DATE: October 29, 2007

In re:	)	
	)	
----------	)	ISCR Case No. 07-02163
SSN: ----------	)	
	)	
Applicant for Security Clearance	)	
	)	

DECISION OF ADMINISTRATIVE JUDGE
MARK W. HARVEY

APPEARANCES

FOR GOVERNMENT
Eric H. Borgstrom, Esq., Department Counsel

FOR APPLICANT
Pro Se

SYNOPSIS

From 2003 to August 2006, Applicant used marijuana about seven times. In 2006, she failed to disclose an arrest for underage possession of alcohol as required on her Security Clearance Application. She subsequently provided a false explanation for failing to disclose this arrest. Security concerns pertaining to drug involvement are mitigated; however, security concerns relating to personal conduct are not mitigated. Eligibility for a security clearance is denied.

STATEMENT OF THE CASE

On July 18, 2006, Applicant submitted a Security Clearance Application (SF 86).[1] On May 11, 2007, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to her,[2] under Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended, modified and revised.[3] The SOR alleges security concerns under Guidelines H (Drug Involvement) and E (Personal Conduct). The SOR 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 her, and recommended referral to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked.

Applicant responded to the SOR allegations, and elected to have her case decided on the written record in lieu of a hearing.[4] A complete copy of the file of relevant material (FORM), dated June 30, 2007, was provided to her on July 15, 2007, and she was afforded an opportunity to file objections and submit material in refutation, extenuation, or mitigation.[5] Submissions were due by August 10, 2007.[6] On August 13, 2007, Applicant responded to the FORM and provided additional documents. On August 22, 2007, Department Counsel declined to object to Applicant's additional documents. The case was assigned to me on September 10, 2007. I admitted the documents she submitted in response to the FORM.

FINDINGS OF FACT

In her response to the SOR, Applicant admitted all of the SOR allegations, except the allegation that she deliberately falsified her SF 86 with intent to deceive. Her admissions are incorporated herein as findings of fact. After a complete and thorough review of the evidence of record, I make the following additional findings of fact.

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[1]Item 3 (Electronic Questionnaires for Investigations Processing (e-QIP) also known as Standard Form (SF) 86, Security Clearance Application). There is an allegation of falsification of this SF 86.

[2]Item 1 (SOR) is the source for the facts in the remainder of this paragraph unless stated otherwise.

[3]On August 30, 2006, the Under Secretary of Defense (Intelligence) published a memorandum directing application of revised Adjudicative Guideline to all adjudications and other determinations made under the Directive and Department of Defense (DoD) Regulation 5200.2-R, *Personnel Security Program* (Regulation), dated January 1987, as amended, in which the SOR was issued on or after September 1, 2006. The revised Adjudicative Guidelines apply to this case.

[4]Item 2 (Applicant's response to SOR).

[5]Defense Office of Hearings and Appeals (DOHA) transmittal letter is dated July 11, 2007.

[6]*Id*. The DOHA transmittal letter informed Applicant that she had 30 days after Applicant's receipt to submit information.

Applicant is 20 years old.[7] From August 2005 to the present, she attended a university. She plays varsity athletics at the university, and is a team leader.[8] She is also a resident assistant at the university. Since May 2006, she has had an intern job with a government contractor. She is a diligent worker. She loves and respects her parents, and her country. She has learned from her mistakes and will not repeat them. She is loyal to her country and is a good American citizen. She provided strong letters of recommendation from her mother, employer, pastor, coach at her university, and assistant dean of students. They laud her hard work, dependability, integrity, leadership and positive personality. She has been active in her church and school, and has a 3.68 GPA in college.

Drug Involvement

From 2003 to August 2006, Applicant used marijuana about seven times.[9] She used marijuana when she was consuming alcohol. Her most recent marijuana use was in August 2006, after signing her SF 86.

In March 2007, Applicant indicated she did not intend to use marijuana or other illegal substances in the future. She emphasized she has limited contact with her marijuana-using friends because they moved off campus, and she has remained on campus.

Personal Conduct

On January 30, 2005, Applicant received a ticket for driving 108 miles per hour (mph) in a 65 mph zone and reckless driving.[10] On February 22, 2005, she was found guilty of speeding, and her reckless driving charge was dismissed. She was sentenced to a fine and ordered to pay court costs, totaling $539. Her driver's license was suspended for two months.

