

DATE: February 28, 2003

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 02-01494

**DECISION OF ADMINISTRATIVE JUDGE**

**ELIZABETH M. MATCHINSKI**

**APPEARANCES**

**FOR GOVERNMENT**

Kathryn D. MacKinnon, Esq., Department Counsel

**FOR APPLICANT**

*Pro Se*

**SYNOPSIS**

In December 2001, Applicant was convicted of theft over \$500.00 but less than \$1,500.00 for purchasing in June 2001 merchandise under retail cost by using false SKU numbers which he had obtained from the Internet. When questioned by a Defense Security Service agent in December 2001 about his arrest, Applicant falsely denied any wrongdoing, concealing his misappropriation of the improper SKU numbers. His recent theft and deliberate misrepresentations about his role in that theft engender serious criminal conduct and personal conduct concerns. Clearance is denied.

**STATEMENT OF THE CASE**

The Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865 (as amended by Executive Orders 10909, 11328 and 12829) and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992 (as amended by Change 4 and the implementation of Title 10, Section 986 of the United States Code), issued a Statement of Reasons (SOR), dated September 9, 2002, to the 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 or continue a security clearance for the Applicant. DOHA recommended referral to an Administrative Judge to conduct proceedings and determine whether clearance should be granted, continued, denied or revoked. The SOR was based on criminal conduct (guideline J) due to Applicant's June 2001 arrest and subsequent conviction of theft of merchandise over \$500.00 but less than \$1,500.00, and his deliberate falsification of a December 2001 sworn statement provided to an agent of the Defense Security Service (DSS).

On October 25, 2002, Applicant responded to the allegations set forth in the SOR and requested a hearing before a DOHA Administrative Judge. The case was assigned to me on November 25, 2002, and pursuant to formal notice dated November 27, 2002, a hearing was scheduled for December 16, 2002. At the hearing, which was held as scheduled, the Government submitted seven exhibits, which were entered into the record. Applicant tendered his testimony and one documentary exhibit, which was admitted. [\(U\)](#)

At the close of the evidentiary record, the Department Counsel moved to amend the SOR to reflect the deliberate falsification of the December 2001 sworn statement raises personal conduct, guideline E, concerns as well. Applicant having no objection thereto, and the amendment as proposed concerning misconduct already alleged in the SOR under guideline J, the motion was granted and the SOR amended to add the following:

2. Guideline E: 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. Available information raising this concern shows:

a. The facts as alleged in subparagraph 1.b., above.

With the receipt on January 3, 2003, of the transcript of the proceedings, this case is ripe for a decision.

### FINDINGS OF FACT

After a thorough review of the evidence, and on due consideration of the same, I render the following findings of fact:

Applicant is a 25-year-old computer software engineer, hired directly out of college by a defense contractor. Granted an Interim Secret security clearance for his duties in July 2001, Applicant is seeking to retain access to classified information.

Applicant emigrated from South Vietnam with his family in 1994 when he was a teenager. After completing high school in the United States, Applicant pursued undergraduate studies in computer science at a state university from August 1998 to May 2001. As a college student, Applicant held part-time employment, including as a computer administrator. In August 2000, Applicant became a naturalized citizen of the United States.

During his senior year at the university, Applicant was recruited by his current employer, a defense contractor. Extended a job offer in Spring 2001, Applicant was asked to complete a security clearance application (SF 86) which was sent to him with the job offer. In conjunction with his defense-related position, which was scheduled to commence in June 2001, Applicant executed an SF 86 on April 25, 2001. Applicant reported thereon the United States residency and naturalized citizenship of his parents and three of his six siblings, the permanent residency status in the United States of another sister, (2) and the foreign citizenship and residency of two other sisters, including one who had remained in Vietnam.

