DATE: September 17, 2007

In re:	)	
	)	
----------	)	ISCR Case No. 05-15174
SSN: ----------	)	
	)	
Applicant for Security Clearance	)	

DECISION OF ADMINISTRATIVE JUDGE
ELIZABETH M. MATCHINSKI

APPEARANCES

FOR GOVERNMENT
Fahryn Hoffman, Esq., Department Counsel

FOR APPLICANT
Pro se

SYNOPSIS

Applicant was charged with larceny in April 2001 for stealing a computer memory chip from a university computer where he was a student. He did not reveal that arrest on his security clearance application and lied about his involvement when interviewed by a government agent. He is ashamed of his misconduct, but it is not enough to mitigate the serious criminal conduct and personal conduct concerns. Clearance is denied.

STATEMENT OF THE CASE

The Defense Office of Hearings and Appeals (DOHA) declined to grant or continue a security clearance for Applicant. As required by ¶ E3.1.2 of Department of Defense Directive 5220.6 (Jan. 2, 1992), as amended, DOHA issued a Statement of Reasons (SOR) on December 14, 2006, detailing the basis for its decision–security concerns raised under Guideline J (Criminal Conduct) and Guideline E (Personal Conduct) of the revised Adjudicative Guidelines (AG) issued on December 29, 2005, and implemented by the Department of Defense effective September 1, 2006. The guidelines were provided to Applicant when the SOR was issued. Applicant answered the SOR on February 20, 2007, and elected to have a hearing before an administrative judge. The case was assigned to me on May 8, 2007.

I convened a hearing on August 21, 2007, to consider whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. At the hearing, five Government exhibits (Ex. 1- 5) and four Applicant exhibits (A-D) were admitted. Testimony was taken from the Applicant. DOHA received the hearing transcript (Tr.) on September 5, 2007.

FINDINGS OF FACT

DOHA alleged under Guideline J that Applicant was charged in April 2001 with larceny under $250 and larceny from a building (SOR ¶ 1.a), and he committed a felony violation under 18 U.S.C. § 1001 because of the conduct alleged under Guideline E (SOR ¶ 1.b). Under Guideline E, Applicant was alleged to have deliberately not disclosed his April 2001 arrest on his June 2002 security clearance application (SF 86) (SOR ¶ 2.a), and to have falsely denied in a March 2003 sworn statement that he had stolen a compute memory chip from a university computer in 2001 (SOR ¶ 2.b).

In his Answer, Applicant admitted the arrest and theft of the computer memory chip. While he also admitted that he falsified material facts on his SF 86 by deliberately not listing his arrest and in his sworn statement by denying the theft of the computer chip, he explained he acted on the advice of the attorney who represented him at the time of his arrest. The attorney told him that since his case was continued without a finding, it would "go away" after six months and he would never have to tell anyone of the incident and it could not be held against him. Applicant apologized for his poor judgment, and indicated he had taken several courses in ethics and security training as well and sought legal counseling to ensure against recurrence.

After a thorough review of the pleadings, exhibits, and transcript, I make the following findings of fact:

Applicant is a 26-year-old systems engineer who has been employed by a defense contractor since June 2002. He started as an intern while he was still in college, and held an interim secret clearance without incident for about four and one-half years until it was withdrawn.

In September 1999, Applicant began his college studies in engineering at a branch of the state university. In March 2001, Applicant stole a computer memory chip valued at $100 from a university-owned computer located in a campus computer lab. He had been informed by his

room/suite mate (student X) of the easy access to the memory chip and stole it because he wanted to add memory to his personal computer. On April 4, 2001, a resident student informed campus police that he observed student X remove a flat screen computer monitor and accompanying power adapter from a computer lab on March 16, 2001. During the course of the investigation into the thefts, student X admitted to campus police that he had stolen the monitor and that the missing memory chip had been taken by Applicant. When confronted by campus police, Applicant immediately turned over the memory chip. He provided the police with a written statement at the station, indicating that he had taken the random access memory about a month ago; that the front of the case had been pried off already when he took the chip ("I was wrong for taking it but all the work had already been done and was out in the open." Ex. 4). On April 18, 2001, Applicant was charged with one count of larceny under $250 and with one count of larceny from a building. On May 10, 2001, the larceny under $250 charge was continued without a finding until November 8, 2001, on payment of $100 costs and $35 victim witness assessment. The larceny from a building charge was dismissed. On November 7, 2001, Applicant's case was dismissed without a finding.

