



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



In the matter of:

Applicant for CAC Eligibility

)
)
)
)
)
)
)

CAC Case No. 15-06220

Appearances

For Government: Benjamin R. Dorsey, Esq., Department Counsel
For Applicant: *Pro se*

10/25/2016

Decision

WESLEY, Roger C., Administrative Judge:

Based upon a review of the pleadings and exhibits, I conclude that Applicant failed to mitigate Common Access Card (CAC) credentialing concerns raised under the supplemental adjudicative standards for the illegal use of narcotics, drugs, or other controlled substances without evidence of substantial rehabilitation. Eligibility for access to a CAC card is denied.

History of the Case

On May 22, 2015, the Department of Defense (DOD) Consolidated Adjudication Facility (CAF) issued a Statement of Reasons (SOR) detailing eligibility concerns for CAC eligibility pursuant to Homeland Security Presidential Directive - 12 (HSPD-12), *Policy for a Common Identification Standard for Federal Employees and Contractors*, dated August 27, 2004. DOD adjudicators were unable to make the affirmative determination that granting Applicant CAC eligibility posed no unacceptable risk. The action was based on the Supplemental Adjudicative Standards (SAS) found in DODI 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), and Regulation 5200.2-R (Reference (q)). The concerns raised under the *Supplemental Adjudicative Standards* of DOD 5200.46 are: "Individual use of narcotics, drugs or other controlled substances without evidence of substantial rehabilitation."

Applicant responded to the SOR on June 18, 2015, and elected to have his case decided on the basis of the written record. Applicant received the Government's File of Relevant Material (FORM) on February 9, 2016, and did not submit any information in response to the FORM. The case was assigned to me on May 10, 2016.

Summary of Pleadings

Under Supplemental Adjudicative Standards-Paragraph 5.a - Drugs, Applicant allegedly (a) used illegal mushrooms between December 2009 and December 2010; (b) illegally used Oxycontin from August to December 2010; (c) illegally used Adderall from December 2009 to December 2010; (d) used cocaine in June 2014; and (e) used marijuana from January 2008 to December 2014.

In his response to the SOR, Applicant admitted each of the allegations with explanations. He claimed he refrained from any illegal drug use since his most recent use of marijuana in December 2014.

Findings of Fact

Applicant is a 26-year-old graduate mechanical engineer for a defense contractor who seeks CAC eligibility. The allegations covered in the SOR, and admitted by Applicant are adopted as relevant and material findings. Additional findings follow.

Background

Applicant earned a bachelor's degree in mechanical engineering in December 2012. (Item 3) He claimed no military service. Applicant worked for his last reported employer between March 2013 and November 2014 as a graduate mechanical engineer. (Items 1 and 3)

Drug Use

Between December 2009 and December 2014, Applicant used multiple drugs of choice: some illegal (mushrooms, marijuana, and cocaine) and others illegal when used without prescription (OxyContin and Adderall) (Items 1 and 2) While SOR allegations detailing Applicant's use of OxyContin and Adderall do not indicate whether Applicant used these drugs without a prescription, Applicant's admission to using these drugs illegally is sufficient to cure any defects in the allegation. Inferences of illegal use of controlled substances and drugs that are illegal when used without a prescription are warranted based on the established facts in this written record.

Applicant assured that he has refrained from any illegal drug use since his most recent marijuana use in December 2014. (Item 1) Without any additional proof of post-2014 use of illegal drugs or prescriptive drugs without a prescription, no inferences can be drawn of recurrent drug use beyond December 2014.

Character References and Awards

Applicant provided no character references on his behalf, either with his answer or with his response to the FORM. Nor did he furnish any performance evaluations or evidence of community and civic contributions.

Policies

The SASs list guidelines to be used by administrative judges in the decision-making process covering CAC cases. These guidelines take into account factors that could create a potential conflict of interest for the individual applicant, as well as considerations that could affect his eligibility to hold a common access card. 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 SASs must be considered before deciding whether or not CAC eligibility should be granted, continued, or denied. The standards do not require administrative judges to place exclusive reliance on the enumerated disqualifying and mitigating conditions in the standards in arriving at a decision. Each of the standards is to be evaluated in the context of the whole person.

In addition to the relevant SASs, administrative judges must take into account the pertinent considerations for assessing extenuation and mitigation set forth in SAS ¶ 1(b) of the SASs, which are intended to assist the judges in reaching a fair and impartial commonsense decision based upon a careful consideration of the pertinent guidelines within the context of the whole person. The adjudicative process is designed to examine a sufficient period of an applicant's life to enable predictive judgments to be made about whether the applicant is an acceptable CAC eligibility risk.

