

DATE: March 6, 2002

In Re:

SSN: -----

Applicant for Security Clearance

CR Case No. 01-03359

**DECISION OF ADMINISTRATIVE JUDGE**

**JOHN G. METZ, JR.**

**APPEARANCES**

**FOR GOVERNMENT**

William S. Fields, Esquire, Department Counsel

**FOR APPLICANT**

*Pro Se*

**STATEMENT OF THE CASE**

On 12 July 2001, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant, stating that DOHA could not make the preliminary affirmative finding<sup>(1)</sup> that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. On 10 and 27 August 2001, Applicant answered the SOR and requested an administrative decision on the record. On 3 October 2001, Applicant responded to the Government's File of Relevant Material (FORM)--issued 25 September 2001. The record in this case closed 16 October 2001--the day Department Counsel indicated no objection to the response. The case was originally assigned to a different administrative judge, but was reassigned to me on 12 December 2001 because of caseload considerations; I received the case the same day to determine whether clearance should be granted, continued, denied, or revoked.

**FINDINGS OF FACT**

Applicant admitted the criminal allegations of the SOR with explanation, but denied intentionally falsifying her clearance application; accordingly, I incorporate those admissions as findings of fact.

Applicant--a 34-year old employee of a defense contractor--seeks to retain access to classified information.

On 23 November 1997, Applicant falsified a Questionnaire for National Security Positions (QNSP)(SF 86) when she answered "no" to a question designed to elicit whether Applicant had any police record not covered by other questions on the QNSP:<sup>(2)</sup>

**23. YOUR POLICE RECORD** For this item, report information regardless of whether the record in your case has been "sealed" or otherwise stricken from the court record. The single exception to this requirement is for certain convictions under the Federal Controlled Substances Act for which the court issued an expungement order under the authority of 21 U.S.C. 844 or 18 U.S.C. 3607.

**. . . f. In the last seven years, have you been arrested for, charged with, or convicted of any offense(s) not listed in**

**response to a, b, c, d, or e above? (Leave out traffic fines of less than \$150 unless the violation was alcohol or drug related.)**

In fact, Applicant had been arrested on 22 September 1993 and charged with third degree theft. According to Applicant's sworn statement on 27 July 2000 (Item 5):

The shoplifting case was when I was with a friend in [store]. We were looking at some jewelry. When we left the store nothing was taken off me. We did have to bond out of jail, but I can't even remember being finger printed.

Although Applicant admits the allegation of the SOR, that she was convicted and fined \$300.00 plus court costs, the court records (Item 7) reflect the disposition as "bond forfeited," with no further information to reconcile the apparent discrepancy between the two stated dispositions. Applicant's 10 August 2001 answer (Item 3) sheds little additional light on the issue:

. . . I was with a friend shopping in a local department store. The time slipped up on us (she had to pick up her mother). So we proceeded to leave the store. She had on a watch that was found on her. I had tried on several watches; they must not have seen me replace the merchandise. No merchandise was ever found in my possession. I don't recall paying a fine or anything. [\(3\)](#)

The disposition of this offense notwithstanding, Applicant offers no explanation for her omitting the arrest on her QNSP.

In February 1998, Applicant was indicted by a local grand jury for obtaining over \$7,000.00 in food stamps and other financial assistance by deception between June 1996 and June 1997. She was arrested in September 1999, and ultimately pleaded guilty to a reduced misdemeanor charge of unauthorized possession of food stamps. She was ordered to make restitution of the full value of the indictment amount, given a one-year suspended sentence, and two years of probation--to run to December 2001. Applicant asserts some confusion over her eligibility for food stamps and financial assistance, but acknowledges that she did not report obtaining employment, because the employment was part-time (Items 3, 5).

Applicant's response to the FORM contains her plea to retain her clearance, but neither the response nor the FORM contain any evidence of successful rehabilitation.