Applicant also had a hearing before a university judicial officer as to whether he should face disciplinary action from the university, including possible expulsion. Applicant was allowed to stay in school,[1] but was required to perform 40 hours of service at the college.

In June 2002, Applicant began working for his employer as an intern. About two weeks later, he completed a security clearance application (SF 86) in which he responded "NO" to the police record inquiries, including question 26 ["In the last 7 years, have you been arrested for, charged with, or convicted of any of any offense(s) not listed in modules 21, 22, 23, 24, or 25? (Leave out traffic fines of less than $150 unless the violation was alcohol or drug related.) For this item, report information regardless of whether the record in your case has been 'sealed' or otherwise stricken from the record. The single exception to this requirement is for certain convictions under the Federal Controlled Substances Act for which the court issued and [sic] expungement order under the authority of 21 U.S.C. 944 or 18 U.S.C. 3607."]. Applicant intentionally did not list the 2001 larceny charges because he understood from the attorney who had represented him for the offense that there would be no record of it since it had been dismissed without a finding. Applicant made no inquiries, including of legal or security personnel, whether he was justified in leaving off the charge.

On or about March 27, 2003, Applicant was interviewed by a special agent of the Defense Security Service about the misdemeanor larceny charges filed against him in April 2001.[2] Applicant admitted he had been charged, but falsely claimed that he had purchased the memory chip for $50 from student X, his room/suite mate at the time, not knowing that it had been stolen, that student X had implicated him in the theft to get a lighter sentence for himself. Applicant denied that he had stolen anything from the school ("I never stole any computer items, or anything else from the school, at any time. I never admitted to stealing anything and I never actually stole anything." *see* Ex. 3). Applicant also maintained that he had been "completely exonerated" at a school judicial officer

[1]The date of the hearing and the specific findings of the school judicial officer were not made available for my review.

[2]The copy of the statement admitted into evidence as Exhibit 3 does not bear Applicant's signature as it is missing the third of three pages. Notwithstanding that it is incomplete, it was admitted as Applicant filed no objection to it and he testified that he initialed each paragraph, including those included in Exhibit 3 (*see* Tr. 42).

hearing. Concerning his failure to list the offense on his SF 86, Applicant explained that either his lawyer or a police sergeant had told him that the charges would be "wiped out" after six months, and it would be as if it never happened. Accordingly, "assuming that no record would be found," he intentionally did not list the charge on his SF 86 even though he knew he was required to list it.

In May 2004, Applicant was awarded his bachelor of science degree in electrical engineering. As an entry-level test design engineer I, he met all significant performance objectives/expectations in 2004 and 2005. Willing to step up and perform what was asked of him, Applicant fully supported, and developed good working relationships, with his team leadership and his peers. As of his evaluation in late 2005, he had exhibited great potential as an engineer. On the recommendation of his department manager and the director of systems engineering, Applicant was promoted to systems engineer effective November 25, 2006, at an annual salary of $64,071.07. As of August 2007, he was working as an aircraft integrator for a helicopter-based missile defense system. Applicant handled classified material regularly until his interim secret clearance was withdrawn. No evidence of any violations of security procedures was presented.

Applicant has taken advantage of several online and in-person training courses offered by his employer covering topics related to his specific position, to employee ethics, and to security awareness. As of February 2007, he had earned 119 training hours.

POLICIES

"[N]o one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has "the authority to . . . control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to occupy a position . . . that will give that person access to such information." *Id.* at 527. The President authorized the Secretary of Defense or his designee to grant applicants eligibility for access to classified information "only upon a finding that it is clearly consistent with the national interest to do so." Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960). An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance." ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002).

