigation. The Judge should then issue a new decision after consideration of any new evidence that is properly brought before her. (*Id*. at 7-8)

The last hearing exhibit is a memorandum filed by Applicant on May 18, 2012, supporting his claim that he is currently involved in a good-faith repayment plan to resolve the civil judgment. (HE 9)

During the presentation of Applicant's exhibits, the Government objected to certain portions of AE P, a character reference of one of the individuals identified in Applicant's Motion in Limine as the Government employee who was supposedly prevented from testifying. (Tr. 43-52) Because certain portions of the individual's character reference contain his view of whether Applicant interfered with contractual relations of the plaintiff (Company A) in the civil action, I sustained the Government's objection in part and overruled it in part. The first paragraph of the exhibit is admitted into evidence. The second paragraph is inadmissible, except for the last sentence of the paragraph. The third paragraph is inadmissible. The fourth paragraph is admissible. (Tr. 51-52)

Findings of Fact

The first paragraph of the SOR, which alleges adverse behavior under the personal conduct guideline, contains seven subparagraphs that represent the seven counts in a civil complaint filed against Applicant in May 2008. On June 26, 2009, a jury returned a verdict against Applicant under the first six counts and for him under the seventh count. Applicant admitted the seven subparagraphs of SOR ¶ 1. The second paragraph of the SOR alleges financial considerations and identifies the remaining portion of the monetary judgment against Applicant that he still owed as of September 2011, the date of the SOR. Applicant admitted the subparagraph (SOR ¶ 2(a)).

Applicant is 55 years old. He has been married since August 1980. (Tr. 146) He has a son 28 years old and a daughter 25 years old. In September 1995, he received a bachelor's degree in history and English, and a master's degree in aerospace science from an aeronautical university. (e-QIP at 10-11; Tr. 164-165)

Applicant served in the U.S. Air Force from May 1981 until he received his honorable discharge in September 1998. (AE U) He spent four additional years in Air Force Reserve until his honorable discharge in April 2002. (AE V). Applicant was trained as a navigator. He flew in 27 combat missions during the Gulf War. He began the Air Force navigation warfare program with Reference R (Tr. 168-175) He received the Distinguished Flying Cross. (AE A) In November 2004, he also received an award from the Secretary of the Air Force for his contributions to global positioning systems (AE AA)

Applicant has held sensitive compartmented information access (SCI) since April 2002. He has never had a security clearance or special access suspended or denied. (GE 1 at 39; Tr. 168) He has never had a security violation. (Tr. 168)

Following his honorable discharge from the Air Force, Applicant began his employment at Company A (plaintiff in the June 2009 civil action) in May 1998 by signing an agreement of employment which included a "nondisclosure of company data" provision and a "work in conflict or for hire outside the company" provision. As a full-time employee,

Applicant owed duties of loyalty and fidelity to Company A, and the duty of highest fidelity to his employer after he became vice president for business development and special access programs (SAP) in November 2002. (GE 4 at 4-5) The employment agreement did not include a covenant not to compete after terminating employment with Company A. (AE GG at 158)

Applicant and another individual (Party C), who also was employed by Company A, decided to establish their own company (Company B) at some time between January and April 2007. (GE 4 at 6, GE 12 at 1) From April to the end of December 2007, Applicant indicated he was working full-time for Company A and pursuing clients for Company B. (GE 12 at 2) He resigned from Company A at the end of December 2007 to work full-time for Company C. (AE JJ 1142-1145)

Civil Proceedings

In May 2008, Company A filed a civil lawsuit (CL-2008-6380) against Applicant, Party C, and Company B. The complaint alleged:

1. Breach of contract against Applicant and Party C (SOR ¶ 1.a);

2. Breach of duty and fidelity and loyalty against Applicant and Party C (SOR ¶ 1.b);

3. Breach of fiduciary duty against Applicant (SOR ¶ 1.c);

4. Tortious interference with contract and/or business relation(s) against Applicant, Party C, and Applicant's Company B (SOR ¶ 1.d);

5. Tortious interference with business expectancy against Applicant, Party C, and Applicant's Company B (SOR ¶ 1.e);

6. Conspiracy to injure Company A by Applicant and Party C (SOR ¶ 1.f); and

7. [State] uniform trade secrets act-conversion and misappropriation of trade secrets against Applicant and Party C (SOR ¶ 1.g).

