**DEPARTMENT OF DEFENSE**
**DEFENSE OFFICE OF HEARINGS AND APPEALS**

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| In the matter of: | ) | |
| | ) | |
| | ) | ISCR Case No. 20-00754 |
| | ) | |
| Applicant for Security Clearance | ) | |

## Appearances

For Government: Kelly M. Folks, Esquire, Department Counsel
For Applicant: Ronald C. Sykstus, Esquire

09/23/2022

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## Decision

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GALES, Robert Robinson, Administrative Judge:

Applicant failed to mitigate the security concerns regarding drug involvement and substance misuse and personal conduct. Eligibility for a security clearance is denied.

## Statement of the Case

On April 30, 2007, on December 6, 2017, and again on July 17, 2019, Applicant applied for a security clearance and submitted Questionnaires for National Security Positions (2007 SF 86; 2017 SF 86; and 2019 SF 86). On an unspecified date, the Defense Office of Hearings and Appeals (DOHA) issued him a set of interrogatories, and also asked him to verify the accuracy of an investigator's summary of an interview. He responded to those interrogatories and verified the summary on March 19, 2020. On June 30, 2020, the Defense Counterintelligence and Security Agency (DCSA) Consolidated Adjudications Facility (CAF) issued a Statement of Reasons (SOR) to him under Executive Order (Exec. Or.) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended and modified; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended and modified (Directive); and Directive 4 of the Security Executive Agent (SEAD 4),

*National Security Adjudicative Guidelines* (December 10, 2016) (AG), effective June 8, 2017.

The SOR alleged security concerns under Guideline H (drug involvement and substance misuse) and Guideline E (personal conduct) and detailed reasons why the DCSA CAF adjudicators were unable to find that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. The SOR recommended referral to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked.

In a sworn statement, dated July 23, 2020, Applicant responded to the SOR, and he requested a hearing before an administrative judge. Department Counsel indicated the Government was prepared to proceed on November 19, 2020. However, because of various health-related protocols associated with the COVID-19 pandemic, processing stopped until new hearing procedures could be established. The case was finally assigned to me on October 25, 2021. A Notice of Microsoft TEAMS Video Teleconference Hearing was issued on March 3, 2022, scheduling the hearing for March 10, 2022. I convened the hearing as scheduled.

During the hearing, Government Exhibits (GE) 1 through GE 6, and Applicant Exhibits (AE) A through AE O were admitted into evidence without objection. Applicant and five other witnesses testified. The transcript (Tr.) was received on March 21, 2022. I kept the record open to enable the parties to supplement it. Both parties took advantage of that opportunity. The Government submitted 3 documents (GE 7 through GE 9) and Applicant submitted 11 documents (AE P through AE Z), which were admitted as identified without objection. The record closed on April 11, 2022, with written final arguments continuing until May 12, 2022.

## Findings of Fact

In his Answer to the SOR, Applicant admitted, with comments, one of the factual allegations pertaining to drug involvement and substance misuse (SOR ¶ 1.a.) and the corresponding allegation under personal conduct (SOR ¶ 2.a.). Applicant's admissions are incorporated herein as findings of fact. After a complete and thorough review of the evidence in the record, and upon due consideration of same, I make the following additional findings of fact:

### Background

Applicant is a 49-year-old employee of a defense contractor. He has been serving as a property manager with his current employer since about April 2021. He was previously employed by various employers in a variety of positions, including senior supply specialist, inventory manager, security specialist, warehouse manager, helpdesk lead, and cable installer and network technician. A 1992 high school graduate, he earned college credits but no degree. He enlisted in the U.S. Air Force in April 1995 and served on active duty until April 1999, when he was honorably discharged. He served in the U.S. Air Force Reserve until he was honorably discharged as a senior airman (E-4) in May

2007. In March 2021, the U.S. Department of Veterans Affairs (VA) granted him a 70% service-connected disability rating. (AE A) He was granted a secret clearance in 1995, and again in March 2018. He was married in 1997 and divorced in 1999. He remarried in 2006. He has no biological children.