The revised Adjudicative Guidelines set forth potentially disqualifying conditions (DC) and mitigating conditions (MC) under each guideline. In evaluating the security worthiness of an applicant, the administrative judge must also assess the adjudicative process factors listed in ¶ 6.3 of the Directive. The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of the applicant. *See* Exec. Or. 10865 § 7. It is merely an indication the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

CONCLUSIONS

Guideline J—Criminal Conduct

Criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. By its very nature, it calls into question a person's ability or willingness to comply with laws, rules and regulations. (AG ¶ 30) Applicant's theft of the computer memory chip from a university computer lab implicates Guideline J disqualifying conditions (DC) ¶ 31(a), *a single serious crime or multiple lesser offenses*, and ¶ 31(c), *allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted*, irrespective of the dismissal of the larceny charge after six months. Moreover, Applicant committed felony criminal conduct in violation of 18 U.S.C. § 1001 by deliberately concealing that theft from the government when he completed his SF 86 and when he was interviewed by the DSS agent (*see* Guideline E, supra).[3] DC ¶ 31(c) applies to his misrepresentations.

Applicant stole the computer chip when he was only 19, more than six years before his security clearance hearing. Yet Applicant cannot avail himself of the benefit of mitigating condition 32(a), *so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment*. His larceny conduct cannot be viewed in isolation from his more recent criminal concealment of his involvement in the theft. Applicant's contributions to his employer, and his efforts to acquire ethics training in particular, reflect some reform as well as maturation (*See* MC ¶ 32(d), *there is evidence of successful rehabilitation; including but not limited to the passage of time without recurrence of criminal activity, remorse or restitution, job training or higher education, good employment record, or constructive community involvement*). However, doubts persist about Applicant's rehabilitation where he continues on some level to justify or minimize his misconduct. When asked by Department Counsel why he stole the computer chip, Applicant responded, "There was a lot of other students doing the same thing at the time and a couple other students showed me how easy it was, and it was just extremely bad, irresponsible peer pressure." (Tr. 44) When he answered the SOR, Applicant indicated that he lied to the DSS agent because his attorney had told him he did not have to tell anyone about it, and he feared the information would be used against him, "that [he] would lose [his] internship without being given the chance to explain."

[3] 18 U.S.C. § 1001 provides in part:

> (a) Except as otherwise provided in this section, whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowing and willfully: (1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact: (2) makes any materially false, fictitious, or fraudulent statement or representation; or (3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry; shall be fined under this title or imprisoned not more than 5 years, or both.

Guideline E—Personal Conduct

Applicant was required to report his arrest for misdemeanor larceny valued under $250 and larceny from a building on his SF 86 completed in June 2002, even though his case had been dismissed in November 2001. He elected to not do so. Under Guideline E, 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 ¶ 15) In his Answer, Applicant suggested that he acted in good faith on the advice of the attorney who represented him on the larceny charges:

> He told me the effect of 'continued without a finding' is I would not have to tell anyone of the incident at all and that this incident could never be held against me. I now know that I should not have answered question 26 on the SF 86 like I did I should have stated all the facts even if I was unsure, regardless of what my attorney told me to do. I also now know that I should have asked the security people who were helping me at the time for guidance.

At his security clearance hearing, he reiterated that he understood he would never have to tell anyone what happened. (Tr. 40). A good faith belief, albeit mistaken, that the charges were not required to be reported would negate the willful intent that raises the security concern under ¶ 16(a) *deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities*. Yet when questioned by the DSS agent in March 2003, Applicant indicated that while he had been told by his attorney that the larceny charge would be "wiped out, he admitted he knew he was required to list the charge on his SF 86 but assumed no record would be found so he did not disclose it (s*ee* Ex. 3). DC ¶ 16(a) applies.

Had Applicant acted in good faith, he would not have lied about his involvement in the theft when questioned by the DSS agent. Instead, he falsely claimed to the agent that he had purchased the memory chip from student X, had no reason to believe it had been stolen, and that he never stole any computer items from the school. His deliberate misrepresentations to the DSS agent not only negate any claim of good faith reliance, but are potentially security disqualifying in their own right. Guideline E DC ¶ 16(b), *deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority, or other official government representative,* is also implicated.

