

DATE: November 15, 2006

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 05-02462

DECISION OF ADMINISTRATIVE JUDGE

MARC E. CURRY

APPEARANCES

FOR GOVERNMENT

Robert E. Coacher, Esq., Department Counsel

FOR APPLICANT

Mark F. Riley, Esq.

SYNOPSIS

Between 1998 and 2003, Applicant, an information technology instructor, copied various computer software programs, and installed them onto the computer systems of some of his students, a neighbor, and two family members. The use of these programs was either consistent with the U.S. Copyright Act, consistent with the software manufacturer's licensing agreements, or consistent with the policy of the college where he taught. No security concerns are raised. Clearance is granted.

STATEMENT OF THE CASE

On September 20, 2005, the Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR) stating it was unable to find that it was clearly consistent with the national interest to grant or continue a security clearance. ⁽¹⁾ The SOR alleged security concerns under Guideline J, criminal conduct, and Guideline E, personal conduct.

Applicant answered the SOR on November 1, 2005 and elected to have a hearing before an administrative judge. The case was assigned to me on June 28, 2006. With the consent of the parties, I convened a hearing on August 25, 2006. At the hearing, I received five government exhibits marked and admitted as Exhibits 1 through 5, in addition to the testimony of one government witness. Also, I received 17 Applicant exhibits marked as Exhibits A-Q. I admitted all of them except Exhibit Q. ⁽²⁾ At the parties' request, I took administrative notice of relevant portions of the U.S. Copyright Act. ⁽³⁾ DOHA received the transcript (Tr.) on September 1, 2006.

FINDINGS OF FACT

Applicant is a 45-year-old married man with two children, ages 24 and 14. He is a contract instructor and course developer who teaches, among other things, courses on computer crimes and computer forensics to various law

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enforcement agencies. Also, he teaches evening courses in computer science and network engineering at a local community college. He has a high school diploma, and several network system certifications.

Applicant is a U.S. Army veteran who served on active duty from 1979 to 1982, and in the reserves from 1982 to 1985. During both his reserve tenure and his active duty tenure, he was a military policeman. For nine years after leaving the Army Reserves, from 1989 to 1998, he worked as a security professional for a company specializing in the armored transportation of gold, valuables, and currency. During this period, he was entrusted with the safekeeping of millions of dollars of financial assets.⁽⁵⁾

In 1998, Applicant earned a degree in theological studies, and became an ordained minister. Currently, he spends approximately four hours per week working as a chaplain at a local correctional facility.⁽⁶⁾

Applicant is highly respected by his employers. According to the program manager of the company where he works as a contract instructor, he is reliable, trustworthy, and deeply committed to the accomplishment of the company's mission.⁽⁷⁾ The department chairman of the information technology department at the college where Applicant works, characterizes him as "an outstanding instructor"⁽⁸⁾ who always complies with the college's rules and regulations.⁽⁹⁾

The courses that Applicant teaches at the community college include "Introduction to Computer Hardware," "Introduction to Computer Software," "Introduction to Windows 2000 Professional," and "Introduction to Microsoft Word."⁽¹⁰⁾ As part of the curriculum, students are required to install software onto their hard drives.⁽¹¹⁾ Also, instructors typically recommend that students bring personal computers to class in order to repair them with their supervision. Applicant is responsible for teaching them several methods to accomplish these tasks.

Students use either software downloaded from the campus file server, or the software included in their textbooks.⁽¹²⁾ At the hearing, Applicant's supervisor, the department chairman, testified. He characterized the software that accompanies the textbooks as evaluation edition software. Such copies expire after 120 days.⁽¹³⁾ He also testified that Applicant made copies of this software consistent with school policy.⁽¹⁴⁾ Also, depending on the course, instructors can use this software to assist students in repairing computers.⁽¹⁵⁾

Applicant is a Microsoft-certified professional.⁽¹⁶⁾ This enables him to subscribe to a service in which he can receive, among other things, evaluation copies of Microsoft software online.⁽¹⁷⁾ As an instructor certified to teach Microsoft programs, Applicant is a "Qualified Educational User" who is licensed to install copies of Microsoft software on up to three personal computers or other devices in his household for non-commercial use by people residing in his household.⁽¹⁸⁾

