

DATE: June 18, 2002

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In Re:

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SSN: -----

Applicant for Security Clearance

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CR Case No. 01-20906

**DECISION OF ADMINISTRATIVE JUDGE**

**JOHN R. ERCK**

**APPEARANCES**

**FOR GOVERNMENT**

Kathryn D. MacKinnon, Department Counsel

**FOR APPLICANT**

James R. Klimaski

**SYNOPSIS**

The security concern raised by the Lebanese citizenship and foreign residence of Applicant's stepfather and stepfather's brother is mitigated by Applicant's minimal contact with them, and by evidence these individuals no longer have connections with the Lebanese Government. The security concern raised by Applicant's academic dishonesty has been mitigated by the time that has passed since its occurrence (more than ten years) and by his current reputation for honesty and integrity; the security concern raised by his copying computer software has been mitigated by his testimony he did not knowingly and willfully violate copyright laws; and his omitting information from his SF 86 (*Security Clearance Application*) has been mitigated by evidence Applicant did not willfully falsify his SF 86, and the information omitted was not pertinent to a determination of his judgment, trustworthiness, or reliability. Clearance is granted.

**STATEMENT OF THE CASE**

On February 12, 2002, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865, "*Safeguarding Classified Information Within Industry*," dated February 20, 1961, as amended, and modified, and Department of Defense Directive 5220.6, "*Defense Industrial Personnel Security Clearance Review Program*" (Directive), dated January 2, 1992, as amended and modified, issued a Statement of Reasons (SOR) to Applicant which detailed reasons why DOHA could not make the preliminary 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 security clearance should be granted, denied or continued.

Applicant answered the SOR on March 6, 2002, and requested a hearing before a DOHA Administrative Judge. Because of caseload considerations, the case was re-assigned to this Administrative Judge on April 15, 2002, after having been previously assigned to another Administrative Judge. A hearing was convened on May 23, 2002 for the purpose of considering whether it is clearly consistent with the national interest to continue Applicant's secret personal security clearance and grant his top secret personal security clearance. The Government's case consisted of three exhibits (Gov. Exh). Applicant submitted three exhibits, called two witnesses and testified on his own behalf. A transcript (Tr.) of the

proceeding was received on June 4, 2002.

### AMENDMENT OF STATEMENT OF REASONS

In her closing argument, Department Counsel moved to amend the Statement of Reasons by adding an allegation Applicant had falsified material facts by answering "yes" to question 31 of the SF 86 which asked if the United States Government had previously investigated his background, and then listing only a prior DoD investigation, but not disclosing background investigations by two other federal agencies<sup>(1)</sup> (Tr. 118). Department Counsel argued DOHA first became aware of the other investigations during Applicant's testimony at his administrative hearing (Tr. 116).

Department Counsel's motion to amend was denied. The evidence of record does not establish Applicant's background had been investigated by two other federal agencies. Moreover, Applicant had informed the DoD in his first signed, sworn statement<sup>(2)</sup> (April 2000) of his applications for employment with two other federal agencies in 1995, 1996, and again in 1999. Although Applicant was not hired as a result of these applications, the record does not disclose if he was rejected because of information uncovered during a background investigation, or because of the adverse information (academic dishonesty and copying computer software) he provided during the polygraph examination--that was part of the application process for one of the federal agencies.

### FINDINGS OF FACT

The SOR alleged security concerns were raised by foreign influence because Applicant's stepfather, and his stepfather's brother (whom Applicant has visited) are Lebanese citizens and by personal conduct because Applicant falsified material facts on his SF 86, illegally copied computer software, and was found guilty of academic dishonesty while in college (circa 1988 to 1993). Applicant admitted the citizenship status of his stepfather and his stepfather's brother, and he admitted being found guilty of academic dishonesty and copying computer software. He denied falsifying material facts on his SF 86. I accept his admissions, and after a complete and thorough review of the evidence of record, and upon due consideration of the same, I make the following additional findings of fact:

Applicant is a 32-year-old policy analyst for a DoD contractor and is currently applying for a top secret personal security clearance. He has worked for his current employer since August 2000. Previously he had worked for a different DoD contractor from November 1997 to August 2000, and had been granted a secret personal security clearance in 1998. Applicant married in December 1999. He received a BS and BA from University A in 1993, he received a MA from University B in 1995, and is currently pursuing a second master's degree in computer security from University C (Tr. 20, 32). Applicant's family associations, academic indiscretions, and professional experience have raised security concerns in the areas of foreign influence and personal conduct.

