



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



In the matter of:

Applicant for CAC Eligibility

)
)
)
)
)

CAC Case No. 15-06135

Appearances

For Government: Aubrey DeAngelis, Esq., Department Counsel
For Applicant: *Pro se*

October 14, 2016

Decision

Goldstein, Jennifer I., Administrative Judge:

Statement of the Case

On September 10, 2015, the Department of Defense (DoD) issued a Statement of Reasons (SOR) to Applicant detailing eligibility concerns for Common Access Card (CAC) issuance pursuant to Homeland Security Presidential Directive-12 (HSPD-12). DoD was unable to find that it was clearly consistent with the national interest to grant Applicant CAC eligibility. The action is based on the Adjudicative Standards found in DoD Instruction 5200.46, *DoD Investigative and Adjudicative Guidelines for Issuing the Common Access Card*, dated September 9, 2014, and made pursuant to 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: Paragraph 2.a (criminal or dishonest conduct) and Paragraph 4.a (alcohol abuse).

Applicant answered the SOR on September 30, 2015 (Answer), and requested a hearing before an administrative judge. The case was assigned to another administrative judge on November 16, 2015, and was reassigned me on February 18, 2016. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing

on May 10, 2016, scheduling the hearing for June 20, 2016. The hearing was convened via video teleconference, as scheduled. The Government offered Exhibits (GE) 1 through 3, and they were admitted without objection. Applicant offered Exhibits (AE) A through C, and testified on his own behalf. AE A through AE C were admitted, without objection. DOHA received the transcript of the hearing (Tr.) on June 28, 2016. Based on the record evidence and testimony presented in this case, Common Access Card eligibility is denied.

Findings of Fact

Applicant is 56 years old. He is married and has two adult daughters. He has worked for his employer for six years. (GE 1; Tr. 19.)

The SOR alleged, under the Supplemental Adjudicative Standards concerning criminal conduct and alcohol abuse, that Applicant should be disqualified from CAC eligibility because: Applicant was arrested and convicted of alcohol-related offenses in 1999 and 2005; and he was arrested for driving under the influence in 2011. Applicant admitted all of the allegations. (Tr. 7-8.) After a thorough and careful review of the pleadings and exhibits, I make the following findings of fact:

On May 29, 1999, Applicant was arrested and charged with operating a motor vehicle with .10 of 1% alcohol (misdemeanor). He was convicted and sentenced to pay a fine of \$300. His driver's license was suspended for 90 days. Applicant testified that "after [a] church meeting, [he] had a drink with friends and [he] was intoxicated but [he] was driving to home, and [he] was caught by police." He frequently drove after drinking alcohol during this time period. He estimated that he had four or five bottles of beer prior to driving on the day of his arrest. (GE 3; Tr. 26-29.)

On December 15, 2005, Applicant was arrested and charged with driving while intoxicated (misdemeanor). He testified he had again been drinking with friends after church and consumed approximately four or five bottles of beer prior to attempting to drive. He was convicted and sentenced to 15 days confinement, placed on probation for three years, fined \$1,000, and his driver's license was revoked. Applicant was required to complete a mandatory six-month rehabilitation program run by his state. During that rehabilitation program, he was subject to mandatory alcohol screening. He claimed he received no diagnosis during the treatment program. After this incident, Applicant abstained from alcohol use for two years. (GE 3; Tr. 23-25, 29-31.)

Applicant resumed drinking alcohol when he moved to another country in 2007. On June 19, 2011, Applicant was arrested in that foreign country, and charged with driving under the influence. On this occasion, Applicant had consumed half a bottle of Soju at his aunt's house. Applicant's wife was the designated driver, but she was ill and unable to drive. He was concerned that he should not drive after drinking, but did anyway. As a result of this incident, Applicant's driver's license was suspended for six months. He was fined approximately \$1,000. (GE 2; Tr. 32-33, 35-36, 39.)

Applicant testified that he consumes alcohol twice per week. He drinks three to four bottles of beer at a time. He weighs 120 pounds. He last consumed beer two days prior to the hearing. He does not recall the last time he was intoxicated, as he does not feel intoxicated when he drinks three to four bottles of beer. He testified that he has changed his drinking habit since his arrests, but failed to elaborate further. (Tr. 22-23, 36.) He also testified that he learned his lesson, "and I [will] never drink and drive again." (Tr. 33.) He does not believe he has any problems moderating the amount of alcohol he consumes. (Tr. 34.)

