



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



In the matter of: )  
)  
) ISCR Case No. 23-02247  
)  
Applicant for Security Clearance )

**Appearances**

For Government: Tara R. Karoian, Esquire, Department Counsel  
For Applicant: Charles McCullough, III, Esquire

08/26/2024

**Decision**

GALES, Robert Robinson, Administrative Judge:

Applicant failed to mitigate the security concerns regarding drug involvement and substance misuse, and personal conduct, but mitigated the security concerns related to sexual behavior. Eligibility for a security clearance is denied.

**Statement of the Case**

On July 23, 2009, March 30, 2010, May 22, 2015, and again on September 18, 2021, Applicant applied for a security clearance and submitted a Questionnaire for National Security Positions (SF 86). On September 14, 2009, April 19, 2010, and again on July 8, 2015, an investigator from the U.S. Office of Personnel Management (OPM) interviewed him. On an unspecified date, the Defense Office of Hearings and Appeals (DOHA) issued him a set of interrogatories. He responded to those interrogatories on December 8, 2023. On December 14, 2023, the Defense Counterintelligence and Security Agency (DCSA) Consolidated Adjudications Services (CAS) 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 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.

On January 9, 2024, Applicant responded to the SOR and elected to have his case decided on the written record in lieu of a hearing. A complete copy of the Government's file of relevant material (FORM), including proposed Government Exhibits (GE) was mailed to him by DOHA on February 28, 2024, and he was afforded an opportunity, within a period of 30 days, to file objections and submit material in refutation, extenuation, or mitigation. Pursuant to ¶ E.3.1.13 of the Directive, the SOR was amended to add two allegations under Guideline D (Sexual Behavior), as well as a corresponding allegation under Guideline E. In addition to the FORM, he was furnished a copy of the Directive as well as the Adjudicative Guidelines applicable to his case. Applicant received the FORM on March 6, 2024. His response was originally due on April 5, 2024, but an extension was granted until April 19, 2024. Applicant timely responded to the FORM, and Department Counsel did not object to the submission. The case was assigned to me on July 5, 2024.

### **Findings of Fact**

In his Answer to the initial SOR, Applicant admitted two factual allegations pertaining to drug involvement and substance misuse (SOR ¶¶ 1.b. and 1.c.) but denied the remaining drug-related allegation (SOR ¶ 1.a.) as well as essentially all the personal conduct allegations (SOR ¶¶ 2.b. through 2.e.), all with substantial comments. He did not respond to one allegation (SOR ¶ 2.a.) and his silence was recorded as a technical denial of the allegation. In his Answer to the Amended SOR, Applicant made some changes to his earlier response and either admitted some personal conduct allegations (SOR ¶ 2.b.), admitted some allegations in part (SOR ¶ 2.a.), or admitted some allegations in part and denied in part (SOR ¶ 2.c. and 2.f.). With respect to the new sexual behavior allegations, he admitted one allegation in part (SOR ¶ 3.a.) and admitted the other allegation (SOR ¶ 3.b.). Applicant's admissions and comments are incorporated herein. After a complete and thorough review of the evidence in the record, and upon due consideration of same, I make the following findings of fact:

### **Background**

Applicant is a 35-year-old employee of a defense contractor for whom he has been serving as a zero trust architect since November 2022. He previously worked for other employers as a zero trust cloud infrastructure lead (April 2021 – October 2022), systems engineer (October 2020 – February 2021), and lead infrastructure subject-matter expert (June 2020 – October 2020). He is a 2007 high school graduate and reported himself to

be an aspirant for a Bachelor of Science in computer technology. He enlisted in the U.S. Air Force in March 2010, and served on active duty until June 2020, when he was reportedly discharged “under honorable conditions” as a technical sergeant (E-6). (GE 3 at 19) He joined the Air National Guard in June 2020, and served in it until December 2022. He was granted several different levels of security clearances since 2009. He has never been married but has cohabitated since October 2018. He has two children, born in 2013 and 2017.

