DATE: April 8, 2002

In Re:

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

Applicant for Security Clearance

CR Case No. 01-10301

DECISION OF ADMINISTRATIVE JUDGE

BURT SMITH

APPEARANCES

FOR GOVERNMENT

William S. Fields, Esq., Department Counsel

FOR APPLICANT

Jon L. Roberts, Esq.

SYNOPSIS

Federally retired Applicant, formerly employed by a military department in the area of foreign military sales, wrongly determined during his federal employment that he was authorized to act as an advocate for the contract interests of foreign countries, sometimes in opposition to US contractual positions, thus rendering himself vulnerable to exploitation by other governments. Clearance is denied.

STATEMENT OF THE CASE

On August 31, 2001, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865, dated February 20, 1960, as amended, and Department of Defense Directive 5220.6, dated January 2, 1992, as amended, issued a Statement of Reasons (SOR) to Applicant which detailed reasons why DOHA could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant a security clearance for Applicant, and recommended referral to an Administrative Judge to determine whether a clearance should be granted.

The Applicant responded to the SOR in a written answer dated September 25, 2001, in which he requested a hearing. The case was assigned to the undersigned on October 31, 2001. On November 14, 2001, a Notice of Hearing was issued scheduling the hearing on December 18, 2001. (See Transcript No. 1, hereafter Tr. 1.)[(1)] The hearing was concluded on December 19, 2001. (See Transcript No. 2, hereafter Tr. 2.)

FINDINGS OF FACT

The Applicant is fifty-five years old, and he is a retired Federal civil servant. Prior to his retirement Applicant was employed by the Department of the Army as a senior-level director in the area of Foreign Military Sales (FMS)[(2)]. While he performed these duties Applicant held a security clearance, but it was suspended by the Army in 1996 and thereafter revoked on August 15, 1997.[(3)] As a contractor employee Applicant now seeks a renewed security clearance

through DOHA in connection with his employment in the defense sector.

The findings of fact below are generally divided into a discussion of security clearance actions taken by the Army, followed by a discussion of subsequent actions taken by DOHA as part of Applicant's current request for a new clearance.

Dept of Army security clearance actions

In May 1996 unidentified informant(s) reported to Army investigators (CID) their belief that Applicant repeatedly showed bias and favoritism toward the Government of Israel (GOI) in his official involvement with Israeli FMS purchases of the Army's widely-sought "Apache" gunship helicopter. Acting upon these allegations the Army temporarily suspended Applicant's security clearance and removed him from classified duties pending an investigation. (4) A CID investigative report dated January 28, 1997 found probable cause to believe some of the allegations against the Applicant were true while others were not. (Gov. Ex. 4b, p. 4b-5.)(5)

On April 23, 1997 the Army issued to Applicant a letter of Intent to Revoke Security Clearance (LOI, Gov. Ex. 2, p. 2-18) under the provisions of DoD 5200.2-R, applicable to DoD civilian employees. The Army's allegations, selectively drawn from the CID report, are summarized below:

a. During 1990 to 1995 you received illegal gratuities and gifts from GOI liaison officers.

b. You acted as an agent of the GOI by challenging the decisions of other FMS personnel in the presence of GOI officials.

c. While on Army business in Israel you did not report to security personnel your discovery of an electronic listening device located in a GOI vehicle in which you were an invited passenger.

d. You leaned on others in FMS to give favorable treatment to GOI because of your feelings for Israel; you gave investigators conflicting information about the listening device; you did not inform Army officials you received GOI gratuities and gifts; and you did not answer investigators' written questions about your activities.

