

DATE: October 30, 2006

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In re:

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SSN: -----

Applicant for Security Clearance

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P Case No. 06-11783

**DECISION OF ADMINISTRATIVE JUDGE**

**LEROY F. FOREMAN**

**APPEARANCES**

**FOR GOVERNMENT**

Rita C. O'Brien, Esq., Department Counsel

**FOR APPLICANT**

James D. Evans, III, Esq.

**SYNOPSIS**

Applicant is 23 years old. While in high school, she was arrested twice for shoplifting, once for disobeying the order of a police officer, and once for disorderly conduct by engaging in an altercation at her senior prom. She was fired from her job as a store cashier after her second arrest for shoplifting, but did not disclose her arrest and firing on her Questionnaire for Public Trust Position (SF 85P). Trustworthiness concerns based on personal conduct and criminal conduct are not mitigated. Eligibility is denied.

**STATEMENT OF THE CASE**

On June 23, 2006, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the basis for its preliminary decision to deny Applicant a favorable trustworthiness determination. This action was taken under Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Jan. 2, 1992), as amended and modified (Directive), and Department of Defense Regulation 5200.2-R, *Personnel Security Program* (Jan. 1987), as amended and modified (Regulation). The SOR alleged security concerns raised under Guideline E (Personal Conduct) and Guideline J (Criminal Conduct) of the Regulation. Applicant answered the SOR in writing on July 5, 2006, admitted the allegations, and elected to have a hearing before an administrative judge. The case was assigned to me on August 4, 2006. The case was heard on August 30, 2006, as scheduled. DOHA received the transcript (Tr.) on September 7, 2006.

**PROCEDURAL RULING**

At the hearing, Department Counsel moved to amend the SOR by deleting the reference to the Regulation. I granted the motion in part by deleting the reference to the outdated paragraph cited in the SOR, but I denied the portion of the motion requesting that the entire reference to the Regulation be deleted (Tr. 14-19).

**FINDINGS OF FACT**

Applicant's admissions in her answer to the SOR and at the hearing are incorporated into my findings of fact. I make the following findings:

Applicant is a 23-year-old employee of a defense contractor, working as an appointment clerk at a military medical facility (Applicant's Exhibit (AX) B; Tr. 37). After working as a temporary employee for six months, she became a permanent employee in June 2005 (Tr. 32). Based on her performance, she received a pay increase in July 2006 (AX C). She has never been previously considered for a trustworthiness determination.

Applicant was arrested for shoplifting a hat and some socks on October 16, 1997, when she was 14 years old (GX 3; Tr. 46). She was arrested again for shoplifting on February 23, 2001, two days after her 18<sup>th</sup> birthday. The second shoplifting occurred while she was employed as a store cashier, and she allowed her friends to leave the store without paying for their merchandise on 10 or 12 occasions (Tr. 46). She was not prosecuted, but was required to pay restitution of about \$900 to the store (Tr. 47, 75). She was fired from her job as a result of her dishonest conduct (Tr. 58).

On March 16, 2002, Applicant's sister was involved in a dispute with her boyfriend. The boyfriend called the police, but Applicant's sister would not allow the boyfriend or the police into the house. Applicant was charged with disobeying the police officer's order to open the door. On March 22, 2002, she turned herself into the police, but she was not prosecuted (Tr. 48).

On May 5, 2002, Applicant was charged with disorderly conduct after she became involved in an altercation at her senior prom. She appeared in court and was convicted (Tr. 50).

On December 4, 2005, Applicant submitted a SF 85P, seeking eligibility for assignment to information systems positions designated ADP I/II/III. Question 12 asked, "Has any of the following happened to you in the last 7 years?" Five choices followed the question: (1) fired from a job; (2) quit a job after being told you'd be fired; (3) left a job by mutual agreement following allegations of misconduct; (4) left a job by mutual agreement following allegations of unsatisfactory performance; and (5) left a job for other reasons under unfavorable circumstances. (Government Exhibit (GX) 1 at 4). She entered a handwritten "x" in the box marked "no." In response to question 20, asking whether she had been arrested for, charged with, or convicted of any offense in the last seven years, she disclosed her arrest for disorderly conduct on May 5, 2002 (GX 1 at 7). She did not disclose the arrests in shoplifting in 2001 and disobeying a police officer in 2002 on her SF 85P, nor did she disclose she had been fired because of her shoplifting. [\(1\)](#)

Applicant provided incorrect information in several other entries on her SF 85P. She listed her grandmother and two other relatives in the list of individuals unrelated to her (Tr. 38). She also neglected to account for all time periods in her employment history (Tr. 41) and neglected to enter the proper codes identifying the type of employer (Tr. 43). The errors were called to her attention and she corrected them (Tr. 40-41), but she did not change her answers to questions 12 and 20.

