

DATE: May 23, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-30039

DECISION OF ADMINISTRATIVE JUDGE

ELIZABETH M. MATCHINSKI

APPEARANCES

FOR GOVERNMENT

Daniel F. Crowley, Esq., Department Counsel

FOR APPLICANT

David Deranamie

Personal Representative

SYNOPSIS

Applicant was convicted of felony larceny and involuntarily terminated from her job in retail sales in 1991 for helping a relative to shoplift merchandise from the store where Applicant worked. She deliberately did not disclose her employment termination or her felony offense on her security clearance application and falsely denied any involvement in the theft in a sworn statement provided to a government investigator. Criminal conduct and personal conduct concerns persist. Clearance is denied.

STATEMENT OF THE CASE

On March 12, 2004, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to the Applicant. The SOR detailed reasons under Guideline J, criminal conduct, and Guideline E, personal conduct, 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. [\(U\)](#)

On March 31, 2004, Applicant answered the SOR and requested a hearing before a DOHA administrative judge. The case was assigned to me on September 15, 2004, and a hearing was scheduled for October 7, 2004. On September 27, 2004, Applicant requested a continuance as she had contacted legal counsel about representing her and she was scheduled to meet with this attorney late that afternoon. During a conference call of September 29, 2004, Applicant indicated the attorney had declined to represent her. She was granted a brief continuance to November 2004 to allow her time to possibly retain legal counsel and to prepare her case.

Pursuant to notice of November 9, 2004, the hearing was held on November 30, 2004. Applicant was represented by her spouse, a recent law school graduate not engaged in the practice of law. Five government exhibits and four Applicant exhibits were admitted into the record and Applicant testified, as reflected in a transcript received on December 9, 2004.

FINDINGS OF FACT

DOHA alleged under Guideline J that Applicant was convicted of a 1991 felony larceny offense involving aiding another to shoplift and she had not complied with the terms of her sentence as of mid-April 2002. Applicant was also alleged to have violated Title 18, Section 1001 of the United States Code for failing to disclose her felony arrest and consequent employment termination on her security clearance application (SF 86) dated January 8, 2000.⁽²⁾ The alleged deliberate falsifications were also cited under Guideline E, personal conduct. Applicant was also alleged under Guideline E to have falsified a June 2002 sworn statement by denying any involvement in the theft and claiming no knowledge as to the basis for the charges filed against her by her former employer.

In her Answer, Applicant admitted her felony arrest, but asserted she pleaded guilty to misdemeanor theft with the understanding her record would be "wiped clean in a couple of years." Applicant contended she had complied with her probation, completed her community service in early 1992 and paid court costs. Applicant denied any intentional falsification of her SF 86 or sworn statement. She attributed her failure to list her felony arrest to her understanding that she had pleaded guilty to a misdemeanor which had been removed from her record and her failure to disclose her employment termination to a "miscalculation of the 10 years time period." Applicant indicated in her Answer that she was standing by her statement to the agent that she had not been involved in any theft; however, she admitted in clarification at the hearing that she had lied to the agent. After a complete and thorough review of the evidence of record, I make the following findings of fact:

Applicant is a 45-year-old senior system analyst employed since August 2000 as a contractor in the logistics support center at a military installation. She seeks a security clearance for her duties.

Divorced from her second husband, Applicant supported herself and her two children by working as a data entry operator at night and as a part-time retail clerk at a local department store. While working the cash register in July 1991, Applicant knowingly aided a close personal relation in the shoplifting of clothing merchandise from the store.⁽³⁾ Store security observed Applicant ring up for sale an item of clothing and then place additional items in this person's shopping bag without charging her for them. Applicant registered total sales of only \$28.01. Store security detained the customer as she attempted to exit the store, and they recovered merchandise with a total retail value of \$552.57.

Applicant was fired from her employment with the store due to her role in the theft. She was also charged criminally with larceny of property over \$250, a felony.⁽⁴⁾

Applicant pleaded not guilty, but in September 1991 she was found guilty by a judge, and sentenced to six months in the house of correction, suspended for two years. Applicant appealed her conviction. Found guilty after a jury trial in late October 1991, Applicant was sentenced to unsupervised probation and ordered to pay \$530 in fines and costs, or in the alternative perform 90 hours of community service, by February 7, 1992. Applicant completed the community service sometime in 1992.