In a letter through his counsel dated July 22, 1997, Applicant denied any wrongful conduct. (Pleadings Folder, tab D.) Applicant addressed the Army's factual allegations by providing explanatory information, and his responses, in summary, are set forth below:

a. My associations with all foreign liaison officers, including Israelis, were within the scope of my FMS duties, to include occasional exchanges of social invitations and minor gratuities.

b. As part of my duties I sometimes brought together US and foreign parties to reconcile FMS contract differences and to resolve conflicts.

c. I believed the device in question was an unattached transmitting microphone which was a normal part of GOI radio equipment in the official vehicle.

d. As a Jew I have a religious and historical affinity for Israel, but it does not affect performance of my professional duties; I provided information about the alleged listening device consistent with my best recollection at the time; my actions relative to reporting foreign gifts and gratuities were always in accord with existing FMS policies and practices; I provided all information requested by investigators during verbal interviews, and I expected they would furnish a sworn statement for me to sign, but they did not.

The Army considered Applicant's written responses but rejected his explanations and revoked his clearance in a letter dated August 15, 1997 addressed to Applicant through his military superior. (Gov. Ex. 2, p. 2-2.) In addition to announcing its decision, the Army's letter explained to Applicant his appeal rights to the Army's Personnel Security Appeal Board (PSAB) or alternatively to the DoD Defense Office of Hearings and Appeals (DOHA)(6). The letter further informed Applicant he must comply with specified timelines if he elected to appeal. The letter contains a "CF"

notation at the end with an address indicating a copy was furnished to Applicant's counsel.

Applicant did not file an appeal with either PSAB or DOHA. Both Applicant and his counsel assert now and in the past they did not receive the Army's letter of revocation. (Tr. 2, pp. 410-414.) Applicant claims he did not learn of the letter of revocation until March 13, 2000, nearly three years after he retired. (Gov. Ex. 3, p. 3-11.)

In resolving the factual issue of Applicant's receipt of the Army's letter of revocation, it is presumed the letter was forwarded to him through established mailing and distribution procedures similar to those used for earlier correspondence. It is also presumed Applicant routinely provided the Army an address for forwarding future correspondence after he retired. It is further presumed that Applicant's counsel was anticipating the Army's important decision regarding his client, and he was alert for its pending arrival. Based upon these logical and reasonable presumptions it is found that, more likely than not, either Applicant or his counsel, or both, received a copy of the Army's decision to revoke his clearance.

Furthermore, it is found that between August 15, 1997 (date of the Army's letter of revocation) and March 13, 2000 (date Applicant claims he first saw the letter) neither Applicant nor his counsel made any serious inquiries directly to the Army in a concerted effort to learn the Army's decision, had they not received it. Applicant's vague claim of congressional correspondence on this issue is not evidence of a diligent pursuit of his rights. (Tr. 2, pp. 410-414; 445-449.)

In view of (1) the Army's LOI informing Applicant of its allegations; (2) Applicant's detailed response (3) the Army's reasoned decision; and (4) Applicant's receipt of the decision and/or his failure to lodge a timely appeal or inquiry, it is found that Applicant was informed of the Army's security concerns, he responded to these concerns, the Army considered his answers but revoked his clearance and notified him, and Applicant failed to appeal the Army's decision.

DOHA security clearance actions

On March 30, 1998, the Applicant completed a Security Clearance Application in connection with his post-retirement employment in the defense sector. (Gov. Ex. 1.) On August 31, 2001, as noted above in the Statement of the Case, Applicant was issued an SOR stating why DOHA could not initially conclude that it is clearly consistent with the national interest to grant Applicant a security clearance.

In reaching factual findings in this case, the Army's prior adjudication is given substantial weight for two reasons. First, the Army's decisions were made contemporaneous with events that occurred well over five years ago. This gave Army adjudicators an advantage of perspective, situational awareness and familiarity with departmental policies at the time. Second, under the well-established legal doctrine of *res judicata* the Army's prior adjudication is entitled to administrative deference, if not full acceptance.

The SOR is generally divided into the Government's principal allegations, *i.e.*, those four which exactly track the Army's LOI, and the remaining allegations which differ from the LOI. In presenting the findings below, DOHA security clearance actions are examined with reference to this division.

