



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



In the matter of:

Applicant for CAC Eligibility

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CAC Case No. 15-00898

Appearances

For Government: Aubrey De Angelis, Esq., Department Counsel
For Applicant: Maryam Z. Khajavi, Esq.

08/29/2016

Decision

HARVEY, Mark, Administrative Judge:

On November 26, 2013, Applicant submitted a Declaration for Federal Employment (Optional Form (OF) 306). He falsely denied that he had been on probation or received a conviction in the previous seven years. Actually, he received two misdemeanor-level convictions in 2010, and he was on probation at the time he signed his OF 306. The falsification of his OF 306 is recent and demonstrated a serious lapse in judgment. All of his criminal conduct was alcohol related and occurred before 2011. He ended his alcohol consumption in December 2009. Criminal dishonest conduct and alcohol abuse common access card (CAC) credentialing concerns are mitigated; however, material, intentional false statement, deception, or fraud in connection with federal or contract employment concerns are not mitigated. CAC credentialing eligibility is denied.

Statement of the Case

On September 17, 2014, Applicant submitted a Questionnaire for Non-Sensitive Positions (SF 85). (GE 1) On May 22, 2015, the Department of Defense (DOD) issued a statement of reasons (SOR) to Applicant detailing eligibility concerns for CAC credentialing pursuant to Homeland Security Presidential Directive – 12, *Policy for a Common Identification Standard for Federal Employees and Contractors*, August 27, 2004 (HSPD-12). DOD was unable to find that it was clearly consistent with the national interest to grant Applicant CAC eligibility.

This action is based on the *Supplemental Adjudicative Standards* (SAS) found in DOD Instruction (DODI) 5200.46, *DOD Investigative and Adjudicative Guidance for Issuing the Common Access Card*, dated September 9, 2014, and the procedures set out in Enclosure (Encl.) 3 of DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive). The concerns raised under DODI 5200.46 are “criminal dishonest conduct,” “material, intentional false statement, deception, or fraud in connection with federal or contract employment,” and “alcohol abuse” in DODI 5200.46, Appendix (App.) 2 to Encl. 4, SAS ¶¶ 2, 3, and 4.

On June 10, 2015, Applicant answered the SOR. Department Counsel was ready to proceed on March 9, 2016. The case was forwarded to the hearing office and assigned to me on March 21, 2016. On June 20, 2016, the Defense Office of Hearings and Appeals (DOHA) issued a Notice of Hearing scheduling the hearing for July 12, 2016. The hearing was held as scheduled. Department Counsel offered five documents. (Transcript (Tr.) 13-14; Government Exhibits (GE) 1-5) Applicant objected to the admissibility of Applicant’s FBI Criminal History Record (GE 3) because it is not current and does not reflect subsequent expungement of criminal information. (Tr. 15-16) The objection to the admissibility of the FBI Criminal History Records was overruled because the objections go to the weight and not the admissibility of GE 3. (Tr. 15; GE 3) The subsequent expungements of two convictions were accepted as relevant information.

Applicant objected to GE 4 and GE 5, unsigned printouts of local law enforcement records provided to the Office of Personnel Management (OPM), because they are hearsay and lack relevance, and they are not official government records. (Tr. 16) The objections to GE 4 and 5 were sustained. Applicant offered six exhibits, which were admitted into evidence without objection. (Tr. 19-21; Applicant Exhibit (AE) A-F) Applicant made a statement on his own behalf. The transcript was received on July 20, 2016.

Findings of Fact

Applicant admitted the allegations in SOR ¶¶ 1.a, 1.d, and 1.h. He partially or fully denied the remaining SOR allegations. He also provided extenuating and mitigating information. His SOR admissions are incorporated in the findings of fact.

Background Information

Applicant is a 48-year-old heavy equipment mechanical inspector employed by a defense contractor since October 2001. (Tr. 25; GE 1) He seeks continued CAC eligibility as a condition of his employment. In 1988, Applicant married. (Tr. 82) He has never served in the military. (GE 1) There is no evidence of security violations, felony convictions, financial problems, or illegal drug abuse.

Applicant provided good work performance. (Tr. 65) His colleagues at work describe him as pleasant, dedicated, responsible, helpful, diligent, and proficient. (AE D)

He reports to work on time, and he contributes to his employer's accomplishment of tasks. (AE D)

Criminal Dishonest Conduct and Alcohol Abuse

Over the previous 30 years, Applicant had five misdemeanor convictions. (Tr. 63) In 1986, 1990, and 2009, Applicant was arrested for driving under the influence of alcohol (DUI), and he was convicted of all three DUI offenses. (Tr. 48-49, 35-37, 69-72, 80)

In 1987, Applicant admitted that he was convicted for resisting or obstructing a police officer. (Tr. 49, 69) In 1993, Applicant was arrested for drunk in public. (Tr. 41-43, 62-63; SOR response ¶ 1.h) It is unclear whether he was convicted of the 1993 offense.

