

amended (Directive), and Regulation 5200.2-R (Reference (q)). The concerns raised under the *Supplemental Adjudicative Standards* of DOD 5200.46 are: an individual's "past criminal or dishonest conduct" and "an individual's conduct involving questionable judgment" "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 a hearing. The case was assigned to me on June 17, 2016, and scheduled for hearing on August 3, 2016. A hearing was held on the scheduled date for the purpose of considering whether it would be clearly consistent with the national interest to grant, continue, deny, or revoke Applicant's CAC eligibility.

At the hearing, the Government's case consisted of nine exhibits. (GEs 1-9) Applicant relied on two witnesses (including himself) and one exhibit (AE A) The transcript (Tr.) was received on August 12, 2016.

Procedural Issues

Before the close of the hearing , Applicant requested the record be keep open to permit him the opportunity to supplement the record with a substance abuse report from 2010 covering Applicant's alcohol rehabilitation program that he entered in 2010 and completed in 2012. For good cause shown, Applicant was granted seven days to supplement the record. Department Counsel was afforded two days to respond.

Within the time permitted, Applicant furnished citations to ISCR cases, but no 2012 substance abuse report. Applicant's submission was admitted as AE B.

Summary of Pleadings

Under Supplemental Adjudicative Standards-Paragraph 2.a - Criminal or Dishonest Conduct . . . , Applicant allegedly incurred multiple arrests and charges covering drugs and alcohol-related conduct between 2008 and 2011. And under Adjudicative Standards-Paragraph 5.a - Illegal Use of Narcotics, Drugs, or Other Controlled Substances, Applicant allegedly used or possessed marijuana between January 2008 and January 2011; illegally possessed Darvon (a prescription drug) and drug paraphernalia in 2011; committed larceny of private property (prescription for Darvon); and received a general discharge under honorable conditions from the U.S. Army for the commission of a serious offense.

Under Adjudicative Standards-Paragraph 5.a - Illegal Use of Narcotics, drugs, or Other Controlled Substances, Applicant allegedly used marijuana and Darvon (a prescriptive drug) as incorporated under ¶ Standards-Paragraph 2.a - Criminal or Dishonest Conduct ,

In his response to the SOR, Applicant admitted each of the allegations. He furnished no explanations.

Findings of Fact

Applicant is a 29-year-old medical record associate 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 met his wife in December 2011 and married her in May 2012. (Tr. 46) He has one daughter (age two) from this marriage. (Tr. 25-26, 73-74)

Applicant claimed no post-high school education credits. (GE 1) He enlisted in the United States (U.S.) Army in June 2005 and served six years of active duty (including several deployments before receiving a general discharge under honorable conditions in June 2011. (GE 2; Tr. 57-58)

Alcohol and drug-related offenses

In January 2008, Applicant tested positive on a urinalysis test for use of marijuana while home from active-duty deployment in the Army. (Tr. 30-31) He received a field grade Article 15 non-judicial punishment (NJP), and was awarded a reduction in rank from E-4 to E-2 and was assigned extra duty and restricted conditions for 45 days. (GEs 8-9; Tr. 31-32) Applicant described himself as a “functioning addict” who abused alcohol and illegal drugs in the Army. (Tr. 32-34) In Applicant’s opinion, his active drug use contributed to his 2011 general discharge under honorable conditions. (Tr. 58)

Details of Applicant’s failed 2008 urinalysis test were noted in the military police report covering Applicant’s urinalysis test. (GE 9) Notes in the report confirmed that Applicant relinquished a urine sample during a routine directed urinalysis, which subsequently tested positive for marijuana metabolites. (GE 9) Applicant, in turn, was advised of his legal rights before being released. (GE 9) The commander’s report covering the test confirmed the urinalysis findings and the ensuing award of NJP to Applicant. (GE 8) As a result of his positive drug test, Applicant enrolled in a 30-day Army substance abuse program (ASAP), which he completed sometime in 2008 with a cannabis dependency diagnosis. (Tr. 52-53) His ASAP counselors did not recommend any period of cannabis abstinence. (Tr. 53)