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

### **Drugs & Personal Conduct**

On July 23, 2009, in Sec. 23: Illegal Use of Drugs or Drug Activity, of his SF 86, Applicant responded “no” to a series of questions regarding the illegal use, possession, or purchase of any controlled substance, including marijuana, during the last seven years, or ever while possessing a security clearance. He then reported that despite his responses, he had used marijuana 10 times during the estimated period starting in May 2006 to November 2008. He certified that his responses were true, complete, and correct to the best of his knowledge and belief and were made in good faith. (GE 12 at 33-34, Signature Form)

On September 14, 2009, Applicant was interviewed by an investigator with the U.S. Office of Personnel Management (OPM) during which he acknowledged his 10-time use of marijuana but could not remember the months or years as to when he did so between May 2006 and November 2008. He estimated that he smoked marijuana approximately one time every other month during that period but was sure it was no more than 10 times. The first time, in May 2006, was with a male friend who provided the marijuana and a pipe. Applicant wanted to experiment, so he took one puff on the pipe. The second time was with a girlfriend, also in 2006, and they shared a marijuana cigarette with marijuana that he got free for the occasion from a friend. The tenth time was with the same girlfriend in November 2008, when they smoked a marijuana pipe (he had three puffs) with marijuana that he provided for the occasion. He could not recall the other incidents, the individuals with whom he smoked marijuana, or how he obtained the marijuana. He acknowledged purchasing marijuana approximately four times during the period. He said he did not intend to use marijuana in the future. (GE 13 at 1-2) Applicant was granted a security clearance in approximately October 2009. (GE 8, at 3)

On March 30, 2010, when asked the identical questions in his SF 86, at Sec. 23, Applicant responded “no” to three questions but changed his response to “yes” for the question asking about the use of marijuana. He repeated his earlier response from 2009 regarding the period and frequency of such use. He certified that his responses were true, complete, and correct to the best of his knowledge and belief and were made in good faith. (GE 11 at 34-35, Signature Form) Applicant was granted a top-secret clearance in approximately June 2010. (GE 8 at 3)

On April 19, 2010, Applicant was interviewed by an OPM investigator and acknowledged his 10-time use of marijuana during the same period. He was more specific, and slightly different, regarding two of the incidents involving smoking (two puffs) of marijuana in a pipe in May 2006 provided by a male friend, and (four puffs) of marijuana in a hand-rolled cigarette provided by a girlfriend on another occasion. He could not recall the details of the other seven times he smoked marijuana. (GE 13 at 8)

On May 22, 2015, when asked similar and expanded questions in his SF 86, at Sec. 23, related to the illegal use, possession, or purchase of drugs in the last seven years, or having ever used such drugs while possessing a security clearance other than previously listed, Applicant responded “no.” He certified that his responses were true, complete, and correct to the best of his knowledge and belief and were made in good faith. (GE 10 at 30-31, Signature Form) Applicant was granted a top-secret clearance with access to secret compartmented information (SCI) in approximately October 2015. (GE 8 at 4)

On January 20, 2021, Applicant was administered a polygraph examination by Another Government Agency (AGA) and psychological reactions were noted during the questioning associated with drugs. During the post-test interview, Applicant acknowledged that from 2006 to 2010, he had smoked marijuana monthly. From 2010 to 2020, he smoked marijuana on three occasions. In June or July 2020, he purchased an unknown quantity of marijuana from a friend for \$80. His most recent use of marijuana was on January 9, 2021 – 11 days before the polygraph. On January 15, 2021, he purchased 20 Delta-8 THC gummies for \$50, and he also received a free CBD joint which he smoked in his residence that same day. He most recently consumed a gummy on January 18, 2021 – two days before the polygraph. When asked about his future intent, he initially said that he wasn’t sure if he would stop ingesting marijuana if the agency asked him to, but later said that for the sake of his job he would stop. He was found by the AGA to have “knowingly withheld this information from the forms and/or during the pre-test interview because he was afraid it would affect his status with the military as well as his processing with this agency.” (GE 5 at 3)

