



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



In the matter of:)
)
) CAC Case No. 17-04087
)
Applicant for CAC Eligibility)

Appearances

For Government: Adrienne Driskill, Esq., Department Counsel
For Applicant: *Pro se*

07/31/2018

Decision

KILMARTIN, Robert J., Administrative Judge:

Applicant has not mitigated Common Access Card (CAC) credentialing concerns raised under the criminal or dishonest conduct supplemental adjudicative standards. CAC eligibility is denied.

Statement of the Case

On September 5, 2017, Applicant submitted a Questionnaire for Non-Sensitive Positions (SF 85). On January 25, 2018, the Department of Defense (DOD) issued a Statement of Reasons (SOR) to Applicant detailing concerns for CAC eligibility pursuant to Homeland Security Presidential Directive – 12, *Policy for Common Identification Standard for Federal Employees and Contractors*, dated August 27, 2004 (HSPD-12). DOD was unable to find that granting Applicant CAC eligibility posed an acceptable risk.

The action is based on the Supplemental Adjudicative Standards found in DOD Instruction 5200.46, *DOD Investigative and Adjudicative Guidelines for Issuing the Common Access Card*, dated September 9, 2014, and the procedures set out in Enclosure 3 of DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive). The concerns raised under the Supplemental Adjudicative Standards of DoDI 5200.46 are criminal or dishonest conduct.

Applicant answered the SOR admitting the single allegation on February 23, 2018, and requested a decision based on the administrative record, without a hearing before a Defense Office of Hearings and Appeals (DOHA) administrative judge. Applicant attached two documents to his Answer: a warrant of arrest and a waiver of preliminary hearing document, indicating that the criminal case was dismissed on September 11, 2017, after Applicant completed all conditions of his six months supervised probation. The case was forwarded to the Hearing Office and assigned to me on July 24, 2018.

Findings of Fact

Applicant admitted the single SOR allegation with explanations. His SOR Answer is incorporated in my findings of fact. He states that he was charged with misdemeanor possession of marijuana (MJ) on February 1, 2017, and ordered to serve six months of supervised probation. The judgment was deferred pending his completion of all requirements of probation. He returned to court on September 1, 2017, and all charges were dismissed. The evidence substantiated his contentions.

Background Information

Applicant is a 36-year-old who has been employed as a service technician since January 2005, by a federal contractor. Applicant graduated and received a certificate from a trade school in 2011. He reports no military service.

Applicant was arrested on February 1, 2017, when the police pulled over a vehicle he was driving and found marijuana in the passenger side. "No one in my vehicle confessed to the substance. With the vehicle being registered under my name, I was charged . . . [.]" (SF-85) The original charge was for possession of one half ounce to five pounds of MJ with intent to distribute. It was later amended down to misdemeanor possession. No police reports, laboratory reports, eye witness statements from other occupants of the vehicle, or character reference statements have been provided. The waiver of preliminary hearing attached to Applicant's Answer, reflects that Applicant pled nolo contendere, and the court found facts sufficient to find guilt but deferred adjudication. Applicant served six months of supervised probation, lost his driver's license for six months, and paid fines and court costs. The charge was dismissed after he completed probation.

When Applicant completed his Declaration for Federal Employment on August 29, 2017, he responded affirmatively to the salient questions and disclosed his arrest on February 1, 2017. (Item 3) In his SF-85, Applicant mistakenly stated the date of the arrest was March 11, 2017. (Item 2) The FBI criminal history report and arrest warrant attached to his answer, confirm the correct date of arrest (Item 4, Answer).

Policies

Every CAC eligibility decision must be a fair and impartial overall commonsense decision based on all available evidence, both favorable and unfavorable. The specific

issues raised are listed in DoDI 5200.46, Enclosure 4, Appendix 1, Basic Adjudicative Standards, and Appendix 2, Supplemental Adjudicative Standards. The overriding factor for all of these conditions is unacceptable risk. The decision must be arrived at by applying the standard that the grant of CAC eligibility does not pose an unacceptable risk².

The objective of CAC credentialing process is the fair-minded commonsense assessment of a person's life to make an affirmative determination that the person is an acceptable risk to have CAC eligibility. Each case must be judged on its own merits, taking into consideration all relevant circumstances, and applying sound judgment, mature thinking, and careful analysis.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, 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." The applicant has the ultimate burden of persuasion to obtain CAC eligibility.

Factors to be applied consistently to all information available include: (1) the nature and seriousness of the conduct; (2) the circumstances surrounding the conduct; (3) the recency and frequency of the conduct; (4) the individual's age and maturity at the time of the conduct; (5) contributing external conditions; and (6) the absence or presence of efforts towards rehabilitation. (DoDI 5200.46, Enclosure 4, paragraph 1)

Analysis

Criminal or Dishonest Conduct

DODI 5200.46, Appendix 2 to Enclosure 4, Supplemental Adjudicative Standards, Paragraph 2 articulates the CAC concern:

A CAC will not be issued to a person if there is a reasonable basis to believe, based on the individual's criminal or dishonest conduct, that issuance of a CAC poses an unacceptable risk.

