

DATE: March 30, 2007

In re:

SSN: -----

Applicant for ADP I/II/III Position

ADP Case No. 06-16576

ECISION OF ADMINISTRATIVE JUDGE

PHILIP S. HOWE

APPEARANCES

FOR GOVERNMENT

D. Michael Lyles, Esq., Department Counsel

FOR APPLICANT

Scott B. Roberts, Esq.

SYNOPSIS

Applicant is 29 years old, unmarried, and works as a claims processor for a defense contractor in the medical services industry. She suffered in the past from a medical condition that caused her to become addicted to prescription painkillers, resulting in multiple medical delinquent debts, two misdemeanor criminal charges, and several rehabilitation treatments. Applicant mitigated the financial considerations, drug involvement, personal conduct, and criminal conduct trustworthiness concerns. Eligibility for an ADP I/II/III position is granted.

STATEMENT OF THE CASE

The Defense Office of Hearings and Appeals (DOHA) declined to grant or continue a position of trust for Applicant⁽¹⁾. On August 25, 2006, DOHA issued a Statement of Reasons⁽²⁾ (SOR) detailing the basis for its decision-trustworthiness concerns raised under Guideline F (Financial Considerations), Guideline H (Drug Involvement), Guideline E (Personal Conduct), and Guideline J (Criminal Conduct) of the Directive. Applicant answered the SOR in writing on September 22, 2006 and elected to have a hearing before an administrative judge. The case was assigned to me on December 18, 2006. On February 1, 2007, I convened a hearing to consider whether it is clearly consistent with the national interest to grant or continue a trustworthiness determination for Applicant. The Government and the Applicant submitted exhibits that were admitted into evidence. The Government moved to amend the SOR. Applicant had no objection to the amendment. I granted the motion. Applicant answered the amended allegations on the record. DOHA received the hearing transcript (Tr.) on February 13, 2007.

FINDINGS OF FACT

Applicant's admissions to the SOR allegations are incorporated 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 29 years old, unmarried, and will receive her college degree in December 2007. She has worked on this degree since she graduated from high school in 1995, but financial and health reasons have delayed her graduation. Presently, she works full-time as a claims processor for a defense contractor in the health care business. She earns \$12.67 hourly. She has worked in this job for the past two and one-half years. Her job performance is rated at and above expectations in all categories. Her supervisor and a co-worker rate her highly as an employee and colleague for her competency and knowledge, plus her work ethic. Her sister's statement explains Applicant works while attending college, and is a very caring and trustworthy person. Applicant currently works part-time as a group fitness instructor for \$56 monthly. She applied for a third job as an assistant track coach for \$1,200 over four months of work. (Tr. 23-26, 63-65, 73-76, 91, 96, 133-145; Exhibits 1, A-C, E)

Applicant suffered from chronic pancreatitis since the summer of 1995. She had an operation in May 1996 to relieve her pain from this condition. The operation enlarged the ducts in her pancreas to help drainage. After the surgery, she continued to have pain and her physician prescribed pain relievers for her. She became addicted to them, receiving prescriptions from a pain clinic and other treating physicians between 1996 and 2001. The pain she suffered affected her ability to attend college classes, and she dropped out of college. When she did that her medical insurance ceased. She was not covered by her parents' insurance, either. She subsequently incurred various medical bills that remain delinquent today. (Tr. 41-50, 8, 104; Exhibit 2)

The Amended SOR lists 28 delinquent debts owed by Applicant. She incurred these debts between 1995 and 2004. Of those delinquent debts, 23 are medically-derived debts for treatments Applicant received since 1995. The remaining five delinquent debts (subparagraphs 1.a. (\$1,379), 1.h. (\$53.21 for a returned check), 1.j. (\$636 for a clothing store credit card), 1.o. (\$112 for a telephone bill), and 1.p. for \$107 owed for a purchase) are credit card debts or other non-medical debts. All 28 delinquent debts total \$18,918, of which five debts exceed \$500 each and total \$3,256. Of the remaining debts, 17 of them are under \$500 each and total \$2,011. Applicant's wages are garnished for the payment of the delinquent debts owed to two medical facilities, though Applicant could not remember which debts they were. Applicant claims she repaid the debt in SOR subparagraph 1.n. to a hospital for a judgment of \$3,083. Her latest pay statement ending February 3, 2007, shows a garnishment amount of \$167.59. The statement also shows Applicant now has medical insurance through her employer. Her net pay in this statement is \$600.88. Her monthly expenses are about \$750. Her total net income monthly is between \$1,200 and \$1,300. She has one credit card with a balance of \$120. She tries to pay more than the minimum payment each month to repay it faster and makes a payment each month so the credit card is current. Applicant did not have a regular repayment plan for her debts. She pays what money she can at the end of each month. Her budget proposal indicates that s when her current dental bill of \$374 is paid in February 2007 she will have about \$400 monthly available to repay other delinquent debts. She lives with her sister, and shares monthly expenses, including paying half of her sister's mortgage payment. Because the SOR allegations regarding the medical provider debts are not listed specifically by each medical provider, Applicant could not identify other creditors among those she may have repaid. (Tr. 24-44; Exhibits 3-5, E)