In 1998, Applicant was arrested for forcible incest and rape. (Tr. 40, 71) He said the victim was 18 years old. (Tr. 40, 84) Applicant agreed to pay child support, and the charge was dismissed when she failed to appear in court. (Tr. 84) He said the sexual intercourse with her was consensual. (Tr. 84) He denied that he was arrested in February 2007 for threats of violence and domestic violence. (Tr. 39-40, 66; SOR response ¶ 1.e)

In about December 2009, Applicant was arrested for DUI. (Tr. 35-36, 71; SOR ¶ 1.d) He hit another car; however, he did not leave the scene of the accident. (Tr. 81) He said he could not remember his blood-alcohol level. (Tr. 81) He was convicted, and in June 2010, he was sentenced. (Tr. 35-37, 71-72; SOR response) He received 13 days of community service, a fine of \$1,828, and five years of probation. (SOR response) Applicant has been sober since his DUI offense in December 2009. (Tr. 27) He completed a four-month alcohol course. (Tr. 28, 38; AE F) He has attended Alcoholics Anonymous (AA) meetings since about 2003, with increased attendance after Christmas 2009. (Tr. 28, 51-54, 74-78; AE D) He tries to go to AA meetings every day. (Tr. 75) He provided attendance records for his AA meetings in 2015 and 2016, and a letter from his AA sponsor describing 13 years of AA attendance. (AE C; AE D) On November 12, 2015, his DUI conviction was expunged. (Tr. 29; AE A) He has never been diagnosed as alcohol dependent. (Tr. 55)

On July 24, 2010, Applicant was arrested for domestic violence involving his spouse. (Tr. 24, 72; SOR response ¶ 1.a) He was convicted of battery on his spouse. (SOR response) He received fines and fees totaling \$660. (SOR response) He completed a 52-week domestic violence course. (Tr. 24, 32, 72; AE E) The course entailed one class a week for two hours. (Tr. 32) In October 2011, he completed the domestic violence course. (Tr. 33) His conviction was subsequently expunged. (Tr. 24; AE B)

Material, Intentional Falsification, Deception, or Fraud

On November 26, 2013, Applicant completed an OF 306. (GE 2) He answered, no, to question nine, which asked, "During the last 7 years, have you been convicted,

been imprisoned, been on probation, or been on parole? (Includes felonies, firearms or explosives violations, misdemeanors, and all other offenses.).”

Applicant said that at the time he completed the November 26, 2013 OF 306, he believed seven years had elapsed since his most recent criminal conviction. (Tr. 22) He acknowledged that he was still on informal or court probation from his 2010 DUI conviction at the time he completed his OF 306. (Tr. 44, 57-58) Informal probation does not include reporting to a probation officer, and it does not necessarily include notification when probation is complete. (Tr. 57-59) He also said he was confused when he answered question nine on his OF 306. (Tr. 44-46) Applicant’s coworkers told him that the government only checked for felonies. (Tr. 46)

Applicant is familiar with completing OF 306s. (Tr. 86) In 2001, 2003, 2007, and 2008 or 2009, Applicant completed OF 306s. (Tr. 85) He did not list his two criminal convictions in 2010 because he did not think the government would check on his misdemeanor-level criminal record, and he did not believe the government would find out about them. (Tr. 87-87)

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, Encl. 4, App. 1, *Basic Adjudicative Standards*, and App. 2, SAS. 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 is clearly consistent with the national interest.

The objective of the 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. In all adjudications, the protection of the national interest is the paramount consideration. Therefore, any doubt concerning personnel being considered for CAC eligibility should be resolved in favor of the national interest.

Analysis

Criminal Dishonest Conduct

DODI 5200.46, App. 2 to Encl. 4, SAS ¶ 2 describes the 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.

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. An individual's past criminal or dishonest conduct may put people, property, or information systems at risk.