When evaluating an applicant's conduct, the relevant standards are to be considered together with the following factors: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowledgeable participation; (3) the frequency and recency 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. See DODI 5200.46.

Viewing the issues raised and evidence as a whole, the following individual guideline is pertinent in this case:

Drugs

DODI 5200.46 Appendix 2 to enclosure 4, Supplemental Adjudicative Standards, Paragraphs 5.a articulates the CAC concern as follows:

An individual's abuse of drugs may put people, property, or information systems at risk. Illegal use of narcotics, drugs, or other controlled substances, to include abuse of prescription or over-the-counter drugs, can raise questions about his or her trustworthiness, or ability or willingness to comply with laws, rules, and regulations. For example, a person's long-term illegal use of narcotics without evidence of substantial rehabilitation may indicate that granting a CAC poses an unacceptable safety risk in a U.S. Government facility.

Burden of Proof

By virtue of the principles and policies framed by the SASs, a decision to grant or continue an applicant's CAC eligibility may be made only upon a threshold finding that to do so is clearly consistent with the national interest. Because the objective of the CAC credentialing process is the fair-minded assessment of a person's life to facilitate an affirmative determination that the person is an acceptable risk, the Directive requires administrative judges to make a commonsense appraisal of the evidence accumulated in the record, the ultimate determination of an applicant's eligibility for a CAC depends, in large part, on the relevance and materiality of that evidence. See *United States, v. Gaudin*, 515 U.S. 506, 509-511 (1995). As with all adversarial proceedings, the judge may draw only those inferences which have a reasonable and logical basis from the evidence of record.

The Government's initial burden is twofold: (1) it must prove by substantial evidence any controverted facts alleged in the SOR, and (2) it must demonstrate that the facts proven have a material bearing to the applicant's eligibility to obtain or maintain CAC eligibility. The required materiality showing, however, does not require the Government to affirmatively demonstrate that the applicant has actually mishandled or abused classified information before it can deny or revoke a security clearance. Rather, the judge must consider and weigh the cognizable risks that an applicant may deliberately or inadvertently fail to demonstrate trust and reliability considerations.

Once the Government meets its initial burden of proof of establishing admitted or controverted facts, the evidentiary burden shifts to the applicant for the purpose of establishing his or her trustworthiness through evidence of refutation, extenuation, or mitigation. Based on the requirement found in DODI Instruction 5200.46 that all CAC eligibility determinations be clearly consistent with the national interest, the applicant has the ultimate burden of demonstrating his or her CAC eligibility. "[S]ecurity-clearance "[CAC eligibility] determinations should err, if they must, on the side of denials." See *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988).

Analysis

The SAS's list several conditions that may be disqualifying: (1) current or recent illegal drug use, serious narcotic, or other controlled substance offense; (3) illegal possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia; and (8) any illegal use or abuse of prescription or over-the-counter drugs. See 5200.46, App. 2, Encl. 4. Each of these listed disqualifying conditions fully apply to the facts in Applicant's case. Judgment concerns exist over Applicant's past drug use. He has a considerable history of drug abuse over a five-year period spanning 2009 through 2014 and less than four years of demonstrated abstinence.

Considering the recent and relatively prolonged nature of Applicant's past abuse of illegal drugs, insufficient time has elapsed to facilitate safe predictable judgments that he poses no unacceptable risks of recurrence. Pertinent mitigating conditions covered by SAS 5c are not available to Applicant. Applicant has expressed no documented intent to avoid abuse of any illegal drugs or prescription drugs without prescriptions in the future and furnished no evidence of completion of a prescribed drug treatment program.

From a whole-person perspective, Applicant has established insufficient probative evidence of his commitment to avert recurrent drug use in the future. He has provided no character references, performance evaluations, or evidence of civic contributions. Applicant's admissions of multiple drug use over a five-year period and insufficient probative evidence that is he not an unacceptable risk to return to drug use in the foreseeable future preclude drawn favorable conclusions about his overall judgment, reliability and trustworthiness.

Taking into account all of the facts and circumstances surrounding Applicant's drug use and associated judgment lapses, Applicant does not mitigate risk concerns related to his use of illegal drugs. Unfavorable conclusions warrant with respect to the allegations covered by SOR ¶¶ 1.a through 1.e. of SAS 5.

Formal Findings

In reviewing the allegations of the SOR and ensuing conclusions reached in the context of the findings of fact, conclusions, conditions, and the factors listed above, I make the following formal findings:

SAS 5 (DRUG INVOLVEMENT):

AGAINST APPLICANT

Subparas. 1.a-1.e

Against Applicant

Conclusions

In light of all the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant or continue Applicant's CAC eligibility. Eligibility for a CAC is denied.

