

KEYWORD: Drugs; Personal Conduct; Criminal Conduct

DIGEST: Applicant is 30 years old, and a licensed pharmacist. She became addicted to vicodin and oxycodine after initially taking dentist prescribed vicodin for a dental condition. During that time she was a pharmacy manager with access to controlled substances. For 16 months she took from her employer's stocks these medicines for herself. When discovered by her employer, she was terminated and arrested. Then she entered an inpatient treatment program. She remains in the program and is monitored by her state's pharmacist regulatory agency. The DOHA Appeal Board remanded the case to consider a document Applicant submitted. She did not mitigate the drug involvement, personal and criminal conduct trustworthiness concerns. Her eligibility for assignment to sensitive positions is denied.

CASENO: 05-04768.h1

DATE: 05/03/2007

DATE: May 3, 2007

In re:)	
)	
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SSN: -----)	ADP Case No. 05-04768
)	
Applicant for ADP I/II/III Position)	
)	

**REMAND DECISION OF ADMINISTRATIVE JUDGE
PHILIP S. HOWE**

APPEARANCES

FOR GOVERNMENT

Braden M. Murphy, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant is 30 years old, and a licensed pharmacist. She became addicted to vicodin and oxycodone after initially taking dentist prescribed vicodin for a dental condition. During that time she was a pharmacy manager with access to controlled substances. For 16 months she took from her employer's stocks these medicines for herself. When discovered by her employer, she was terminated and arrested. Then she entered an inpatient treatment program. She remains in the program and is monitored by her state's pharmacist regulatory agency. The DOHA Appeal Board remanded the case to consider a document Applicant submitted. She did not mitigate the drug involvement, personal and criminal conduct trustworthiness concerns. Her eligibility for assignment to sensitive positions is denied.

REMAND STATEMENT OF THE CASE

The Defense Office of Hearings and Appeals (DOHA) declined to grant or continue a Applicant's application for a position of trust¹. On October 12, 2005, DOHA issued a Statement of Reasons² (SOR) detailing the basis for its decision—security concerns raised under Guideline H (Drug Involvement), Guideline E (Personal Conduct), and Guideline J (Criminal Conduct) of the Directive. Applicant answered the SOR in writing on November 2, 2005. Applicant requested her case be decided on the written record in lieu of a hearing.

On March 1, 2006, Department Counsel submitted the Department's written case. A complete copy of the file of relevant material (FORM) was provided to the Applicant. She was given the opportunity to file objections and submit material in refutation, extenuation, or mitigation. Applicant filed a response to the FORM on April 6, 2006. The Department Counsel, on April 19, 2006, objected to the response because it included a handwritten statement from Applicant's psychiatrist dated April 5, 2006. The Department Counsel objected on the basis he could not cross-examine the psychiatrist, and the offering of this statement was a surprise because the psychiatrist was not disclosed in Applicant's Answer. The case was assigned to me on April 20, 2006.

Originally, I upheld the objection and did not admit the psychiatrist's handwritten statement into evidence, and did not consider it as evidence. Subsequently, I referred to the Applicant's response in the findings of fact, meaning her written response, not the psychiatrist's letter, which Applicant referred to as a "letter of reference." Some confusion arose because Item 3 contains a November 2, 2005, letter from a pharmacist who declared Applicant was "clean and sober," the words I used in my penultimate finding of fact. The reference letter of April 5, 2006, to which the Department Counsel objects, only uses the word "sober" to describe Applicant. However, I did refer to that letter in my conclusions. The DOHA Appeal Board decided in Applicant's appeal of my decision that the document should be admitted into evidence and considered. The Board remanded the case to me to take that action. Therefore, the psychiatrist's document submitted as part of Applicant's response to the FORM is now admitted. I will consider it, but give it the weight I think it merits in this case.

Furthermore, pursuant to the Appeal Board's remand decision, I gave both parties time to submit additional arguments, and the Department Counsel time to submit rebuttal evidence. My order was prepared on March 14, 2007, and expressed to both parties. The Department Counsel submitted only additional arguments objecting to weight being given to the psychiatrist's report in a response dated March 26, 2007. Applicant had until April 11, 2007, to respond t . She did not submit any arguments or additional documents by that date and the record closed on April 12, 2007.

REMAND FINDINGS OF FACT

¹Adjudication of trustworthiness cases for ADP I, II, and III positions are resolved using the provisions of Department of Defense Directive 5220.6 (Directive). Memo from Carol A. Haave, Deputy Under Secretary of Defense for Counterintelligence and Security to DOHA Director, *Adjudication of Trustworthiness Cases* (Nov. 19, 2004)

²Pursuant to Exec. Or. 10865, *Safeguarding Classified Information within Industry* (Feb. 20, 1960), as amended and modified, and the Directive.