**Drug Involvement and Substance Misuse and Personal Conduct**

On May 14, 2018, Applicant underwent a non-observed pre-employment urinalysis. He reported to his director of human resources (HR) that was feeling under the weather and noted that the urinalysis collection worker had left his urine "sitting out for too long" – estimated to be approximately 30 minutes – resulting in a test result that was outside the normal range, requiring a re-test. (Tr. at 35, 46-47) He requested permission to undergo the re-test at another facility, and his request was granted, but he decided to return to the original testing facility. That same day, the urinalysis collection worker reported to HR that the urine sample was "so far out of the normal range that [Applicant] would've 'been dead' for the urine to belong to him" She implied the urine was far too cold for the sample to have come from him." The re-test would have to be observed. (GE 5 at 1; GE 6 (Email from HR, dated May 25, 2018))

Although an Incident History indicated that Applicant took an observed retest urinalysis the following day the actual Rapid Drug Screen Test Results state that the observed urinalysis re-test occurred on May 18, 2018. (GE 9 at 5-6) The re-test certified results were positive for marijuana metabolites of 296-ng/mL, exceeding the workplace drug testing guideline of 50-ng/mL (confirmatory cutoff of 15-ng/mL). (GE 9 at 6) Tetrahydrocannabinol (THC), known as marijuana is a Schedule I Controlled Substance (https://www.deadiversion.usdoj.gov/schedules/; 21 U.S.C. § 812 (c)) On May 24, 2018, the re-test results were reported to his employer, and Applicant disclosed to his supervisor that the positive test was because he had "been around individuals using marijuana in the time prior to his drug tests." His employment was terminated. (GE 5 at 1)

In March or April 2018, Applicant was not sure when, although his wife claims it was the last weekend in April 2018, he and his wife were on a camping trip at a park. He, his wife, and another couple went to a party at someone else's camper in the park. They remained outside until it started to rain, and then they entered the camper. It was described as a small one bedroom/one bath camper, or a 19 to 20-foot camper of about 100 square feet, with no open windows. Applicant did not know any of the other people at the party. When they first arrived at the party-camper, Applicant could smell marijuana being smoked, essentially because he had used marijuana one time two and one-half decades earlier while in high school. (Tr. at 70) One of his friends noted that three or four people were smoking marijuana, and the smoke was heavy as he could see smoke lingering when he walked in. Nevertheless, in an exercise of bad judgment, Applicant remained at the party for about an hour and one-half and he consumed six or more beers and three or four mixed drinks, becoming slightly intoxicated. Applicant's wife thought he had consumed two to possibly three Jell-O shots. He did not describe the mixed drinks. He claimed that he did not use marijuana at the party or at any other time after high school. He claimed he did not realize that marijuana being smoked by others in the

camper could get into his system. (GE 3 at 33-34; GE 4 at 4-5; AE Z; Statement of Applicant's wife, undated, attached to his Answer to SOR at 1; Tr. at 81-83, 90)

Applicant's initial reaction was that since he was "exposed" to marijuana smoke at the party "inside a small camper," it must have been secondhand smoke from those marijuana-smokers around him that he ingested. (Answer to SOR at 1) In December 2019, well after that camper-party, he was informed by a female friend he has known for over two decades and his wife has known for three decades, that at the mid-April 2018 camper-party, Jell-O shots with Cannabidiol (CBD) oil in them had purportedly been served. (Statement dated July 17, 2020, attached to Answer to SOR) She overheard a conversation between some people she doesn't really know talking about the Jell-O shots. She, herself consumed seven Jell-O shots at the camper-party, but didn't feel any different. (Tr. at 93-104) The husband of that woman consumed four or five shot-glass Jell-O shots, and subsequently told Applicant that when he departed the party, he overheard a couple of women discussing how Jell-O shots are made, and one of them said that she made them with CBD oil. (AE Z) It was not made clear if that was merely a conversation in general, or if the CBD shots at the party were made with CBD oil. Applicant and his wife are now not sure if his problems occurred because of inhaling second-hand marijuana smoke or because he ingested CBD-infused Jell-O shots. (Statement of Applicant's wife at 2; Answer to SOR at 2)