Applicant received residential treatment for her prescription drug addiction from February 1, 2001, to early April 2001. She also spent three to four days in detoxification treatment for narcotics withdrawal at a local hospital from July 25, 2001. She was treated at another hospital for narcotic withdrawal from July 31, 2001, to August 1, 2001 and then, entered a residential treatment program from August 1, 2001 to August 31, 2001. She did not use prescription pain medication again until she relapsed sometime in 2003. She then entered another 30-day residential program on August 29, 2003, and successfully completed it. She has not used prescription drugs in an addictive manner since October 2003. Her diagnosis for these treatments was polysubstance abuse and opiate dependency by a certified alcohol and drug addiction counselor in September 2003. A physician signed the discharge diagnosis from the drug recovery program in September 2003. He diagnosed Applicant as having polydrug dependence and withdrawal syndrome and gave her a guarded prognosis because of the manipulative way in which she obtained prescription medications. Since then, Applicant returned to college to get her degree, remained free of prescription pain drugs, been employed regularly, and has no desire to resume using prescription painkillers. (Tr. 44-52, 79, 80-82, 88-90, 104-121; Exhibit 2, 7-9, F, Answer)

Applicant was charged with obtaining prescription drugs by fraud and deception on March 1 and 3, 2001. She and a friend went to an urgent care facility at a local hospital, claiming Applicant's friend needed pain medication. Applicant did not obtain medication at that time. She obtained pain medications from her dentist when complaining of pain for a root canal. On these occasions she would present her friend or herself to physicians with medical problems that seemed

to need prescription painkillers to provide relief. She and her friend then divided the prescribed drugs and used them. She was convicted of the misdemeanor offenses on December 14, 2001. She received conditional discharge of those offenses, with nine months probation, 30 hours of community service, and a fine of \$50 as her conditions. She successfully completed her probation. She found it useful because she learned to be more accountable for her actions while on probation. (Tr. 56-60, 69-71, 79, 80; Exhibits 2, 7, 8, D)

Applicant was charged in April 2002 for stealing a physician's prescription pad on July 12, 2001, and writing herself prescriptions. This charge of theft of moveable property occurred in another county different from the fraud charges of March 2001. She was convicted on August 27, 2002, of this charge, and was sentenced on September 6, 2002, to conditional discharge with 12 months probation. She successfully completed this probation. (Tr. 56-60, 69-71, 81; Exhibits 2, 9, D)

Applicant completed a Questionnaire for Public Trust Positions (QPT) on October 18, 2004, and resigned it on November 16, 2004. She signed the certification that her answers are true and correct. Applicant also signed a statement given to a Government investigator on March 31, 2005, again certifying that her statement was true and complete. In her QPT, in answer to Question 20 (*In the last 7 years, have you been arrested for, charged with, or convicted of any offenses?*) and her investigative statement she only disclosed the July 2001 theft of moveable property charge. She disclosed she received probation on this charge. She did not disclose the March 2001 incident and subsequent charges specifically in the QPT or the statement. She claims she intended the one theft disclosure to include the other charges on her QPT. She further claims she does not remember the Government investigator asking her about any additional charges in March 2005, but she indicated in her statement that she did not have any more theft charges to report. Her statement discusses her visits to various physicians in several towns to obtain prescriptions to feed her addiction. The police affidavit in the March 2001 fraud case describes similar travels to obtain prescription drugs. (Tr. 52-55, 82-89; Exhibits 1, 2, 7)