On March 3, 2006, Applicant was at an off campus party when the police entered the residence and noted alcohol was present. She received a summons and was charged with underage possession of alcohol. On June 27, 2006, she was found not guilty of this offense.[11] Section 23 of Applicant's July 18, 2006, SF 86 asks, "**Section 23: Your Police Record . . . d. Have you ever been charged with or convicted of any offense(s) related to alcohol or drugs?**" to which Applicant answered, "No."

On November 1, 2006, Applicant told a Department of Defense (DoD) investigator that she did not disclose the underage possession of alcohol incident because the final disposition of this charge occurred after she completed her SF 86.[12] The DoD investigative interview states,

[7] Item 3, *supra* n. 1.

[8] Applicant's response to the FORM is the source for the facts in this paragraph, unless stated otherwise.

[9] Item 4, Applicant's response to interrogatories, dated March 2, 2007, is the source for the facts in this paragraph, unless stated otherwise.

[10] Item 2, *supra* n. 4, is the source for the facts in this section, unless stated otherwise.

[11] Item 4 (Automated Complaint System, Charge Disposition Inquiry, March 6, 2007).

"After discussing it with her mother, they did not think it was necessary to list something where the outcome was not known." As indicated previously, the underage possession of alcohol offense was dismissed on June 27, 2006, and she signed her SF 86 on July 18, 2006.

In her response to the SOR, Applicant explained why she answered, "No" for SF 86, Section 23d:

> I didn't particularly understand "charged or convicted" because nothing was held against me. The court told me this would not be on my records and would not be needed for my clearance. I did not deliberately withhold this information on purpose. I was told it was not needed because it was not on my record. Also, I told the judge I would be going through a security clearance, and how does this show up on my record? He said quote, "Being cleared shows up as nothing – it never happened." So I listened to the judge and never brought it up!

The FORM lists her inconsistent explanations for her incorrect answer to Section 23d. In her response to the FORM, Applicant restates the judge's advice and explains, "I didn't understand if I was really charged or not. And apparently I'm still confused about this same matter. If at a hearing your case is dropped (are you really still charged or does it still remain over your head forever)." Her mother's statement indicates, "Relating to the citation, I sat in court and heard the judge say this will not show up on your record, so I am in the same feeling as [my daughter], that the charges were dropped; and it was unnecessary to be mentioned."

POLICIES

In an evaluation of an applicant's security suitability, an administrative judge must consider the "Adjudicative Guidelines for Determining Eligibility For Access to Classified Information" (AG). In addition to brief introductory explanations for each guideline, the AGs are divided into Disqualifying Conditions (DC) and Mitigating Conditions (MC), which a judge uses to determine an applicant's eligibility for access to classified information.

These AGs are not inflexible ironclad rules of law. Instead, recognizing the complexities of human behavior, they are applied in conjunction with the factors listed in the adjudicative process. AG ¶ 2. A judge's over-arching goal is a fair, impartial and common sense decision. Because the entire process is a conscientious scrutiny of a number of variables known as the "whole person concept," a judge considers all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision. AG ¶ 2(c).

Specifically, a judge should consider the nine adjudicative process factors listed at AG ¶ 2(a): "(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) extent to which participation is voluntary; (6) the presence or absence of rehabilitation and other permanent

[12] Item 5, sworn interview of Applicant at 2-3 is the source for this sentence and the next sentence.

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."

Since the protection of the national security is the paramount consideration, the final decision in each case is arrived at by applying the standard that "[a]ny doubt concerning personnel being considered for access to classified information will be resolved in favor of national security." AG ¶ 2(b). In reaching this decision, a judge must draw only those conclusions that are reasonable, logical and based on the evidence contained in the record. Likewise, a judge must avoid drawing inferences grounded on mere speculation or conjecture.

In the decision-making process, facts must be established by "substantial evidence."[13] The Government initially has the burden of producing evidence to establish a case which demonstrates, in accordance with the Directive, that it is not clearly consistent with the national interest to grant or continue an applicant's access to classified information. Once the Government has produced substantial evidence of a disqualifying condition, the burden shifts to applicant to present "witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by the [Government], and [applicant] has the ultimate burden of persuasion as to obtaining a favorable clearance decision." Directive ¶ E3.1.15. The burden of disproving a mitigating condition never shifts to the Government. *See* ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).[14]

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours. The Government reposes a high degree of trust and confidence in individuals to whom it grants access to classified information. Decisions under this Directive include, by necessity, consideration of the possible risk an applicant may deliberately or inadvertently fail to protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information.