Applicant's position raises three separate areas of consideration: a) can an individual test positive after inhaling secondhand marijuana smoke, and if so, what are the parameters in play; b) can an individual test positive after consuming CBD, and if so, what are the parameters in play; and c) how long after an individual inhales secondhand marijuana smoke, or consumes CBD, can the individual realistically test positive?

**Testing positive on a drug test after inhaling secondhand marijuana smoke:**

The National Institute on Drug Abuse (NIDA) published a study where researchers conducted several experiments in which nonsmokers were placed in an unvented (all windows and doors are closed) room or well-ventilated space very close to smokers casually smoking marijuana. In one study, nonsmokers spent three hours in a well-ventilated space. Sensitive laboratory tests were able to find THC in the nonsmokers' urine, but not enough to trigger a positive result on most commonly used drug tests. In another experiment, nonsmokers spent one hour in an unventilated room with marijuana that had higher levels of THC (11.3%, compared with 5.3% in the previous experiment). This time, some nonsmoking participants did test positive for the THC in their urine – but it was rare, and it only happened **in the hours right after the experiment**. (emphasis supplied) (GE 7) Based on the scientific evidence, I conclude that secondhand smoke would not have registered a positive test result 19 days after the incident supposedly took place.

**Testing positive on a drug test after consuming CBD-infused Jell-O shots:**

To reach the 50ng/mL of THC, one would have to consume upwards of 2,000 mg of CBD products that contain 0.3% or less of THC, which is much higher than the average

person is likely to take. Even in clinical trials and research studies, people are usually only administered 100-800 mg per day. THC is fat-soluble, especially via edibles or a drop of oil on the tongue, and it is absorbed along with other fats and can be stored in the body's fatty tissue. Depending on how much CBD is consumed, especially if it contains more than 0.3% THC, how often it is consumed, an individual's body weight and diet, it is possible for THC to accumulate in the body in as little as four to six days to trigger a positive drug test. Research has found that **THC can be detectable in one's system for up to 30 days, but it is usually only present in heavy cannabis users after the first week.** (AE Q) In urine testing, THC at a concentration of 50nL is necessary to trigger a positive test. (GE 8) Because detection windows vary according to dose and frequency of use, in general, THC metabolites are detectable in urine for approximately 3 to 15 days, and sometimes up to 30 days, after use. Also, since CBD is generally believed to have an elimination half-life of one to two days, half of the dose leaves the body at this time. (AE W) According to the Mayo Clinic, **THC metabolites can be detected for as long as 15 days post-administration among frequent and daily users.** (emphasis supplied) (AE P; AE X) Based on the scientific evidence, I conclude that CBD would not have registered a positive test result 19 days after the incident supposedly took place, unless Applicant was a frequent or daily user.

The date of the camper-party is seemingly in dispute, with Applicant contending that it took place in March or April 2018 – he was unsure of the actual date; while his wife thought it took place during the last weekend in April, and her friend, and her friend's husband claimed that it occurred in late April 2018. I have taken administrative notice that the last weekend in April 2018 consisted of April 27th (a Friday) through April 29th (a Sunday). What is not in dispute are the dates of the first unobserved urinalysis (May 14, 2018) and the observed re-test (May 18, 2018) – 19 days following the latest date considered the date of the camper-party. The first test was deemed unacceptable and was rejected because the urine sample was "so far out of the normal range that [Applicant] would've 'been dead' for the urine to belong to him," and it was implied the urine was far too cold for the sample to have come from Applicant. The re-test results, as noted above, were positive for marijuana metabolites of 296-ng/mL, exceeding the workplace drug testing guideline of 50-ng/mL (confirmatory cutoff of 15-ng/mL), and as noted by Department Counsel, nearly six times the minimum required for a positive result.