Applicant retained an attorney. (Tr. 62) The jury trial began on June 22, 2009. Company A presented evidence. Applicant and Party C presented evidence and Company A presented rebuttal evidence. After the trial concluded on June 26, 2009, the presiding judge furnished instructions to the jury and they began deliberations. The jury returned a verdict against Applicant on the same day. The first six counts were found against Applicant and the seventh count for him. The jury awarded compensatory damages against Applicant for $57,000 damages and $130,000 in punitive damages. (GE 6) Post-trial motions were

denied. On June 29, 2009, the presiding judge suspended judgment to entertain post-trial motions and take other action deemed appropriate. (GE 6, 7) On September 18, 2009, the presiding judge filed a Final Order and Judgment setting forth the verdict and damages specified by the jury. (GE 2 at I-10-I-11, GE 7)

On December 18, 2009, Applicant's attorney filed an appeal of the verdict and damage award to the state supreme court. The one assignment of error was that the presiding judge committed error by refusing to set aside the jury verdict and judgment notwithstanding Company A's failure to prove that Applicant and Party C's conduct proximately caused injury to Company A. (AE II) On April 21, 2010, the state supreme court indicated that, after reviewing the arguments for and against the appeal, it found no reversible error in the judgment complained of. The state supreme court refused the petition for appeal. (GE 9)

On April 22, 2010, the day after the appeal was denied, Applicant asked his civil trial attorney to negotiate a payment plan with Company A. (AE D) The attorney tried repeatedly but unsuccessfully to work out a settlement plan or a percentage of earnings agreement. (AE E; Tr. 73) Company A informed the attorney that they would continue to recover the judgment through the collection process. Company A recovered $14,997 through garnishment proceedings of Applicant's bank account. Company A garnished Applicant's two other employers without success. (GE 2 at I-8-I-26) Although Company A never agreed to a payment plan, they discontinued garnishment proceedings for unknown reasons. Applicant began monthly payments of $3,000 in December 2011, and has made six payments totaling $18,000. (Tr. 71; AE G, H, I, J, T, FF) Through garnishment and monthly payments, Applicant has reduced the balance of the civil judgment by approximately $33,000. He intends to continue making the monthly payments because, "It's a debt that I owe. I pay my debts." (Tr. 187)

Applicant did not believe there was any conflict between the business of Company B and Company A because B's business was in the sale and marketing of unmanned aerial vehicles (UAV). In his view, Company A was prohibited by government contract from manufacturing or selling any equipment. (GE 12 at 1-2) He testified that because Company A had a hardware exclusion clause in all their DoD contracts, they could not do sales and marketing. (AE JJ at 1129; Tr. 191) Applicant did not believe he interfered with Company A's customer relations. On November 26, 2007, he submitted his resignation letter to the president of Company A, stating that he would notify his customers (Government agencies) no later than the end of November 2007 of his decision to leave Company A at the end of the year. He indicated that he would try to find replacement employees of Company A to continue customer relationships before and after he left Company A. (AE JJ at 1143-1145) Applicant believed that he resigned on good terms with Company A. (Tr. 184) After he resigned, he never tried to contact Company A's client's intending to obtain Company A's business. (Tr. 187)

When Applicant was asked whether the June 2009 jury verdict altered his opinion in any way, he replied, "Yes sir. I have learned a very hard and costly lesson that you need to make sure that you're very clean in every business relationship that you have, and there's no ambiguity. It's black and white." (Tr. 188) Applicant was asked what he would do differently if he was leaving Company A. He replied:

> If I had to do it all over again I would probably inform them of my intentions of what I was doing better that I did when I left. I would have made sure that they understood what I was going and doing and that I did not interfere with anything they were doing. (Tr. 189)

Applicant was then asked whether he learned any long-term lessons from the jury verdict. He replied that he takes a closer look at business relationships and potential conflicts of interest. In the last two years, he has turned down two potential business opportunities because of the potential conflict with his ongoing tasks with his government customer. (Tr. 190) Applicant also testified that:

> The second thing I've learned is that you need to be completely aboveboard with everybody. There should be no gray in the world. It's got to be black and white. There needs to be clear demarcation lines in what you're doing and how you're doing, how you conduct your business. (Tr. 190)