The scope of a judge's decision is limited. Nothing in this decision should be construed to suggest that I have based this decision, in whole or in part, on any express or implied determination as to Applicant's allegiance, loyalty, or patriotism. Executive Order 10865, § 7.

[13] "Substantial evidence [is] such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the record." ISCR Case No. 04-11463 at 2 (App. Bd. Aug. 4, 2006) (citing Directive ¶ E3.1.32.1). "This is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent [a Judge's] finding from being supported by substantial evidence." *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620 (1966). "Substantial evidence" is "more than a scintilla but less than a preponderance." *See v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994).

[14] "The Administrative Judge [considers] the record evidence as a whole, both favorable and unfavorable, evaluate[s] Applicant's past and current circumstances in light of pertinent provisions of the Directive, and decide[s] whether Applicant ha[s] met his burden of persuasion under Directive ¶ E3.1.15." ISCR Case No. 04-10340 at 2 (App. Bd. July 6, 2006).

CONCLUSIONS

Upon consideration of all the facts in evidence, and after application of all appropriate legal precepts, factors, and conditions, including those described briefly above, I conclude the following with respect to the allegations set forth in the SOR:

Guideline H (Drug Involvement)

Guideline ¶ 24 articulates the Government's concern concerning drug involvement stating, "[u]se of an illegal drug or misuse of a prescription drug can raise questions about an individual's reliability and trustworthiness, both because it may impair judgment and because it raises questions about a person's ability or willingness to comply with laws, rules, and regulations."[15]

Two Drug Involvement Disqualifying Conditions could raise a security concern and may be disqualifying in this case: "any drug abuse,"[16] and an "illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia." Guideline ¶¶ 25(a) and 25(c). The other six disqualifying conditions listed in Guideline ¶ 25 are not applicable.

The two disqualifying conditions in Guideline ¶¶ 25(a) and 25(c) apply because Applicant possessed and used marijuana without a prescription.

The Government produced substantial evidence of these two disqualifying conditions, and the burden shifted to Applicant to produce evidence and prove mitigation. Guideline ¶ 26 provides for potentially applicable drug involvement mitigating conditions:

> (a) the behavior happened so long ago, was so infrequent, or happened under such circumstances that it is unlikely to recur or does not cast doubt on the individual's current reliability, trustworthiness, or good judgment;
>
> (b) a demonstrated intent not to abuse any drugs in the future, such as:
>
> (1) disassociation from drug-using associates and contacts;
>
> (2) changing or avoiding the environment where drugs were used;

[15]Guideline ¶ 24(a) defines "drugs" as substances that alter mood and behavior, including:

> (1) Drugs, materials, and other chemical compounds identified and listed in the Controlled Substances Act of 1970, as amended (e.g., marijuana or cannabis, depressants, narcotics, stimulants, and hallucinogens), and (2) inhalants and other similar substances.

Schedules I, II, III, IV, and V, as referred to in the Controlled Substances Act are contained in 21 U.S.C. § 812(c). The Controlled Substances Act, appears generally as 21 U.S.C. §§ 801 et seq. Marijuana is listed at Schedule I (c)(10).

[16] Guideline ¶ 24(b) defines "drug abuse" as "the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction."

(3) an appropriate period of abstinence;

(4) a signed statement of intent with automatic revocation of clearance for any violation;

(c) abuse of prescription drugs was after a severe or prolonged illness during which these drugs were prescribed, and abuse has since ended;

(d) satisfactory completion of a prescribed drug treatment program, including but not limited to rehabilitation and aftercare requirements, without recurrence of abuse, and a favorable prognosis by a duly qualified medical professional.