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 F: Financial Considerations: *The Concern: An individual who is financially overextended is at risk of having to engage in illegal acts to generate funds.* E2.A6.1.1

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

"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)

CONCLUSIONS

Financial Considerations Applicant has multiple medical-related delinquent debts. She incurred them when she had her addiction to prescription painkilling drugs and no health insurance. She did not have a plan to repay these debts because she was using her income to pay monthly living expenses. She has not incurred any additional debt or used credit cards excessively or irresponsibly. By garnishment and using surplus cash at the end of the month from her paycheck, she has repaid at least three debts. She testified she paid some of the debts, but could not identify them because of the non-specific listing in the SOR. Disqualifying Conditions (DC) 1 (A history of not meeting financial obligations. E2.A6.1.2.1), and DC 3 (Inability or unwillingness to satisfy debts. E2.A6.1.2.3) apply.

After her deductions, Applicant earns about \$1,300 monthly. She has a small part-time job teaching fitness that pays her about \$56 monthly. Her sister is helping her get a job as an assistant track coach at the high school where she teaches

that will pay Applicant \$1,200 for four months work. Her budget and other documents, submitted after the hearing, note that she will use her 2006 tax refund to repay certain debts, leaving her with about \$400 per month to pay other debts after her current dental bill is paid in February 2007. If she adheres to this plan, she could have 17 small delinquent debts repaid within five months, representing more than half of the total number of debts listed in the SOR. Applicant is now focused on paying her delinquent debts because her life has stabilized, she has health insurance from her employer, and she has a steady income. The delinquent debts were incurred between 1995 and 2004, for medical treatments, and some of them were reduced to judgment or referred for collection as late as 2006. During that time period Applicant frequently did not have medical insurance. Her pancreatic pain made her drop out of college at times, and her employment record in Exhibit 1 shows a pattern of low-paying jobs that would not generate the income necessary to pay these bills. Applicant will graduate from college in December 2007, and perhaps her income will increase to enable her to repay these debts faster. Based on these facts, Mitigating Conditions (MC) 3 (The conditions that resulted in the behavior were largely beyond the person's control, that is, her chronic pancreatitis and chemical addiction to the prescription painkillers given her by her physicians. E2.A6.1.3.3) and MC 6 (The person initiated a good-faith effort to repay overdue creditors or otherwise resolve debts. E2.A6.1.3.6) apply.

Drug Involvement Applicant was addicted to prescription painkillers. She took them originally to relieve pain due to chronic pancreatitis, but soon became dependant on them. She used legal drugs in a manner that deviated from the approved medical purpose. In September 2003 a certified alcohol and drug addiction counselor and a physician diagnosed Applicant with polydrug dependence and withdrawal syndrome, and gave her a guarded prognosis based on her past behavior techniques for obtaining prescription drugs. She also was convicted twice in 2001 of offenses relating to her fraudulent methods to obtain extra painkillers to feed her addiction. DC 1 (Any drug abuse. E2.A8.1.2.1) and DC 3 (Diagnosis by a credentialed medical professional, a physician in this case, of drug dependence. E2.A8.1.2.3) apply.

Applicant's drug dependence ceased four years ago.. She has not abused prescription drugs since 2003 and has no desire to resume using them. She completed in-patient and out-patient programs for drug rehabilitation in 2001 and 2003. She has not relapsed from that treatment in four years. She also lives with her sister, who observes her daily and who will work with her as a track coach at a high school. Her mother also works with her at the same employer and maintains daily contact with her. MC 1 (The drug involvement was not recent. E2.A8.1.3.1), MC 3 (A demonstrated intent not to abuse drugs in the future. E2.A8.1.3.3), and MC 4 (Satisfactory completion of a prescribed drug treatment program, including rehabilitation and aftercare requirements, without recurrence of abuse, and a favorable prognosis by a credentialed medical professional. E2.A8.1.3.4) apply. While her prognosis four years ago was guarded, she has complied with all recommendations, and the manipulative behavior upon which the physician based his prognosis has not been repeated.