SOR, Paragraph 1, subparas. a.(1.) through a.(4.). In these subparagraphs of the SOR the Government sets out its principal case, four allegations taken verbatim from the Army's LOI. Not surprisingly, Applicant's answers are nearly identical to those he provided in his response to the LOI. (These four allegations and Applicant's responses were discussed above as LOI allegations a. through d.)

At the DOHA hearing, the Government's primary evidence was the CID report, the same evidence relied upon by the Army in the LOI and the decision to revoke clearance. For his part, Applicant's evidence does not depart significantly from the evidence he provided the Army. An independent review of the hearing record results in no basis to disagree with the Army's ultimate factual determinations, except in one area discussed further below.

The Applicant's official conduct on-duty resulted in numerous reports of his bias toward GOI liaison officers. Additionally, while off-duty in Israel, Applicant shared the private home of a retired Israeli officer whom he first met through FMS activities. He never made such a noticeable gesture of personal friendship toward officers from any other

country. (Tr. 2., pp. 438-439.)

Applicant concedes he acted vigorously on behalf of Israeli FMS customers and others in their aggressive insistence upon full contractual compliance, and sometimes more. As a source of his authority, Applicant relies almost exclusively upon one brief line in a blanket charter regulation that simultaneously directs his office and ten others "*to ensure customer commitments are kept to ensure customer satisfaction with the FMS process.*"[(7)] (Emphasis supplied.)

Within government, powerful management authority over major programs is not customarily set out this way, *i.e.*, through an obscure sentence found in the latter portion of a charter document that applies to multiple organizations. Therefore, it is unreasonable to accept Applicant's contention that these few words gave him official authority to act as an FMS contract advocate for over fifty foreign nations in a multi-billion dollar program. Regardless of a perceived need for the role of an advocate, Applicant's assumption of this power is based upon a serious distortion of his directorate's charter. (For security clearance purposes, silence or indifference by Applicant's superiors does not justify his actions.)

As Applicant explains it, this isolated sentence was his license and authority to speak as a champion of the FMS buyers. At the hearing he testified that with regard to buyers from foreign countries he was an "advocate for the country." (Tr. 2, p. 369.) Applicant made it further clear in his testimony that he was dedicated to persuading the buyers of his loyalty to their needs. Using the hypothetical example of a Taiwan buyer, he testified that he wanted the Taiwanese to know "I'm your guy here. I'm here to see that your program works." (Tr. 2., p. 377.)

Still referring to the hypothetical Taiwan buyer, Applicant makes clear the extent of his advocacy for foreign nations. He testified if he judged the Army's contract performance to be inadequate in his view "I was going to probably beat [an Army official] on the head, and I was going to do it right in front of the Taiwanese General so he knew that I cared, and I was going to get his problem fixed." (Tr. 2, p. 377.)

Nevertheless, Applicant testified persuasively, supported by other witnesses, that any gratuities he received from foreign representatives were nominal tokens of good business relations, and he complied with customary FMS reporting procedures. This finding is a departure from one element of the Army's LOI.

SOR, Paragraph 1 (subparas.1.b. and 1.c.) and Paragraphs 2 and 3. The second portion of the SOR relies, for the most part, upon the factual underpinnings of the principal allegations previously discussed.

With regard to subpara. 1.b. the Government presents extracts from two paragraphs of the Army's letter of clearance revocation. As found above, Applicant complied with FMS policies regarding the acceptance and reporting of minor gratuities. Except for this departure from the Army's ultimate findings, the Government's allegations in subpara. 1.b. are supported.

With regard to subpara. 1.c., the Government alleges that Applicant is ineligible for clearance because his retirement became effective on the same day his clearance was revoked by the Army, and he never appealed the Army's decision. The timing of these events is probably coincidental. (See footnote 3, supra.) Furthermore, the Government presents no evidence to connect these events with the type of disqualifying personal conduct contemplated by Guideline E.