By lying to the agent in March 2003, Applicant compounded the security concerns raised by his SF 86 omission. MC ¶ 17(a), *the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts*, clearly does not apply. Nor does the evidence support favorable consideration of MC ¶ 17(b), *the refusal or failure to cooperate, omission, or concealment was caused or significantly contributed to by improper or inadequate advice of authorized personnel or legal counsel advising or instructing the individual specifically concerning the security clearance process. Upon being made aware of the requirement to cooperate or provide the information, the individual cooperated fully and truthfully.* Assuming

Applicant had been told by his attorney that he would never have to report the offense, this would not qualify for MC ¶ 17(b) as the advice was not given in the context of the security clearance process. Furthermore, it would not excuse the deliberate fabrications to the DSS agent, which causes greater concern for his judgment and trustworthiness than had he initially refused to discuss the incident based on legal advice and then admitted his role in the theft after being apprised of his duty to cooperate.

Applicant has apologized for his poor decisions, and submits in rehabilitation his completion of ethics training and counseling from an attorney. Applicant's training record (Ex. A) shows he completed about 12.5 hours of ethics training since June 2002, most of it after he was interviewed by the DSS agent. The only information about the counseling comes from Applicant, who indicated the attorney taught him that even though his case was continued without a finding, he still had to disclose it, and who taught him "the importance of full disclosure regarding anything to do with national security." (*See* Answer) To the extent that Applicant suggests he did not know that he had to report the larceny charges until the counseling, he undercuts his claim of reform. He told the DSS agent in March 2003 that he knew the charges were required to be disclosed. He testified that it was not until after he received the SOR that he consulted with the attorney (Tr. 66). Under the circumstances presented, I am unable to apply MC ¶ 17(d), *the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that caused untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur*.

Applicant has not yet shown that he understands his obligation of full candor, as evidenced by his exchange with Department Counsel concerning his claim that he had been exonerated of any wrongdoing by a judicial officer at the college:

> Q And the next paragraph you indicate that the judicial officer, meaning I guess the judge in your case, or a magistrate or someone, did not, they realized you did not steal anything and you were exonerated from any wrongdoing?
> A That was from the judicial officer at the college.
> Q At the college? So the school, why did they exonerate you from wrongdoing if you had admitted stealing the chip?
> A You would have to ask the judicial officer of the college.
> Q Do you have any documents with you today to show that you were exonerated from wrongdoing on the campus?
> A No, I don't.
> Q Isn't it true that you did 40 hours of community service as a result of this, I guess a plea bargain?
> A Yes.
> Q Was that on campus or--
> A Yes.

(Tr. 49). In an attempt to reconcile the inconsistency between his claim of complete exoneration and his 40 hours of service at the college, Applicant went on, "The college exonerated me from any wrongdoing but they realized that I had made a mistake and that was my, that was why I performed the community service." (Tr. 50) He later explained the mistake was "irresponsibly handling computer equipment, which didn't warrant any actual punishment from the college." (Tr. 55) This

raises doubts as to whether Applicant was completely candid during his judicial hearing at the college.

Whole Person Analysis

The adjudicative process is an examination of a sufficient period of a person's life to make an affirmative determination that the person is eligible for a security clearance. (AG ¶ 2(a)) *Each security clearance decision must be a fair and impartial common sense determination based upon consideration of all the relevant and material information and the pertinent criteria and adjudication policy*. Directive ¶ 6.3. Applicant's larceny of the computer chip raises very serious judgment, trustworthiness, and reliability concerns (¶ 2(a)(1), *the nature, extent, and serious of the conduct*). While immaturity and peer influences were likely factors in his decision to steal the computer chip (¶ 2(a)(4), *the individual's age and maturity at the time of the conduct*), he decided to take the computer chip because he wanted to upgrade his computer. Self-interest was also a motivation in his decisions to lie on his SF 86 and during his DSS interview, as he feared that the larceny would negatively affect his internship/employment with the defense contractor. Lingering concerns that he may place his personal interest ahead of his fiduciary obligations preclude me from finding that it is clearly consistent with the national interest to restore his access, even though he has apparently handled classified information without incident while he held an interim secret-level clearance.

FORMAL FINDINGS

Paragraph 1. Guideline J:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant
Subparagraph 1.b:	Against Applicant
Paragraph 2. Guideline E:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant
Subparagraph 2.b:	Against Applicant

DECISION

In light of all of the circumstances in this case, it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant. Clearance is denied.

Elizabeth M. Matchinski
Administrative Judge