In March 2000, Applicant installed a new hard drive into his wife and daughter's computer after they had exhausted all of the space in the old hard drive. After moving all of the files and programs from their network operating system, he encountered difficulty in operating their Microsoft Word program successfully. Subsequently, he installed another copy of Microsoft Word onto his wife's computer. The record is unclear with respect to whether the copy was an evaluation copy he purchased, or a copy that he transferred from an old laptop computer that he owned.⁽¹⁹⁾

In April 2000, a student in Applicant's "Introduction to Microsoft Word" class brought her laptop to class, and asked him to repair it. In the process of repairing it, Applicant re-installed an evaluation version of Microsoft Word. Before installing the CD-ROM, Applicant confirmed that the student's computer had the proper Microsoft Word license, and sought permission from his supervisor to use the school's Microsoft Word CD-ROM.⁽²⁰⁾

In May 2000, Applicant with the permission of his supervisor, downloaded an evaluation copy of a Microsoft Word program onto a student's personal computer to enable the student to perform his course work.⁽²¹⁾ In the spring of 2001, he installed an evaluation version of Windows 2000 onto computer systems of two other students.⁽²²⁾

In April 2001, Applicant repaired a neighbor's computer. In the process, he reinstalled Microsoft Word onto her network

operating system using a CD-ROM he had purchased. After installing the program, he attempted to activate it using the product activation key affixed to the neighbor's computer. When the activation code did not work, he contacted a Microsoft representative, and explained the situation, whereupon the representative issued a new product activation code. Using the code, he then completed the installation. [\(23\)](#)

Between September 2001 and February 2002, Applicant permitted students to download an evaluation version of Windows 2000 onto their personal laptop computers from the school's network. In April 2002, Windows XP was not working properly on the computer of Applicant's wife and daughter because of a virus. After identifying the problem, he installed an evaluation version of Windows XP software to repair it. [\(24\)](#)

In June 2002, a student brought a computer with a defective hard drive to class. Applicant repaired it by, among other things, installing an evaluation version of Windows 2000 onto the hard drive, and restoring the system to its original configuration. [\(25\)](#) Similarly, in May 2003, a student brought a system infected with viruses to class. In the process of repairing it, Applicant installed an evaluation version of Windows 2000 onto the student's computer, and restored it to its original configuration. [\(26\)](#)

In June 2003, Applicant assisted two students with installing Windows XP onto computers they brought to class. In one case, he installed the program directly from the college network. With respect to the other computer, he copied the program from the college network onto a CD-ROM, whereupon, the student installed it onto the computer. [\(27\)](#)

In July 2003, a student brought a computer to class that was not running Windows XP, its operating system, properly. Applicant repaired it by installing an evaluation version of Windows XP onto the student's computer. He then restored it to its original configuration, and contacted a Microsoft representative who issued him a new activation code for the computer. [\(28\)](#)

In November 2003, an investigator interviewed Applicant. During the interview he asked if Applicant had ever downloaded and distributed any copyrighted software. Applicant responded as follows:

From approximately 1998 to the summer 2003, as a favor to several family members and friends I downloaded and distributed the following copies of copyrighted software installed on my personal computer. I made three or four copies of Office Word, valued at approximately \$2000.00, three or four copies of XP, valued at approximately \$300.00, and five or six copies of Windows 2000, valued at approximately \$2000.00. Some of my family members and friends at one time had copies of one or more of these programs on their personal computers, however, were unable to access them or had been removed from their computers. I knew this was wrong, however, it was a common practice to download computer programs without paying. I have not downloaded any other copies of copyrighted software. I have no intentions to do this again in the future. [\(29\)](#)

POLICIES

Enclosure 2 of the Directive sets forth adjudicative guidelines to be considered in evaluating a person's eligibility to hold a security clearance. They are divided into those that may be considered in deciding whether to deny or revoke an individual's eligibility for access to classified information (disqualifying conditions) and those that may be considered in deciding whether to grant an individual's eligibility for access to classified information (mitigating conditions).

