



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



In the matter of:)	
)	
)	ADP Case No. 09-04905
SSN:)	
)	
Applicant for Public Trust Position)	

Appearances

For Government: Caroline H. Jeffreys, Esq., Department Counsel
For Applicant: *Pro se*

October 29, 2010

Decision

LAZZARO, Henry, Administrative Judge

Applicant failed to mitigate the trustworthiness concerns that arise from his abuse of controlled substances he misappropriated from his place of employment while working as a registered nurse and his continuing denial of alcohol addiction that was diagnosed when he underwent substance abuse counseling. Eligibility for access to sensitive information is denied.

On May 24, 2010, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant detailing its trustworthiness concerns.¹ The SOR alleges security concerns under Guideline H (drug involvement), Guideline G (alcohol consumption), and Guideline E (personal conduct). Applicant's response to the SOR was received by DOHA on June 14, 2010. He admitted SOR allegations 1.b through 1.g, he denied SOR allegations 1.a, 2.a, 2.b, and 3.a, and he requested a hearing.

¹ This action was taken under Executive Order 10865, DoD Directive 5220.6, dated January 2, 1992, as amended and modified (Directive), DoD Regulation 5200.2-R, dated January 1987, as amended (Regulation), and the revised adjudicative guidelines which became effective within the Department of Defense for SORs issued after September 1, 2006.

The case was assigned to me on July 27, 2010. A notice of hearing was issued on July 27, 2010, scheduling the hearing for August 12, 2010. The hearing was conducted as scheduled. The Government submitted five documentary exhibits that were marked as Government Exhibits (GE) 1-5 and admitted into the record without objection. Applicant testified and submitted 11 documentary exhibits that were marked as Applicant Exhibits (AE) 1-11 and admitted into the record without objection. The transcript was received on August 20, 2010.

Findings of Fact

Applicant's admissions to the SOR allegations are incorporated herein. In addition, after a thorough review of the pleadings, testimony and exhibits, I make the following findings of fact:

Applicant is 37 years old and has been employed as a registered nurse/quality assurance specialist by a defense contractor since February 2009. His duties include supervising about 12 people in the performance of periodic health assessments for Army Reserve and National Guard personnel.

Applicant graduated from high school in 1991. He served in the U.S. Navy from August 1991 until February 1992, when, according to his testimony, he received a General Discharge because of confusion with paperwork dealing with his enlistment. Applicant worked as a tile installer from April 1996 until May 2004. He participated in a work-study program at a college from January 2002 until May 2004, when he was awarded an associate degree in nursing. He was employed as a registered nurse at a hospital from July 2004 until January 2009.

Applicant was married in June 2006. That marriage ended by divorce in March 2010. Applicant has a three-year-old daughter and a seven-year-old stepson from this marriage. Applicant's wife was granted custody of their daughter and Applicant has routine visitation rights with the child.

Applicant experimented with marijuana on a couple of occasions when he was about 16 years old. He began taking prescribed opiates in 2004 following arm surgery. He consumed a total of about 240 Vicadin over the course of approximately two months. In 2006, he sustained a back injury for which he was prescribed Lortab and Oxycodone. He consumed 30 tablets of each drug over the course of about two weeks.

In September 2007, Applicant felt "stressed out" because he had just recently gotten married, had purchased a new house, had a new baby, and acquired a stepson who was eventually diagnosed with ADHD. As a result, he decided to self-medicate himself by consuming the controlled substance dilaudid. He acquired this drug from waste pumps (syringes/vials) that had been used for patients at the hospital where he worked but not fully consumed. The vials were supposed to be destroyed, but Applicant instead removed them from the refrigerator where they were stored and consumed the contents either at work or at home. He admits he acquired the drugs by abusing the trust that had been placed in him by his co-workers to properly dispose the substances.

Applicant only consumed dilaudid at work, after work, or at home for six months after he first began using it. The drug had a euphoric and calming effect on him. Eventually, his usage escalated to using the drug both before and after work. He was consuming dilaudid a couple of times a day at work by October 2008. Applicant also experimented with morphine a couple of times at the hospital. The morphine had the same calming effect on him as the dilaudid, but it did not provide him with the same sense of euphoria.

