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Court File No. T-

FEDERAL COURT

BETWEEN:

Kimberly **MUMA**

Applicant

- and -

ATTORNEY GENERAL OF CANADA

Respondent

APPLICATION UNDER S. 18.1 OF THE *FEDERAL COURTS ACT*

NOTICE OF APPLICATION

TO THE RESPONDENT:

A PROCEEDING HAS BEEN COMMENCED by the applicant. The relief claimed by the applicant appears on the following page.

THIS APPLICATION will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court orders otherwise, the place of hearing will be as requested by the applicant. The applicant requests that this application be heard at Ottawa, Ontario.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application, you or a solicitor acting for you must prepare a notice of appearance in Form 305 prescribed by the *Federal Court Rules* and serve it on the applicant's solicitor, or where the applicant is self-represented, on the applicant, WITHIN 10 DAYS after being served with this notice of application.

Copies of the *Federal Court Rules* information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO OPPOSE THIS APPLICATION, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

Date: **February 11, 2024**

Issued by _____

Address of local office:
Thomas D'Arcy McGee Building
90 Sparks Street
Ottawa, ON K1A 0H9

TO: **Shalene Curtis-Micallef**
Deputy Attorney General of Canada
Department of Justice
Civil Litigation Department
50 O'Connor Street, Suite 500
Ottawa, ON K1A 0H8

APPLICATION

This is an application for judicial review against the decision revoking the Applicant's Reliability Status. The decision was made by a/Director Karine Loiselle of the Industrial Personnel Security Services Directorate, Industrial Security Sector, Departmental Oversight Branch, Public Services and Procurement Canada ("PSPC"). The Applicant received the decision on January 12, 2024.

THE APPLICANT MAKES APPLICATION FOR:

1. an order quashing the decision revoking the Applicant's Reliability Status;
2. a declaration that the Applicant's Reliability Status ought to be reinstated, or in the alternative, an order remitting this matter to a different decision-maker for redetermination in accordance with appropriate instructions from this Honourable Court;
3. the costs of this application;
4. such further and other relief as this Honourable Court deems just.

THE GROUNDS OF THE APPLICATION ARE:**Identity of the Applicant**

1. The Applicant was a Senior Network Systems Integrator/Consultant, working at all material times under contract with the Department of National Defence (“DND”). As part of the Applicant’s work, he developed and tested software solutions to enhance IT network security for DND and the Canadian Forces.

The Applicant’s Work with the Trinkey Device and Flash Drive

2. In or around October to November, 2022, the Applicant was attempting to address a certain security issue that had arisen in the course of his work duties. In order to develop a solution to this issue, the Applicant used source code that was present on two portable file storage devices: 1) a “Trinkey Device”; and 2) a “Flash Drive”. The Trinkey Device was the Applicant’s personal property, but the Flash Drive had been provided to him specifically for his work at DND.
3. The Applicant typically worked with a number of different computers and devices in the course of his duties. Certain of these computers and devices had classified material on them; others did not and were therefore unclassified; and one was a DWAN workstation, meaning that it was connected to the Defence Wide Area Network (an Intranet-type network internal to DND).
4. The Applicant was using an unclassified device (the “Unclassified Machine”) to develop and test his proposed solution to the security issue, via the Trinkey Device and the Flash Drive. This was a permitted use of the Unclassified Machine.

5. On one occasion, by accident, the Applicant mistakenly plugged the Flash Drive into the DWAN workstation. He did not run any programs from the Flash Drive on that machine, and none were initiated. He then realized his mistake and unplugged the Flash Drive.
6. At no time did the Flash Drive ever run or initiate any program on the DWAN workstation.

Confiscation of the Trinkey Device

7. On or about November 16, 2022, three representatives from the Canadian Forces came to the Applicant's workstation and declared that he had been using a "USB rubber ducky" device. These representatives disconnected and impounded the Applicant's DWAN workstation.
8. A "USB rubber ducky" is a device which, when plugged into a computer or workstation, spontaneously begins to run (often malicious) code. The Applicant did not possess any such device at any material time.
9. However, when faced with the representatives' query, the Applicant believed they were looking for his Trinkey Device – a device which possesses a simple circuit board. The Applicant surrendered this device to the representatives, believing that this was the item they had incorrectly characterized as a "USB rubber ducky". The Trinkey Device did not contain any malicious software.

Security Review for Cause

10. The next day, on or about November 17, 2022, the Applicant was informed that he was not permitted to work on any DND or Canadian Forces systems, that he was not to come into work, and that he was under investigation.