On September 18, 2021, when asked several questions in his SF 86, in Sec. 23, that were similar to those questions in his other SF 86s related to the illegal use of drugs or drug activity, Applicant’s responses were more revealing. In response to the question in the last seven years, “have you illegally used any drugs or controlled substances,” he reported that during the estimated periods of April 2020 and January 2021, he had “used about 1 gram of cannabis within the confines of my home, thinking it was legal due to the state that I live in, as an attempt to lower anxiety and stress that I was experiencing during those times.” He justified his actions because he felt that if he had consumed a legal substance such as alcohol, it would have required amounts that could be dangerous to his health. (GE 3 at 45-46) He acknowledged that during each such incident, he possessed a security clearance. (GE 3 at 46-47) Applicant also acknowledged that in April 2020 (estimated), while possessing a security clearance, he purchased two grams worth of cannabis. (GE 3 at 47-48) He certified that his responses were true, complete, and correct to the best of his knowledge and belief and were made in good faith.

Applicant added that he does not intend to use cannabis in the future in order to meet conditions of government employment and “I have since seen the egregious errors in my use of the illegal drug and have since found other means such as faith and meditation to cope with anxiety and stress.” (GE 3, at 46-47)

On November 15, 2021, Applicant was interviewed by an OPM investigator and acknowledged that during April 2020 and January 2021, he had used marijuana that he had obtained from an unnamed associate because he was stressed due to the pandemic. He denied ever receiving drug counseling or treatment; claimed that he no longer associates with individuals who “use drugs illegally;” and stated that he will not use drugs in the future “unless marijuana becomes federally legal.” Applicant added that he now uses prayer to combat stress. (GE 4 at 7)

On February 4, 2022, Applicant was interviewed by an OPM investigator and acknowledged that his use of marijuana in April 2020 occurred while he was in the Air Force, and his use in January 2021 occurred while he was a contractor. (GE 4 at 9) Nearly two weeks later, on February 16, 2022, a follow-up OPM interview was conducted during which Applicant claimed that he was unaware that the use of marijuana in January 2021 was against company policy. (GE 4 at 13)

On March 16, 2022, Applicant was interviewed by an OPM investigator. He repeated his statement about his 10-time use of marijuana from May 2006 to November 2008. He noted that he was “a young teenager,” under 18 years old when he used marijuana, and he did not list it on an SF 86 because it was outside of the requested timeframe and prior to his military service. Also, he was unable to recall the details of his marijuana use, or persons familiar with his use, during that period. (GE 4 at 14-15)

On December 8, 2023, when Applicant responded to the interrogatories previously issued to him by DOHA, he said his use of marijuana commenced in May 2006 and continued twice over a 9-month span, and then resumed on unspecified dates for 10 times within a 2-year span ending over 17 years ago. He stated that he had no intention of “having future use of marijuana while it is federally illegal, and it’s (sic) use negatively impacts government employment.” (GE 4 at 2-3)

In Applicant’s April 2024 response to the FORM, he essentially admitted his marijuana use was during “highly sporadic and infrequent periods” commencing in May 2006 and ending in January 2021. While he now claims that he did not understand or appreciate the seriousness of such use, he pointed out that the greatest frequency of usage was when he was much younger, and the most recent use in April 2020 and January 2021 occurred while he was suffering from great stress and anxiety. He did not explain or describe the causes for such stress and anxiety. He purportedly now acknowledges and takes responsibility for his prior drug involvement. He also claimed that “most of the minor reporting inconsistencies are the result of [his] lack of attention to detail and/or inability to appropriately recall specific date ranges.” He acknowledged that he provided information to the AGA, during his polygraph pre-test interview, that was not self-reported to DOD and should have been, regarding his marijuana use between 2010

and 2020. He also deliberately omitted material facts regarding his purchases and use of marijuana in 2020 and 2021. (Response to FORM at 8-10)

