

DATE: July 12, 2006

In re:

SSN: -----

Applicant for ADP I/II/III Position

ADP Case No. 05-04768

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, a licensed pharmacist, and enrolled in a drug dependence rehabilitation program for the past 32 months. She became addicted to vicodin and oxycodine after she initially took vicodin prescribed by her dentist for a dental condition. During that time she was the pharmacy manager with access to controlled substances. For 16 months she took from her employer's stocks the drugs she self-prescribed 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. She did not mitigate the drug involvement, personal and criminal conduct trustworthiness concerns. Her eligibility for assignment to sensitive positions is denied

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 trust⁽¹⁾. On October 12, 2005, DOHA issued a Statement of Reasons⁽²⁾ (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 objected to the response because of the inclusion in the response of a handwritten statement from Applicant's psychiatrist dated April 5, 2006. The Department Counsel objected on the basis she 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. I uphold the objection and do not admit the psychiatrist's handwritten statement into evidence, and will not consider it as evidence. The case was assigned to me on April 20, 2006.

FINDINGS OF FACT

Applicant's admissions to all of the SOR allegations 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 so that 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 taking vicodin from the pharmacy stocks to feed her desire for 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 usage 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 taking 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 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 herself in a narcotic treatment and rehabilitation program as an in-patient 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 of that program states Applicant remained clean and sober since her enrollment. (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*

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.

Based on all the evidence, the Drug Involvement 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.

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 state she has no intent to abuse drugs in the future, but she is prohibited from dispensing narcotics under the probation 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 reoccur. She has a history of a serious drug abuse problem and has not met her burden of proof and persuasion she has solved or controlled it outside her current rehabilitation environment. I conclude this guideline against Applicant.

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 procedure of the pharmacy profession. Her addiction and thefts made her very vulnerable to exploitation, coercion, and duress.

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

The criminal conduct concern is that she was arrested in November 2003 for theft in her actions of taking 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 stole from her employer the controlled medical substances 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, and also she started self-prescribing and stealing controlled substances in her first pharmacist employment position. 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 no evidence of successful rehabilitation because Applicant is still in the rehabilitative process and has not completed it. Therefore, I conclude no MC apply and then conclude this guideline against Applicant.

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

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. Eligibility is denied.

Philip S. Howe

Administrative Judge

1. Adjudication 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)

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