On October 7, 2008, Applicant experimented with fentanyl that he misappropriated at work. He tried the fentanyl because of its availability. Fentanyl is a more potent drug than dilaudid.

Applicant's co-workers began noticing a personality change in him, and, on October 7, 2008, after he had consumed the fentanyl, he was directed to take a drug test. The test came back positive for fentanyl, hydrocodone, and hydromorphone (dilaudid). Applicant denies taking hydrocodone other than when it had been prescribed for him in 2004 and 2006 as vicadin or lortab.

Applicant first consumed alcohol when he was 12-years-old at a family party. He admits he consumed alcohol a couple of times a month while he was in high school, and that his alcohol consumption increased after high school through his early 20s. He also admits that he occasionally became intoxicated. However, he currently denies that he is or ever has been alcohol dependent.

Applicant was placed on administrative leave by his employer after he failed the drug test and he then enrolled in a 28-day residential substance abuse program. He entered into the program on October 14, 2008. He was discharged from the residential program on November 12, 2008, with a diagnosis of opiate dependence. He was recommended to begin aftercare counseling sessions and to remain drug free.

Applicant was permitted to resume his employment at the hospital from which he had taken the drugs after completion of the residential substance abuse program. He soon found it necessary to change jobs because of the temptation he faced daily by once again having access to controlled substances.

Applicant attended his first relapse prevention group meeting on November 17, 2008. The notes from that meeting indicate that Applicant discussed with the group his history of addiction to alcohol and prescription pain medications. The group facilitator, a licensed clinical social worker (LCSW) and certified alcohol and drug counselor (CADC) who is a staff member of a recognized drug treatment program, diagnosed Applicant as being alcohol dependent and opioid dependent. Applicant continued to meet regularly with the group until August 17, 2009, when he was forced to discontinue participation because his insurance coverage had apparently been exhausted. Applicant's relapse potential at the time he completed his last group session was deemed to be in the low to moderate range.

Although Applicant currently denies he is or ever has been alcohol dependent, the group counseling notes indicate the contrary is true. For example, in the December 29,

2008 meeting, Applicant discussed with the group a desire that he was experiencing to use alcohol with the New Year's holiday approaching. During the January 5, 2009 meeting, Applicant discussed with the group the temptation he had experienced on New Year's Day to consume alcohol and how his addictive thinking was leading him to believe that alcohol was not his problem. During the April 6, 2009 meeting, Applicant expressed a concern about his desire to use alcohol as a method of escape.

During the April 20, 2009 meeting, Applicant indicated that alcohol had become a problem in his awareness of his desire and that he had not been totally honest about his powerlessness in his relationship to alcohol. On April 27, 2009, Applicant informed the group that he was continuing to struggle with the idea that he was alcohol dependent and the thoughts and triggers to drink had become quite prevalent in his life. He went on to add that he has the most trouble with not drinking, while at the same time acknowledging it was an issue of his switching addictions. On June 1, 2009, Applicant indicated he was continuing to struggle with the concept that he was alcohol dependent, but then went on to reveal some points that would be convincing about how alcohol had been a problem for him.²

In addition to the issues dealing with Applicant's diagnosed addictions, his group sessions repeatedly involved discussions concerning issues within his marriage. His wife attended sessions with Applicant's counselor along with Applicant in an obviously unsuccessful effort to resolve the issues in their marriage.

Applicant attended Alcoholic's Anonymous (AA) meetings on a fairly regular basis from the time he began group therapy sessions until April 2010. He acquired a sponsor and he still communicates with him and other recovering addicts on a frequent basis. He denies he has consumed any alcohol or controlled substance since October 2008. He discontinued attendance at AA meetings due to a combination of expenses, time limitations, visitation with his daughter, and his belief that he does not need to attend them at present.

Applicant's counselor during the group sessions wrote a letter of recommendation for him in which he expressed his opinion that Applicant is a trustworthy individual with a positive attitude that allowed him to grasp addiction recovery. He also opined that Applicant is a positive asset for any employer and that he personally holds him in high regard (AE 1). Applicant also submitted numerous other letters of recommendation that indicate he is highly respected at his current place of employment and was similarly respected at his previous place of employment. Finally, additional letters of recommendation and other notations indicate he was sincere and helpful to others while he was engaged in both residential and group substance abuse treatment.