Applicant admitted all of the SOR allegations and they are incorporated here as findings of fact. After a complete and thorough review of the evidence in the record, and full consideration of that evidence, I make the following additional findings of fact:

Applicant is 30 years old and a licensed pharmacist since 2000. She worked for a pharmacy as a pharmacist manager, having access to all prescription and controlled substances dispensed by that pharmacy in the normal course of the pharmacy profession. This pharmacist position commenced after her graduation from college. In July 2002, her dentist prescribed vicodin as a pain reliever for an infected tooth. Applicant took one or two tablets of vicodin daily as needed to relieve pain. Soon she started taking more vicodin and by September 2002 she was using two or three tablets per day several times a week. By December 2002 she was using eight to twelve tablets daily. Her prescription having expired after the initial period, she was stealing vicodin from the pharmacy stock to feed her addiction to the controlled substance. In February 2003 she started taking oxycodone plus the vicodin because it was a more powerful combination that she enjoyed. She continued that combination until November 2003. (Items 3-5)

The pharmacy discharged Applicant in November 2003 when an audit by her employer found shortages of the prescription drugs vicodine (hydrocodone) and oxycodone. Applicant took without authority or permission numerous tablets of the vicodine (hydrocodone) from her employers stocks from about July 2002 to November 2003. She took without authority or permission the oxycodone from about February to November 2003. Applicant became addicted to these prescription medications during the 16 months she was stealing them. (Items 3-5)

At the time of her discharge, Applicant was arrested by the local police force, and placed in jail. Applicant was charged with theft, but there is no disposition from the criminal court system submitted by Applicant shown in the file. She was also charged administratively by the state pharmacy board with violation of her state's pharmacist regulatory statute. She was placed on probation by the state regulatory agency and a monitoring plan, dated November 18, 2003, created for her case. Her probation requirements include refraining from acting as a pharmacist in charge for two years, no solo practice, a 90 day suspension of practice, and refraining from administering or having any responsibility for controlled substances. Applicant also must submit periodic reports, and is on probation for 36 months, which is the minimum period for her abstinence from alcohol and drugs and in compliance with mental health treatment recommendations. The monitoring agreement is a four page written agreement Applicant signed. Her probation continues to at least May 2007. (Items 3, 6-8)

After her termination, Applicant enrolled in an in-patient narcotic treatment and rehabilitation program for about 30 days. She was successfully discharged from that program at the end of December 2003. She participates in a continuing care program, including Alcoholics/Narcotics Anonymous (AA) meetings with a sponsor, and has random urine drug screens. She had them during 2004 to the present, and passed each one. Since at least June 2004 she participates in the pharmacy recovery network program biweekly. The other week she attends the outpatient program for rehabilitation that she has been in since December 2003. The director, a pharmacist, of that program states Applicant remained clean and sober since her enrollment. (Items 3-8)

Applicant's self-described "letter of reference" from a psychiatrist dated April 5, 2006, describes Applicant only as "sober" for the past two years. Neither Applicant nor the psychiatrist explain if or when he provided treatment to her and the basis for his comments and evaluation.

There is no explanation why he is not mentioned in any of the other documents she submitted. The letter of reference is hand-written and not notarized. Applicant refers to his letter as a “letter of reference submitted on my behalf by an accredited medical professional. . .” Guideline H contains the term “credentialed medical professional” and defines it as a “physician, clinical psychiatrist, or psychiatrist.” (Items 3, 7, 8, FORM Response)

After discharge from the narcotic treatment program, Applicant obtained a job as a consulting pharmacist with another company. She continues to work there to date, and seeks a trustworthiness determination. She filed that application on May 25, 2004. (Item 4)

POLICIES

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 occupy a position . . . that will give that person access to such information.” *Department of the Navy v. Egan*, 484 U.S. 518, 527 (1988). The President has authorized the Secretary of Defense or his designee to grant applicants eligibility for access to classified information “only upon a finding that it is clearly consistent the national interest to do so.” Exec. Or. 10865, *Safeguarding Classified Information with Industry* § 2 (Feb. 20, 1960). By direction of the Under Secretary of Defense for Counterintelligence and Security, adjudications of cases forwarded to DOHA by the Defense Security Service or the Office of Personnel Management (OPM) for a trustworthiness determination shall be conducted under the provisions of the Directive. Eligibility for a position of trust is predicated upon the applicant meeting the guidelines contained in the Directive and a finding it is clearly consistent with the national interest to do so. *See* Directive ¶ 2.3. An applicant “has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his trustworthiness determination.” *See* Directive ¶ E3.1.15