11. Subsequently, the Applicant was informed that PSPC was initiating a review for cause of his Reliability Status, which underpinned his ability to hold his Secret and Top Secret security clearances.
12. During the review for cause process, which spanned over a year and contained several interviews, the Applicant learned that he was accused of possessing a credential-stealing tool ("CST"). Initially, he was informed that the CST was on the Trinkey Device. (This was false. There was no CST on the Trinkey Device.)
13. At a subsequent interview, the PSPC interviewer informed the Applicant that the CST had actually been on a flash drive which had been plugged into a DWAN workstation, and that this was the basis of the review for cause.
14. Upon hearing this from the interviewer, the Applicant immediately realized that the device triggering the investigation had not been the Trinkey Device (as he had previously thought) but the Flash Drive. The Applicant immediately disclosed the existence of the Flash Drive to PSPC investigators and offered to provide it to them. PSPC ignored this offer, and never actually took the Flash Drive for examination. In the meantime, DND and Canadian Forces personnel investigated the Trinkey Device and confirmed, via a written technical report, that it did not pose any security concern to them.
15. The Applicant explained that he had used one of the programs on the Flash Drive to try and address a security issue for the purposes of his work. The Applicant further explained that while the Flash Drive housed another program which could theoretically be used to capture credentials, this program had not been opened or run on any DND/Canadian Forces device, and certainly was not opened or run on the DWAN workstation. DND and

Canadian Forces personnel did not ever examine the Flash Drive, but indicated that based on the Applicant's characterization, this program would pose minimal security risk.

Revocation Decision

16. On January 12, 2024, the Applicant received a Notice of Revocation of his Reliability Status. In this Notice, a/Director Loiselle stated:

- a) That the Applicant had intentionally used an unauthorized personal device on DND assets;
- b) That the Applicant had provided an unacceptable explanation for not discussing his intentions with his supervisor;
- c) That the Applicant's actions had led to the DWAN being exposed to a malicious software;
- d) That the Applicant should have been reasonably aware that his actions were unacceptable, because he had been reprimanded in 2003 for a similar incident and because he had been cautioned by colleagues about this recent course of action;
- e) That the Applicant did not immediately report to DND security that he had inserted an unauthorized device into the DWAN, despite knowing he ought to;
- f) That the Applicant provided the incorrect device to DND for assessment and did not make any attempt to contact them regarding this error, with his explanation for this failure to report being unreasonable; and,
- g) Despite being under the impression that he was not authorized to communicate with DND personnel, the Applicant had done so regardless.

17. The Applicant's Reliability Status was revoked with immediate effect, thus administratively closing his Secret and Top Secret security clearances and rendering him unable to continue working for DND/Canadian Forces.

Basis of Application

18. A/Director Loisel made an unreasonable decision for the following reasons:

- a) There was no evidence in the record that the Applicant had "intentionally" used an unauthorized personal device on his DWAN workstation; his insertion of the Flash Drive had been accidental and unintentional, and moreover, the Flash Drive was explicitly provided to the Applicant for his DND work. With respect to his unclassified machine, DND was or should have been aware of his use of the Trinkey Device and had condoned such use;
- b) The Applicant explained his actions on multiple occasions to various individuals in the DND/Canadian Forces chain of command, and to PSPC investigators;
- c) The DWAN was never exposed to any "malicious software", and no such software was ever opened or run, nor was the DWAN workstation logged-in when the Flash Drive had been mistakenly inserted;
- d) The Applicant's colleagues had not been aware that he was using benign devices to address a work-related issue, and had "cautioned" him based on a misinterpretation of what he was actually doing;
- e) The Flash Drive had never opened or run any programs on the DWAN workstation and had been unplugged after mere minutes. The Applicant's failure to report such a minor and non-impactful insertion was due to sheer inadvertence and was not intentional;

- f) The Applicant did not realize he had provided DND with the wrong device for assessment until the PSPC interviewer mentioned a flash drive in the second interview, following which the Applicant immediately disclosed and offered the Flash Drive. He never intentionally withheld the Flash Drive, and in fact, no one at PSPC, DND, or Canadian Forces ever accepted his offer to have the Flash Drive examined; and,
 - g) The DND personnel with whom the Applicant had communicated following the commencement of the Review for Cause process had all reached out to him. He had not contacted any of them of his own initiative. He was understandably confused about his ability to communicate with them and reasonably assumed, from the fact of them contacting him as well as his communications with the PSPC investigator, that he could do so;
19. Given the above, there was no reasonable basis on which PSPC could conclude that the Applicant posed a risk to the information and assets of the Government of Canada, such that his Reliability Status should be revoked;
20. Subsection 18.1(4) of the *Federal Courts Act*, RSC 1985, c F-7.
21. Such further and other grounds as counsel may advise and this Honourable Court permit.

THE APPLICATION WILL BE SUPPORTED BY THE FOLLOWING MATERIAL:

- 1. the affidavit of Kimberly Muma, with exhibits;
- 2. such other material as counsel may advise and this Honourable Court permit.

The Applicant requests that PSPC send a certified copy of the material that is in its possession and relevant to the decision under review (including all records of the Applicant's investigative interviews and the full technical report referenced in paragraph 14, above) to the Applicant and to the Registry, pursuant to Rules 317 and 318 of the *Federal Courts Rules*.

Date: February 11, 2024

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