



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



In the matter of:

Applicant for CAC Eligibility

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CAC Case No. 17-00447

Appearances

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

11/30/2018

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 and alcohol abuse. CAC eligibility is denied.

Statement of the Case

On May 26, 2017, 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 and ¶ 4.a, alcohol abuse.

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 June 21, 2017, and requested a hearing before an administrative judge. The case was assigned to me on November 20, 2017. The Defense Office of Hearings and Appeals (DOHA) issued a 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 5 were admitted in evidence without objection. Applicant testified and after the hearing, submitted documents marked as Applicant Exhibits (AE) A-C, which were admitted without objection. DOHA received the hearing transcript (Tr.) on March 19, 2018.

Findings of Fact

Applicant is 59 years old. He has worked as a heavy-mobile-equipment mechanic for his current employer since 2009. He has been married for 32 years and has two adult children. He received his GED diploma in 1994 and served in the U.S. Army from 1976 to 1977. He was discharged with a general discharge under honorable conditions. He currently holds CAC eligibility for access to a government facility.

The SOR alleges eight incidents of criminal conduct from 2003 to 2015 for assault and public intoxication, and one allegation of 28 arrests from 1976 to 1995. The SOR also cross-alleged the alcohol-related incidents in SOR ¶¶ 1.b, 1.e, 1.f, 1.g, and 1.h, and 15 alcohol-related offenses that occurred from 1979 to 1995. Applicant admitted the SOR allegations, with explanations. He testified that nearly all of the criminal incidents involved alcohol use.

Applicant has had a long history of alcohol related criminal conduct beginning in 1976. His most recent offenses include four instances of public intoxication from 2003 to 2008, driving while intoxicated and carrying a prohibited weapon in 2010, and three incidents of assault causing bodily injury on a family member in 2008, 2009, and 2015. These incidents were typically confrontations with his sons. The 2009 incident involves Applicant brandishing a weapon on his son, and the 2010 incident involved a weapon found in Applicant's car while he was intoxicated with alcohol and pain medication. Applicant does not remember the 2009 incident but said he has never pulled a weapon on anyone, claims he does not own a weapon, and does not know how a weapon got into his car in 2010.

In 2015, Applicant was involved in an altercation with his son. The police witness statements conflict with his testimony. The witnesses claim Applicant and his son were arguing, which led to a physical altercation where Applicant struck his son with a metal rod and ax handle when his son stepped in to repel him from threatening harm to his spouse with the ax handle. Alternatively, Applicant testified that his son entered the home to steal, presumably to buy drugs. Applicant confronted him and they fought. Applicant was charged with aggravated assault with a deadly weapon, but he claims he pushed his son into a bathroom towel rack, which was considered the deadly weapon, that caused the injury. Applicant claimed that the arresting police officer had something against him, despite being the officer's youth t-ball coach. Applicant's son and spouse refused to testify, and the charges were dismissed.

Applicant's testimony regarding his past criminal activity was sometimes vague and inconsistent or he could not remember details. He claimed to have stopped drinking on his own volition, on July 4, 2011. He stated that he attended Alcoholics Anonymous (AA) meetings in 2007 or 2008, completed some steps, but stopped attending in 2008 or 2009 without explanation. He also stated that he completed court-ordered family violence counseling in 2009, but did not provide documentation of any counseling or AA attendance. He claims he does not have alcohol in his home and he does not frequent bars.

Applicant attended an alcohol assessment by video teleconference in June 2017, arranged by his attorney. The practitioner reported that she reviewed the SOR, conducted standardized testing, and interviewed Applicant by video teleconference. The tests revealed Applicant had an alcohol use disorder that has been in remission for six years. She determined that no treatment is warranted, and that he is not at risk of relapse, is fully capable of safeguarding classified information, and is "fit for duty in a position affecting the national security."

Applicant submitted evidence of good work performance and character letters, including supporting statements from his manager and coworkers. They generally speak highly of his work ethic, trustworthiness, and sobriety over the past several years.

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 2008, he has been involved in four incidents including violence; threats of violence; and use, threats, and possession of weapons. Three of the four most recent incidents involved excessive alcohol use. He claimed to have stopped drinking in 2011, but again was involved in a violent physical altercation in 2015 involving weapons. Applicant admits that alcohol was a contributing factor in most of his criminal incidents, and provided inconsistent testimony regarding the 2015 incident. Despite the dismissal or no prosecution for some of the incidents, the totality of Applicant's involvement of violence, danger to persons, and

alcohol abuse, are difficult to overcome. I have insufficient evidence to determine that his criminal conduct will not recur and that his behavior is now under control. Finally, Applicant did not provide documentary evidence that he has sufficiently addressed his history of violence and alcohol abuse through counseling. I have insufficient evidence to apply any of the relevant mitigating conditions described above despite Applicant's testimony and letters of support.

Perhaps with evidence of professional counseling, a satisfactory prognosis, and a substantial period of cessation of violence, Applicant will be able to overcome his past criminal 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 has been overcome.

Alcohol Abuse

DODI 5200.46, App. 2 to Encl. 4, SAS ¶ 4 describes the concern:

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.

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.

DODI 5200.46, App. 2 to Encl. 4, SAS ¶ 4b, lists four conditions that raise a CAC concern and may be disqualifying:

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

As described above, Applicant has a long history of alcohol related incidents resulting in criminal conduct. SAS ¶ 4b(1) applies because Applicant has a pattern of alcohol-related arrests.

DODI 5200.46, App. 2 to Encl. 4, SAS ¶ 4c, lists three conditions that could mitigate concerns about "whether there is a reasonable basis to believe there is an unacceptable risk":

- (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's history of alcohol abuse resulting in criminal conduct is well documented. His stated abstinence from alcohol consumption since 2011 was discussed in the previous section. Although Applicant has acknowledged his alcohol problems and testified to self-abstaining from alcohol use, he did not provide sufficient evidence of alcohol treatment, counseling, or other actions taken to ensure his problems do not recur. He did not show documentary evidence of AA attendance, nor did he stay with the program or complete all of the steps. Applicant is asking me to trust his statement of abstinence and that he can control his problem on his own. Given his track record, I cannot make that leap of faith. Concerns about alcohol abuse are not fully mitigated.

I have carefully considered all of 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
Subparagraphs 1.a-1.i:	Against Applicant
Paragraph 2, Alcohol Abuse:	AGAINST APPLICANT
Subparagraph 2.a-2.b:	Against Applicant

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