



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



In the matter of:

Applicant for CAC Eligibility

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CAC Case No. 15-06085

Appearances

For Government: Richard Stevens, Esq., Department Counsel
For Applicant: *Pro se*

11/20/2017

Decision

LOUGHRAN, Edward W., Administrative Judge:

Applicant mitigated Common Access Card (CAC) credentialing concerns raised under the illegal use of narcotics, drugs, or other controlled substances supplemental adjudicative standards, but he did not mitigate criminal or dishonest conduct credentialing concerns. CAC eligibility is denied.

Statement of the Case

On August 3, 2015, the Department of Defense (DOD) issued a Statement of Reasons (SOR) to Applicant detailing credentialing concerns for CAC eligibility under the adjudicative standards of criminal or dishonest conduct and illegal use of narcotics, drugs, or other controlled substances. Applicant responded to the SOR on August 25, 2015, and elected to have the case decided on the written record in lieu of a hearing.

The Government's written case was submitted on March 8, 2016. A complete copy of the file of relevant material (FORM) was provided to Applicant, who was afforded an opportunity to file objections and submit material to refute, extenuate, or mitigate the credentialing concerns. Applicant received the FORM on March 17, 2016. As of May 9, 2016, he had not responded. The case was assigned to me on November 9, 2017. The Government exhibits included in the FORM are admitted in evidence.

Findings of Fact

Applicant is 66 years old. He has a general educational development (GED) high school equivalency certificate.¹

Applicant has a criminal history going back more than 48 years. In 1969, he was arrested and charged with forgery. He was convicted and sentenced to incarceration for three years. In 1971, he was arrested and charged with carrying a pistol without a license, carrying a concealed pistol, and armed robbery. He was convicted of armed robbery and sentenced to incarceration for ten years, with seven years suspended.²

Applicant was arrested in 1976 and charged with simple assault. He does not remember this incident. There is no evidence that the charge resulted in a conviction.³

In 1996, Applicant was arrested and charged with possession with intent to distribute cocaine. He was convicted. The sentence is not in the record.⁴

Applicant was arrested in 2005 and charged with possession of a controlled substance for resale and driving under the influence (DUI). The charges were dismissed and then refiled in 2007 as possession of over 26 grams of cocaine for resale, possession of drug paraphernalia, and DUI. In 2008, he was convicted of possession of a controlled substance and sentenced to incarceration for ten years. Applicant was released on parole in 2010. He was still on parole as of August 2015.⁵

Applicant completed a two-year residential drug treatment program and participated in religious studies when he was incarcerated. He asserted that he was no longer involved in illegal drugs.⁶

Policies

This case is adjudicated under Homeland Security Presidential Directive – 12 (HSPD-12); DOD Instruction (DODI) 5200.46, *DOD Investigative and Adjudicative Guidance for Issuing the CAC*, 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).

¹ Item 4.

² Items 1, 2, 5.

³ Items 1, 2, 5.

⁴ Items 1, 2, 5.

⁵ Items 1-3, 5.

⁶ Item 2.

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.

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, ¶ 1)

Analysis

Criminal or Dishonest Conduct

DODI 5200.46, Appendix 2 to Enclosure 4, Supplemental Adjudicative Standards, ¶ 2 provides:

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.

DODI 5200.46, Appendix 2 to Enclosure 4, Supplemental Adjudicative Standards, ¶ 2.b lists several conditions that could raise a CAC eligibility concern and may be disqualifying. The following are potentially applicable in this case:

(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; and

(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.

Applicant's criminal history is sufficient to establish the above disqualifying conditions.

SOR ¶¶ 1.d, 1.e, and 1.f allege the same underlying criminal conduct. The same conduct should not be alleged more than once. SOR ¶¶ 1.d and 1.e are concluded for Applicant.

DODI 5200.46, Appendix 2 to Enclosure 4, Supplemental Adjudicative Standards, ¶ 2.c lists circumstances relevant to the determination whether there is a reasonable basis to believe there is an unacceptable risk. The following may be relevant:

(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 does not remember the 1976 arrest for simple assault. There is no evidence that the charge resulted in a conviction. The mitigating circumstance in ¶ 2.c(2) is applicable to SOR ¶ 1.c.

Applicant has a long criminal history. His last criminal offense was in 2005; he completed a two-year residential drug treatment program when he was incarcerated; and he asserted that he was no longer involved in illegal drugs. However, his 2008 conviction carried a sentence of ten years. He was released on parole in 2010, and he was still on parole as of August 2015. Applicant appears to be sincere, but that is insufficient to mitigate the well-established pattern of criminal conduct. I am unable to determine that criminal behavior is unlikely to recur. There is some mitigation, but the

limited information in the FORM has not convinced me that Applicant does not pose an unacceptable risk. I also considered the factors in DODI 5200.46, Enclosure 4, ¶ 1.

Illegal Use of Narcotics, Drugs, or Other Controlled Substances

DODI 5200.46, Appendix 2 to Enclosure 4, Supplemental Adjudicative Standards, ¶ 5 provides:

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 illegal use of narcotics, drugs, or other controlled substances without evidence of substantial rehabilitation, that issuance of a CAC poses an unacceptable risk.

a. 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.

DODI 5200.46, Appendix 2 to Enclosure 4, Supplemental Adjudicative Standards, ¶ 5.b lists several conditions that could raise a CAC eligibility concern and may be disqualifying. The following are potentially applicable in this case:

(2) A pattern of drug-related arrests or problems in employment; and

(3) Illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution of illegal drugs, or possession of drug paraphernalia.

Applicant's history of illegal drug involvement raises the above disqualifying conditions.

DODI 5200.46, Appendix 2 to Enclosure 4, Supplemental Adjudicative Standards, ¶ 5.c lists circumstances relevant to the determination whether there is a reasonable basis to believe there is an unacceptable risk. The following may be relevant:

(1) The behavior happened so long ago, was so infrequent, or happened under such circumstances that it is unlikely to recur (e.g., clear, lengthy break since last use; strong evidence the use will not occur again);

- (2) A demonstrated intent not to abuse any drugs in the future, such as:
- (a) Abstaining from drug use;
 - (b) Disassociating from drug-using associates and contacts;
 - (c) Changing or avoiding the environment where drugs were used;
and
- (4) Satisfactory completion of a prescribed drug treatment program, including but not limited to rehabilitation and aftercare requirements without recurrence of abuse, and a favorable prognosis by a duly qualified medical professional.

There is no evidence of any drug involvement after 2005. Applicant completed a two-year residential drug treatment program when he was incarcerated. He asserted that he was no longer involved in illegal drugs. Concerns about Applicant's drug involvement are mitigated.

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
Subparagraphs 1.a-1.b:	Against Applicant
Subparagraph 1.c:	For Applicant
Subparagraph 1.d:	Against Applicant
Subparagraphs 1.e-1.f:	For Applicant
Subparagraph 1.g:	Against Applicant
Paragraph 2, Illegal Use of Controlled Substances:	For Applicant
Subparagraph 2.a:	For Applicant

Conclusion

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

Edward W. Loughran
Administrative Judge