

DATE: January 24, 2007

In re:

SSN: -----

Applicant for ADP I/II/III Position

P Case No. 06-11779

DECISION OF ADMINISTRATIVE JUDGE

SHARI DAM

APPEARANCES

FOR GOVERNMENT

Julie R. Edmunds, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant is 36 years old and works for a company that administers government health care benefits. From approximately 1996 until 2004, he used cocaine between 40 and 100 times. He voluntarily requested an evaluation for substance abuse in 2004, and was diagnosed as cocaine dependent. However, he did not complete the recommended rehabilitation program or provide sufficient evidence to document abstinence. He failed to mitigate the trustworthiness concerns raised by his drug involvement. His eligibility for assignment to a sensitive position is denied.

STATEMENT OF THE CASE

On October 25, 2004, Applicant submitted a public trust position questionnaire (SF-85P). The Defense Office of Hearings and Appeals (DOHA) declined to grant an ADP I/II/III position for Applicant. As required by Department of Defense Regulation 5200.2-R, (Jan. 1987), as amended (Regulation), and Department of Defense Directive 5220.6, ¶ E3.1.2 (Jan. 2, 1992), as amended (Directive), DOHA issued a Statement of Reasons (SOR) on August 25, 2006, detailing the basis for its decision-trustworthiness concerns under Guideline H (drug involvement) of the Directive.

In a sworn statement, dated September 20, 2006, Applicant responded to the SOR allegations and requested a hearing. On October 16, 2006, this case was assigned to me. A Notice of Hearing was issued on November 9, 2006, setting the case for hearing on November 28, 2006. At the hearing Department Counsel introduced Government Exhibits (GX) 1-3 into evidence without objections. Applicant testified in his case and introduced Applicant Exhibits (AX) A-B into evidence without objections. DOHA received the hearing transcript (Tr.) on December 8, 2006.

PROCEDURAL ISSUES

Prior to the commencement of the hearing Department Counsel filed a Motion to Amend the SOR as follows:

In subparagraph 1.d., replace "45 days extra duty, 45 days restriction" with "30 days extra duty, 30 days restriction." Applicant did not object to the Motion and I granted it.

FINDINGS OF FACT

Based on the entire record, including Applicant's admissions in his Answer to the SOR and at the hearing, I make the following additional findings of fact:

Applicant is 36 years old and has a seven-year-old child, whom he supports. After high school, he enlisted in the Army where he served from June 1988 until July 1992, which included nine months in Desert Storm. (Tr. 12-14) Shortly after entering the Army (in November), he was charged with possessing and using cocaine after a random drug screen tested positive for cocaine. He admitted he had smoked a cocaine-laced cigarette the night before at a party. He claimed he never used cocaine before that incident. He received a Field Grade Article 15 punishment, which included 30 days extra duty, 30 days restriction, and forfeiture of \$335 for two months. When he separated from the service in 1992, he received an honorable discharge.

After returning home in 1992, Applicant began working as a computer specialist for a private telemarketing firm. (Tr. 15) He left the company in August 2004 as a result of the change in the laws affecting telemarketing. In October 2004, he began his present position as a customer service representative for a company that administers a government health insurance plan. (Tr. 20)

In between the time Applicant left his former position in August, and started his new job in October, he voluntarily entered a Veterans Administration (VA) substance abuse program for an evaluation for cocaine addiction. (Tr. 17) Beginning in 1996, he started having unsettling dreams that he attempted to manage by using cocaine to stay awake. The dreams occurred about twice a month. He estimated that he purchased and used cocaine 40 to 100 times from 1996 until July 2004 as a sleep deterrent, and not for social purposes. (Tr. 16) After being evaluated, the health care providers at the VA diagnosed him as cocaine dependent and recommended inpatient treatment. (Tr. 19) He attended the first two months of inpatient treatment and the outpatient program from the end of September to the middle of November 2004. He stopped participating in the program because he began his current job at the end of October, and it was incompatible with his work schedule. He also thought he was "okay enough to stop going." (Tr. 20) He has not participated in any sobriety program since that time and asserted he has not used cocaine since August 2004, when he sought an evaluation. (Tr. 21) Applicant continues to have sleep related problems, sleeping only three or four hours a night. He has not obtained additional medical assistance because he does not believe it will help him. (Tr. 22)

Applicant stated that as a former soldier he would never divulge sensitive information relating to military personnel. (Tr. 26) He has worked in the area of information systems for 13 years and has been careful with the information that comes to his attention. (Tr. 9) He has an apartment, likes his current job, is paying his child support, and would like to attend the local college. (Tr. 29, 34) He has some direction in his life. (Tr. 39) He has not been involved in any criminal incidents related to drugs other than the 1988 charge. (Tr. 31)

Applicant's performance evaluations from October 2004 to December 2005 indicate that he meets company expectations in most categories and exceed expectations in a couple areas. (AX A). His supervisor credits him with being dependable and trustworthy. (AX B)

POLICIES

Positions designated as ADP I or ADP II are classified as sensitive positions. Regulation ¶AP10.2.1. ADP III positions are nonsensitive positions. Regulation AP102.3.1. By memorandum dated November 19, 2004, the Deputy Under Secretary of Defense for Counterintelligence and Security directed DOHA to resolve all contractor cases submitted for trustworthiness determinations, including ADP I, II, and III, under the Directive. Thus, even though they are nonsensitive positions, ADP III cases are treated in the same way and adjudicated under the same guidelines and procedures as ADP I and II cases.