Finally, paragraphs 2 and 3 of the SOR allege that Applicant is ineligible for clearance under Guidelines C and B of the Directive pertaining to Foreign Preference and Foreign Influence. In support of its allegations the Government relies on factual evidence presented under subparas. 1.a. and 1.b. of the SOR. Accordingly, the findings entered as to those subparagraphs are incorporated by reference for consideration under Paragraphs 2 and 3.

Summary of findings.

The Government alleges that Applicant wrongfully used his official authority to provide undue assistance to GOI officials involved in the FMS purchase of Apache helicopters. Applicant denies these allegations, claiming he merely acted as an evenhanded advocate in trying to assist all FMS purchasers. Upon consideration of the factual record it is found that the Government's evidence is sufficient to support the allegations in the SOR, except where noted. As a related matter, it is found that Applicant received appropriate due process from the Army, and he failed to exercise his

rights of appeal.

POLICIES

Enclosure 2 of the Directive sets forth adjudicative guidelines which must be considered in the evaluation of security suitability. The guidelines are divided into those that may be considered in deciding whether to deny or revoke an Applicant's eligibility for access to classified information (Disqualifying Conditions) and those that may be considered in deciding whether to grant an individual's request for access to classified information (Mitigating Conditions).

The following adjudicative guidelines have application in this case.

Guideline E - Personal Conduct.

Disqualifying conditions:

1. Reliable, unfavorable information provided by associates, employers, coworkers, neighbors, and other acquaintances;

4. Personal conduct or concealment of information that increases an individual's vulnerability to coercion, exploitation or duress, such as engaging in activities which, if known, may affect the person's personal, professional, or community standing or render the person susceptible to blackmail.

Mitigating conditions:

(None have application.)

Guideline C - Foreign Preference.

Disqualifying conditions:

9. Performing or attempting to perform duties, or otherwise acting as to serve the interests of another government in preference to the interests of the United States.

Mitigating conditions:

(None have application.)

Guideline B - Foreign Influence.

Disqualifying conditions:

2. Sharing living quarters with a person or persons, regardless of their citizenship status, if the potential for adverse foreign influence or duress exists.

3. Relatives, cohabitants, or associates who are connected with any foreign governments.

6. Conduct which may make the individual vulnerable to coercion, exploitation or pressure by a foreign government

Mitigating conditions:

2. Contacts with foreign citizens are the result of official United States Government business.

The Whole Person Concept.

In addition to the guidelines above the Directive also provides that under the "whole person concept" the Administrative Judge shall also consider (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 voluntariness of participation; (6) the presence or absence of rehabilitation and other pertinent 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.

CONCLUSIONS

In the defense industry, classified industrial secrets are entrusted to civilian workers who must be counted upon to safeguard such sensitive information at all times. The Government is therefore appropriately concerned where reliable information indicates that an Applicant for clearance demonstrates personal unreliability, preference for a foreign country, or undue foreign influence. These characteristics, if carried over to a security environment, might result in a loss of classified industrial information through Applicant's poor judgment, misplaced loyalty or exploitation by others.

Prior adjudication

As discussed in the above factual findings the Dept of Army, as employer of the Applicant, had proper authority and responsibility to provide Applicant due process in the adjudication of his alleged misconduct in security clearance matters. In the exercise of this authority the Army reached a decision to suspend and later revoke Applicant's security clearance, and precedent from the DOHA Appeal Board strongly suggests that substantial weight should be afforded the Army's decision. (ISCR 96-0525, June 17, 1997.)

Moreover, the Appeal Board has announced that the doctrine of *res judicata,* the acceptance of prior due process adjudications, may be applied in DOHA cases. (ISCR 97-0191, April 28, 1998.) In setting out parameters, the Board states *res judicata* it is not applied as strictly in administrative proceedings as it is in judicial proceedings. Therefore, where the strict application of res judicata is not indicated, an independent review of the facts is permissible.