DODI Instruction 5200.46, Appendix 2, Supplemental Adjudicative Standards lists the following conditions that raise a CAC concern and may be disqualifying:

2.a – An individual's conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about his or her reliability or trustworthiness and may put people, property, or information systems at risk.

2.b – Therefore, conditions that may be disqualifying include:

- (1) A single serious crime or multiple lesser offenses which put safety of people at risk or threaten the protection of property or information . . . [.]
- (2) Charges or admission of criminal conduct relating to the safety of people and proper protection of property or information systems, regardless of whether the person was formally charged, prosecuted, or convicted.

The Government established these disqualifying conditions through evidence presented with the FORM (GE 2, GE 3, GE 4, and GE 5). An individual's abuse of drugs may put people, property, or information systems at risk. Although there is no direct evidence that Applicant was using the MJ found in his car, an inference can be drawn, which was not refuted.

Applicant pled nolo contendere to the criminal charge that he was driving a vehicle registered in his name, which was stopped and police found one half ounce to five pounds of MJ in the vehicle. He served the six months of probation and lost his driver's license for six months. However, he has never refuted the charge that this significant amount of MJ was his, or denied use or possession of MJ. An inference can be drawn that he possessed this MJ and intended to use it. The state legislature has codified laws making this criminal conduct potentially dangerous to other motorists and the public. It is also a violation of federal law.¹ This criminal offense was committed 18 months ago. Without a statement of intent to refrain, or other evidence, not enough time has elapsed to conclude that it will not recur.

DODI 5200.46, Appendix 2 to Enclosure 4, Supplemental Adjudicative Standards, Paragraph 2.c provides a list of circumstances relevant to the determination of whether there is a reasonable basis to believe there is an unacceptable risk. In particular, Paragraph 2.c.(1) is potentially applicable:

2.c.(1) – The behavior happened so long ago, was minor, or happened under such circumstances that it is unlikely to recur.

The arrest was within the last two years, it might be construed as minor if some explanation were offered, or an assurance that it won't happen again. No such evidence was presented.

DODI 5200.46, Enclosure 4, CAC Adjudicative Procedures, Paragraph 1, Guidance For Applying Credentialing Standards During Adjudication provides the following factors to be considered in each case:

a. As established in Reference (g), credentialing adjudication considers whether or not an individual is eligible for long-term access to federally controlled facilities and/or information systems. The ultimate determination

¹ See 21 U.S. Code § 841.

to authorize, deny, or revoke the CAC based on a credentialing determination of the PSI must be made after consideration of applicable credentialing standards in Reference (c); and

b. Each case is unique. Adjudicators must examine conditions that raise an adjudicative concern, the overriding factor for all of these conditions is unacceptable risk. Factors to be applied consistently to all information available to the adjudicator are:

(1) The nature and seriousness of the conduct. The more serious the conduct, the greater the potential for an adverse CAC determination.

(2) The circumstances surrounding the conduct. Sufficient information concerning the circumstances of the conduct must be obtained to determine whether there is a reasonable basis to believe the conduct poses a risk to people, property, or information systems.

(3) The recency and frequency of the conduct. More recent or more frequent conduct is of greater concern.

(4) The individual's age and maturity at the time of the conduct. Offenses committed as a minor are usually treated as less serious than the same offenses committed as an adult, unless the offense is very recent, part of a pattern, or particularly heinous.

(5) Contributing external conditions. Economic and cultural conditions may be relevant to the determination of whether there is a reasonable basis to believe there is an unacceptable risk if the conditions are currently removed or countered (generally considered in cases with relatively minor issues).

(6) The absence or presence of efforts toward rehabilitation, if relevant, to address conduct adverse to CAC determinations.

(a) Clear, affirmative evidence of rehabilitation is required for a favorable adjudication (e.g., seeking assistance and following professional guidance, where appropriate; demonstrating positive changes in behavior and employment).

(b) Rehabilitation may be a consideration for most conduct, not just alcohol and drug abuse. While formal counseling or treatment may be a consideration, other factors (such as the individual's employment record) may also be indications of rehabilitation.

To his credit, Applicant disclosed this adverse information on his Declaration for Federal Employment, and his SF-85. However, he has offered no evidence of intent to refrain from possessing or using MJ in the future, or disassociation from drug-using

friends. He has offered inadequate mitigating evidence. Having carefully considered the facts of this case, I find ¶¶ 1.b. (1), (2), (3), and (4) of the credentialing standards are applicable. The amount of MJ discovered in Applicant's vehicle by police can be construed as more than incidental or user amount. The arrest was fairly recent, and Applicant was a mature adult when he committed this drug-related offense, which society has deemed unsafe.

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, Criminal or Dishonest Conduct:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, I conclude that granting Applicant CAC eligibility poses an unacceptable risk. CAC eligibility is denied.

ROBERT J. KILMARTIN
Administrative Judge