Applicant also raised the issue regarding Applicant's weight during the camper incident. He was 44 years old at the time and supposedly weighed much more than he does today. Applicant's counsel noted that he weighed "over 265 pounds" at that time. However, that argument is seemingly without basis because Applicant reported in April 2007 he weighed 220 pounds (2007 SF 86 at 6), and in December 2017 (2017 SF 86 at 8), and again in July 2019 (2019 SF 86 at 8), when Applicant reported that he still weighed 240 pounds.

With regard to Applicant's future intentions, he submitted a signed statement of intent to abstain from all drug involvement and substance misuse, acknowledging that any future involvement or misuse is grounds for revocation of national security eligibility. (AE D) There is no evidence of Applicant ever having received drug-counseling or treatment.

When Applicant completed his 2019 SF 86, in response to several of the questions in Section 23 – *Illegal Use of Drugs or Drug Activity – Illegal Use of Drugs or Controlled Substances*: In the last seven (7) years: (1) have you illegally used any drugs or controlled substances; (2) provide the identity of the drug or controlled substance; (3) provide an estimate of the month and year of the most recent use; and (4) was your use while possessing a security clearance? Applicant answered "yes" to the first and fourth questions; identified the drug or controlled substance as marijuana; and "estimated" the most recent use took place in March 2018. He explained that he was exposed to marijuana at a party. (2019 SF 86 at 33-34) The SOR allegation was that Applicant falsified material facts by claiming that his claimed most recent use occurred in March 2018, whereas in truth, he used marijuana prior to his drug screenings in May 2018. Based on the evidence, and the way the SOR allegation was drafted, I conclude that with the exception of the estimated date of most recent use, Applicant did not intentionally falsify his response. It is clear that the incident took place in either March or April 2018, prior to the May 2018 drug screenings.

In November 2019, during an interview conducted by an investigator with the U.S. Office of Personnel Management (OPM), Applicant contended that he was exposed to marijuana in March 2018 while attending the camper party described above. He claimed that he was exposed to secondhand marijuana smoke while at the party, and that he did not did not use marijuana at the party. (GE 4 at 7) The SOR allegation was that Applicant falsified material facts to the investigator by denying that he had used marijuana prior to his drug screenings in May 2018. Based on the evidence, and the way the SOR allegation was drafted, I conclude that with the exception of the estimated date of most recent use, Applicant did not intentionally falsify his response, as alleged in the SOR. It is clear that the incident took place in either March or April 2018, prior to the May 2018 drug screenings.

**Character References and Work Performance**

Two of Applicant's former supervisors, one the president of one his previous employers, and the other the personnel and administration manager of another employer, are very supportive of him. Applicant's work ethic, logistical prowess, and communication skills were considered exceptional. He was always confident and knowledgeable and was recognized as one who could break down a complex problem and be counted on to develop a viable solution set in a schedule-driven environment. (AE B; AE C) Another individual in Applicant's former supervisory chain – for about five years – characterized him as outstanding, being the first to arrive in the morning and available to stay late if needed. Based on his knowledge of Applicant, he cannot believe the allegations or that he would jeopardize himself by smoking marijuana. (Tr. at 114-116) Another team member, while working alongside each other, but for different employers, never questioned Applicant's honesty or integrity. (Tr. at 120-122)

In February 2009, an Air Force major general, serving as director of test, noted that Applicant's exceptional performance of duty while supporting the short notice stand-up of a newly formed initiative was instrumental to the development and fielding of certain systems for the protection of our nation and our allies. (AE I) In June 2014, a Navy vice

admiral, serving as director for a defense agency, personally thanked Applicant for his dedication, ingenuity, and hard work in minimizing the environmental impacts of the agency's everyday activities while creating efficiencies and saving valuable resources. (AE F)

Applicant's Enlisted Performance Reports covering the period 1995 through 1998 reflect primarily exceptional performance with recommendations that he be promoted immediately. (AE R) During both his military career and civilian career, to date, he has received numerous certificates of appreciation and military decorations. (AE G; AE H; AE J; AE K; AE L; AE R)

## Policies

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security emphasizing, "no 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 have access to such information. The President has authorized the Secretary of Defense or his designee to grant an applicant 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), as amended and modified.)

