



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



In the matter of:)
)
) CAC Case No. 16-01813
)
Applicant for CAC Eligibility)

Appearances

For Government: Bryan J. Olmos, Esq., Department Counsel
For Applicant: *Pro se*

10/29/2018

Decision

CERVI, Gregg A., Administrative Judge:

Applicant did not mitigate Common Access Card (CAC) credentialing concerns raised under supplemental adjudicative standards (SAS) for criminal or dishonest conduct. CAC eligibility is denied.

Statement of the Case

On June 3, 2016, the Department of Defense (DOD) issued a Statement of Reasons (SOR) to Applicant detailing credentialing concerns for CAC eligibility pursuant to Homeland Security Presidential Directive – 12 (HSPD-12). The DOD was unable to find that granting Applicant CAC eligibility did not pose an unacceptable risk.¹ The concerns raised under the Adjudicative Standards of DODI 5200.46 are SAS ¶ 2.a, criminal or dishonest conduct.

¹ The action was taken under the Adjudicative Standards found in DOD Instruction (DODI) 5200.46, *DOD Investigative and Adjudicative Guidelines 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).

Applicant responded to the SOR on July 29, 2016, and requested a hearing before an administrative judge. The case was initially assigned to another Administrative Judge and was scheduled for hearing on January 26, 2017. The hearing was canceled indefinitely at Applicant's request due to medical issues, and the case file was transferred to me. The Defense Office of Hearings and Appeals (DOHA) issued a new notice of hearing on February 21, 2018, scheduling the hearing for March 13, 2018. The hearing was convened as scheduled. Government Exhibits (GE) 1 through 4 were admitted in evidence without objection. Applicant testified and after the hearing, submitted documents marked as Applicant Exhibit (AE) A, which was admitted without objection. DOHA received the hearing transcript (Tr.) on March 19, 2018.

Findings of Fact

Applicant is 47 years old. He has worked as a diesel mechanic for his current employer and previous contractors since 2008. He was first married in 2001 and divorced in 2002; next married in 2007 and divorced in 2008; and again married in 2010. He has four adult children. He graduated from high school and completed some college. He currently holds CAC eligibility for access to a government facility.

The SOR alleges 30 incidents of criminal conduct from 1987 to 2015. Charges include four domestic-violence incidents from 2010 to 2015; assault and battery in 2009 and 1996; five arrests for driving while intoxicated (DUI) from 1989 to 2005; harassment, carrying a prohibited weapon and improperly discharging a firearm; various driving offenses and failure to comply with court orders; and two incidents of minor in possession. Applicant admitted all the SOR allegations, with explanations.

Applicant was arrested in June 2009 for assault. He was convicted and sentenced to one year probation and ordered to complete an anger-management course. In July 2010, he was arrested for fighting with his 30-year-old nephew after the nephew struck Applicant's girlfriend. Applicant and the nephew were both intoxicated. Applicant was convicted, placed on probation for one year, and again required to attend anger management and individual counseling for alcohol abuse. Applicant was again arrested in July 2011 for domestic battery after he struck his spouse. This was another incident of criminal activity while intoxicated. Applicant was arrested in December 2011 for battery, but he does not recall the incident. Finally in March 2015, Applicant was arrested for domestic battery after fighting with his spouse and pushing past her to exit the home. He called the police on himself, and was intoxicated at the time. The charge was not prosecuted.

In 2015, Applicant self-referred to individual and couples counseling for alcohol abuse and anger management. Applicant diagnosed himself with an alcohol addiction, but since suffering a heart attack in 2016 and being diagnosed with liver failure in 2017, has abstained from alcohol. He returned to work six months after his heart attack and is the sole provider for his family.

Applicant testified that he changed his life since his diagnosis of liver failure and consults with his pastor for counseling for disputes with his spouse. He acknowledges

that all of his past criminal issues resulted from alcohol use. Applicant's spouse noted in a letter of support, that they no longer have alcohol in the home, they attend church regularly, and they resolve their problems with rational discussion. Other letters of support attest to his change in lifestyle.

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, 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, SAS ¶ 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.

SAS ¶ 2.b lists several conditions that could raise a CAC concern and may be disqualifying. The following are potentially applicable in this case:

(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.

Applicant has a long history of criminal conduct including violence and alcohol abuse. SAS ¶¶ 2.b (2) and (5) apply.

SAS ¶ 2.c provides circumstances relevant to the determination of whether there is a reasonable basis to believe there is an unacceptable risk. Relevant conditions include:

(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 has a long history of violence, alcohol-related arrests, and rules violations. Since 2009, he has been involved in five incidents of violence and admits that alcohol was a contributing factor each time. In that period, he was required to attend anger management and alcohol counseling. He claimed to have stopped drinking following a diagnosis of liver failure in 2017. Despite the dismissal of some charges and relatively minor charges in some circumstances, the totality of incidents over Applicant's lifetime, including five arrests since 2009, and involvement of violence, danger to persons, and alcohol abuse, are difficult to overcome. Although his current medical condition may result in an end to his cycle of criminal activity, insufficient time has passed since his last incident and since abstaining from alcohol to determine that this activity will not recur and that his behavior is under control. Finally, Applicant did not provide medical or counseling records to show the extent and efficacy of anger or alcohol abuse counseling, or a future prognosis. I have insufficient evidence to apply any of the relevant mitigating conditions described above despite Applicant's testimony and the heartfelt letters of support from his spouse and close family and friends.

Perhaps with evidence of professional counseling, a satisfactory prognosis, and a cessation of violence, alcohol abuse, and rules violations over another year, Applicant will be able to overcome his past conduct and again qualify for CAC eligibility. At this time, there is insufficient evidence that the behavior leading to the denial of his CAC eligibility have been overcome.

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),² 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).³

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.

² Reference (g) is HSPD – 12.

³ Reference (c) is U.S. Office of Personnel Management Memorandum, *Final Credentialing Standards for Issuing Personal Identity Verification Cards under HSPD-12*, July 31, 2008.

(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.

I have carefully considered the facts of this case and applied the adjudicative and whole-person standards in DODI 5200.46. Based on the record and Applicant's testimony, there is insufficient evidence to find that the SOR allegations have been mitigated. 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 Enclosure 3 of the Directive, are:

Paragraph 1, Criminal or Dishonest Conduct:	AGAINST APPLICANT
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Subparagraphs 1.a-1.dd:	Against Applicant
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Conclusion

In light of all of the circumstances, granting Applicant CAC eligibility poses an unacceptable risk. CAC eligibility is denied.

Gregg A. Cervi
Administrative Judge