Personal Conduct Applicant specifically revealed only her second offense in 2001, the theft of moveable property charge, on her QPT in Question 20 in 2004. In her 2005 statement to the Government investigator, she disclosed that charge by name. The Government is concerned she did not disclose in both documents her earlier charges in 2001 of obtaining prescription drugs by fraud. However, her statement does describe those activities, though not by offense name. For that information to have been included in the statement given to the Government investigator, Applicant must have discussed it with that investigator. Her QPT answer was "yes" and she listed a contemporaneous offense. She explains the absence of the second offense by her intent to include both offenses under the "theft" designation she used in her answer to Question 20. Her view is that because both offenses involved the illegal obtaining of prescription medications by fraud or deception, and occurred in the same year, she was disclosing them. If she discloses one contemporaneous offense, and declares she has been arrested, then the Government is on notice she has a criminal record that should be further investigated. She could not have expected to hide one offense by disclosing the second. Her explanation is reasonable and logical in that context. She obviously did not intend to mislead the Government because she made a disclosure of criminal activity. Therefore, I am persuaded by her disclosures that she did not intend to deliberately conceal her two arrests. No DC apply.

Criminal Conduct Applicant was charged with two offenses in 2001 relating to obtaining prescription drugs illegally. She was placed on probation for both offenses. 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 has not repeated those offenses, nor been involved in any other offenses since then. She has undergone drug rehabilitation in 2001 and 2003, and not used prescription pain drugs since 2003. The offenses were five years ago. Applicant's addiction arising from pancreatic pain and prescriptions for painkillers are not pressures present in her life anymore. MC 1 (The criminal behavior is not recent. E2.A10.1.3.1), MC 3 (The person was pressured into committing those acts and those pressures are no longer present in that person's life. E2.A10.1.3.3), and MC 6 (There is clear evidence of rehabilitation. E2.A10.1.3.6) apply.

Whole Person Analysis "The adjudicative process is an examination of a sufficient period of a person's life to make an affirmative determination that the person is eligible for a" trustworthiness decision. Directive E2.2.1. "Available, reliable information about the person, past and present, favorable and unfavorable, should be considered in reaching a determination." *Id.* In evaluating Applicant's case, I have considered the adjudicative process factors listed in the Directive ¶ E2.2.1.

Applicant has reformed her conduct in the past five years. Her chronic pancreatitis has been solved and her pain from that medical condition resolved. , The addiction to the prescription painkillers has also been resolved through detoxification and in-patient hospital treatments in 2001 and 2003. She has not repeated her abuse of these drugs since her discharge in late 2003 from treatment. Her two criminal charges involving her manipulative methods to obtain prescription drugs to feed her addiction were resolved through the court system, and there has been no repeat misconduct. Based on her conduct since 2003, there is little likelihood such behavior will be repeated. Her family knows about her prior condition, and fully supports her. She works with her mother in the same company and lives with her sister. This support network sustains Applicant's efforts to improve her life. I also note two state judges gave Applicant conditional discharges in the two criminal cases, apparently trusting her to change her life and not engage in similar misconduct.

Applicant's entire situation arose from her medical condition that caused her pain over several years. That pain led to the addiction. Medical treatments without medical insurance to pay for them caused the financial delinquencies listed in the SOR. The criminal charges resulted from the medical condition and the addiction. Now, all prior and underlying pain is gone, and so the resulting events will not recur.

Applicant's statements I conclude were credible and persuasive. Her explanations of her history were forthright and honest. The support of her mother and particularly her sister were persuasive that Applicant has changed and is worthy of trust in her position. Therefore, I conclude the financial considerations, drug involvement, personal conduct, criminal conduct, and whole person concept for Applicant.

FORMAL FINDINGS

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

Paragraph 1. Guideline F: FOR APPLICANT

Subparagraph 1.a to 1.bb: For Applicant

Paragraph 2. Guideline H: FOR APPLICANT

Subparagraph 2.a to 2.i: For Applicant

Paragraph 3. Guideline E: FOR APPLICANT

Subparagraph 3.a. to 3.c.: For Applicant

Paragraph 4. Guideline J: FOR APPLICANT

Subparagraph 4.a. to 4.c.: For Applicant

DECISION

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant Applicant eligibility for assignment to sensitive duties. Her application for eligibility for an ADP I/II/III position is granted.

Philip S. Howe

Administrative Judge

1. Adjudication of trustworthiness cases for ADP I, II, and III positions are resolved using the provisions of DoD Directive 5220.6 (Directive), pursuant to the memorandum 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.