Applicant contended that he did not use marijuana in 2009 and 2010 and believes the inclusion of those years were included by the polygraph examiner by mistake, “possibly due to garbled communication during his polygraph interview.” (Response to FORM at 10) He also acknowledged that he initially denied the purchase and use of marijuana in 2020 and 2021 in his Answer to the SOR as “he did not read or examine closely enough the language of the security concern and did not realize that the security concern specifically related to his failure to be forthcoming during the pre-polygraph interview.” He acknowledged that he was not initially forthcoming with the examiner at the beginning of the polygraph session because he was extremely nervous and anxious. He regrets his lack of reporting compliance and pledges that it will never happen again. (Response to FORM at 10, 23) Applicant failed to address the post-test interview acknowledgement that from 2006 to 2010, he had smoked marijuana monthly.

In his Answer to the initial SOR, Applicant stated that he has no intention of purchasing or using marijuana “while federally illegal and negatively impacts government employment.” (GE 2 at 3) That declaration transitioned over time to a more recent statement that he understands that marijuana is prohibited under Title 21 of the United States Code, and that the legality of marijuana at the state level is irrelevant to his federal clearance; and that he now pledges to abstain from all drug involvement and substance misuse. (Response to FORM at 9)

Based on the evidence in the record, I conclude that Applicant is not a candid historian and reporter regarding his use and purchase of marijuana on a substantial number of occasions far exceeding the numbers repeatedly reported by him between May 2006 and January 2021, and that during some of those periods he was either in the Air Force (April 2020) or was a contractor (January 2021) while holding a sensitive position and/or security clearance. Moreover, because of the fluid nature of his acknowledgments regarding quantity and frequency, as well as his explanations for his failures to be open and honest about such purchase and use of marijuana, and his claimed ignorance that his involvement with marijuana was prohibited by his civilian employer, Applicant’s acknowledgment that he withheld this information from the forms and/or during the pre-polygraph test interviews because he was afraid it would affect his status with the military and his security clearance processing, is the most persuasive and honest statement he has made.

### **Personal Conduct**

Applicant’s September 2021 SF 86 also contained a series of questions in Sec. 13A – Employment Activities. One question asked his reason for leaving a particular employer, and Applicant responded, “to pursue employment opportunity with (another employer).” He responded “no” to six other questions that asked if, in the last seven years, any of the following happened to him: fired; quit after being told he would be fired; left by mutual agreement following charges or allegations of misconduct; left by mutual

agreement following notice of unsatisfactory performance; or received a written warning, been officially reprimanded, suspended, or disciplined for misconduct in the workplace, such as a violation of security policy. (GE 3 at 16-17) He certified that his responses were true, complete, and correct to the best of his knowledge and belief and were made in good faith.

The 2021 SF 86 also asked a question in Sec. 25 – Investigations and Clearance Record: “Have you EVER had a security clearance eligibility/access authorization denied, suspended, or revoked? Applicant responded “no.” (GE 3 at 51) He certified that his responses were true, complete, and correct to the best of his knowledge and belief and were made in good faith.

As noted above, when Applicant was administered the polygraph examination on January 20, 2021, psychological reactions to certain topics were noted. As a result of the polygraph and interview, on February 5, 2021, a determination was made by the AGA to rescind Applicant’s conditional access to SCI, resulting in the refusal to permit his access to SCI Facilities (SCIFs), classified networks, or classified information. It was noted that this was not a final clearance determination, and the decision to rescind cannot be appealed. Once a final clearance determination was rendered, his employer would be notified. (GE 6) In March 2021, Applicant’s supervisor notified him that his use of marijuana was against company policy and that he would need to look for another employer. (GE 4 at 8) Applicant denied that he deliberately falsified his response to the question in Sec. 13A, claiming that he does not believe he was ever “fired” from the employer. Instead, he believes he “was let go” and contends that he spoke with his former manager who purportedly confirmed that as an administrative matter, Applicant was never actually “fired.” Applicant did not submit any documentation to verify his version of the issue. He does acknowledge that he should have said that he left by “mutual agreement” after self-reporting a violation of the employer’s policy regarding the use of marijuana. Applicant contends that this was an “unintentional oversight.” (Response to FORM at 11) Despite acknowledging that his use of marijuana was a violation of company policy, Applicant continued to deny that he left his employment in March 2021 following his use of marijuana.