Applicant dedicated her efforts to supporting her family thereafter, working as a computer operator and then computer specialist for a variety of companies, including a bank. In September 1999, she married her present spouse, and she earned her Bachelor of Science degree in May 2002.⁽⁵⁾ In August 2000, she began her present employment as a contractor at a military installation where she monitors an automated inventory management system. Needing a security clearance for her duties, Applicant executed a security clearance application (SF 86) on January 8, 2001. In knowing concealment of her 1991 larceny conviction, Applicant responded "No" to question 20 concerning termination of employment under adverse circumstances within the past 10 years, and to question 21 concerning whether she had ever been charged with or convicted of a felony offense.

On June 18, 2002, Applicant was interviewed by a special agent of the Defense Security Service (DSS). Applicant intentionally misled the agent about her role in the 1991 theft of merchandise from her former employer. Applicant admitted she had been fired after being charged with larceny, but she falsely denied any involvement in the theft. As reflected in a signed, sworn statement provided to the agent, Applicant described her role as follows:

On the day of the incident, I was working as a cashier. The company security people stopped a lady at the door. They

took her to a back room and questioned her. She told them that after she came through the checkout line, another person took her bag and put other things in her bag. The receipt indicated that she came through my checkout line. Apparently the security people did not believe her and charged me.

I was not involved in any theft. I rang up only the items that she came through the line with. I do not know why the security people would say that they saw me pass two items through the checker and only ring up one item. That is not true. [\(6\)](#)

Applicant claimed that when she went to court, the judge did not have enough information to determine the truth, so called for a jury trial after which she was sentenced to either pay a fine or complete community service. Applicant denied any intentional falsification of her SF 86 when she failed to disclose the offense or employment termination, contending she had been charged with a misdemeanor that did not have to be listed and her employment with the department store was more than seven years before her application.

On August 29, 2002, Applicant was reinterviewed by the DSS about her involvement in the 1991 larceny. Applicant admitted she knew "a lady" was leaving the store without having paid for items, but she continued to deny any involvement in the theft of merchandise:

As I was working the cash register line that day, a lady approached the line with some merchandise in a basket. She presented the merchandise for payment by placing the items on the belt. I rang up all of the items she presented for payment and placed them in a bag. The total came to approximately \$28.00. The lady was also carrying two additional bags of [store X] merchandise for which she had not paid, and which I did not ring up on the register. I allowed the lady to proceed through the line without paying for the additional two bags full of merchandise, knowing she was going to depart the store without paying for them. This was the only time that I ever allowed anyone to depart the store without paying for their merchandise. . . . This statement is the complete truth regarding this incident. [\(7\)](#)

Applicant remains unwilling to acknowledge her criminal culpability with respect to the larceny. At her November 30, 2004 hearing, Applicant testified initially a "lady" came to her line, and she rang in the items put in front of her. When the woman was caught, she had two other bags with about \$500 in merchandise that had not been rung up as sales. Applicant claimed she was convicted on the basis she should have stopped "the lady." (Tr. 49) Although she later acknowledged she had a personal relationship with the woman, who she described as her sister, Applicant directly contradicted her August 2002 statement by denying any knowledge of the extra bags at the time her sister proceeded through her checkout ("She had her pocketbook, I know, and then the things that she put on the counter, that's what I saw. . . ." Tr. 56).

Applicant also denies any intentional falsification of her SF 86, attributing her omission of her employment termination and larceny conviction to her belief she did not have to report incidents that occurred more than seven years before. Given the inquiries are clear in requiring reporting of adverse employment information within the preceding ten years and any felony offenses no matter when they took place, Applicant's explanations are not persuasive. The record evidence does not support her claim of June 2002 that she pleaded guilty to a misdemeanor in 1991. Where she lied to the DSS agent about her involvement in the larceny, her claim of miscalculation as to the date of her firing from her retail sales job is not credible.

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 has 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). Eligibility for a security clearance is predicated upon the applicant meeting the security guidelines contained in the Directive. 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.

Enclosure 2 of the Directive sets forth personnel security guidelines, as well as the 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 that the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Concerning the evidence as a whole, the following adjudicative guidelines are most pertinent to this case:

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

Personal Conduct. 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.A5.1.1.)

CONCLUSIONS

Having considered the evidence of record in light of the appropriate legal precepts and factors, and having assessed the credibility of the Applicant, I conclude the government established its case with respect to Guideline J, criminal conduct, and Guideline E, personal conduct. Applicant was convicted in October 1991 after a jury trial of felony larceny for her involvement in the theft of merchandise from her employer. Moreover, she committed felony violations of Title 18, Section 1001 of the United States Code by deliberately not listing this offense or her resultant employment termination on her SF 86 and by intentionally misleading the DSS about her role in the 1991 theft. ⁽⁸⁾

Under Guideline J, DC 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*, apply.