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the guidelines in SEAD 4. In addition to brief introductory explanations for each guideline, the guidelines list potentially disqualifying conditions and mitigating conditions, which are used in evaluating an applicant's eligibility for access to classified information.

An administrative judge need not view the guidelines as inflexible, ironclad rules of law. Instead, acknowledging the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. The entire process is a conscientious scrutiny of a number of variables known as the "whole-person concept." The administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a meaningful decision.

In the decision-making process, facts must be established by "substantial evidence." "Substantial evidence [is] such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all contrary evidence in the record." (ISCR Case No. 04-11463 at 2 (App. Bd. Aug. 4, 2006) (citing Directive ¶ E3.1.32.1)). "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).)

The Government initially has the burden of producing evidence to establish a potentially disqualifying condition under the Directive, and has the burden of establishing controverted facts alleged in the SOR. Once the Government has produced substantial evidence of a disqualifying condition, under Directive ¶ E3.1.15, the applicant has the burden of persuasion to present evidence in refutation, explanation, extenuation or mitigation, sufficient to overcome the doubts raised by the Government's case. 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).)

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 as well. It is because of this special relationship that the Government must be able to repose a high degree of trust and confidence in those individuals to whom it grants access to classified information. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to 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. Furthermore, "security clearance determinations should err, if they must, on the side of denials." (*Egan*, 484 U.S. at 531)

Clearance decisions must be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." (*See* Exec. Or. 10865 § 7) Thus, 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. It is merely an indication the Applicant has or has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance. In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

## Analysis

### Guideline H, Drug Involvement and Substance Misuse

The security concern relating to the guideline for Drug Involvement and Substance Abuse is set out in AG ¶ 24:

> The illegal use of controlled substances, to include the misuse of prescription and non-prescription drugs, and the use of other substances that cause physical or mental impairment or are used in a manner inconsistent with their intended purpose can raise questions about an individual's reliability and trustworthiness, both because such behavior may lead to physical or psychological impairment and because it raises questions about a person's ability or willingness to comply with laws, rules, and regulations. *Controlled substance* means any "controlled substance" as defined in 21 U.S.C. 802. *Substance misuse* is the generic term adopted in this guideline to describe any of the behaviors listed above.

Furthermore, on October 25, 2014, the Director of National Intelligence (DNI) issued Memorandum ES 2014-00674, *Adherence to Federal Laws Prohibiting Marijuana Use*, which states:

> [C]hanges to state laws and the laws of the District of Columbia pertaining to marijuana use do not alter the existing National Security Adjudicative Guidelines (Reference H and I). An individual's disregard of federal law pertaining to the use, sale, or manufacture of marijuana remains adjudicatively relevant in national security determinations. As always, adjudicative authorities are expected to evaluate claimed or developed use of, or involvement with, marijuana using the current adjudicative criteria. The adjudicative authority must determine if the use of, or involvement with, marijuana raises questions about the individual's judgment, reliability, trustworthiness, and willingness to comply with law, rules, and regulations, including federal laws, when making eligibility decisions of persons proposed for, or occupying, sensitive national security positions.