Applicant as advocate for foreign nations

Contrary to Applicant's assertions, the record does not show that the Army reposed in his office the power to act as FMS advocate for the contract interests of foreign powers. In the absence of such express authority, Applicant's job is no different from all others in Government. It carries with it a fundamental expectation that in FMS contract negotiations the Applicant will not publicly express his personal dissatisfaction with other members or elements of the American negotiating team. To do so is harmful to American interests because it reveals (or sometimes creates) a division within the American negotiating position which customer nations may try to exploit.

Applicant's expansive and misguided interpretation of his authority, as expressed throughout the record, allowed him to believe he was officially empowered to act as a champion or advocate for foreign buyers. For example, he concluded he was justified in publicly berating an American military officer in front of a foreign representative, primarily to reassure the foreigner that, in Applicant's own words, "I'm your guy here."[(8)] In this regard Applicant displayed an inflated sense of independence from traditional expectations of institutional loyalty. Where Applicant willingly misconstrues an operational regulation to suit his own purposes, he might easily do the same with a security reglation.

Thus, the Applicant's defense contains a major flaw. The Applicant seeks to prove that while he was an advocate for the interests of Israel he was evenhanded in his advocacy and he did the same thing for many other foreign nations. However, the Government's concern for clearance purposes is not merely that Applicant chose to act as an FMS advocate for the state of Israel. It is instead that Applicant knowingly and willingly, and without authority, acted as an advocate for *any* foreign government, including Israel. When Applicant planted his flag of advocacy in the camp of another country, *any* country, he rendered his objective judgment suspect and left himself vulnerable to exploitation and manipulation by a foreign nation.

Application of policies.

A DOHA decision must examine disqualifying conditions and mitigating conditions applicable to each security guideline set forth in the SOR. (*See* Policies, above.) Furthermore, the Directive requires that security clearance adjudicators apply the "whole person concept" and make an overall commonsense determination when evaluating an Applicant's security eligibility. (Directive, 6.3. and ISCR 00-0030, September 20, 2001.)

Under Guideline E (Personal Conduct) disqualifying conditions 1 and 4 are considered because reliable, unfavorable information was furnished to Army investigators by Applicant's associates, and Applicant's advocacy of foreign interests rendered him vulnerable to exploitation. No mitigating conditions are present. It is noted that Applicant has not indicated a renewed security clearance will alter his behavior.

Under Guideline C (Foreign Preference) it is clear that Applicant willingly served the interests of another government by performing as their advocate in FMS contract disputes, thus preventing DoD from maintaining a unified position during negotiations. No mitigating conditions are present. It is noted that Applicant's advocacy for foreign powers was ultimately repudiated by the Army, precluding a finding of sanctioned activity by the United States.

The disqualifying conditions of Guideline B (Foreign Influence) are significant. Despite Applicant's delicate and high profile position as an FMS officer he failed to grasp the significance of his developing a strong personal association with a retired GOI representative even to the extent of sharing the official's home in Israel.

Conduct such as this, coupled with Applicant's assertion that he is an advocate for the Government of Israel and other FMS purchasers, makes the Applicant vulnerable to foreign exploitation. The official nature of Applicant's contacts do not mitigate his wrongful advocacy for foreign governments. His berating a US Army officer in front of a foreign general was a serious display of bad judgment.

All elements of the DoD "whole person concept" have been considered as well, and the record supports a conclusion that each of the nine elements must be resolved against the Applicant. As the record reveals, Applicant publicly expressed his disagreement with officially-sanctioned US positions in a bargaining situation with foreign powers; the conduct was frequent and voluntary; and Applicant's age and maturity did not yield the wisdom needed to recognize his errors. Although the conduct was not recent Applicant gives no indication that he will change his behavior in the future. In the absence of insight and reform on Applicant's part there exists the likelihood he will again act as an advocate for a foreign government while holding a security clearance.