In May 2010, Applicant was arrested by state police in his state of residence and charged with driving while intoxicated (Misdemeanor Class B) and Obstructing Highway Passageway (Misdemeanor Class B). When he appeared in court to answer the charges, he pled no contest to the Obstructing Highway Passageway and received a 12-month deferred probation from the court. (GE 3; Tr. 34-36, 40)

Applicant tested positive on a urinalysis test in January 2011 for marijuana while on active-duty military service. (GEs 2-3 and 6-7) Records from his command confirm

that he was awarded Article 15 NJP and reduced in rank to E-1, ordered to forfeit \$733 pay per month, given extra duty, and restricted for 45 days. (GE 8)

In June 2011, Applicant was arrested by military police and charged with wrongful possession of Darvon (a prescription drug), drug paraphernalia, and larceny of private property (a prescription for Darvon). His 2011 general discharge from the Army under honorable conditions was formally attributed to the commission of a serious offense. (GE 8) Applicant attributed his general discharge to drug use. (Tr. 40-44)

Applicant's drug and alcohol abuse history

Applicant was introduced to marijuana in 2007, five to six months before he tested positive for marijuana in January 2008. (Tr. 30-31, 50) Between 2007 and December 2011, Applicant used marijuana bi-daily for the most part, often with other soldiers in his command who supplied the marijuana. (Tr. 47-48, 54-56) Sometimes, he would avoid marijuana altogether for weeks at a time while on deployment and in other situations. (Tr. 54-56, 58-59) Following his marriage in December 2011, he reduced his marijuana in-take to every two to three days out of respect to his wife. (Tr. 58-59) And since February 2015, he assured he has abstained from marijuana altogether. (Tr. 46-47)

Prior to his 2010 arrest, he abused alcohol, consuming a half-pint of alcohol (Tr. 34) He attended an alcohol rehabilitation program following his 2010 DUI arrest and received an alcohol and cannabis dependence diagnosis before completing the program in 2012. (Tr. 36-37) Since 2012, he has attended counseling sessions on an on and off basis and takes prescribed medications. (Tr. 37-39) Because Applicant provided no medical records detailing his cannabis and alcohol dependence diagnoses and recommendations (if any), no firm alcohol assessment can be made on the facts presented.

Applicant assured he last used marijuana and ceased associating with individuals who used drugs in February 2015. (Tr. 46-48) He attributed his decision to cease all use of illegal drugs to his parental concerns over his child and issues with his wife over his drug use. (Tr. 48) Further, he assured he stopped consuming alcohol in early 2012, and has maintained his abstinence from alcohol since February 2012. (Tr. 58)

Asked to verify his commitment to abstinence for both drug and alcohol use, his wife provided some background to better assess Applicant's childhood development and his lack of role models in his life. (Tr. 63-67, 73) She contrasted his earlier childhood development with his current progress and family support, which she believes has served him well and helped to steer himself away from alcohol and drug abuse. (Tr. 63-67)

Applicant considers himself a changed man since he met his wife in June 2012. (Tr. 44-45) He has added lifestyle changes to his daily routine, to include physical activity and church-based community service to keep himself motivated and resistant to

urges to return to substance abuse. (Tr. 49) Since he stopped using drugs in February 2015, Applicant no longer associates with the individuals who supplied him the marijuana he used. (Tr. 47)

Without the benefit of an updated substance abuse report, however, a full and reliable assessment of Applicant's drug and alcohol use condition and prognosis cannot be made at this time. More documented details of Applicant's drug and alcohol abuse history are needed before a more definitive risk assessment can be made about Applicant's risks of recurrence of drug and alcohol can be properly made.