In addition, on December 21, 2021, the DNI issued Memorandum ES 2021-01529, *Security Executive Agent Clarifying Guidance Concerning Marijuana for Agencies Conducting Adjudications of Persons Proposed for Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position*, which states in part:

> [D]isregard of federal law pertaining to marijuana remains relevant, but not determinative, to adjudications of eligibility for access to classified information or eligibility to hold a sensitive position. . . .
>
> Additionally, in light of the long-standing federal law and policy prohibiting illegal drug use while occupying a sensitive position or holding a security clearance, agencies are encouraged to advise prospective national security workforce employees that they should refrain from any future marijuana use upon initiation of the national security vetting process, which commences once the individual signs the certification contained in the Standard Form 86 . . ., Questionnaire for National Security Positions.
>
> With respect to the use of CBD products, agencies should be aware that using these cannabis derivatives may be relevant to adjudications in accordance with SEAD 4. Although the passage of the Agricultural Improvement Act of 2018 excluded hemp from the definition of marijuana within the Controlled Substances Act, products containing greater than a 0.3 percent concentration of delta-9 tetrahydrocannabinol (THC), a psychoactive ingredient in marijuana, do not meet the definition of "hemp." Accordingly, products labeled as hemp-derived that contain greater than 0.3 percent THC continue to meet the legal definition of marijuana, and therefore remain illegal to use under federal law and policy. . . . [T]here is a risk that using these products may nonetheless cause sufficiently high levels of THC to result in a positive marijuana test under agency-

> administered employment or random drug testing programs. Should an individual test positive, they will be subject to an investigation under specific guidelines established by their home agency.

The guideline notes some conditions under AG ¶ 25 that could raise security concerns in this case:

> (a) any substance misuse (see above definition);
>
> (b) testing positive for an illegal drug;
>
> (f) any illegal drug use while granted access to classified information or holding a sensitive position.

Applicant was granted a security clearance in March 2018. He underwent an unobserved pre-employment urinalysis on May 14, 2018, but that test was deemed unacceptable and was rejected because the urine sample was "so far out of the normal range that Applicant would've 'been dead' for the urine to belong to him, and it was implied the urine was far too cold for the sample to have come from Applicant. As a result of a re-test on May 17, 2018, Applicant tested positive for marijuana metabolites of 296-ng/mL, exceeding the workplace drug testing guideline of 50-ng/mL (confirmatory cutoff of 15-ng/mL). AG ¶¶ 25(a), 25(b), and 25(f) have been established.

The guideline also includes examples of conditions under AG ¶ 26 that could mitigate security concerns arising from Drug Involvement and Substance Misuse:

> (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; and
>
> (b) the individual acknowledges his or her drug involvement and substance misuse, provides evidence of actions taken to overcome this problem, and has established a pattern of abstinence, including, but not limited to: (1) disassociation from drug-using associates and contacts; (2) changing or avoiding the environment where drugs were used; and (3) providing a signed statement of intent to abstain from all drug involvement and substance misuse, acknowledging that any future involvement or misuse is grounds for revocation of national security eligibility.

AG ¶¶ 26(a) and 26(b) minimally apply. The date of the camper party is seemingly in dispute, with Applicant contending that it took place in March or April 2018 – he was unsure of the actual date; while his wife thought it took place during the last weekend in April, and her friend, and her friend's husband claimed that it occurred in late April 2018. As noted above, I have taken administrative notice that the last weekend in April 2018 consisted of April 27th (a Friday) through April 29th (a Sunday). What is not in dispute are the dates of the first unobserved urinalysis (May 14, 2018) and the observed re-test (May 18, 2018) – 19 days following the latest date considered the date of the camper-party.

While he has acknowledged his "exposure" to marijuana, either through secondhand smoke or by consuming CBD-infused Jell-O shots, and he denied any knowing use of marijuana between the party-camper incident and the date of the initial drug test, he has offered no evidence other than possible scenarios and unproven suggestions of possible reasons for his positive re-test, the results of which were nearly six times the minimum required for a positive result.