² All group meeting notes discussed above are contained in GE 4.

Policies

Positions designated as ADP I and ADP II are classified as sensitive positions.³ The standard to 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.⁴ Trustworthiness adjudications apply to cases forwarded to DOHA by the Defense Security Service and Office of Personnel Management.⁵ Department of Defense contractor personnel are afforded the right to the procedures contained in the Directive before any final unfavorable access determination is made.⁶

An administrative judge must consider the disqualifying and mitigating conditions in the adjudicative guidelines when evaluating an Applicant's suitability for a public trust position. The administrative judge must also consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision. The entire process is a conscientious scrutiny of a number of variables known as the whole-person concept. The protection of the national security is the paramount consideration, and any doubt concerning personnel being considered for access to sensitive information will be resolved in favor of national security. Decisions are made in terms of the national interest and are not determinations as to the loyalty of the applicant concerned.⁷

The Government is required to present evidence to establish controverted facts alleged in the SOR.⁸ The applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel.⁹ The applicant has the ultimate burden of persuasion as to obtaining a favorable trustworthiness decision.

Analysis

Guideline H, Drug Involvement

Use of an illegal drug or misuse of a prescription drug can raise questions about an individual's reliability and trustworthiness, both because it may impair judgment and

³ Regulation ¶¶ C3.1.2.1.1.7 and C3.1.2.1.2.3.

⁴ Regulation ¶ C6.1.1.1.

⁵ Deputy Under Secretary of Defense (Counterintelligence and Security) Memorandum, dated November 19, 2004.

⁶ Regulation ¶ C8.2.1.

⁷ Section 7 of Executive Order (EO) 10865.

⁸ Directive ¶ E3.1.14.

⁹ Directive ¶ E3.1.15.

because it raises questions about a person's ability or willingness to comply with laws, rules, and regulations. (Adjudicative Guideline [AG] ¶ 24)

Applicant's use of marijuana when he was 16 years old does not create a current security concern. However, he misappropriated and consumed several types of controlled substances from the hospital where he worked between September 2007 and October 2008. His use of those controlled substances continued until he was directed to take a drug test because he was suspected of being under the influence of a controlled substance while at work. That drug test came back positive for three different types of controlled substances.

Applicant completed a 28-day residential drug treatment program and he participated in outpatient group therapy from November 2008 until August 2009. He was diagnosed as opioid dependent by a LCSW CADC who is a staff member of a recognized drug treatment program. Disqualifying Conditions (DC) 25(a): *any drug abuse*; DC 25(b): *testing positive for illegal drug use*; and DC 25(e): *evaluation of drug abuse or drug dependence by a licensed clinical social worker who is a staff member of a recognized drug treatment program* apply.

Applicant has successfully completed a residential drug treatment program, eight months of follow-up group counseling sessions, and attendance at AA meetings. Applicant's relapse potential at the time he completed his last group session was deemed to be in the low to moderate range. While not explicitly so stating, the letter of recommendation from his counselor can be considered a favorable prognosis. Accordingly, Mitigating Condition (MC) 26(d): *satisfactory completion of a prescribed drug treatment program, including but not limited to rehabilitation and aftercare requirements, without recurrence of abuse, and a favorable prognosis by a duly qualified medical professional* applies.

Applicant was prescribed and used several types of controlled substances in 2004 and 2006. Thereafter, feeling stressed out about a number of things that were occurring in his life, he chose to misappropriate waste controlled substances from his place of employment and consume them before work, at work, after work, and at home. His consumption of these controlled substances continued until his use was discovered by his employer through a mandated drug test.

Applicant has not seen his counselor since December 2009. He does maintain regular contact with his AA sponsor and other recovering addicts. However, Applicant has not attended an AA meeting since April 2010, although the reasons he gives for not attending those AA meetings, such as time constraints, economic issues, and visitation with his daughter, along with his recent divorce and the adjustments that come with that divorce are providing him with the type of stresses in his life that led to his prior abuse of drugs and should raise a concern for him.

Most troubling in this case is Applicant's insistence that alcohol is not a problem for him and his dispute with the diagnosis that he was alcohol dependent. His protestation is severely contradicted by the numerous notes recording discussions he himself initiated about his alcohol cravings and concerns while he was attending group therapy. It is

inconceivable that so much of his group session time would have focused on issues regarding his alcohol consumption if he, his counselor, and other members of the group did not perceive it to be a problem. His protestations against the diagnosis and his discontinuing attendance at AA meetings cause serious concern that a relapse is likely.