## **POLICIES**

Enclosure 2 of the Directive sets forth adjudicative guidelines to be considered in evaluating an individual's security eligibility. The Administrative Judge must take into account the conditions raising or mitigating security concerns in each area applicable to the facts and circumstances presented. Each adjudicative decision must also assess the factors listed in Section F.3. and in Enclosure (2) of the Directive. Although the presence or absence of a particular condition for or against clearance is not determinative, the specific adjudicative guidelines should be followed whenever a case can be measured against this policy guidance, as the guidelines reflect consideration of those factors of seriousness, recency, motivation, *etc.*

Considering the evidence as a whole, the following adjudication policy factors are most pertinent to this case:

### **CRIMINAL CONDUCT (GUIDELINE J)**

E2.A10.1.1. A history or pattern of criminal activity creates doubt about a person's judgment, reliability and trustworthiness.

E2.A10.1.2. Conditions that could raise a security concern and may be disqualifying include:

E2.A10.1.2.1. Allegations or admissions of criminal conduct, regardless of whether the person was formally charged;

E2.A10.1.2.2. A single serious crime or multiple lesser offenses.

E2.A10.1.3. Conditions that could mitigate security concerns include:

None.

### **PERSONAL CONDUCT (GUIDELINE E)**

E2A5.1.1. 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. . .

E2. A5.1.2. 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, . . . [or] determine security clearance eligibility or trustworthiness. . . ;

E2.A5.1.2.3. Deliberately providing false or misleading information concerning relevant and material matters to an investigator, . . . in connection with a personnel security or trustworthiness determination;

E2.A5.1.3. Conditions that could mitigate security concerns include:

None.

### **Burden of Proof**

Initially, the Government must prove controverted facts alleged in the Statement of Reasons. If the Government meets that burden, the burden of persuasion then shifts to the applicant to establish his security suitability through evidence of refutation, extenuation or mitigation sufficient to demonstrate that, despite the existence of disqualifying conduct, it is nevertheless clearly consistent with the national interest to grant or continue the security clearance.

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

### **CONCLUSIONS**

The Government has established its case under Guideline J. Applicant's deliberate falsification of her police record to an agency of the federal government on matters within that agency's jurisdiction clearly violate 18 U.S.C. §1001. The falsifications had the potential to influence the course of the background investigation--in areas of legitimate concern to the Government. Applicant's two convictions in 1999 and 1993--while clearly less significant than the falsification--nevertheless cast doubt on Applicant's fitness for access to classified information. I find Guideline J. against the Applicant.

The Government has established its case under Guideline E. Applicant knew she had a 1993 shoplifting arrest and conviction, and deliberately failed to disclose that incidents. <sup>(4)</sup> Applicant offered no explanation for this omission which had the potential to influence the course of the background investigation. I find Guideline E. against Applicant.

### **FORMAL FINDINGS**

Paragraph 1. Guideline J: AGAINST THE APPLICANT

Subparagraph a: Against the Applicant

Subparagraph b: Against the Applicant

Subparagraph c: Against the Applicant

Paragraph 2. Criterion E: AGAINST THE APPLICANT

Subparagraph a: Against the Applicant

Subparagraph b: For 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 or continue a security clearance for Applicant.

**John G. Metz, Jr.**

**Administrative Judge**

1. Required by Executive Order 10865, as amended, and Department of Defense Directive 5220.6, dated January 2, 1992--and amended by Change 3 dated 16 February 1996, and by Change 4 dated 20 April 1999 (Directive).
2. Applicant is also alleged to have falsely answered "no" to question 29: Public Record Civil Court Actions, In the past 7 years, have you been a party to any public record civil court actions not listed elsewhere on this form?, because she sued a local grocery for negligence in April 1995. Applicant denies falsifying this information, claiming that she did not recall seeing the question, and may have interpreted the question as asking if she had ever been sued herself. Although the plain language of the question does not support that interpretation, I can nevertheless understand where a lay person might read that interpretation into the question. Applicant's misapprehension of the question is sufficient to vitiate the required intent to falsify.
3. Applicant essentially reiterated this version in her 27 August 2001 answer (Item 3).
4. For the reasons stated in my Findings of Fact, I conclude that Applicant did not deliberately withhold the fact that she had sued a local grocery for personal injury.