In May 2001, Applicant earned his bachelor of science degree in computer science. Sometime prior to mid-June 2001, Applicant learned the SKU numbers on merchandise for sale on the website of a major discount retailer did not match the SKU numbers on the items sold in the company's retail stores. (3) With SKU numbers obtained from the company's website, Applicant in mid-June 2001 went to a local retail outlet of the company where he placed false SKU numbers on a variety of items (including a satellite dish), which he then purchased at the false prices. Applicant paid \$160.86 for merchandise which retailed in the store for \$1,070.66 in total. As he exited the store, Applicant was detained in the parking lot area by a loss prevention officer, who had observed his illegal actions. Law enforcement was notified and Applicant was arrested for theft of merchandise greater than \$500.00 and less than \$1,500.00, a class A misdemeanor. At the time of his arrest, Applicant admitted to the police that he had obtained the false SKU numbers off the Internet in an attempt to obtain the items at a discount. At the station, the police inventoried Applicant's personal property in his possession, which included \$659.48 in currency.

Circa July 2001, Applicant commenced his employment with the defense contractor. He was granted an Interim Secret clearance for his defense-related duties.

On September 6, 2001, Applicant was interviewed by a DSS special agent about his family's emigration from South Vietnam and any foreign ties. Applicant indicated the sister who had been in Vietnam emigrated to the United States in August 2001. While he had grandparents, aunts and uncles in South Vietnam, he denied any contact with them. Applicant denied any pressure having been placed on him or family members by any foreign authorities, and he maintained loyalty solely to the United States. Applicant did not volunteer to the Defense Security Service agent that

charges were pending against him for the retail theft committed in June 2001.

On December 4, 2001, Applicant was interviewed by the DSS about his involvement in the June 2001 theft of merchandise. As reflected in a signed, sworn statement taken during that interview, Applicant admitted he had been arrested, but he falsely claimed he had been found to be in possession of items in the bottom rack of his shopping cart which he had not known were there. He indicated he had been in the company of two children who he "strongly suspect[ed]" may have placed the items at the bottom of the cart. Emphatically denying that he had attempted to steal any item from the store, Applicant expressed his intent to fight the case against him as it was not fair to him.

One week after his DSS interview, Applicant, pursuant to a plea bargain, pleaded guilty in court to misdemeanor theft, an offense punishable by a fine not to exceed \$4,000.00 and/or confinement in jail not to exceed one year. Applicant was sentenced to pay a \$500.00 fine and court costs of \$210.25. Applicant paid the fine and costs.

Applicant has not informed his employer of his June 2001 arrest and subsequent conviction of theft. In October 2002, Applicant was given a "Spot Award" by the company for his contributions to a project on which he has accessed classified information.

At his hearing in December 2002, Applicant indicated he was "shameful of [the] misdemeanor." When asked why he obtained the false SKU numbers and attempted to purchase merchandise using these false SKU numbers, Applicant testified he wanted to see if it would work. <sup>(4)</sup>

## **POLICIES**

The adjudication process is based on the whole person concept. All available, reliable information about the person, past and present, favorable and unfavorable, is to be taken into account in reaching a decision as to whether a person is an acceptable security risk. Enclosure 2 to the Directive sets forth adjudicative guidelines which must be carefully considered according to the pertinent criterion in making the overall common sense determination required. Each adjudicative decision must also include an assessment of the nature, extent, and seriousness of the conduct and surrounding circumstances; the frequency and recency of the conduct; the individual's age and maturity at the time of the conduct; the motivation of the individual applicant and extent to which the conduct was negligent, willful, voluntary or undertaken with knowledge of the consequences involved; the absence or presence of rehabilitation and other pertinent behavioral changes; the potential for coercion, exploitation and duress; and the probability that the circumstances or conduct will continue or recur in the future. *See* Directive 5220.6, Section 6.3 and Enclosure 2, Section E2.2. Because each security case presents its own unique facts and circumstances, it should not be assumed that the factors exhaust the realm of human experience or that the factors apply equally in every case. Moreover, although adverse information concerning a single criterion may not be sufficient for an unfavorable determination, the individual may be disqualified if available information reflects a recent or recurring pattern of questionable judgment, irresponsibility or emotionally unstable behavior. *See* Directive 5220.6, Enclosure 2, Section E2.2.4.