DODI 5200.46, App. 2 to Encl. 4, SAS ¶ 2b, lists seven conditions that raise a concern and may be disqualifying:

(1) A single serious crime or multiple lesser offenses which put the safety of people at risk or threaten the protection of property or information. A person's convictions for burglary may indicate that granting a CAC poses an unacceptable risk to the U.S. Government's physical assets and to employees' personal property on a U.S. Government facility;

(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, formally prosecuted, or convicted;

(3) Dishonest acts (e.g., theft, accepting bribes, falsifying claims, perjury, forgery, or attempting to obtain identity documentation without proper authorization);

(4) Deceptive or illegal financial practices such as embezzlement, employee theft, check fraud, income tax evasion, expense account fraud, filing deceptive loan statements, or other intentional financial breaches of trust;

(5) Actions involving violence or sexual behavior of a criminal nature that poses an unacceptable risk if access is granted to federally-controlled facilities and federally-controlled information systems. For example, convictions for sexual assault may indicate that granting a CAC poses an unacceptable risk to the life and safety of persons on U.S. Government facilities;

(6) Financial irresponsibility may raise questions about the individual's honesty and put people, property or information systems at risk, although financial debt should not in and of itself be cause for denial; and

(7) Deliberate omission, concealment, or falsification of relevant facts or deliberately providing false or misleading information to an employer, investigator, security official, competent medical authority, or other official U.S. Government representative, particularly when doing so results in personal benefit or which results in a risk to the safety of people and proper safeguarding of property and information systems.

In 1986, 1990, and 2009, Applicant was arrested for DUI, and he was convicted of three DUI offenses. In 1987, he was convicted for resisting or obstructing a police officer. In 2000, he was convicted of committing battery on his spouse. There is insufficient evidence to establish Applicant committed the offense of rape or incest. There is no police report describing this offense. Applicant admitted he engaged in sexual intercourse with the victim; however, he claimed she was 18 years old. There is no evidence to contradict his claim. SAS ¶¶ 4b(1), 4b(2), and 4b(5) apply to his five misdemeanor-level convictions.

DODI 5200.46, App. 2 to Encl. 4, SAS 2c, lists four conditions that could mitigate CAC credentialing concerns:

(1) The behavior happened so long ago, was minor in nature, or happened under such unusual circumstances that it is unlikely to recur;

(2) Charges were dismissed or evidence was provided that the person did not commit the offense and details and reasons support his or her innocence;

(3) Improper or inadequate advice from authorized personnel or legal counsel significantly contributed to the individual's omission of information. When confronted, the individual provided an accurate explanation and made prompt, good-faith effort to correct the situation; and

(4) Evidence has been supplied of successful rehabilitation, including but not limited to remorse or restitution, job training or higher education, good employment record, constructive community involvement, or passage of time without recurrence.

Three of Applicant's five substantiated misdemeanor-level offenses are alcohol-related. He attended alcohol-related counseling for four months, and he has participated in AA meetings since December 2009. He has refrained from alcohol consumption for six years. He has not committed any criminal offenses since 2010. In 2015, he successfully completed probation. His two most recent convictions were expunged. He has a good record of employment as documented in several character statements. SAS ¶¶ 2c(1) and 2c(4) apply because: he provided evidence of actions taken to overcome

his alcohol abuse and criminal conduct; he established a pattern of abstinence from alcohol use; and criminal conduct has not recurred since 2010. Concerns about criminal dishonest conduct are mitigated.

Alcohol Abuse

DODI 5200.46, App. 2 to Encl. 4, SAS ¶ 4 describes the concern:

A CAC will not be issued to a person if there is a reasonable basis to believe, based on the nature or duration of the individual's alcohol abuse without evidence of substantial rehabilitation, that issuance of a CAC poses an unacceptable risk.

An individual's abuse of alcohol may put people, property, or information systems at risk. Alcohol abuse can lead to the exercise of questionable judgment or failure to control impulses, and may put people, property, or information systems at risk, regardless of whether he or she is diagnosed as an abuser of alcohol or alcohol dependent. A person's long-term abuse of alcohol without evidence of substantial rehabilitation may indicate that granting a CAC poses an unacceptable safety risk in a U.S. Government facility.

DODI 5200.46, App. 2 to Encl. 4, SAS ¶ 4b, lists four conditions that raise a CAC concern and may be disqualifying:

- (1) A pattern of alcohol-related arrests;
- (2) Alcohol-related incidents at work, such as reporting for work or duty in an intoxicated or impaired condition, or drinking on the job;
- (3) Current continuing abuse of alcohol; and
- (4) Failure to follow any court order regarding alcohol education, evaluation, treatment, or abstinence.

In 1986, 1990, and 2009, Applicant was arrested for DUI, and he was convicted of these three DUI offenses. SAS ¶ 4b(1) applies because Applicant has a pattern of alcohol-related arrests.

DODI 5200.46, App. 2 to Encl. 4, SAS ¶ 4c, lists three conditions that could mitigate concerns about "whether there is a reasonable basis to believe there is an unacceptable risk":

- (1) The individual acknowledges his or her alcoholism or issues of alcohol abuse, provides evidence of actions taken to overcome this problem, and has established a pattern of abstinence (if alcohol dependent) or responsible use (if an abuser of alcohol);

(2) The individual is participating in counseling or treatment programs, has no history of previous treatment or relapse, and is making satisfactory progress; and

(3) The individual has successfully completed inpatient or outpatient counseling or rehabilitation along with any required aftercare. He or she has demonstrated a clear and established pattern of modified consumption or abstinence in accordance with treatment recommendations, such as participation in an alcohol treatment program. The individual has received a favorable prognosis by a duly qualified medical professional or a licensed clinical social worker who is a staff member of a recognized alcohol treatment program.