Applicant was born in the United States to parents who had been born in Hungary and later immigrated to the United States where they met and married (Tr 21). His parents divorced on an undisclosed date. Because his parents are both naturalized U.S. citizens, they have always had many foreign friends who visited them, and to whom Applicant was introduced (Gov. Exh. 3).

In 1987, Applicant's mother married Mr. X, a Lebanese citizen and her fourth and current husband (Tr. 22, 73, Gov. Exhs 2 and 3). Mr. X had been employed by the World Bank for 15 years prior to his retirement in 1995 (Gov. Exh. 3), and is currently self-employed in his own business<sup>(3)</sup>. Applicant spent time with his mother and Mr. X while attending University A, and he traveled with them to Lebanon on two occasions<sup>(4)</sup>. On both occasions, Applicant, his mother and r. X were guests of his Mr. X's brother in Lebanon. Although Mr. X and his brother have been associated with a previous Lebanese Government, neither Mr. X or his brother have any connection with the current Lebanese Government (Tr.69). Applicant's stepfather did not pay for any of Applicant's college education, and Applicant has never been employed by his stepfather's company. Mr. X currently resides in Cypress; his mother spends equal amounts of time in Cypress and the United States. Applicant has not had any contact with Mr. X's brother since 1994, Mr. X's brother is a German citizen, but continues to reside in Lebanon (Tr. 71).

While attending college, Applicant was charged with academic dishonesty after a homework assignment he turned in bore a striking resemblance to the homework assignment of a classmate with whom Applicant claimed he had

collaborated. He was found guilty of academic dishonesty and his grade for the course was reduced by one letter grade. Beginning while he was in college and continuing until approximately two years ago (Tr. 36-37), Applicant copied computer software programs (games, etc..) for his own use which he had borrowed from a friend, but had not purchased (5). He did not copy these software program for resale or for further distribution to friends. Although he was not aware of the "exact legalities" of copying software, he knew "it didn't seem right (Tr. 36-37). Applicant testified that he discontinued the practice when his personal income increased to the point where he was able to purchase software on his own (Tr. 39), and when he learned more about the applicable copyright law through his study of computer security (Tr. 40).

From 1995 to 1997, Applicant worked as an intern for Institute X, a public policy research organization (think tank) with an "International" name and orientation. Although the duties and responsibilities of this position required him to have regular or frequent contact with foreign military personnel and other representatives of foreign governments, there is no evidence his contact with these individuals ever developed into friendships or resulted in his associating with them away from work. Applicant has described the role of an intern as being primarily that of a "go for": he provided hospitality services to visitors and performed administrative tasks for his employer (Tr. 26-27). Applicant's description of the duties he performed while employed at Institute X are corroborated by the testimony of Mr. A (Tr. 106-107).

In 1995, Applicant submitted an employment application to an agency of the United States Government. He was required to undergo a polygraph examination as part of the application process. It was during this examination that Applicant first disclosed information that he had been charged with academic dishonesty while in college and that he had copied computer software while in college and graduate school. He applied to another federal agency in 1996. He re-applied to the same federal agency (to which he had first applied in 1995) again in 1999. He was not hired by either federal agency, and he was never informed of the reason for his rejection (Tr. 83).

When Applicant completed his SF 86 (*Security Clearance Application*) in July 1998, he certified:

My statements on this form, and any attachments to it, are true, complete, and correct to the best of my knowledge and belief and are made in good faith. I understand that a knowing and willful false statement on this form can be punished by fine or imprisonment or both.

Not all of Applicant's answers to the questions posed on the SF 86 were truthful. In response to question 14 which asked him if he had "ever had any contact (6) with a foreign government, its establishments (embassies or consulates), or its representatives, whether inside or outside the U.S., other than on official U.S. Government business," Applicant answered "no".

Later when he was interviewed by a special agent of the Defense Security Service (DSS), Applicant provided information about his former employer (Institute X) and disclosed the nature of his duties and responsibilities while in its employment. Applicant also disclosed additional information about his stepfather, Mr. X and his brother.

A character reference who testified on Applicant's behalf described him as "an extremely honest man of very high integrity" (Tr. 98). This individual has worked closely with Applicant on various project during the past 20 months and found him to be very "trustworthy and reliable." Another character reference who first became acquainted with Applicant while he was employed by Institute X, corroborated Applicant's testimony about the nature of his (Applicant's) duties and responsibilities while employed at the Institute. He had co-edited a book with Applicant and found him to be "credible, responsible, honest" (Tr. 107).