Considering the evidence as a whole, I find the following adjudicative guidelines to be most pertinent to this case:

### **GUIDELINE J**

#### **Criminal Conduct**

E2.A10.1.1. The Concern: 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 admission 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.

## GUIDELINE E

### Personal Conduct

E2.A5.1.1. 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 also include:

E2.A5.1.2.3. Deliberately providing false or misleading information concerning relevant and material matters to an investigator, security official, competent medical authority, or other official representative in connection with a personnel security or trustworthiness determination.

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

None.

Under the provisions of Executive Order 10865 as amended and the Directive, a decision to grant or continue an applicant's clearance may be made only upon an affirmative finding that to do so is clearly consistent with the national interest. In reaching the fair and impartial overall common sense determination required, the Administrative Judge can only draw those inferences and conclusions which have a reasonable and logical basis in the evidence of record. In addition, as the trier of fact, the Administrative Judge must make critical judgments as to the credibility of witnesses. Decisions under the Directive include consideration of the potential as well as the actual risk that an applicant may deliberately or inadvertently fail to properly safeguard classified information.

### Burden of Proof

Initially, the Government has the burden of proving any controverted fact(s) alleged in the Statement of Reasons. If the Government meets its burden and establishes conduct cognizable as a security concern under the Directive, the burden of persuasion then shifts to the applicant to present evidence in refutation, extenuation or mitigation sufficient to demonstrate that, despite the existence of criterion conduct, it is clearly consistent with the national interest to grant or continue his security clearance.

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. Where the 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 that 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 that security clearance determinations should err, if they must, on the side of denials." Any doubt as to whether access to classified information is clearly consistent with national security will be resolved in favor of the national security. See Enclosure 2 to the Directive, Section E2.2.2.

## CONCLUSIONS

Having considered the evidence of record in light of the appropriate legal precepts and factors, I conclude the following with respect to guidelines J and E:

In December 2001, Applicant pleaded guilty to theft of more than \$500.00 and less than \$1,500.00 for his efforts to obtain merchandise at discounted prices through the use of SKU numbers which he knew were false. Applicant's criminal conduct is viewed as especially egregious because it involved dishonesty and misuse of a computer and was committed after he had applied for a security clearance in connection with his employment as a computer software engineer for a defense contractor. Furthermore, Applicant violated Title 18, Section 1001 of the United States Code when he falsely denied in a signed, sworn statement provided to the DSS in December 2001 that he had committed any

wrongdoing with regard to the theft of merchandise in June 2001. <sup>(5)</sup>

His lack of candor about his criminal actions constitutes additional criminal conduct cognizable under guideline J. Disqualifying conditions E2.A10.1.2.1., allegations or admission of criminal conduct, regardless of whether the person was formally charged, and E2.A10.1.2.2., a single serious crime or multiple lesser offenses, must be considered in evaluating Applicant's current security worthiness.

None of the corresponding mitigating conditions are applicable. His June 2001 theft and December 2001 false statements are viewed as recent. Although the nature of the acts are different, both his theft through use of false SKU numbers and his intentional misrepresentation involve dishonesty. While recent criminal conduct not isolated in nature may still be mitigated where there is clear evidence of successful rehabilitation (E2.A10.1.3.6.), Applicant has demonstrated insufficient remorse over his criminal behavior. Applicant admits his criminal conviction and he testified he was shameful of it (Transcript p. 38). However, when subsequently asked how he felt about the fact that he had committed criminal conduct after he had filed his application for security clearance, Applicant responded that he could lose his clearance and his defense-related position, which would necessitate search for another job or opening some business for himself. (Transcript p. 61). In focusing on his self-interest, Applicant demonstrates little personal insight into the seriousness of his criminal conduct. Moreover, Applicant's rationale for the theft-he just wanted to see if it could be done-raises doubt as to whether he appreciates his obligation to adhere to law and regulation. Adverse findings are warranted as to subparagraphs 1.a. and 1.b., as he has failed to meet his burden of overcoming the security concerns presented by his recent criminal conduct.