Security concerns can be mitigated based on AG ¶ 26(a) by showing that the drug offenses happened so long ago, were so infrequent, or happened under such circumstances that they are unlikely to recur. There are no "bright line" rules for determining when conduct is "recent." The determination must be based "on a careful evaluation of the totality of the record within the parameters set by the directive." ISCR Case No. 02-24452 at 6 (App. Bd. Aug. 4, 2004). If the evidence shows "a significant period of time has passed without any evidence of misconduct," then an administrative judge must determine whether that period of time demonstrates "changed circumstances or conduct sufficient to warrant a finding of reform or rehabilitation." *Id*. AG ¶ 26(a) does not fully apply because Applicant's last marijuana use was in August 2006, which is too recent. However, she receives some credit for ending her marijuana use in August 2006, and for not using any drugs for about six months before providing her response to the SOR. *See* ISCR Case No. 04-07360 at 2, 3 (App. Bd. Sep. 26, 2006) (indicating when a mitigating condition cannot be fully applied, "some credit" is still available under that same mitigating condition).

AG ¶ 26(b) lists four ways Applicant can demonstrate her intent not to abuse illegal drugs in the future. The first three are applicable. She has "significantly" disassociated from drug-using associates and contacts; avoided the environment where drugs were used; and abstained from drug abuse since August 2006. She only used marijuana seven times between 2003 and 2006, and did not use any other illegal drugs. AG ¶ 26(b) is applicable and significantly mitigates the security concerns involving her drug involvement.

AG ¶ 26(c) is not applicable because her marijuana abuse did not follow an illness, and marijuana was never prescribed for her. AG ¶ 26(d) is not applicable because she has not completed a prescribed drug treatment program, and there has not been a favorable prognosis by a duly qualified medical professional.

Guideline E (Personal Conduct)

Under AG ¶ 15, "[c]onduct involving . . . lack of candor [or] dishonesty . . . can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. Of special interest is any failure to provide truthful and candid answers during the . . . clearance process . . . ."

Two personal conduct disqualifying conditions are particularly relevant and may be disqualifying in this case. AG ¶ 16(a) and (b) provide:

> (a) deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire . . . [used to] determine security clearance eligibility or trustworthiness . . . .; and,
>
> (b) deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority, or other official government representative.

Applicant gave an incorrect answer in Section 23 of her July 18, 2006, SF 86, and failed to disclose her charge of underage possession of alcohol. The evidence of record establishes her erroneous answer was a deliberate falsification.[17] She understood the question, and was aware of the charge as it was dismissed the previous month.

On November 1, 2006, a DoD investigator interviewed Applicant, and she falsely said she did not disclose the underage possession of alcohol because at the time she completed her SF 86 it was not adjudicated.[18]

Applicant subsequently asserted in her response to the FORM that she told the judge, who adjudicated the possession of alcohol charge, she would be going through the security clearance process, and he stated, "Being cleared shows up as nothing – it never happened." Most likely a judge would be aware that there would be some record of the charge, and it is unlikely a judge would recommend that Applicant not disclose the existence of the charge. Her mother's statement provides very limited corroboration about the judge's statement because it most likely indicates the judge was advising Applicant there was no record of conviction.[19] In any event it is

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[17]The Appeal Board has cogently explained the process for analyzing falsification cases, stating:

> (a) when a falsification allegation is controverted, Department Counsel has the burden of proving falsification; (b) proof of an omission, standing alone, does not establish or prove an applicant's intent or state of mind when the omission occurred; and (c) a Judge must consider the record evidence as a whole to determine whether there is direct or circumstantial evidence concerning the applicant's intent or state of mind at the time the omission occurred. [Moreover], it was legally permissible for the Judge to conclude Department Counsel had established a prima facie case under Guideline E and the burden of persuasion had shifted to the applicant to present evidence to explain the omission.

[18] As indicated previously, the judge found her Not Guilty on June 27, 2006, and she signed her SF 86 on July 18, 2006.

[19]Administrative judges "must look at the record for corroboration of Applicant's testimony." ISCR Case 02-03186 at 3 (App. Bd. Feb. 16, 2006). Moreover, a judge may consider "Applicant's failure to present documentary evidence in corroboration of his denials and explanations." ISCR Case 01-20579 at 5 (App. Bd. Apr. 14, 2004) (holding Applicant's failure to provide reasonably available corroborative evidence may be used in common sense evaluation to determine whether Applicant's claims are established). In ISCR Case 01-02677 at 7 (App. Bd. Oct. 17, 2002), the Appeal Board explained:

> While lack of corroboration can be a factor in evaluating the reliability or weight of evidence, lack of corroboration does not automatically render a piece of evidence suspect, unreliable, or

Applicant's false statement to the DoD investigator about her rationale for not disclosing the charge which receives greater weight because it is in closer temporal proximity to her signature on her SF 86 than her subsequent statement about being misled by the judge. Her answer to the DoD investigator is clearly false, and it is not attributed to the judge or anyone else.