With regard to the inquiry into the denial, suspension, or revocation of security clearance eligibility/access, Applicant again denied intending to give a false answer. He claimed that he did not fully understand that his AGA polygraph and interviews constituted an “investigation” for SF 86 record purposes. (Response to FORM at 12) He stated, without verification, that the AGA official told him that the agency decision to rescind his access should not be reported on his next SF 86 as it did not constitute a security clearance denial or revocation. (Response to FORM at 12) In retrospect, he now understands that he should have reported that there was an access rescission.

Based on the evidence in the record, I conclude that Applicant was not candid, open, and honest regarding his termination from employment or his security clearance access rescission. Instead, he knowingly concealed, omitted, and falsified his responses in an effort to preserve his security clearance processing.

## **Sexual Behavior and Personal Conduct**

As noted above, when Applicant was administered the polygraph examination on January 20, 2021, psychological reactions to certain topics were noted, and one of those topics was criminal conduct. After the pre-test interview and the actual polygraph examination, the post-test interview was conducted. Applicant stated that in approximately 2014, while in the Air Force, he and his girlfriend – his current cohabitant and mother of his children – were both intoxicated and got into an argument because he wanted to have sex, but she did not. He physically restrained her, moved her underwear, and although she said “no” 5 to 20 times, he had forcible sexual intercourse with her – another term for “rape.” She did not report the incident to the police because at the time they had a child together. She suspected that he had cheated on her with one or two people, but he acknowledged that he had cheated on her between 5 and 15 times since 2014, with the most recent incident taking place on January 17, 2021. Applicant acknowledged that he did not disclose the information during the pre-test interview because he knew it was wrong and he was afraid it would affect his security clearance processing. (GE 5 at 4)

In Applicant’s April 2024 response to the FORM, he admitted that the incident occurred approximately one decade earlier and that it was an exercise of extremely poor judgment on his part. He claimed that he apologized and is extremely remorseful for his behavior, and that it will never happen again. Regarding his subsequent sexual affairs, he both admitted and denied the allegation and noted that neither his forcible sexual intercourse with his cohabitant nor his subsequent sexual affairs with others are reportable on any SF 86. (Response to FORM at 12) Applicant did not address why he did not mention the sexual behavior issues with the OPM investigators during his interviews or why he failed to disclose those issues during the pre-test interview with the investigator administering the polygraph examination. Applicant contends that he and his cohabitant have undergone relationship counseling and that she is aware of all his outside sexual relationships. He did not submit any documentation to verify his relationship counseling. However, his cohabitant submitted a statement claiming that he apologized to her years ago for the 2014 incident and she completely forgave him for it. With respect to the sexual affairs, he had with other women, she claimed to be fully aware of all the facts and circumstances, and she has forgiven him for his mistakes. She acknowledged that they are attending counseling sessions. (Response to FORM at 69)

Based on the evidence in the record, I conclude that following the psychological reactions noted during his polygraph examination, Applicant was finally candid, open, and honest regarding his forcible sexual intercourse with his cohabitant in 2014 and the extensive sexual affairs that he had while in a relationship with her.

## **Character References**

Several individuals, some of whom who knew him since they were in school together, some who were with him in the service, and others who have worked with him as a contractor, have stepped forward with extremely supportive comments. The Chief



Executive Officer of his current employer has worked with Applicant since 2021. Applicant has consistently delivered outstanding results, coupled with a collaborative spirit and innovative mindset, which have been instrumental in the company's success. He goes beyond his role, providing valuable insights that guide the team in deciding what information should and should not be included in program documentation due to its sensitive nature. His great integrity and unwavering professionalism are evident in his every action. (Response to FORM at 56)