Applicant denied intentionally falsifying her SF 85P. She testified she did not disclose the February 2001 shoplifting arrest because she was 17 years old when the offenses occurred and she was still a juvenile (Tr. 66, 69). She testified she did not disclose the March 2002 arrest because the charges were dismissed (Tr. 66). She also testified that a background check by her previous employer did not reflect the shoplifting incidents, disorderly conduct, and her firing for shoplifting (Tr. 71). However, the May 2002 disorderly conduct charge for which she was convicted was reflected on her previous background investigation (Tr. 72). When asked why she answered "no" to the question whether she had been fired from a job, she responded that she did not know (Tr. 64).

Applicant testified she no longer associates with the same friends. She attends church more often. When asked what caused her to change her behavior, she responded she was "just tired of doing wrong." (Tr. 76.)

Applicant's father, a self-employed architectural designer, marine motor repairman, and an ordained minister, testified on her behalf. He testified Applicant asked him for advice on how to respond to the allegation of falsifying her SF 85P in the SOR, and he advised her to admit it and ask for a hearing where she would have an opportunity to explain herself (Tr. 81). He testified he did not realize he was advising her to admit intentional falsification (Tr. 82).

Applicant was living at home when the February 2001 shoplifting incident occurred. Her father testified he remembered the incident, but he did not remember her being fired for it (Tr. 90).

Applicant's father also testified that during the past four years she has become more mature, more religious, less quick-tempered, and more obedient to authority (Tr. 85). She has been very

diligent at work (Tr. 85).

## POLICIES

The adjudicative guidelines set out in the Regulation are used to make ADP trustworthiness determinations. Department of Defense contractor personnel are afforded the right to the procedures contained in the Directive before any final unfavorable access determination may be made. Regulation ¶ C8.2.1.

Positions designated as ADP I and ADP II are classified as "sensitive positions." Regulation ¶¶ C3.1.2.1.1.7 and C3.1.2.1.2.3. "The standard that must be met for . . . assignment to sensitive duties is that, based on all available information, the person's loyalty, reliability, and trustworthiness are such that . . . assigning the person to sensitive duties is clearly consistent with the interests of national security." Regulation ¶ C6.1.1.1. Appendix 8 of the Regulation sets forth personnel security guidelines, as well as the disqualifying conditions (DC) and mitigating conditions (MC) under each guideline.

"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." Regulation Appendix 8. Each eligibility determination must be a fair, impartial, and commonsense decision based on the relevant and material facts and circumstances, the whole person concept, and the factors listed in the Regulation. An administrative judge should consider: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowledgeable participation; (3) the frequency and recency of the conduct; (4) the individual's age and maturity at the time of the conduct; (5) the voluntariness of participation; (6) the presence or absence of rehabilitation and other pertinent behavioral changes; (7) the motivation for the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence. *Id.*

In security clearance cases, the government must initially present evidence to establish controverted facts in the SOR that disqualify or may disqualify the applicant from being eligible for access to classified information. Directive ¶ E3.1.14. Thereafter, the applicant is responsible for presenting evidence to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. 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). "Any doubt as to whether access to classified information is clearly consistent with national security will be resolved in favor of the national security." Directive ¶ E2.2.2. These same burdens of proof apply to trustworthiness determinations for ADP positions.

## CONCLUSIONS

### **Guideline E (Personal Conduct)**

Conduct involving questionable judgment, untrustworthiness, unreliability, or unwillingness to comply with rules and regulations could indicate that the person may not properly safeguard classified information. Regulation Appendix 8 at 142. A disqualifying condition (DC 2) under this guideline may be raised by "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." *Id.*

When a falsification allegation is controverted, as in this case, the government has the burden of producing substantial evidence to establish it. An omission, standing alone, does not prove an applicant's state of mind when the omission occurred. An administrative judge must consider the record evidence as a whole to determine whether there is direct or circumstantial evidence concerning an applicant's state of mind at the time the omission occurred. *See* ISCR Case No.