## POLICIES

The Adjudicative Guidelines of the Directive are not a set of inflexible rules of procedure. Instead, they are to be applied by Administrative Judges on a case by case basis with an eye toward making decisions with reasonable consistency which are clearly consistent with the interests of national security. In making these overall common sense determinations, Administrative Judges must consider, assess, and analyze the evidence of record, both favorable and unfavorable, not only with respect to the relevant Adjudicative Guidelines, but also in the context of the factors set forth in Section E2.2. of the Directive. In that vein, the Government no only has the burden of proving any controverted

fact(s) alleged in the SOR, it must also demonstrate the facts proven have a nexus to Applicant's lack of security worthiness.

The following Adjudicative Guidelines are deemed applicable to the instant matter:

### **FOREIGN INFLUENCE**

#### **(Guideline B)**

The Concern: A security risk may exist when an individual's immediate family, including cohabitants, and other persons to whom he or she may be bound by affection, influence, or obligation are not citizens of the United States or may be subject to duress. These situations could create the potential for foreign influence that could result in the compromise of classified information. Contracts with citizens of other countries or financial interests in other countries are also relevant to security determinations if they make an individual potentially vulnerable to coercion, exploitation, or pressure.

#### **Conditions that could raise a security concern and may be disqualifying include:**

E2.A2.1.2. An immediate family member, or a person to whom the individual has close ties of affection or obligation, is a citizen of, or resident or present in a foreign country;

#### **Conditions that could mitigate security concerns include:**

E2.A2.1.3.1. A determination that the immediate family member(s), (spouse, father, mother, sons, daughters, brothers, sisters) cohabitant, or associates in question are not agents of a foreign power or in a position to be exploited by a foreign power in a way that could force the individual to choose between loyalty to the person(s) involved and the United States.

### **PERSONAL CONDUCT**

#### **(Guideline E)**

The Concern: Conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations could indicate that the person may not properly safeguard classified information.

#### **Conditions that could raise a security concern and may be disqualifying include:**

E2.A5.1.2.2. The deliberate omission, concealment, or falsification of relevant and material facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determination employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities.

E2.A5.1.2.5. A pattern of dishonesty or rule violations, including violations of any written or recorded agreement made between the individual and the agency.

#### **Conditions that could mitigate security concerns include:**

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

### **Burden of Proof**

The Government has the burden of proving any controverted facts alleged in the Statement of Reasons. If the Government establishes its case, the burden of persuasion shifts to Applicant to establish his security suitability through evidence which refutes, mitigates, or extenuates the disqualifying conduct and demonstrates it is clearly consistent with the national interest to grant or continue his security clearance.

A person who seeks access to classified information enters a fiduciary relationship with the Government predicated upon trust and confidence. Where the facts proven by the Government raise doubts about Applicant's judgment, reliability or trustworthiness, Applicant has a heavy burden of persuasion to demonstrate he is nonetheless security worthy. As noted by the United States Supreme Court in *Department of Navy v. Egan*, 484 U.S. 518, 531 (1988), "the clearly consistent standard indicates security clearance determinations should err, if they must, on the side of denials." As this Administrative Judge understands the Court's rationale, doubts are to be resolved against an Applicant.

### CONCLUSION

Having considered the record evidence in accordance with the appropriate legal precepts and factors, this Administrative Judge concludes the Government has established its case with regard to Guidelines B and E. In reaching my decision, I have considered the evidence as a whole, including each of the factors enumerated in Section E2.2., as well as those referred to in the section dealing with the Adjudicative Process.

A security concern is raised by the citizenship of Applicant's stepfather, Mr. X. Mr. X and his brother are citizens of Lebanon and have had personal connections with people of influence in previous governments of that country. There is no evidence Mr. X or his brother are currently agents of the Lebanese Government or are in a position to be exploited in a way that could force Applicant to choose between loyalty to them and loyalty to the United States (MC E2.A2.1.3.1). Moreover, Applicant has credibly testified that his contacts with Mr. X have diminished considerably since he (Mr. X) lives and works in Cypress. Likewise, his contacts with Mr. X's brother; Applicant has indicated he has had no contact with him since 1994 (MC E2.A2.1.3.3.).

A security concern is also raised by Applicant's personal conduct. He demonstrated questionable judgment, a lack of candor, dishonesty, and an unwillingness to comply with rules and regulations when he cheated on a college homework assignment, copied computer software and computer games for personal use, and failed to disclose his contacts with representatives of foreign governments on his SF 86. This pattern of questionable personal conduct could indicate he may not properly safeguard classified information.