Other colleagues and friends stress Applicant's honesty and reliability in all aspects of his life, and that his "commitment to integrity is truly commendable and sets him apart as a person of high moral character." "In terms of integrity, loyalty, and trustworthiness, [Applicant] exemplifies these qualities effortlessly...." (Response to FORM at 62-63, 67)

### **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 several 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 (4<sup>th</sup> 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 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:

. . . disregard 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 (SF 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 ... 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. Additionally, agencies should be aware that the Federal Drug Administration does not certify levels of THC in CBD products, so the percentage of THC cannot be guaranteed, thus posing a concern pertaining to the use of a CBD product under federal law. Studies have shown that some CBD products exceed the 0.3 percent threshold for hemp, notwithstanding advertising labels.... Therefore, there 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.

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

- (a) any substance misuse (see above definition);
- (c) illegal possession of a controlled substance, including . . . purchase;
- (f) any illegal drug use while granted access to classified information or holding a sensitive position; and
- (g) expressed intent to continue drug involvement and substance misuse, or failure to clearly and convincingly commit to discontinue such misuse.

Commencing in about May 2006 and continuing periodically or sporadically until January 2021, Applicant purchased, as well as used, marijuana – a Schedule I Controlled Substance. The marijuana was either in leaf form to be smoked in a cigarette or pipe, or Delta-8 THC CBD gummies to be eaten. During some of those periods he was either in the Air Force (April 2020) or was a contractor (January 2021) while holding a sensitive position and/or security clearance.

Applicant's variety of comments regarding future use of marijuana create some confusion regarding his true intentions. In 2009 he intended not to use cannabis in the future. He was granted a security clearance. Nevertheless, he did use marijuana again. That changed to no future use of marijuana in order to meet conditions of government employment. He was again granted a security clearance. He used it again. He was again granted a security clearance. He used it again. The next change was that he will not use drugs in the future "unless marijuana becomes federally legal." Upon being represented by an attorney, he made the final change which appears in his Response to FORM that he will abstain from all drug involvement and substance misuse. These comment variations and continued use of marijuana after submitting SF 86s reflect an equivocation or failure to clearly and convincingly commit to discontinue such misuse until now. AG ¶¶ 25(a), 25(c), 25(f), and 25(g) 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.

As noted above, as of the closing of the record, Applicant had 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. Based on his history of continued periodic or sporadic use of marijuana over the years, despite being granted security clearances, and his acknowledged (as well as disputed) concealments and/or omissions of such marijuana involvement when he was expected to abstain and subsequently reveal such involvement, it is difficult to conclude that the drug involvement was infrequent or happened so long ago, as it commenced in 2006 with inconsistent frequency estimates, and did not conclude until as recently as January 2021. Given his prohibited purchase and use of marijuana; his acknowledged failures to be candid when candor was expected; his inconsistent acknowledgments; his claimed "noted errors and oversights in his reporting of his usage;" his claimed "minor discrepancies" between his forms and interviews; and his purported "inattention to detail or faulty recollection" which always minimized or concealed his drug involvement, it is difficult to conclude that such involvement is unlikely to recur or that it does not cast doubt on his current reliability, trustworthiness, or good judgment. Also, given his repeated lack of candor, he has failed to furnish a verified pattern of abstinence, and has not submitted verifiable proof that he had disassociated himself from drug-providing associates. AG ¶ 26(a) does not apply, and AG ¶ 26(b) minimally applies.

A person should not be held forever accountable for misconduct from the past. Continued abstinence is to be encouraged, but, when balanced against his full history of marijuana use, the relatively brief period of purported abstinence is considered insufficient to conclude that the abstinence will continue, especially after so much confusion regarding his future intentions. Applicant's repeated purchase and use of marijuana for such a lengthy period, especially after being granted security clearances, 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

(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 some 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;

(c) credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other

characteristics indicating that the individual may not properly safeguard classified or sensitive information; and

(d) credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the individual may not properly safeguard classified or sensitive information. This includes, but is not limited to, consideration of:

(1) untrustworthy or unreliable behavior to include breach of client confidentiality, release of proprietary information, unauthorized release of sensitive corporate or government protected information;