Roger C. Wesley
Administrative Judge

Applicant is a fully employed network engineer for a defense contractor who accumulated delinquent mortgage-related debts exceeding \$275,000. Two of the listed debts (i.e., the home equity lines of credit with creditors 1.a and 1.c) were charged off and remain outstanding with no evidence of their being addressed by Applicant to date. The remaining debt with creditor 1.b remains in collection status with no evidence of any initiated payment action by Applicant. The record evidence confirms that Applicant has made no payments on any of the listed lines of credit and expressed no plans to do so.

Applicant's collective accumulation of delinquent debts warrant the application of two of the disqualifying conditions (DC) of the Guidelines. DC ¶ 19(a), "inability or unwillingness to satisfy debts," and DC ¶ 19(c), "a history of not meeting financial obligation," apply to Applicant's situation.

Applicant's pleading admissions with respect to his accumulation of unaddressed delinquent debts covered in the SOR negate the need for any independent proof (*see McCormick on Evidence*, § 262 (6th ed. 2006)). Each of Applicant's listed filing lapses and debts are fully documented in his credit reports. Some judgment problems persist over Applicant's insufficiently explained accrual of mortgage-related debts with his lenders. To date, he has taken no documented corrective steps to resolve his delinquencies and demonstrate he acted responsibly in addressing his listed debts. See ISCR Case 03-01059 at 3 (App. Bd. Sep. 24, 2004).

Holding a public trust position involves a fiduciary relationship between the Government and the public trust position holder. Quite apart from any agreement the public trust position holder may have signed with the Government, the nature of the public trust position holder's duties and access to privacy information necessarily imposes important duties of trust and candor on the public trust position holder that are considerably higher than those typically imposed on Government employees and contractors involved in other lines of Government business. See *Snepp v. United States*, 444 U.S. 507, 511 n.6 (1980).

Dishonesty issues associated with Applicant's transfer of assets to his sister for holding compound judgment concerns over Applicant's trustworthiness and reliability. By placing his assets beyond the reach while contemplating filing for bankruptcy, Applicant impaired the ability of the creditors to enforcement their creditor rights.

Whether Applicant ever pursues Chapter 13 bankruptcy relief is still very difficult to predict. Should he ever decide to petition for Chapter 13 relief, his asset transfers are potentially at risk to being determined fraudulent transfers under his state's law governing fraudulent conveyances and set asides. Based on the evidence presented, none of the mitigating conditions covered by Guidelines F and E apply to Applicant's situation.

Whole-person assessment does not enable Applicant to surmount the judgment questions raised by his accumulation of delinquent mortgage debts and failure to resolve them. Resolution of his listed delinquent accounts is a critical prerequisite to his regaining control of his finances. His ensuing placement of his assets beyond the reach of his creditors adds to the judgment concerns associated with his accrual of delinquent mortgage-related debts only adds to the judgment concerns associated with his debt accruals.

While unanticipated financial burdens might have played a considerable role in his failures to address his delinquent debts, Applicant failed to provide more specific explanatory material for consideration. Endorsements and performance evaluations might have been helpful, too, in making a whole-person assessment of her overall clearance eligibility, but were not provided.

Overall, public trust position eligibility assessment of Applicant based on the limited amount of information available for consideration in this record does not enable him to establish judgment and trust levels sufficient to overcome trust concerns arising out of his lapses in judgment associated with his accumulation of delinquent mortgage debts and placing his assets beyond the reach of his creditors.; Taking into account all of the documented facts and circumstances surrounding Applicant's accrual of delinquent mortgage-related debt and his lack of more specific explanations for his debt accruals and his lack of documented resolution of them, it is still too soon to make safe predictions of Applicant's ability to satisfactorily resolve his outstanding debts. Unfavorable conclusions warrant with respect to the allegations covered by subparagraphs 1.a through 1.c of Guideline F and subparagraph 2.a of Guideline E.

Formal Findings

In reviewing the allegations of the SOR and ensuing conclusions reached in the context of the findings of fact, conclusions, conditions, and the factors listed above, I make the following formal findings:

GUIDELINE F (FINANCIAL CONSIDERATIONS): AGAINST APPLICANT

Subparas. 1.a through 1.d:	Against Applicant
----------------------------	-------------------

GUIDELINE E (PERSONAL CONDUCT): AGAINST APPLICANT

Subpara. 2.a:	Against Applicant
---------------	-------------------

Conclusions

In light of all the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant or continue Applicant's eligibility to hold a public trust position. Eligibility to hold a public trust position is denied.

Roger C. Wesley
Administrative Judge