AG ¶ 17 lists six mitigating conditions that could mitigate security concerns:

> (a) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts;
>
> (b) the refusal or failure to cooperate, omission, or concealment was caused or significantly contributed to by improper or inadequate advice of authorized personnel or legal counsel advising or instructing the individual specifically concerning the security clearance process. Upon being made aware of the requirement to cooperate or provide the information, the individual cooperated fully and truthfully;
>
> (c) the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment;
>
> (d) the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that caused untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur;
>
> (e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress; and,
>
> (f) the information was unsubstantiated or from a source of questionable reliability.

On January 30, 2005, Applicant received a speeding ticket. However, it is her only speeding ticket, and is not sufficiently serious and recent to be a security concern. Her underage possession of alcohol offense resulted in a finding of not guilty. She denied that she possessed alcohol on that occasion, and this offense is unsubstantiated. Her last use of marijuana was after she completed her SF 86; however, as indicated previously her drug involvement is mitigated. For SOR ¶¶ 2a, 2b and 2e, I find for Applicant.

Applicant admitted that her answer on Section 23 of her SF 86 was incorrect, and she provided inaccurate information to the DoD investigator. However, she did not admit she intended to deceive security officials or the DoD investigator. Instead she eventually attributed her false answer on her SF 86 to advice received from the judge who adjudicated her underage

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> incredible. . . . Evidence that lacks corroboration must be evaluated in terms of its intrinsic believability and in light of all the other evidence of record, including evidence that tends to support it as well as evidence that tends to detract from it.

possession of alcohol charge. She also argued that a charge did not need to be disclosed unless it resulted in a conviction. She did not fully acknowledge her conduct, and she has not received counseling. Her falsifications are recent, serious and not mitigated.

"Whole Person" Analysis

In addition to the facts discussed in the enumerated disqualifying and mitigating conditions, I have considered each of the factors related to the whole person concept under AG ¶ 2(a). As noted above, her two falsifications were directly related to the security clearance process. They occurred in 2006. Although she admitted her answers were incorrect, she failed to acknowledge that she intended to deceive security officials and a DoD investigator. Her falsifications were voluntary and deliberate. She was not coerced into making the false statements.

Applicant presented substantial extenuating and mitigating evidence. She is only 20 years old. The absence of evidence of any prior violation of her employer's rules or requirements, and her efforts in sports and academics at her university weigh in her favor. She is loyal to her country. This process has made her aware of the necessity to provide accurate information during the security clearance process. "Applicant is now alert to the security concerns presented by h[er] circumstances and the responsibilities incumbent on h[er] as a result." ISCR Case No. 04-07360 at 3 (App. Bd. Sep. 26, 2006). This case has sensitized her to the importance of accurate information on her SF 86. She provided a strong package of recommendations lauding her character, diligence, leadership and integrity, as well as other traits.

Evidence of rehabilitation and Applicant's good character, however, is insufficient to resolve my doubts about her reliability, trustworthiness, and good judgment. The overall record evidence leaves me with questions or doubts as to her security eligibility and suitability. I take this position based on the law, as set forth in *Department of Navy v. Egan*, 484 U.S. 518 (1988), my "careful consideration of the whole person factors"[20] and supporting evidence, my application of the pertinent factors under the Adjudicative Process, and my interpretation of my responsibilities under the Guidelines. Applicant has failed to mitigate or overcome the government's case. I conclude she is not eligible for a security clearance.

FORMAL FINDINGS

Formal findings For or Against Applicant on the allegations set forth in the SOR, as required by Section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline H:	FOR APPLICANT
Subparagraph 1.a:	For Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraphs 2.a to 2.b:	For Applicant
Subparagraphs 2.c to 2.d:	Against Applicant
Subparagraph 2.e:	For Applicant

[20] *See* ISCR Case No. 04-06242 at 2 (App. Bd. June 28, 2006).

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 Applicant's security clearance. Eligibility for a security clearance is denied.

Mark W. Harvey
Administrative Judge