I have considered application of MC 26(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 MC 26(b): *a demonstrated intent not to abuse any drugs in the future, such as: (1) disassociation from drug-using associates and contacts; (2) changing or avoiding the environment where drugs were used; (3) an appropriate period of abstinence; (4) a signed statement of intent with automatic revocation of clearance for any violation* and conclude they do not apply. The remaining mitigating condition has no application to the facts of this case.

_____ It has been two years since Applicant abused controlled substances on a daily basis. He attributes that abuse to the stresses he was experiencing in his life at the time. He is once again experiencing stresses that he attributes in large part to the reason why he is no longer attending AA meetings. He disagrees with the diagnosis that he was alcohol dependent despite his own statements to the contrary while he was attending group therapy. In view of all of the above, and despite application of MC 26(d), I conclude Applicant has failed to mitigate the drug involvement security concerns alleged in this case.

Guideline G, Alcohol Consumption

Excessive alcohol consumption often leads to the exercise of questionable judgment or the failure to control impulses, and can raise questions about an individual's reliability and trustworthiness. AG ¶ 21

Applicant's reported history of alcohol use is not what would be considered problematical. However, while attending group therapy sessions as a result of his other substance abuse issues, Applicant on numerous occasions made statements and entered into discussions with the group indicating that alcohol was a problem and a concern for him. Most notable is the April 27, 2009 meeting wherein Applicant acknowledged it was a matter of substituting one addiction for another. Applicant was diagnosed as alcohol dependent by a LCSW CADC who is a staff member of a recognized drug treatment program. DC 22(e): *evaluation of alcohol abuse or alcohol dependence by a licensed clinical social worker who is a staff member of a recognized alcohol treatment program* applies.

I have considered all possible mitigating conditions. For all the reasons discussed under the drug involvement concern, I conclude that none apply.

Guideline E, Personal Conduct

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 information. Of special interest is

any failure to provide truthful and candid answers during the security clearance process or any failure to cooperate with the security clearance process. AG 15

Applicant acquired the controlled substances he used from his workplace. Those substances were stored in a refrigerator prior to their intended disposal. Applicant admits he abused the trust that was placed in him by his co-workers when he took those substances under the apparent pretext that they were being properly disposed. DC 16(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 judgement, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information. This includes but is not limited to consideration of: . . . (3) a pattern of dishonesty or rule violations applies.*

It has been two years since Applicant last misappropriated drugs from his employer and violated the trust placed in him by his co-workers. He changed jobs due to the temptation he faced by once again having access to controlled substances rather than once again succumbing to the temptation and again taking drugs from his workplace. His letters of recommendation indicate that people believe he has regained his trustworthiness since undergoing residential and group therapy. Unlike his alcohol and drug issues where his continued denial of having an alcohol problem prevents mitigating those issues, his actions and recommendations in relation to the personal conduct issue do provide adequate mitigation.

MC 17(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 cause doubt on the individual's reliability, trustworthiness, or good judgment;* and MC 17(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 caused untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur apply.*

Considering all relevant and material facts and circumstances present in this case, the whole-person concept, the factors listed in ¶ 6.3.1 through ¶6.3.6 of the Directive, and the applicable disqualifying and mitigating conditions, Applicant has failed to mitigate the drug involvement and alcohol consumption security concerns. He has not overcome the case against him nor satisfied his ultimate burden of persuasion in regard to those concerns. He has mitigated the personal conduct security concern. It is not clearly consistent with the national interest to grant Applicant access to sensitive information.

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
Subparagraph 1.a:	For Applicant
Subparagraphs 1.b-g:	Against Applicant
Paragraph 2, Guideline G:	AGAINST APPLICANT
Subparagraphs 2.a-b:	Against Applicant
Paragraph 3, Guideline E:	FOR APPLICANT
Subparagraph 2.a:	For Applicant

Conclusion

In light of all the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant Applicant eligibility for a public trust position. Eligibility for access to sensitive information is denied.

Henry Lazzaro
Administrative Judge