When asked whether in hindsight, did Applicant sense some gray in the manner he conducted himself (with Company A), Applicant responded:

> Well, no. When I left [Company A] I didn't believe that what - -what they were doing was nothing what I was going to go do with [Company B]. I mean, [Company B] was going to be focused on doing sales and marketing of unmanned aerial vehicles, UAVs, which is something that Company A didn't do and Company A couldn't do because they had a hardware exclusion clause in all their DoD contracts. (Tr. 190-191)

At page 192 of the transcript, Applicant indicated that based on the jury's interpretation of his conduct, he would not take certain actions:

> Well, the first thing, I wouldn't have let Party C take a path along with me setting up Company B until he had departed. That would be the first thing. The second thing is I would have informed Company A exactly what I was going to do. I did tell them that I was going off to work UAVs but clearly I wouldn't have done anything to establish a company while I was in their employment. (Tr. 191-192)

Since Applicant's departure from Company A and the civil judgment, he has experienced stress. He has reduced employment opportunities within Government. He focuses more attention to contractual relationships. (Tr. 193)

Character Evidence

Applicant called five witnesses to testify about his character. Witness D is a systems engineer for a contractor. He provided a written character reference. (AE M) He is engaged in projects for the U.S. Air Force and the Army. He has held a security clearance for 20 years. He has known Applicant since 1995 when Applicant was employed by the Air Force in charge of navigation warfare and Witness D was a contractor. In the last three to four years that Witness D and Applicant have been working on Army programs, Witness D has observed no inappropriate conduct by Applicant. Witness D has dined at Applicant's house. Applicant volunteers on the weekends at a hobby shop. In Witness D's opinion, Applicant has never put his interests above those of the Government. Witness D recommends Applicant for a security clearance based on his flawless integrity. (Tr. 84-89)

Witness E, currently a consultant and tavern owner, was a 17-year-employee of a contractor that provided support for an Army installation. He has held a security clearance since 1977, and is familiar with security clearance requirements. He first met Applicant in 2004 or 2005 when Applicant was working in navigation warfare for Company A. Witness E worked with Applicant about three or four years supporting Witness E, who was the program manager and contractor special security officer for the contractor. After their working relationship ended in 2008, Witness E had only sporadic contact, and has not worked with Applicant on any contracts or subcontracts in the last two years. Based on his observations of Applicant over the years, Witness E considers Applicant to be a dedicated and honest person who does not waste the taxpayer's money. (Tr. 100-110)

Witness F, who also provided a character reference (AE N), testified that he is a senior manager for a defense contractor. Along with other tasks, he has been involved in navigation warfare and has known Applicant since 1996 when Applicant was at the Government office (Air Force) operating the navigation warfare program. From 1998 to 2008, Witness F had only occasional contact with Applicant, but in the last three years, his contact with Applicant has been regular in performing several modeling simulation analyses for the Air Force. From communicating daily and traveling with Applicant regularly, Witness F opines that Applicant is very professional and reliable. Applicant's honesty and integrity were demonstrated recently when he concluded that a global positioning system (GPS) test not be conducted because critical equipment that would maximize the potential benefit of the test was unavailable. Witness F has requested that Applicant be a consultant on an ongoing Army contract. (Tr. 114-127)

Witness G testified that he has been employed by a defense contractor as manager of technical strategy for navigation warfare since March 2011. He also provided a character reference. (AE P) Before his managerial job, he was technical adviser of electronic warfare, and program manager for technical signals intelligence at the other Government agency (AGA). Witness G has known Applicant since 2004 when they were working on the coalition war program. At the time, Witness G worked as a technical advisor and Applicant worked as Company A's representative in navigation warfare. The coalition warfare program was funded until 2006 or 2007. When funding again became available, the program was transferred from another DoD agency to the AGA, and Applicant and Witness G put together concepts of flying UAVS to establish electronic support capabilities. Witness G believes Applicant is an honest and loyal person who consistently produces an outstanding job performance. During their job-related travels between 2004 and 2010, Applicant always acted appropriately during dining engagements, never consuming alcohol to excess. On an infrequent basis, Witness G has met Applicant and his wife for dinner. Witness G wants to hire Applicant as a consultant for a project. (Tr. 129-143)