03-09483 at 4 (App. Bd. Nov. 17, 2004) (explaining holding in ISCR Case No. 02-23133 at 5 (App. Bd. Jun. 9, 2004)).

Applicant's explanation for her failure to disclose the arrest for disorderly conduct and disobeying the police officer's order was plausible and credible. She had been swept up in a disorderly situation in which she was a bystander, turned herself into the police six days later, and was told she would not be prosecuted.

Applicant's explanation for failing to disclose her arrest in February 2001 for shoplifting, however, was neither plausible nor credible. She was arrested, required to pay \$900 in restitution, and fired from her job. The instructions accompanying question 20 clearly stated, "Do not include anything that happened **before your 16<sup>th</sup> birthday.**" (Emphasis added.) She knew she was 17 years old when she committed the offenses and 18 years old when she was arrested and fired. She is a high school graduate and attends a community college. She appeared intelligent and articulate at the hearing. She knew her SF 85P was being scrutinized carefully because she had to complete or correct several entries. Her explanation was totally inconsistent with the plain and straightforward instructions accompanying question 20.

Applicant offered no explanation for failure to disclose she had been fired. This question also was simple and straightforward: "Has any of the following happened to you in the last 7 years?" Her situation was the first listed situation and the simplest. Nevertheless, she answered "no." The record reflects that her father did not know she had been fired. His testimony suggests Applicant did not tell him she had been fired. Her false negative answer on her SF 85P appears to have been a continuation of her effort to conceal an embarrassing and discreditable event in her life.

This case involves more than a mere omission. It involves omission of information about a shoplifting arrest in question 20 plus a handwritten affirmative misstatement in response to question 12 about being fired for the same act of shoplifting. The nature of the incident, the fact that it was covered by two separate questions on the form, the clarity and simplicity of the two questions, Applicant's affirmative act of handwriting a patently incorrect answer on the form directly above the reference to being fired, and her apparent failure to tell her father she had been fired all indicate intentional falsification rather than a mere omission of information. Based on all the evidence, I conclude DC 2 applies, based on her failure to disclose her February 2001 arrest for shoplifting and her failure to disclose that she was fired for shoplifting.

A disqualifying condition (DC 5) under this guideline also may be raised by a "pattern of dishonesty or rule violations." Regulation Appendix 8 at 142. Applicant had four arrests between the ages of 14 and 18. The first arrest preceded the others by more than three years, and her arrest for disobeying a police officer appears to have been a case of being in the wrong place at the wrong time. However, even if these two arrests are discounted, the record reflects a shoplifting in February 2001, an altercation at her school prom in May 2002, and falsification of her SF 85P in December 2005. I conclude DC 5 applies.

Since the government produced substantial evidence to establish DC 2 and DC 5, the burden shifted to Applicant to produce evidence to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. Applicant has the burden of proving a mitigating condition, and the burden of disproving it is never shifted to the government. *See* ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

Two mitigating conditions are relevant to Applicant's falsifications. MC 2 applies when the falsification was an isolated incident, was not recent, and the individual has subsequently provided correct information voluntarily. Regulation Appendix 8 at 143. MC 3 applies when the individual made prompt, good-faith efforts to correct the falsification before being confronted with the facts. *Id.* Neither condition is established in this case. Her falsifications were not isolated, but a part of a pattern of dishonest and rebellious conduct. They were not recent, because they involved her current application for a trustworthiness determination. She made no effort to correct the falsifications or to seek clarifications of the questions, even though she had an opportunity when she made other corrections in her SF 85P after several errors were called to her attention.

### **Guideline J (Criminal Conduct)**

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

Regulation Appendix 8 at 150. A disqualifying condition (DC 1) may be based on "any conduct, regardless of whether the person was formally charged." *Id.* "[A] single serious crime or multiple lesser offenses" may also be disqualifying (DC 2). *Id.*

It is a felony, punishable by a fine or imprisonment for not more than five years, or both, to knowingly and willfully make any materially false, fictitious, or fraudulent statement or representation in any matter within the jurisdiction of the executive branch of the government of the United States. 18 U.S.C. § 1001. Trustworthiness determinations are within the jurisdiction of the executive branch of the government of the United States. A deliberately false answer on a SF 85P is a serious crime within the meaning of Guideline J. Applicant's arrest record and her falsification of her SF 85P raise trustworthiness concerns based on DC 1 and DC 2.