Applicant's lack of candor with the DSS agent raises personal conduct (guideline E) concerns as well. Disqualifying condition 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 determination, applies because of Applicant's intentionally false account in his December 2001 interview and sworn statement of the circumstances which led to his arrest in June 2001. In claiming that he had been with two children who may have placed items under his cart without his knowledge, Applicant's false statements went beyond denials of wrongdoing to calculated fabrication.

The concerns for judgment, reliability and trustworthiness engendered by deliberate falsifications may be overcome if the information was unsubstantiated or not pertinent to a determination of judgment, trustworthiness, or reliability (MC E2.A5.1.3.1.); the falsification was isolated, not recent and corrected voluntarily (MC E2.A5.1.3.2.); the individual made prompt, good faith efforts to correct the falsification before being confronted (MC E2.A5.1.3.3.); or omission of material facts was caused or significantly contributed to by improper or inadequate advice of authorized personnel, and the previously omitted information was promptly and fully provided (MC E2.A5.1.3.4.). None of these mitigating conditions work to Applicant's benefit. Applicant made no effort to inform the DSS agent during his September 2001 interview that he had charges pending against him for theft. Absent evidence the subject of any criminal conduct was raised, Applicant's failure to disclose his criminal conduct at that time is regarded as an opportunity passed on to demonstrate good faith rather than as an act of deliberate falsification. However, when directly confronted in December 2001 with the fact of his arrest, Applicant chose to lie about his involvement. Although the Government is now aware of his misuse of the SKU numbers for personal gain, there is no evidence Applicant contacted the Government voluntarily to correct the record. Subparagraph 2.a. is also concluded against Applicant, as doubts persist whether he can be counted on place his obligations to the Government, which include complete candor at all times, ahead of his personal interest. Applicant's contributions to his employer notwithstanding, I am unable to find at this time that it is clearly consistent with the national interest to continue Applicant's access to classified information.

### **FORMAL FINDINGS**

Formal Findings as required by Section 3. Paragraph 7 of Enclosure 1 to the Directive are hereby rendered as follows:

Paragraph 1. Guideline J: AGAINST THE APPLICANT

Subparagraph 1.a.: Against the Applicant

Subparagraph 1.b.: Against the Applicant

Paragraph 2. Guideline E: AGAINST THE APPLICANT

Subparagraph 2.a.: 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 or continue a security clearance for Applicant.

**Elizabeth M. Matchinski**

**Administrative Judge**

1. Prior to going on the record, Applicant was asked about his name, to include the proper pronunciation. Based on his representation as to his proper middle name, Applicant was initially identified by me consistent with the correction. Applicant subsequently identified himself by name consistent with what is listed on the SOR and in his criminal record, however. Applicant indicated he could not recall the order of his names on his immigration documents. In order to avoid any confusion, the decision is issued under the name which appears on the SOR.

2. He provided conflicting information regarding the citizenship of another sister who resides in the United States. In response to question 9 regarding relatives and associates, he listed her citizenship as "United States." In answer to question 10 concerning the citizenship of relatives and associates, he provided an alien registration number for that sister. (Ex. 1).

3. Asked at his hearing where he learned the SKU numbers on the Internet site did not match the SKU numbers used in the stores, Applicant responded, "General information like you hear all the time." (Transcript p. 55).

4. "[I]t's like you are doing something and you're trying to see if it's going to work, it's just like you have a-I'm trying to think up something. It's just like say you have two telephones at home and you're trying to make it into two radios, something like, people say something like that and you want to see if it works like that." (Transcript p. 57).

5. By signing the statement, Applicant certified it was "true, complete and accurate to the best of [his] knowledge and belief and [was] made in good faith" and that he understood a knowing and willful false statement could be punished by fine or imprisonment or both, pursuant to Title 18, Section 1001 of the United States Code. Section 1001 of Title 18 of the United States Code provides in pertinent 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, knowingly 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.