The adjudication process is based on the whole person concept. Enclosure 2 of the Directive sets forth personnel security guidelines, as well as the disqualifying conditions (DC) and mitigating conditions (MC) under each guideline that must be carefully considered in making the overall common sense determination required. The decision to deny an individual eligibility to occupy a position of trust is not necessarily a determination as to the loyalty of the applicant. *See* Exec. Or. 10865 § 7. It is merely an indication that the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a such a determination.

In evaluating the trustworthiness of an applicant, the administrative judge must also assess the adjudicative process factors listed in ¶ 6.3 of the Directive. Those assessments include: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, and the extent of knowledgeable participation; (3) how recent and frequent the behavior was; (4) the individual’s age and maturity at the time of the conduct; (5) the voluntariness of participation; (6) the presence or absence of rehabilitation and other pertinent behavioral changes; (7) the motivation for the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence (*See* Directive, Section E2.2.1. of Enclosure 2). Because each case presents its own unique facts and circumstances, it should not be assumed that the factors exhaust the realm of human experience or that the factors apply equally in every case. Moreover, although adverse information concerning a single condition may not be sufficient for an unfavorable

determination, the individual may be disqualified if available information reflects a recent or recurring pattern of questionable judgment, irresponsibility, or other behavior specified in the Guidelines.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that disqualify, or may disqualify, the applicant from being eligible to occupy a position of trust. The Directive presumes a nexus or rational connection between proven conduct under any of the disqualifying conditions listed in the guidelines and an applicant's trustworthiness suitability. See ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996). All that is required is proof of facts and circumstances that indicate an applicant is at risk for mishandling classified information, or that an applicant does not demonstrate the high degree of judgment, reliability, or trustworthiness required of persons handling classified information. ISCR Case No. 00-0277, 2001 DOHA LEXIS 335 at **6-8 (App. Bd. 2001). Once the Government has established a *prima facie* case by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. See Directive ¶ E3.1.15. An applicant "has the ultimate burden of demonstrating that is clearly consistent with the national interest to grant or continue his trustworthiness determination. ISCR Case No. 01-20700 at 3 (App. Bd. 2002). "Any doubt as to whether access to classified information is clearly consistent with national security will be resolved in favor of the national security." Directive ¶ E2.2.2

Based upon a consideration of the evidence as a whole, I find the following adjudicative guidelines most pertinent to an evaluation of the facts of this case:

Guideline H: Drug Involvement: *The Concern: Improper or illegal involvement with drugs, raises questions regarding an individual's willingness or ability to protect classified information. Drug abuse or dependence may impair social or occupational functioning, increasing the risk of an unauthorized disclosure of classified information. E2.A8.1.1*

Guideline E: Personal Conduct: *The Concern: Conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations could indicate that the person may not properly safeguard classified information. E2.A5.1.1*

Guideline J: Criminal Conduct: *The Concern: A history or pattern of criminal activity creates doubt about a person's judgment, reliability and trustworthiness. E2.A10.1.1*

REMAND CONCLUSIONS

The Government established by substantial evidence and Applicant's admissions each of the allegations in the SOR. I have carefully considered all the facts in evidence and the legal standards.

Drug Involvement Guideline H: Based on all the evidence, the Disqualifying Conditions (DC) 1 (any drug abuse of a controlled substance, including use of a legal drug that deviates from approved medical direction. E2.A8.1.2.1) and DC 3 (Diagnosis by a credentialed medical professional (a psychiatrist, physician, or clinical psychologist) of drug dependence (E2.A8.1.2.3) apply. Applicant abused vicodin and oxycodine for about a 16-month period in 2002 and 2003. Her

psychiatrist in his submission attached to Applicant's FORM Response diagnosed her with chemical dependency. However, because his letter is only one of reference and not a properly drafted psychiatric opinion, Applicant failed to meet her burden of persuasion that this letter should support any Mitigating Conditions or should be given any weight. She did not show this psychiatrist treated her, or based his letter on personal observations in a professional consultation. The psychiatrist does not provide a foundation for his conclusions and recommendations. More importantly, he does not provide his professional credentials. I conclude the letter is inadequate and does not comport with requisite legal standards for a professional's opinion. Thus, I give it no weight and it is not persuasive.