An administrative judge need not view the adjudicative guidelines as inflexible rules of law. Instead, acknowledging the complexities of human behavior, these guidelines, when applied in conjunction with the factors set forth in the Adjudicative Process provision in Section E2.2., Enclosure 2, of the Directive, are intended to assist the administrative judge in reaching fair and impartial common sense decisions.

Because the entire process is a conscientious scrutiny of a number of variables known as the "whole-person concept," all available reliable information about the person, past and present, favorable and unfavorable, should be considered in making a meaningful decision. The Adjudicative Process factors which an administrative judge should consider are: (1) the nature and seriousness of the conduct and surrounding circumstances; (2) the frequency and recency of the conduct;

(3) the age of the applicant; (4) the motivation of the applicant, and the extent to which the conduct was negligent, willful, voluntary, or undertaken with knowledge of the consequences; (5) the absence or presence of rehabilitation; and (6) the probability that the circumstances or conduct will continue or recur in the future.

Based upon a consideration of the evidence as a whole, I find the following adjudicative guidelines most pertinent to an evaluation of the facts of this case:

Criminal Conduct - Guideline J: A history or pattern of criminal activity creates doubt about a person's judgment, reliability, and trustworthiness.

Personal Conduct - Guideline E: Conduct involving questionable judgment, untrustworthiness, 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, as well as those which could mitigate security concerns, pertaining to these adjudicative guidelines are set forth and discussed in the conclusions below.

Since the protection of the national security is the paramount consideration, the final decision in each case must be reached by applying the standard that the issuance of the clearance is "clearly consistent with the national interest." (30) In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record.

The government is responsible for presenting witnesses and other evidence to establish facts in the SOR that have been controverted. The applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven by the government, and has the ultimate burden of persuasion as to obtaining a favorable trustworthiness determination.

A person who seeks access to classified information enters into a fiduciary relationship with the government predicated upon trust and confidence. It is a relationship that transcends normal duty hours and endures throughout off-duty hours as well. It is because of this special relationship the government must be able to repose a high degree of trust and confidence in those individuals to whom it grants access to classified information. Decisions under this Directive include, by necessity, consideration of the possible risk an applicant may deliberately or inadvertently fail to protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information.

Applicant's loyalty is not at issue in these proceedings. Section 7 of Executive Order 10865 specifically provides industrial security clearance decisions shall be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned."

CONCLUSIONS

A copyright infringement is the violation of the exclusive distribution rights of a copyright owner. (31) No bright line standard governs what constitutes a civil copyright infringement. (32) Each analysis must be conducted on a case by case basis, and must consider the following concerns:

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work. (33)

The reproduction of copyrighted materials for such purposes as classroom instruction, machine maintenance, or repair does not constitute infringement. [\(34\)](#)

A copyright infringement constitutes a criminal offense if it is committed willfully, and either:

(A) for the purposes of commercial advantage or private financial gain;

(B) by the reproduction or distribution, including by electronic means during any 180-day period of 1 or more copies or phonorecords of 1 or more copyrighted works, which have a total retail value of more than \$1,000, or

(C) by the distribution of a work being prepared for commercial distribution, by making it available on a computer network accessible to members of the public, if such person knew or should have known that the work was intended for commercial distribution. [\(35\)](#)

Here, the issue of whether Applicant violated the Copyright Act is raised by various incidents where he either downloaded, copied, or distributed software programs to his students, his family, and a neighbor. He violated neither criminal nor civil copyright law when he used evaluation software from the instructional materials, and downloaded programs from the college network in his capacity as an instructor. Both a former instructor who taught with Applicant at the college, and the chairman of the college's information technology department testified that his activities were consistent with the college's standard operating procedure.

Similarly, Applicant's installation of Microsoft Word onto his neighbor's computer in April 2001, and his installation of Windows XP on his family's computer in April 2002 did not constitute criminal or civil copyright violations. When repairing his neighbor's computer in April 2001, he used a copy of the software program that he purchased through an online subscription. Although he did not purchase the copy of the Windows XP used to repair his family's computer in April 2002, it was an instructional version of the software that he was authorized to install as a qualified educational user of Microsoft software.