Applicant's wife testified that she has been married to him since 1980. She described the challenges of raising two children with Applicant being away from the household on military deployments. The primary reason Applicant resigned his Air Force commission two years before he was eligible for retirement was to be with his family. He joined Company A in July 1998 and left at the end of 2007 because he always wanted to be his own boss, and his long-term vision for Company A appeared to be different from that held by the president of Company A. (Tr. 145-153)

Applicant's wife pays the family bills while he is responsible for the business account. They have never been intentionally late paying any bills. The family has never had financial problems except for the civil judgment. Applicant coached hockey for approximately four years and received a trophy from an area high school in 2004. (AE Z) He also coached his children's soccer and baseball teams. He volunteers at a hobby shop on the weekends. He meets periodically at the hobby shop with other individuals of a modeling club, and has been recognized by club members. (AE DD) His wife believes he is a loyal, honest person whose caring and concerned attitude has been adopted by his children. (Tr. 154-162)

Several individuals wrote character references about Applicant. Reference K, a colonel with 24 years of experience in the U.S. Air Force, met Applicant in 1996 and worked with him until 1998, and from 2004 to 2007. In 2009, Applicant was assigned to assist Reference K on an electronic warfare project designed to protect warfighters' use of global positioning devices. Based on 16 years of observation, the colonel could think of no other person who has compiled as much experience in electronic warfare as Applicant. He recommends Applicant for a security clearance. (AE K)

Reference L, a retired colonel who served in the U.S. Air Force for 30 years, has known Applicant since 1999. After being hired by Applicant in 2003, Reference L worked for Company A from 2003 until 2007, when he took another position in joint navigation warfare. He believes that Applicant's involvement in navigation warfare from the middle 1990s to the current time supports a continuation of his security clearance. (AE L)

Reference O, a team leader at a U.S. Air Force research lab, who has held a security clearance since 1979, met Applicant in June 1996 and worked on several projects with him, or has provided funding to hire him as a subcontractor for navigation warfare input. She believes Applicant has an excellent reputation in navigation warfare testing experience. He is trustworthy. (AE O)

Reference Q, a group leader who has been employed by a defense contractor since 1984, has worked with Applicant and the navigation warfare program since 1996. Based on the projects they have worked on together, Reference Q knows that Applicant is an honest person who is dedicated to doing what is right and best for the Government. (AE Q)

Reference R, a program manager at a U.S. Air Force research lab, has been employed at the same location for more than 37 years. She has known Applicant for 20 years and believes he has unique expertise in navigation warfare. He has always been concerned about the best interests of the Government. She recommends that his security clearance be reinstated. (AE R) Because she is a federal civilian employee, her command informed her she could not appear to testify for Applicant. (AE X)

Applicant's U.S. Air Force service awards, medals, commendations, and certificates of recognition appear in the 21 pages of AE W. His vitae appears in AE A.

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the AG. Each guideline lists potentially disqualifying conditions and mitigating conditions, which are useful in evaluating an applicant's eligibility for access to classified information.

The administrative judge's ultimate goal is to reach a fair and impartial decision that is based on common sense. The decision should also include a careful, thorough evaluation of a number of variables known as the "whole-person concept" that brings together all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to protect or safeguard classified information. Such decisions entail a certain degree of legally permissible

extrapolation as to the potential, rather than actual, risk of compromise of classified information.

Under Directive ¶ E3.1.14., the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.l5., the applicant is responsible for presenting "witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel. . . ." The applicant has the ultimate burden of persuasion to demonstrate that it is clearly consistent with the national interest that he be granted eligibility for a security clearance.

Analysis

Personal Conduct

The security concern for personal conduct is set forth in AG ¶ 15:

> 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.

AG ¶ 16 contains two disqualifying conditions that are relevant to Applicant's conduct with Ms. V:

> AG ¶ 16(c) credible adverse information in several adjudicative 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 they may not properly safeguard classified information; and
>
> AG ¶ 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 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; (2) disruptive, violent, or other behavior in the workplace; (3) a pattern of dishonesty or rule violations; and (4) evidence of significant misuse of government or other employer's time or resources.

In June 2009, the civil jury returned a verdict finding that Applicant: (1) breached his employment contract with Company A; (2) breached his duty of loyalty and fidelity to Company A; (3) breached his fiduciary duty to Company A; (4) engaged in tortious interference with contracts and business relations of Company A; (5) engaged in tortious interference with business expectancies of Company A; and (6) conspired to injure the business of Company A. Applicant's adverse conduct raises security concerns under AG ¶¶ 16(c) and 16(d) (3) a pattern of dishonesty and rules violations.