Aside from the re-test results, the issues surrounding the initial rejected test create substantial doubts regarding Applicant's acknowledgement of his of actions involving drug involvement and substance abuse. It will never be known, unless a DNA analysis is performed on that test sample to see if the urine was Applicant's or it belonged to someone else. If it was not Applicant's urine, other issues arise regarding his trustworthiness and honesty. Also, the four-day delay in taking the re-test creates additional doubt if it was associated with an effort to reduce any possible THC still in his system. He has cut his ties with the camp site. He submitted a signed statement of intent to abstain from all drug involvement and substance misuse, acknowledging that any future involvement or misuse is grounds for revocation of national security eligibility. There is no evidence of Applicant ever having received drug-counseling or treatment. All of the above continues to cast doubt on his current reliability, trustworthiness, and good judgment.

**Guideline E, Personal Conduct**

The security concern relating to the guideline for Personal Conduct is set out in AG ¶ 15:

> Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness, and ability to protect classified or sensitive information. Of special interest is any failure to cooperate or provide truthful and candid answers during national security investigative or adjudicative processes. The following will normally result in an unfavorable national security eligibility determination, security clearance action, or cancellation of further processing for national security eligibility:
>
> (a) refusal, or failure without reasonable cause, to undergo or cooperate with security processing, including but not limited to meeting with a security investigator for subject interview, completing security forms or releases, cooperation with medical or psychological evaluation, or polygraph examination, if authorized and required; and
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> (b) refusal to provide full, frank, and truthful answers to lawful questions of investigators, security officials, or other official representatives in connection with a personnel security or trustworthiness determination.

The guideline also includes examples of conditions that could raise security concerns under AG ¶16:

(a) deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine national security eligibility or trustworthiness, or award fiduciary responsibilities;

(b) deliberately providing false or misleading information; or concealing or omitting information, concerning relevant facts to an employer, investigator, security official, competent medical or mental health professional involved in making a recommendation relevant to a national security eligibility determination, or other official government representative; and

(e) personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress by a foreign intelligence entity or other individual or group. Such conduct includes: (1) engaging in activities which, if known, could affect the person's personal, professional, or community standing. . . .

AG ¶¶ 16(b) and 16(e) have been established, but AG ¶ 16(a) has not been established. Applicant was terminated from his employment in May 2018 after failing two drug screenings. The initial sample was outside the normal temperature range and the re-test sample tested positive for THC. He had been granted a security clearance in March 2018. When Applicant completed his 2019 SF 86, in response to several of the questions in Section 23 – *Illegal Use of Drugs or Drug Activity – Illegal Use of Drugs or Controlled Substances*: In the last seven (7) years: (1) have you illegally used any drugs or controlled substances; (2) provide the identity of the drug or controlled substance; (3) provide an estimate of the month and year of the most recent use; and (4) was your use while possessing a security clearance? Applicant answered "yes" to the first and fourth questions; identified the drug or controlled substance as marijuana; and "estimated" the most recent use took place in March 2018. He explained that he was exposed to marijuana at a party. The SOR allegation was that Applicant falsified material facts by claiming that his claimed most recent use occurred in March 2018, whereas in truth, he used marijuana prior to his drug screenings in May 2018. Based on the evidence, and the way the SOR allegation was drafted, with the exception of the estimated date of most recent use, Applicant did not intentionally falsify his response. It is clear that the incident took place in either March or April 2018, prior to the May 2018 drug screenings.

In November 2019, during an OPM interview, Applicant contended that he was exposed to marijuana in March 2018 while attending the camper party described above. He claimed that he was exposed to secondhand marijuana smoke while at the party, and that he did not did not use marijuana at the party. The SOR allegation was that Applicant falsified material facts to the investigator by denying that he had used marijuana prior to his drug screenings in May 2018. Based on the evidence, and the way the SOR allegation was drafted, with the exception of the estimated date of most recent use, Applicant did not intentionally falsify his response, as alleged in the SOR. It is clear that the incident took place in either March or April 2018, prior to the May 2018 drug screenings.