Mitigating Applicant's cheating on the homework assignment and his unauthorized copying of computer software and computer games is the fact most of this conduct occurred more than 10 years ago. The cheating incident occurred in 1990 when Applicant was a college junior. It was also an isolated incident as there is no evidence he has been involved in similar misconduct at anytime in the succeeding 12 years. While cheating on a homework assignment was clearly dishonest, some credence must be accorded the manner in which this matter was disposed of responsible college officials. They reviewed the facts and circumstances of the event at a time close to its occurrence and concluded disciplinary action beyond lowering his letter grade (by one full letter) was not necessary or appropriate. Since the event, Applicant has established a reputation for honesty, integrity and trustworthiness.

Copying computer software and computer games is likewise serious misconduct. Statutes have been enacted to protect the property rights of individuals who write books and create computer software; however, most individuals are not aware of these laws or their application to the technology that surrounds us. It is a fact of life that individuals are not born with copyright laws embedded in their conscience. These laws are not taught with reading, writing and arithmetic, nor is knowledge of them imparted by parents and schools as part of the moral information necessary to function in society. While reproducing copyrighted material is illegal, it is not uncommon. Copyright laws are violated by individuals who make audio and video recordings from prerecorded audio and video recordings and by individuals who reproduce pages from copyrighted books and other published materials. It is somewhat telling, that while the Government has alleged Applicant "illegally" copied computer software and computer games, no statute is cited in the SOR, and no statute was referred to at the administrative hearing. Applicant testified he stopped copying software after his personal resources increased, and he became aware of the laws prohibiting this activity as a result of pursuing an advanced degree in computer security. The record does not establish Applicant repeatedly copied software after he knew this practice was specifically prohibited by copyright laws.

Applicant's failure to disclose his contacts with representatives of foreign governments in response to question 14 on the SF 86 is mitigated by the circumstances under which this omission occurred. Question 14 is written to elicit the broadest possible response; the Government wants applicants for security clearances to disclose all contacts with representative

of foreign governments, except for those contacts that are specifically identified as being excluded. The Government, not an applicant, is responsible for deciding if there has been a foreign contact that warrants further inquiry.

Although Applicant had had contacts with representatives of foreign governments which required him to answer "yes" to question 14, the record does not establish he was deliberately providing false and misleading information to the U.S. Government when he answered "no." There is no evidence he had contacts with representatives of foreign governments while employed for Institute X that he wanted or needed to conceal in order to be granted a security clearance. The evidence suggests Applicant erroneously interpreted the question as requiring him to report only foreign contacts that were more substantive than the superficial contacts he had while employed at Institute X. If Applicant had had substantive foreign contacts which were of a security concern, information about them would have surfaced during the earlier interviews when he disclosed cheating in college and copying computer software, or during his recent DoD background investigation. Under the circumstances, his "no" answer to question 14 was not a concealment of information pertinent to a determination of Applicant's judgment, trustworthiness, or reliability (MC E2.A5.1.3.1.). Guideline E is decided for Applicant.

### **FORMAL FINDINGS**

Formal findings as required by Section 3, Paragraph 7, of enclosure 1 of the Directive are hereby rendered as follows:

#### Paragraph 1 (Guideline B) FOR THE APPLICANT

Subparagraph 1.a. For the Applicant

Subparagraph 1.b. For the Applicant

#### Paragraph 2 (Guideline E) FOR THE APPLICANT

Subparagraph 2.a. For the Applicant

Subparagraph 2.b. For the Applicant

Subparagraph 2.c. For the Applicant

### **DECISION**

In light of all the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant Applicant's security clearance.

**John R. Erck**

**Administrative Judge**

1. Paragraph E3.1.17. of Enclosure 3 (Additional Procedural Guidance, DoD Directive 5220.6) provides the SOR may be amended so as to render it in conformity with the evidence admitted or for other good cause.
2. See p. 10, Government Exhibit 3.
3. Mr. X's business is incorporated in Ireland, but his current business address and residence are on Cypress (Gov. Exh. 3).
4. The two trips to Lebanon were "home leave" vacations authorized for World Bank employees (Gov. Exh. 3).
5. Applicant had disclosed information about these collegiate indiscretions during a polygraph examination he submitted to while applying for employment with a different federal agency (Tr. 38). This adverse information was apparently forwarded to the Defense Security Service (DSS). It is not known from the record whether this information had been made available to the DSS prior to Applicant being granted a secret clearance in 1998.

6. The question did not require Applicant to list "routine visa applications and border crossing contacts."