There are two mitigating conditions under AG ¶ 17 that are potentially applicable to the circumstances in this case. Those conditions are:

> AG ¶ 17(c) the offense was 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; and
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> AG ¶ 17(d) the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate stressors, circumstances, or factors that caused untrustworthy, unreliable or other inappropriate behavior, and such behavior is unlikely to recur.

Applicant's adverse conduct was not minor because it occurred over at least an eight-month period in 2007 when he was working for Company A and Company B. Though Applicant has consistently maintained that he did not breach any contract or interfere with contract relations since the business objectives of Company A and C were different, the jury verdict confirms the opposite conclusion. However, having weighed all the disqualifying evidence with the mitigating evidence, I am convinced that Applicant's underlying behavior occurred under circumstances that are unlikely to recur. The character evidence from the witnesses and the written endorsements outline Applicant's positive impact in the military, particularly in the area of navigation and electronic warfare. The character evidence consistently demonstrates that he is trustworthy, reliable, and resourceful with taxpayer's money. Applicant receives some credit under AG ¶ 17(c).

When Applicant was asked to characterize his behavior and what he would do differently in the future if the circumstances were the same, he responded that he did not believe he had done anything wrong. But he testified that he had learned a hard lesson

about clean business relationships. He stated he would be more specific in stating his intentions about the exact nature of his work in the future. After describing the need for clarity and no black or gray area in business relationships, Applicant reiterated he did not believe there was any gray area in the way he resigned from Company A. However, he recognized a short time later in his testimony that he would not have established Company B while he was still in Company A's employ. His acknowledgment that he could not form Company B while still in the employ of Company A, and do a better job in defining his business relationships, entitles Applicant to mitigation under AG ¶ 17(d).

Financial Considerations

Paragraph 18 of the AG sets forth the security concern related to financial considerations:

> Failure or inability to live within one's means, satisfy debts and meet financial obligations may indicate poor self-control, lack of judgment, or unwillingness to abide by rules and regulations, all of which can raise questions about an individual's reliability, trustworthiness, and ability to protect classified information. An individual who is financially overextended is at risk of having to engage in illegal acts to generate funds. Compulsive gambling is a concern as it may lead to financial crimes including espionage. Affluence that cannot be explained by known sources of income is also a security concern. It may indicate proceeds from financially profitable criminal acts.
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> The two disqualifying conditions under AG ¶ 19 are:
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> AG ¶ 19(a) inability or unwillingness to satisfy debts; and
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> AG ¶ 19(d) deceptive or illegal financial practices such as embezzlement, employee theft, check fraud, income tax evasion, expense account fraud, filing deceptive loan statements, and other intentional financial breaches of trust.

On June 26, 2009, a civil jury returned a verdict against Applicant of counts 1-6 and count 7 in his favor. A judgment was entered against him for $57,000 in compensatory damages and $130,000 in punitive damages. On April 21, 2010, the state supreme court notified Applicant that his appeal of the jury verdict had been denied. On April 22, 2010, Applicant requested by email that his civil trial attorney work out a settlement. The attorney repeatedly tried to work out a payment plan, settlement, or a percentage of earnings arrangement. Company A declined the proposals, choosing instead to continue with the collection process over negotiation. The garnishment process yielded Company A approximately $14,997. AG ¶ 19(a) applies to Applicant's inability but not unwillingness to

satisfy the judgment. AG ¶ 19(d) applies to the jury's determination of Applicant's breach of contract, interference of contract relations and business expectancy, and conspiring to injure Company A's business.

Four conditions under AG ¶ 20 could potentially mitigate Applicant's delinquent indebtedness:

> AG ¶ 20(a) the behavior happened so long ago, was so infrequent, or occurred under such circumstances that it is unlikely to recur and does not cast doubt on the individual's current reliability, trustworthiness, or good judgment;
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> AG ¶ 20(b) the conditions that resulted in the financial problem were largely beyond the person's control, and the person acted responsibly under the circumstances;
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> AG ¶ 20(c) the person has received or is receiving counseling for the problem and/or there are clear indications that the problem is being resolved or is under control; and
>
> AG ¶ 20(d) the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts.