Reform and rehabilitation.

In DOHA cases the presence of reform and rehabilitation over an acceptable period of time might indicate that an Applicant has developed an appreciation for the security significance of his misconduct, and it likely will not recur. As discussed above, Applicant continues to claim that his interpretation of his orders was reasonable and he properly acted as an advocate for the interests of foreign buyers. Due to Applicant's unyielding assertion in this regard it can not be said that he presently demonstrates reform and rehabilitation sufficient to conclude he will safeguard classified information from release to other nations whose interests he feels duty-bound to advocate.

However, this decision should not be construed as a determination that Applicant will never possess the good judgment and reliability needed to justify an award of a DoD security clearance. There is little doubt that over the course of Applicant's long career in FMS activities he provided superior service to the Army in many capacities. Furthermore he may again be a valuable asset to the Government as a contractor employee in the defense sector.

To be sure, Applicant erroneously misconstrued his role as an FMS officer in the employ of the Department of Army, wrongly believing he could advocate foreign FMS interests while simultaneously promoting the best interests of the United States. Nevertheless, this is an error which, with thought, introspection, study and consultation, Applicant might firmly and permanently correct. Should this occur in the future Applicant may then demonstrate the reform and rehabilitation necessary to earn the privilege of access to classified information.

Summary of conclusions.

Upon a review of the entire record, it is concluded that the Government has met its burden of proving that Applicant wrongly assumed authority to act as an advocate for the FMS contract interests of numerous allied nations, including the Government of Israel, and his actions as a self-appointed advocate for these foreign governments cause doubt as to his reliability in a security environment. Applicant's evidence by way of defense, explanation, mitigation or reform does not outweigh or offset the Government's case against him. Accordingly, findings and conclusions of this case are entered

against the Applicant, except where noted.

FORMAL FINDINGS

Formal findings For or Against the 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: AGAINST THE APPLICANT.

Subparas. 1.a.-1.b.: Against the Applicant.

Subpara. 1.c.: For the Applicant.

Paragraph 2. Guideline C: AGAINST THE APPLICANT

Paragraph 3. Guideline B: AGAINST THE APPLICANT

DECISION

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

Burt Smith

Administrative Judge

1. Line 14 of page 202, Tr. 1., is corrected by inserting the word "not" between the words "could" and "have". (See court reporter's letter of correction, Pleadings File.)

2. Under the federal FMS program DoD may sell items of weaponry and military services to allied foreign governments. (Title 22 United States Code section 2761 *et seq*.) FMS is a major DoD budgetary item, and Applicant's directorate had a multi-billion dollar program value with participation by 50-60 foreign nations. (Tr. 2, p. 354.).

3. By a probable coincidence, this is the same date as Applicant's retirement. On July 23, 1997 Applicant submitted a request for retirement effective August 15, 1997, not having received notification his security clearance would be revoked. (Tr. 2., pp. 405, 411 and App. Ex. N.)

4. In 1997, Applicant filed an EEO lawsuit in Federal District Court alleging the Army's actions unlawfully discriminated against him on the basis of his Jewish faith. Applicant's lawsuit was dismissed. (Gov Ex. 5.) At the DOHA hearing Applicant renewed his allegations of illegal anti-Semitism by the Army, but this evidence was curtailed. (Tr. 1, pp. 264-267.) Applicant testified his affinity for Israel does not affect his job performance. (Tr. 2., pp. 392-393.)

5. The CID forwarded its report to the Office of U.S. Attorney for prosecutorial review, but prosecution was declined. (Gov. Ex. 4, p. 4b-32.)

6. DOHA is authorized to conduct appellate-level security clearance hearings requested by both contractor employees and DoD civilian employees.

7. ATCOM Reg 10-1, App. Ex. H, pp. H-2 and H-4, subpara. m.

8. Tr. 2, p. 377.