The evidence shows that the criminal conduct alleged in both SOR ¶¶ 2.c. and 2.d involved the same conduct during the disturbance involving Applicant's sister. When the same conduct is alleged twice in the SOR under the same guideline, one of the duplicative allegations should be resolved in Applicant's favor. *See* ISCR Case No. 03-04704 (App. Bd. Sep. 21, 2005) at 3 (same debt alleged twice). Accordingly, I resolve SOR ¶ 2.d. in Applicant's favor.

Criminal conduct can be mitigated by showing it was not recent (MC 1), was an isolated incident (MC 2), or there is clear evidence of successful rehabilitation (MC 6). Regulation Appendix 8 at 150. I conclude MC 2 is not established for the reasons set out above under Guideline E.

Under both MC 1 and MC 6, the issue is whether there has been a significant period of time without any evidence of misconduct, and whether the evidence shows changed circumstances or conduct. The Regulation is silent on what constitutes a sufficient period of reform and rehabilitation. The sufficiency of an applicant's period of conduct without recurrence of past misconduct does not turn on any bright-line rules concerning the length of time needed to demonstrate reform and rehabilitation, but rather on a reasoned analysis of the facts and circumstances of an applicant's case based on a careful evaluation of the record. If the evidence shows that a significant period of time has passed without evidence of misconduct by an applicant, then an administrative judge must articulate a rational basis for concluding why that significant period of time does not demonstrate changed circumstances or conduct sufficient to warrant a finding of reform or rehabilitation. ISCR Case No. 02-24452 at 6 (App. Bd. Aug. 4, 2004).

Had Applicant not falsified her SF 85P, MC 1 and MC 6 might apply. She has matured considerably since her high school years and is well regarded by her employer. She no longer associates with her old friends. Her testimony that she was "just tired to doing wrong" struck me as sincere. However, her recent falsification of her SF 85P is inconsistent with changed conduct and rehabilitation. I conclude MC 1 and MC 6 apply.

### **Whole Person Analysis**

In addition to considering the specific disqualifying and mitigating conditions under each guideline, I have also considered the general adjudicative guidelines in the Regulation. I have considered: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowledgeable participation; (3) the frequency and recency of the conduct; (4) the applicant's age and maturity at the time of the conduct; (5) the voluntariness of participation; (6) the presence or absence of rehabilitation and other pertinent behavioral changes; (7) the motivation for the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence. Regulation Appendix 8 at 132.

Some of Applicant's misconduct amounted to no more than minor infractions. All her misconduct, except the falsification of her SF 85P, occurred while she was young and immature. She has matured significantly since her high school days. Because her background is now fully known by her family and her employer, the potential for pressure, coercion, exploitation, or duress is nil. On the other hand, her second shoplifting arrest occurred while she was in a position of trust and was a serious breach of that trust. Her misconduct was not continuous, but it recurred repeatedly. Her recent lack of candor on her SF 85P precludes me from concluding that recurrence is unlikely. She has not yet established a track record of sound judgment, reliability, and trustworthiness. *See* Directive ¶¶ E3.1.37 and E3.1.38 (reapplication procedure). Close cases must be resolved in favor of protecting sensitive information.

After weighing the disqualifying and mitigating conditions under Guidelines E and J, and evaluating all the evidence in

the context of the whole person, I conclude Applicant has not mitigated the trustworthiness concerns based on based on personal conduct and criminal conduct. Accordingly, I conclude she has not carried her burden of showing that it is clearly consistent with the interests of national security to grant her eligibility for assignment to sensitive positions.

### **FORMAL FINDINGS**

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

Paragraph 1. Guideline E: AGAINST APPLICANT

Subparagraph 1.a: Against Applicant

Subparagraph 1.b: Against Applicant

Paragraph 2. Guideline J: AGAINST APPLICANT

Subparagraph 2.a: Against Applicant

Subparagraph 2.b: Against Applicant

Subparagraph 2.c: Against Applicant

Subparagraph 2.d: For Applicant

Subparagraph 2.e: Against Applicant

### **DECISION**

In light of all of the circumstances in this case, it is not clearly consistent with the interests of national security to grant Applicant eligibility for assignment to sensitive duties. Eligibility is denied.

LeRoy F. Foreman

Administrative Judge

1. She was not required to disclose her first arrest for shoplifting on her SF 85P, because it occurred before her 16<sup>th</sup> birthday.