The record is unclear with respect to whether Applicant repaired the family computer in March 2000 using a copy of Microsoft Word software that he purchased, or a copy of Microsoft Word software that he transferred from his personal laptop computer. In either case, no copyright infringement occurred. The fair market value of the software was less than \$1,000. [\(36\)](#) Moreover, the primary purpose of using the software was to repair the family computer, not to earn a profit. [\(37\)](#)

The government's case is based solely on Applicant's 2003 statement to an investigator in which he voluntarily discussed in broad terms, without confrontation, occasions in which he either copied, downloaded, or transferred copyrighted information, and asserted that these activities were wrong. The issue of whether the identified use of the copyrighted materials was appropriate is governed by the Copyright Act, and is a question of law, not fact. Therefore, Applicant's opinion expressed to the agent in 2003 has limited probative value.

At the hearing, Applicant clarified his earlier statement, methodically identifying every episode of software copying, transferring, or downloading in which he was engaged between 1998 and 2003 that could conceivably be construed as a copyright infringement, and explained that each was either authorized by his employer, licensed by the software manufacturer, or consistent with the Copyright Act. This testimony was corroborated by the testimony of the chairman of the information technology department of his college, and was consistent with Applicant's documentary evidence.

After weighing all of the evidence, I conclude Applicant violated neither civil nor criminal copyright law, and that no corresponding security concerns exist under Guidelines J and E.

FORMAL FINDINGS

The following are my conclusions as to each allegation in the SOR:

Paragraph 1. Guideline J: FOR APPLICANT

Subparagraph 1.a: For Applicant

Subparagraph 1.b: For Applicant

Subparagraph 1.c: For Applicant

Paragraph 2. Guideline E: FOR APPLICANT

Subparagraph 2.a: For Applicant

DECISION

In light of all of the circumstances in this case, it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. Clearance is granted.

Marc E. Curry

Administrative Judge

1. This action was taken under Executive Order 10865, dated February 20, 1960, as amended, and DoD Directive 5220.6, dated January 2, 1992, as amended and modified (Directive).

2. Exhibit Q was marked for identification purposes only.

3. 17 U.S.C. §§ 107, 117, 501, and 506.

4. Tr. 64.

5. Answer to SOR, dated November 1, 2005, at 12.

6. Exhibit O, Reference Letter from the Senior Pastor at Applicant's church, dated August 16, 2006.

7. Exhibit E, Reference Letter from Applicant's Program Manager, dated October 31, 2005.

8. Tr. 140.

9. Tr. 141.

10. *See* note 5 at 5, 8, and 9.

11. Tr. 125 - Testimony of Instructor who worked with Applicant at the College.

12. Tr. 120 - Testimony of Instructor who worked with Applicant at the College.

13. Tr. 139.

14. Tr. 145.

15. Tr. 139 - Testimony of Department Chair of the Information Technology Department at Applicant's College.

16. Tr. 78.

17. *Id.*

18. Microsoft End-User License Agreement for Microsoft Software, as listed in Exhibit 4, Microsoft Software Licensing Agreements and Policy Documentation, at 11.

19. *Cf.* Answer at 6 with Tr. 71.

20. *See* note 5 at 5.

21. *Id.* at 6.

22. *Id.* at 8.

23. *Id.* at 6.

24. *Id.* at 7.

25. *Id.* at 9.

26. *Id.*

27. *Id.* at 7.

28. *Id.* at 8.

29. Exhibit 2, Signed, Sworn Statement, dated December 5, 2003, at 2.

30. *See generally*, Directive, Sec. 2.3., Sec. 2.5.3., Sec. 3.2., and Sec. 4.2.

31. 17 U.S.C. §501(a)(2006).

32. *See generally* H.Rep. No. 94-1476, pp. 65-66, U.S. Code Cong. & Admin. News 1976, p. 5680.

33. 17 U.S.C. § 107.

34. 17 U.S.C. §§ 107, 117(c)..

35. 17 U.S.C. § 506(a)(1)(2006).

36. *See* note 27.

37. 'Profit' includes the "sale or exchange of the infringing work for something for value in the hope of some pecuniary gain" (*United States v. Taxe*, 380 F. Supp. 1010, 1018 (C.D. Cal. 1974, aff'd 540 F.2d 961 (9 Cir. 1976)).