The guideline also includes examples of conditions under AG ¶ 17 that could mitigate security concerns arising from personal conduct:

> (a) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts;
>
> (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; and
>
> (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 contributed to untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur.

None of the conditions apply. While time has passed since the 2018 camper-party, the rejected initial drug screen, and the positive re-test, Applicant has been steadfast in denying any knowing use of marijuana, and only acknowledged "exposure" to marijuana. First he attributed the positive re-test to secondhand smoke, and then he transitioned into CBD-infused Jell-O shots. His first urinalysis was rejected, and four days later his re-test was positive, with a number nearly six times the minimum required for a positive result.

**Whole-Person Concept**

Under the whole-person concept, the administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of the applicant's conduct and all the circumstances. The administrative judge should consider the nine adjudicative process factors listed at SEAD 4, App. A, ¶ 2(d):

> (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 extent to which participation is voluntary; (6) the presence or absence of rehabilitation and other permanent 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.

Under SEAD 4, App. A, ¶ 2(c), the ultimate determination of whether to grant a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept. Moreover, I have evaluated the various aspects of this case in light of the totality of the record evidence and have not merely performed a piecemeal analysis. (*See U.S. v. Bottone*, 365 F.2d 389, 392 (2d Cir. 1966); *See also* ISCR Case No. 03-22861 at 2-3 (App. Bd. Jun. 2, 2006))

There is some evidence mitigating Applicant's conduct. Applicant is a 49-year-old employee of a defense contractor. He has been serving as a property manager with his current employer since about April 2021. He was previously employed by various employers in a variety of positions, including senior supply specialist, inventory manager, security specialist, warehouse manager, helpdesk lead, and cable installer and network technician. A 1992 high school graduate, he earned college credits but no degree. He enlisted in the U.S. Air Force in April 1995 and served on active duty until April 1999, when he was honorably discharged. He served in the U.S. Air Force Reserve until he was honorably discharged as a senior airman (E-4) in May 2007. In March 2021, the U.S. Department of Veterans Affairs (VA) granted him a 70% service-connected disability rating. (AE A) He was granted a secret clearance in 1995, and again in March 2018. Former supervisors support him. Applicant's Enlisted Performance Reports covering the period 1995 through 1998 reflect primarily exceptional performance with recommendations that he be promoted immediately. During both his military career and civilian career, to date, he has received numerous certificates of appreciation and military decorations.

The disqualifying evidence under the whole-person concept is more substantial. Applicant was granted a security clearance in March 2018. He underwent an unobserved pre-employment urinalysis on May 14, 2018, but that test was deemed unacceptable and was rejected because the urine sample was "so far out of the normal range that Applicant would've 'been dead' for the urine to belong to him, and it was implied the urine was far too cold for the sample to have come from Applicant. As a result of a re-test on May 17, 2018, Applicant tested positive for marijuana metabolites of 296-ng/mL, exceeding the workplace drug testing guideline of 50-ng/mL (confirmatory cutoff of 15-ng/mL). That test result was nearly six times the minimum required for a positive test result. Based on the scientific evidence, neither secondhand smoke nor CBD would have registered a positive test result 19 days after the incident supposedly took place, unless Applicant was a frequent or daily user.

Overall, the evidence leaves me with substantial questions and doubts as to Applicant's eligibility and suitability for a security clearance. For all of these reasons, I conclude Applicant has failed to mitigate the security concerns arising from his drug involvement and substance abuse, and personal conduct. *See* SEAD 4, App. A, ¶¶ 2(d) (1) through AG 2(d) (9).

## 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: | AGAINST APPLICANT |
| Subparagraphs 1.a. and 1.b.: | Against Applicant |
| Paragraph 2, Guideline E: | AGAINST APPLICANT |

| | |
|---|---|
| Subparagraph 2.a.: | Against Applicant |
| Subparagraphs 2.b. and 2.c.: | For Applicant |

## Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

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ROBERT ROBINSON GALES
Administrative Judge