Considering the evidence as a whole, I conclude that Applicant is entitled to partial credit under AG ¶ 20(a) for the same reasons that I have identified under AG ¶ 17(c). Furthermore, except for the civil judgment, Applicant has never had financial problems.

To receive mitigation under AG ¶ 20(b), an applicant should show that "the conditions that resulted in the financial problem were largely beyond the person's control," and that the individual acted responsibly under the circumstances." The mitigation condition is inapplicable because it was his inappropriate conduct that resulted in a jury verdict and judgment against him in June 2009.

Applicant is entitled to some credit under AG ¶ 20(c) and 20(d) because there are clear indications that he is resolving the judgment in a systematic manner. The first $14,997 was paid through the collection process. Since December 2011, Applicant has initiated a good-faith effort to repay Company A by furnishing six monthly payments of $3,000 totaling $18,000. He intends to continue to honor the payment plan. SOR ¶ 2(a) is resolved in Applicant's favor.

Whole-Person Concept

I have examined the evidence under the disqualifying and mitigating conditions of the personal conduct and financial considerations guidelines. I have also weighed the circumstances within the context of nine variables known as the whole-person concept. In evaluating the relevance of an individual's conduct, the administrative judge should consider the following factors:

> 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 the participation was 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 a commonsense judgment based on careful consideration of the guidelines and the whole-person concept.

In early 2007, Applicant established Company B when he was still employed full-time by Company A. After he departed Company A at the end of December 2007, the company filed a lawsuit against him in May 2008 alleging breach of contract, breach of duty and loyalty, tortious interference with contract and business relations and business expectancy, and conspiracy to injure Company A's business. Applicant was represented by counsel and presented evidence. On June 26, 2009, a jury returned a verdict and judgment against Applicant. The presiding judge confirmed the verdict and judgment. Though Applicant did not believe he had done anything wrong, I conclude the jury verdict clearly changed his thinking about what he would and would not do in his business relations in the future. Applicant credibly testified about the necessity that all business relationships contain no ambiguity. He stated he should have expressed his intentions of what he was going to do after he left Company A. In the past two years, Applicant has turned down two expected business opportunities because of the potential conflict of interest with his business customer. Finally, Applicant stated he would not have done anything to establish a company while he was still employed by Company A. Judging by the totality of the evidence, I am persuaded that he realizes that he used poor business judgment in establishing Company B while working full-time with Company A, and not being more forthright about his future employment intentions as he neared the end of his employment with Company A. I conclude he will not repeat this conduct in the future. Applicant has mitigated the security concerns associated with personal conduct.

On April 22, 2010, the day after the state supreme court notified Applicant's attorney that his appeal of the civil verdict and judgment had been denied, Applicant asked his attorney to negotiate a payment plan or settlement with Company A. The attorney tried to structure a payment plan or settlement. He suggested a percentage of earnings arrangement. Company A, after informing Applicant's attorney they decided to use the collection process, received $14,997 via garnishment of Applicant's bank account. When Company A discontinued garnishment for unknown reasons, Applicant began making monthly payments on the judgment in December 2011. He has made six monthly payments ($18,000) between December 2011 and June 2012. Even though he still owes more than $150,000, he credibly testified he intends to keep making payments on the judgment because he pays his debts. I find his payment plan credible and made in good faith, even though he did not begin making the payments until three months after he received the SOR. Except for the civil judgment, there is no indication that Applicant has any other financial problems. He is not financially overextended. After reviewing the entire record of Applicant's efforts to resolve the civil judgment, I conclude that he has developed a meaningful track record of debt reduction in line with the definition rendered by the DOHA Appeal Board in ISCR Case No. 07-06482 at 3 (App. Bd. May 21, 2008)

Considering the evidence as a whole, Applicant's poor business judgment during 2007 is overshadowed by his reputation for trustworthiness, reliability, and good judgment that he has demonstrated in his 22-year military career and subsequently in the defense contractor community. On balance, I conclude that Applicant has met his ultimate burden of persuasion in establishing that he warrants security clearance access.

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 (1) through (7):	For Applicant
Paragraph 2 (Guideline F):	FOR APPLICANT
Subparagraph 2.a:	For Applicant

Conclusion

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

Paul J. Mason
Administrative Judge