Applicant presented a letter or recommendation from his managing director. She indicated Applicant "has performed well on the projects under his supervision and had them completed on time." (AE A.) Applicant's daughter submitted an affidavit that indicated Applicant provided for his daughters and was a loving and supportive father. (AE B.) Applicant also included a list of his major projects he has performed. (AE C.)

Policies

Every CAC eligibility decision must be a fair and impartial overall commonsense decision based on all available evidence, both favorable and unfavorable. The HSPD-12 credentialing standards 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 eligibility criteria 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 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 the 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.) 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

Supplemental Adjudicative Standards, Paragraph 2.a

DoDI 5200.46, Enclosure 4, Appendix 2, Supplemental Adjudicative Standards expresses concerns pertaining to criminal or dishonest conduct. Paragraph 2 of this section states:

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.

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

The disqualifying conditions set forth in DoDI 5200.46, Enclosure 4, Appendix 2, Subparagraph 2.b that are raised by Appellant's criminal conduct are:

(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 employee's personal property on a U.S. Government facility; and

(2) Charges or admissions 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.

Applicant was convicted of two separate alcohol offenses because he chose to drive a vehicle after consuming alcohol in 1999 and 2005. Despite two years of sobriety, he resumed alcohol consumption and again chose to operate a vehicle after consuming alcohol in 2011. These three criminal offenses put the safety of others at risk. The above disqualifying conditions apply.

Potentially mitigating conditions are set forth in DoDI 5200.46, Enclosure 4, Appendix 2, Subparagraph 2.c. The conditions that could apply to mitigate the security concerns raised by the evidence in this case are:

(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; 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.

Applicant admitted all three criminal incidents. He failed to submit evidence of successful rehabilitation. He has a history of driving after consuming alcohol. While he claims to have learned his lesson, and that five years have passed since his last alcohol-related arrest, he documented little evidence to establish that recidivism is unlikely. He continues to consume alcohol to excess. Six years passed between each of his prior alcohol-related incidents, yet he chose to get behind the wheel of a vehicle after becoming intoxicated again in 2011, despite completing a required alcohol rehabilitation program. As a result, I am unable to conclude that these three instances of criminal conduct occurred under unusual circumstances or that future criminal conduct is unlikely. Applicant failed to meet his burden to establish mitigation under the conditions in DoDI 5200.46, Enclosure 4, Appendix 2, Subparagraph 2.c.

Supplemental Adjudicative Standards, Paragraph 4.a

DoDI 5200.46, Enclosure 4, Appendix 2, Supplemental Adjudicative Standards, also expresses concerns pertaining to alcohol abuse. Paragraph 4 of this section states:

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.

- a. 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.

The applicable disqualifying condition set forth in DoDI 5200.46, Enclosure 4, Appendix 2, Subparagraph 4.b that is raised by Appellant's alcohol abuse is:

- (1) A pattern of alcohol-related arrests.

Applicant's three arrests for driving under the influence constitute a pattern of alcohol-related arrests. Subparagraph 4.b(1) is disqualifying and places the burden on Applicant to mitigate the Government's concern.

Potentially mitigating conditions are set forth in DoDI 5200.46, Enclosure 4, Appendix 2, Subparagraph 4.c. The conditions that could apply to mitigate the security concerns raised by the evidence in this case are:

- (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 failed to demonstrate any of the above mitigating conditions apply. He does not acknowledge any issues of alcohol abuse or alcoholism. He continues to consume alcohol and did not present evidence of a pattern of responsible use, other than the absence of alcohol-related offenses in the past five years. This alone is not enough to mitigate the Government's concern, given his past history since 1999. He previously completed a rehabilitation program, but relapsed when he moved to another country. He is not currently participating in any treatment programs. Applicant's alcohol abuse remains a concern.

Further Mitigation

DODI 5200.46, Enclosure 4, *CAC Adjudicative Procedures*, Paragraph 1, *Guidance For Applying Credentialing Standards During Adjudication* provides the following:

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 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).

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.

Applicant presented evidence of good character through the letters from his manager and his daughter. However, those letters fail to establish rehabilitation or other positive changes. His three alcohol-related incidents, which occurred when Applicant was a mature adult, continue to cast doubt on his judgment and reliability. He has not demonstrated that he has the requisite judgment to have CAC eligibility. Applicant's request for CAC eligibility should be denied.

Formal Findings

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

SOR Paragraph 1:	AGAINST APPLICANT
Subparagraphs 1.a~1.c:	Against Applicant
SOR Paragraph 2:	AGAINST APPLICANT
Subparagraph 2.a:	Against 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.

Jennifer I. Goldstein
Administrative Judge