Applicant's three alcohol-related problems (DUIs) are also criminal conduct. His abstinence from alcohol consumption and rehabilitation are discussed in the previous section. SAS ¶ 4c(1) applies because he acknowledged his alcohol-related problems, provided evidence of actions taken to overcome his problem, and established a pattern of alcohol abstinence of more than five years. Concerns about alcohol abuse are mitigated.

Material, Intentional Falsification, Deception, or Fraud

DODI 5200.46, App. 2 to Encl. 4, SAS, ¶ 3 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 material, intentional false statement, deception, or fraud in connection with federal or contract employment, that issuance of a CAC poses an unacceptable risk.

The individual's conduct involving questionable judgment, lack of candor, or unwillingness to comply with rules and regulations can raise questions about an individual's honesty, reliability, trustworthiness, and put people, property, or information systems at risk.

DODI 5200.46, App. 2 to Encl. 4, SAS, ¶ 3b indicates a condition that "may be disqualifying include[s] material, intentional falsification, deception or fraud related to answers or information provided during the employment process for the current or a prior federal or contract employment (e.g., on the employment application or other employment, appointment or investigative documents, or during interviews.)."

The Government established this disqualifying condition through Applicant's admissions and evidence presented that he did not disclose his two misdemeanor-level convictions in 2010 and his being on probation at the time he completed his November 26, 2013 OF 306. He did not disclose this information because he believed the government would not find out about it.

DODI 5200.46, App. 2 to Encl. 4, SAS ¶ 3c, lists two circumstances relevant to the determination of whether there is a reasonable basis to believe there is an unacceptable risk:

- (1) The misstated or omitted information was so long ago, was minor, or happened under such unusual circumstances that it is unlikely to recur; and
- (2) The misstatement or omission was unintentional or inadvertent and was followed by a prompt, good-faith effort to correct the situation.

Applicant intentionally provided false information on his November 26, 2013 OF 306 about his criminal history when he denied that he had criminal convictions and was on probation in the previous seven years. This falsification is recent, intentional, and serious. Material, intentional falsification, deception, or fraud concerns are not mitigated.

Whole-Person Assessment

DODI 5200.46, Encl. 4, *CAC Adjudicative Procedures*, ¶ 1, *Guidance For Applying Credentialing Standards During Adjudication* provides the following mitigating factors:

As established in Reference (g),¹ 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 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).²

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.

¹Reference (g) is HSPD – 12.

²Reference (c) is U.S. Office of Personnel Management Memorandum, *Final Credentialing Standards for Issuing Personal Identity Verification Cards Under HSPD-12*, July 31, 2008.

(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.

Applicant is a 48-year-old heavy equipment mechanical inspector employed by a defense contractor since October 2001. He is credited with being a good employee. He seeks continued CAC eligibility as a condition of his employment. His colleagues at work describe him as pleasant, dedicated, responsible, helpful, diligent, and proficient. He reports to work on time, and he contributes to his employer's accomplishment of tasks. There is no evidence of security violations, felony convictions, or illegal drug abuse.

On November 26, 2013, Applicant completed an OF 306. Applicant answered, no, to question 9, which asked, "During the last 7 years, have you been convicted, been imprisoned, been on probation, or been on parole? (Includes felonies, firearms or explosives violations, misdemeanors, and all other offenses)." He provided this false answer despite having two misdemeanor convictions in 2010 and being on probation on November 26, 2013, when he signed his OF 306. He lied because he believed the government would not find out about his criminal history.

I have carefully considered the facts of this case and applied the standards in DODI 5200.46. None of the mitigating conditions are sufficient to fully resolve CAC eligibility concerns because his submission of a false OF 306 on November 26, 2013, is

recent and demonstrated a serious lapse in judgment. Applicant's request for CAC eligibility is denied.

Formal Findings

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by section E3.1.25 of Encl. 3 of the Directive, are:

Paragraph 1, Criminal Dishonest Conduct:	FOR APPLICANT
Subparagraphs 1.a through 1.h:	For Applicant
Paragraph 2, Material, Intentional False Statement, Deception, or Fraud:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant
Paragraph 3, Alcohol Abuse:	FOR APPLICANT
Subparagraph 3.a:	For Applicant

Conclusion

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 CAC eligibility. CAC eligibility is denied.

MARK HARVEY
Administrative Judge