There is no evidence of any theft-related misconduct by Applicant since 1991 (*see* MC E2.A10.1.3.1. *The criminal behavior was not recent*). Yet, this criminal conduct cannot be viewed as remote in time or isolated in nature, given her intentional misrepresentations of material facts to the government--behavior that raises personal conduct as well as criminal conduct concerns. Under Guideline E, DC 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, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities*, and DC 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*, apply.

Applicant's pursuit of her college degree and work contributions reflect positively, but they are not enough to meet her burden of rehabilitation. There was no prompt good-faith effort at rectification, so MC E2.A5.1.3.3. (*The individual made prompt, good-faith efforts to correct the falsification before being confronted with the facts*) is not pertinent. When interviewed by the DSS agent in June 2002, Applicant falsely claimed she did not know why the store filed charges against her. In August 2002, she told the DSS she had allowed "the lady" to pass through her checkout line with two bags aware the items inside had not been paid for. At her hearing, Applicant admitted the other female involved was her "sister," but she denied any knowledge of the theft and claimed her sister had been given a bag to hold after she had proceeded through her checkout line. Significant doubts persist about Applicant's judgment, reliability and trustworthiness where she lacks remorse for her involvement in the theft, and where she continues to place her self-interest ahead of her obligation of candor to the government. SOR subparagraphs 1.a., 1.c., 2.a., 2.b, and 2.c. are resolved against her. SOR subparagraph 1.b. is concluded for Applicant as the government did not prove that Applicant had not complied with the terms of her larceny sentence by April 2002.

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.: For the Applicant

Subparagraph 1.c.: Against the Applicant

Paragraph 2. Guideline E: AGAINST THE APPLICANT

Subparagraph 2.a.: Against the Applicant

Subparagraph 2.b.: Against the Applicant

Subparagraph 2.c.: 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. Clearance is denied.

Elizabeth M. Matchinski

Administrative Judge

- 1.
2. The document bears a typewritten date of December 18, 2000, but a hand signature date of January 8, 2000. It is likely Applicant signed the document on January 8, 2001, and that her reference to the year that just passed was an inadvertent error. While DOHA erred in alleging falsification of a January 2000 SF 86, there is no dispute over which form Applicant is alleged to have falsified.
3. Asked at her hearing whether she had a personal relationship with the woman who presented the clothing for purchase, Applicant responded she is her sister. (Tr. 54-55) The other suspect named in the police report was residing at the same address as Applicant. (Ex. 2) Yet, Applicant did not list this person as a relative on her SF 86. Applicant listed as siblings one sister of a different name and one brother. She may well not have included all of her siblings on her SF 86. Even if the other person involved in the theft was not a blood relative, Applicant clearly knew her and had a close relationship with her.
4. Applicant was charged with violating Chapter 266, Section 30 of state law, which provides as follows:
 - (1) Whoever steals, or with intent to defraud obtains by a false pretence, or whoever unlawfully, and with intent to steal or embezzle, converts, or secretes with intent to convert, the property of another as defined in this section, whether such property is or is not in his possession at the time of such conversion or secreting, shall be guilty of larceny, and shall, if the property stolen is a firearm, as defined in section one hundred and twenty-one of chapter one hundred and forty, or, if the value of the property stolen exceeds two hundred and fifty dollars, be punished by imprisonment in the state prison for not more than five years, or by a fine of not more than twenty-five thousand dollars and imprisonment in jail for not more than two years; or, if the value of the property stolen, other than a firearm as so defined, does not exceed two hundred and fifty dollars, shall be punished by imprisonment in jail for not more than one year or by a fine of not more than three hundred dollars; or, if the property was stolen from the conveyance of a common carrier or of a person carrying on an express business, shall be punished for the first offence by imprisonment for not less than six months nor more than two and one half years, or by a fine of not less than fifty nor more than six hundred dollars, or both, and for a subsequent offence, by imprisonment for not less than eighteen months nor more than two and one half years, or by a fine of not less than one hundred and fifty nor more than six hundred dollars, or both.

5. Applicant indicated on her SF 86 that her B.S. degree was awarded on May 14, 1999. (Ex. 1) However, she presented a copy of her degree showing the award of a B.S. degree in May 2002 from the same college. This discrepancy was not explored at the hearing.

6. *See* Ex. 4.

7. *See* Ex. 5.

8. 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, 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.