(2) any disruptive, violent, or other inappropriate behavior;

(3) a pattern of dishonesty or rule violations; and

(4) evidence of significant misuse of Government or other employer's time or resources;

My discussions related to Applicant's drug involvement and substance misuse, as well as sexual behavior, are adopted herein. Applicant has a dozen years' worth of military experience while in the Air Force and National Guard as well as four years of experience as a contractor, he has submitted four SF 86s during that period, been interviewed several times by various investigators, and been polygraphed. His character references refer to his integrity and high moral character, and his current employer referred to his valuable insights that guide the team in deciding what information should and should not be included in program documents. Nevertheless, with all that experience and glowing references, under federal law he illegally purchased and used marijuana on a substantial number of occasions between May 2006 and January 2021, and during some of those periods he was either in the Air Force or was a contractor holding a sensitive position and/or security clearance.

Applicant knowingly falsified, concealed, and omitted information from various forms and failed to provide full, frank, and truthful answers to lawful questions of investigators and security officials during the pre-polygraph test interviews because he was afraid it would affect his status with the military and his security clearance processing. He continues to deny that (1) his conditional access to SCI was rescinded by AGA; and (2) he was fired from one employer despite documentary evidence to the contrary. Individuals with integrity and high moral character do not routinely violate the law by illegally using drugs, lying on forms, lying to investigators, or by having forcible sexual intercourse with someone who said "no" so many times. AG ¶¶ 16(a), 16(b), 16(c), and 16(d)(2), and 16(d)(3) have been established.

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;
- (b) the refusal or failure to cooperate, omission, or concealment was caused or significantly contributed to by advice of legal counsel or of a person with professional responsibilities for advising or instructing the individual specifically concerning security processes. 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 contributed to untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur; and
- (e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress;

None of the mitigating conditions apply. Applicant did not make prompt, good-faith efforts to correct his actions, omissions, concealments, and falsifications generally until he was confronted with them. He maintained some of his lies until he was caught by the polygraph examination, and then he fessed up. He still refers to his actions as minor, infrequent, or stale. There was nothing unique about the circumstances that resulted in his drug involvement or subsequent cover-up actions. He now acknowledges and takes responsibility for his prior drug involvement, and with few exceptions continues to deny deliberately falsifying his responses on the forms and to investigators. Despite his reputation for attention to detail, he claims most of the minor reporting inconsistencies were the result of his lack of attention to detail and/or inability to appropriately recall specific date ranges; there were errors and oversights in his reporting of his marijuana usage; and there were “minor discrepancies” between his forms and interviews. Yet, his purported “inattention to detail or faulty recollection” always minimized or concealed his drug involvement, SCI rescission, and his termination from employment.

#### **Guideline D, Sexual Behavior**

The security concern relating to the guideline for Sexual Behavior is set out in AG ¶12.



Sexual behavior that involves a criminal offense; reflects a lack of judgment or discretion; or may subject the individual to undue influence of coercion, exploitation, or duress. These issues, together or individually, may raise questions about an individual's judgment, reliability, trustworthiness, and ability to protect classified or sensitive information. Sexual behavior includes conduct occurring in person or via audio, visual, electronic, or written transmission. No adverse inference concerning the standards in this Guideline may be raised solely on the basis of the sexual orientation of the individual.

The guideline notes several conditions under AG ¶ 13 that could raise security concerns in this case:

- (a) sexual behavior of a criminal nature, whether or not the individual has been prosecuted;
- (b) a pattern of compulsive, self-destructive, or high-risk sexual behavior that the individual is unable to stop; and
- (c) sexual behavior that causes an individual to be vulnerable to coercion, exploitation, or duress.