"The standard that must be met for . . . assignment to sensitive duties is that, based on all available information, the person's loyalty, reliability, and trustworthiness are such that . . . assigning the person to sensitive duties is clearly consistent with the interests of national security." Regulation ¶ C6.1.1.1. Appendix 8 of the Regulation sets forth the adjudicative policy, as well as the disqualifying conditions (DC) and mitigating conditions (MC) associated with each

guideline. DoD contractor personnel are afforded the adjudication procedures contained in the Directive. Regulation ¶ C8.2.1.

Based upon a consideration of the evidence, the following adjudicative guideline is pertinent to an evaluation of this case:

Guideline H: Drug Involvement: A trustworthiness concern arises when an individual is involved with the improper or illegal use of drugs, which raise questions about one'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.

CONCLUSIONS

I considered all of the facts in evidence and the application of the appropriate legal standards, including the "whole person" concept, and concluded the following with respect to the allegations set forth in the amended SOR:

Guideline H: Drug Involvement

The Government raised a potential disqualification under disqualifying condition (DC) 1 (*Any drug abuse*), which includes cocaine. Applicant admitted he used cocaine in 1988, and between 40 and 100 times from 1996 until August 2004.

The Government having raised a trustworthiness concern, the burden shifted to Applicant to mitigate or rebut the allegations. After reviewing the mitigating conditions (MC) under this guideline, I conclude MC 1 (*The drug involvement was not recent*), and MC 3 (*A demonstrated intent not to abuse any drugs in the future*), provide limited mitigation. Applicant stated that he has not used cocaine for two years, is fulfilling his child support obligations, has some direction, and is performing well at his job, which he contends are factors demonstrating his decision not to use drugs over the past two years. While those factors are significant and support the application of two mitigating conditions, they are insufficient to overcome the Government's present concern, given Applicant's extensive use and purchase of cocaine over an eight-year history. Consequently, I considered the remaining MC's, and concluded they do not apply. MC 2 (*The drug involvement was an isolated or infrequent event*) does not provide additional mitigation because Applicant used cocaine in 1988, and on numerous occasions from 1996 until August 2004, which cannot be construed to be isolated or infrequent. Although the VA recommended he participate and (and presumably complete) a substance abuse program, he stopped attending after approximately four months; hence, MC 4 (*Satisfactory completion of a drug treatment program prescribed by a credentialed medical professional*), is not applicable.

Whole Person Analysis

In addition to evaluating the disqualifying and mitigating conditions under each guideline, the adjudicative process requires thorough consideration and review of all available, reliable information about the applicant, past and present, favorable and unfavorable, to arrive at a balanced decision. Directive ¶ E.2.2.2. describes the essence of scrutinizing all appropriate variables in a case as the "whole person concept." In evaluating the disqualifying and mitigating conduct of the applicant, an administrative judge should consider: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct; (3) the frequency and recency of the conduct; (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 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

I considered the totality of the evidence in view of the "whole person" concept, including Applicant's credibility and demeanor while testifying, his candid testimony about his cocaine use and voluntary submission for a substance abuse evaluation. I considered the fact that he first tried cocaine in 1988, and then began using it frequently and extensively from 1996 through July or August 2004. I gave significant weight to the fact that he was diagnosed as cocaine dependent, but decided not to complete the recommended substance abuse program or participate in ongoing rehabilitative programs supportive of sobriety because it was not convenient or necessary. I also gave great weight to his testimony that he continues to experience sleep problems (that he previously managed with cocaine), and chooses not to

seek medical treatment. While I find his accomplishments over the last two years commendable, I am not convinced that an eight-year addiction can be managed without competent medical assistance and participation in programs dedicated to maintaining abstinence. I suspect he held the same belief when he sought help in 2004. Until he presents independent corroboration from a credentialed health care provider, documenting his assertions that he is drug free and has a good prognosis for remaining abstinent in the future, I am not sufficiently persuaded that he is capable of maintaining abstinence. I am concerned there is a strong likelihood that he will relapse into his former behaviors, especially in view of his current untreated sleep problems. Hence, Applicant did not mitigate those security concerns raised by his drug involvement. Accordingly, Guideline H is concluded against him.

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 as follows:

Paragraph 1: Guideline H (Drug Involvement) AGAINST APPLICANT

Subparagraphs 1.a. -d: Against Applicant

DECISION

In light of all of the circumstances presented by the record in this case, it is clearly not consistent with the national interest to grant Applicant eligibility for assignment to sensitive duties. His application for eligibility is denied.

Shari Dam

Administrative Judge