Character references

Applicant's wife (a second grade school teacher with a concentration in reading and language) traced Applicant's adjustment problems to his early upbringing without a father or role models in his life. (Tr. 62-65) Raised by his mother, he encountered difficult adjustment problems in the Army and turned to drugs. (Tr. 64-65) Since their marriage, she has consistently encouraged him to give up drugs and credited him with positive changes in his life. (Tr. 66-73)

Equally supportive of Applicant's progress in changing the direction of his life is Applicant's pastor. (AE A) In a favorably-worded letter, his pastor cited Applicant's achievements as a trustee for his church's offering committee and active member of his church, men's group, and volunteers and offered his blessing of Applicant as a valued part of their church. (AE A) As a commissioned officer of the Army with 22 years of active duty service, Applicant's pastor assessed Applicant's performance in citizenship, professionalism, and dedication to be superior to many in his former commands. (AE A) Whether his pastor was aware of any of Applicant's background issues covered in this proceeding is unknown.

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 or her 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. Specific issues raised in individual cases are listed I DODI 5200.46, Enclosure 4, Appendix 1, Basic Adjudicative Standards, and Appendix 2.

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:

Criminal Conduct

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

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.

Drugs

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

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 CAC eligibility, 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 CAC eligibility. To be weighed in determining CAC eligibility are 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

CAC eligibility concerns center on Applicant's considerable history of positive urinalysis tests over three-plus years (January 2008 and June 2011), and alcohol and drug-related arrests. Applicable disqualifying conditions (DC) for criminal or dishonest conduct under the SASs are as follows: DC ¶ 2a(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. . . ." and DC ¶ 2a(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," apply to Applicant's situation. Applicant's accumulated arrests and charges are neither minor nor aged (2008-2011) and raise continued safety and recurrence concerns.

Overlapping, but covered separately by the CAC drug guidelines are Applicant's documented use and possession of marijuana with associates who supplied him the marijuana over an eight year period (2007-2015 period). The SAS's list several conditions that may be disqualifying under the drug guideline: (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 and alcohol and drug abuse and lacks any documentation of prior and recent substance abuse assessments or seasoned track record of proven abstinence.

Considering the recent and relatively prolonged nature of Applicant's sustained patterns of drug and alcohol abuse accompanied by dependence diagnoses and related criminal offenses covering use and possession of illegal drugs, misuse of prescription drugs, and DUI charges, insufficient time has elapsed to facilitate safe predictable judgments that he poses no unacceptable risks of recurrence. Applicant's accumulated arrests and charges are neither minor nor unlikely recur in light of his past history.

Pertinent mitigating conditions covered by SAS 2.c and 5.c 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. While Applicant and his wife expressed confidence in Applicant's ability steer clear of drugs and related criminal offenses, Applicant provided no updated evaluation of his current status. A detailed assessment of Applicant's drug and alcohol history by a licensed substance abuse counselor is needed to provide corroborating assurances that Applicant is no longer subject to an unacceptable risk of recurrence of his drug abuse of previous years.

From a whole-person perspective, Applicant has established insufficient probative evidence of his commitment to avert recurrent drug use in the future. His positive support from his wife and pastor, while encouraging, are not enough to overcome reasonable doubts about his ability to avert recurrent drug abuse. Applicant's admissions of regular marijuana use over an eight-year period, prescriptive drug use without a lawful prescription on at least one occasion in 2011, and insufficient probative evidence that is he not an unacceptable risk to return to drug use in the foreseeable future preclude favorable conclusions about his overall judgment, reliability and trustworthiness.

Taking into account all of the facts and circumstances surrounding Applicant's history of alcohol and drug-related arrests, regular use of drugs, either illegal per se or used illegally, and associated judgment lapses, Applicant does not mitigate risk concerns related to his exhibited criminal conduct and use of illegal drugs, or drugs used illegally. Unfavorable conclusions are warranted with respect to the allegations covered by SOR ¶¶ 1.a through 1.d. of SAS 2 and 2.a 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 2 (CRIMINAL or DISHONEST CONDUCT): AGAINST APPLICANT

Subpara. 1.a-1.d:	Against Applicant
SAS 5 (ILLEGAL USE OF DRUGS):	AGAINST APPLICANT
Subparas. 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 CAC eligibility. Eligibility for a CAC is denied.

Roger C. Wesley
Administrative Judge