My discussions related to Applicant's personal conduct are adopted herein. Applicant's forcible sexual intercourse with his cohabitant in 2014 despite her repeatedly saying "no" constitutes "rape" and it is sexual behavior of a criminal nature. He was not prosecuted because his cohabitant – the mother of his children – did not want to interrupt the family and have him taken away. His multiple sexual affairs, which he noted took place between 5 and 15 occasions, with the most recent one occurring in January 2021, reveal a pattern of compulsive, self-destructive, and possibly high-risk sexual behavior that he was seemingly unable or unwilling to stop until it was revealed after he took his polygraph examination. That sexual behavior – before he purportedly confessed to his cohabitant – made him vulnerable to possible coercion and exploitation. AG ¶¶ 13(a), 13(b), and 13(c) have been established.

The guideline also includes examples of conditions under AG ¶ 14 that could mitigate security concerns arising from his Sexual Behavior:

- (b) the sexual behavior happened so long ago, so infrequently, or under such unusual circumstances, that it is unlikely to recur and does not cast doubt on the individual's current reliability, trustworthiness, or judgment;
- (c) the behavior no longer serves as a basis for coercion, exploitation, or duress; and
- (e) the individual has successfully completed an appropriate program of treatment, or is currently enrolled in one, has demonstrated ongoing and

consistent compliance with the treatment plan, and/or has received a favorable prognosis from a qualified mental health professional indicating the behavior is readily controllable with treatment.

AG ¶¶ 14(b) and 14(c) have been established. The one-time forcible sexual intercourse incident Applicant had with his cohabitant occurred in 2014 – a decade ago, and such conduct was never repeated. Since his cohabitant has forgiven him for that incident, Applicant apologized for his conduct, and they are apparently participating in relationship counseling, it appears that it is unlikely to recur. His repeated sexual affairs – while not the actions of one whose reputation is honesty, integrity, trust, and high moral character, especially when he was in a “committed” relationship with his cohabitant – were strictly private, consensual, and discreet, and those incidents did not come to the surface until Applicant underwent his polygraph examination. He confessed to his cohabitant for those affairs. Moreover, Applicant has not been married, and his sexual affairs do not constitute adultery. The overall conduct – which most recently took place in 2021 – no longer casts doubt on Applicant’s current reliability, trustworthiness, or judgment.

### **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 considering 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))

I have incorporated my comments under Guideline H, Guideline E, and Guideline D in my whole-person analysis, and I have considered the factors in SEAD 4, App. A. After weighing the disqualifying and mitigating conditions under those Guidelines, and evaluating all the evidence in the context of the whole person, I conclude that Applicant proffered some mitigating evidence such as his military record, some of his employment record, and favorable character references, but that evidence is insufficient to overcome

the disqualifying conditions established under Guideline H and Guideline E. The Guideline D allegations, while serious, have been mitigated by time and other circumstances described above. He finally acknowledges and takes responsibility for his prior drug involvement, and with few exceptions continues to deny deliberately falsifying his responses on the forms and to investigators.

As noted above, despite having a reputation for attention to detail, Applicant continues to claim what he characterized as the minor reporting inconsistencies were the result of his lack of attention to detail and/or inability to appropriately recall specific date ranges; there were errors and oversights in his reporting of his marijuana usage; and there were “minor discrepancies” between his forms and interviews. Yet, his purported “inattention to detail or faulty recollection” always minimized or concealed his drug involvement, SCI rescission, and his termination from employment. He even attempted to conceal negative information during his polygraph examination, but he was finally caught. Applicant acknowledged that he withheld negative information from the forms and/or during the pre-polygraph test interviews because he was afraid it would affect his status with the military and his security clearance processing. Applicant’s long-standing lack of candor, when added to his illegal substance abuse while holding a sensitive position/security clearance, and his repeated use of marijuana after proclaiming he would not do so in the future, does little to support his eligibility for a security clearance.

Overall, the evidence leaves me with substantial questions and doubts as to Applicant’s eligibility and suitability for a security clearance. For all these reasons, I conclude while Applicant mitigated the sexual behavior security concerns, he 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. through 1.c.:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraphs 2.a. through 2.e.:	Against Applicant
Subparagraph 2.f.:	For Applicant
Paragraph 3, Guideline D:	FOR APPLICANT
Subparagraphs 3.a. and 3.b.:	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