There are no Mitigating Conditions (MC) applicable under this guideline. Her drug involvement is recent and for that reason Applicant remains on probation from her state regulatory authority until at least May 2007. Her drug involvement was not isolated or aberrational. She may assert that she has no intent to abuse drugs in the future, but she is prohibited from dispensing narcotics under the probationary terms and has not made that declaration in a hearing where her credibility can be judged, and her testimony tested by cross-examination. She continues in an aftercare program, so she has not completed it. There is no favorable prognosis yet and it is too early to determine if abuse will recur. She has a history of a serious drug abuse problem and has not met her burden of proof and persuasion, which is to demonstrate that she has resolved her problems beyond her current rehabilitation environment. I also considered the fact she did not enter a rehabilitation program until after she was apprehended and terminated from her job. I conclude this guideline against Applicant.

Personal Conduct Guideline E: Regarding the personal conduct concern, DC 1 (Reliable, unfavorable information provided by associates, employers, coworkers, neighbors, and other acquaintances. E2.A5.1.2.1), DC 4 (Personal conduct that increases an individual's vulnerability to coercion, exploitation or duress, such as engaging in activities which, if known, may affect the person's personal, professional, or community standing or render the person susceptible to blackmail. E2.A5.1.2.4), and DC 5 (A pattern of dishonesty or rule violations, including violation of any written or recorded agreement made between the individual and the agency. E2.A5.1.2.5). Applicant's employer terminated her because she stole vicodin and oxycodine from the pharmacy stocks for her own use. Theft of that nature violates a basic tenet of the pharmacy profession, and is a serious breach of trust. Her addiction and thefts make her vulnerable to exploitation, coercion, and duress.

No MC apply under this guideline. Applicant engaged in a continued course of illegal conduct while in a position of authority that allowed her to steal controlled substances from her employer to feed her drug abuse problem. The trustworthiness concern under the personal conduct guideline is met by the totality of Applicant's misconduct when she was a pharmacist in charge and stole drugs to feed her addiction. She has not met her burden of proof and persuasion on the facts she submitted in writing. Therefore, I conclude this concern against Applicant.

Criminal Conduct Guideline J: The criminal conduct concern is that she was arrested in November 2003 for stealing vicodin and oxycodine from her employer's stocks of controlled substances. DC 1 (Allegations or admissions of criminal conduct, regardless of whether the person was formally charged. E2.A10.1.2.1) and DC 2 (A single serious crime or multiple lesser offenses. E2.A10.1.2.2) apply. Applicant was arrested for taking from her employer controlled medical

substances that she needed to feed her drug addiction.

Applicant has not met her burden of proof and persuasion on this guideline either. Her criminal conduct remains unresolved by the local prosecutor. Applicant has the burden of showing the criminal case was resolved and the result. The conduct is recent, particularly because she remains in a rehabilitation mode. Her pharmacist work history is not long enough or free of misconduct to apply this or any MC here. These crimes were not isolated. There is insufficient evidence of successful rehabilitation because Applicant has not completed the treatment program nor established a significant period of abstinence subsequent to being released from it. Therefore, I conclude no MC apply and conclude this guideline against Applicant.

Whole Person Concept: The “whole person concept” looks at the factors listed in paragraph 3 of the **POLICY** section of this decision. I considered Applicant’s age and high level of professional education. I considered her misconduct went on for 16 months until her wrongdoing was discovered by her employer. Applicant is intelligent enough to know that she had an addiction, was committing illegal and untrustworthy acts against her employer and her profession’s standards of conduct, but never took action to address her problems until she was caught. There was great potential for pressure, coercion, exploitation and duress while she was stealing the two prescription medicines she needed to feed her addiction. Applicant has not dissuaded me that there is strong likelihood of recurrence based on the duration of her addiction and the length of time she stole controlled substances. Considering all of the factors, I conclude the “whole person concept” against Applicant.

REMAND FORMAL FINDINGS

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

Paragraph 1. Guideline H: AGAINST APPLICANT

 Subparagraph 1.a: Against Applicant

 Subparagraph 1.b: Against Applicant

 Subparagraph 1.c: Against Applicant

Paragraph 2. Guideline E: AGAINST APPLICANT

 Subparagraph 2.a: Against Applicant

Paragraph 3. Guideline J: AGAINST APPLICANT

 Subparagraph 3.a: Against Applicant

REMAND DECISION

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 assignment to sensitive duties. Her eligibility for assignment to sensitive positions is denied.

Philip S. Howe
Administrative Judge