



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



In the matter of:

Applicant for CAC Eligibility

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CAC Case No. 17-00495

Appearances

For Government: David F. Hayes, Esq., Department Counsel
For Applicant: *Pro se*

02/09/2018

Decision

LOUGHRAN, Edward W., Administrative Judge:

Applicant did not mitigate Common Access Card (CAC) credentialing concerns raised under the alcohol abuse and criminal or dishonest conduct supplemental adjudicative standards. Misconduct or negligence in employment concerns are mitigated. 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 under the adjudicative standards of alcohol abuse, criminal or dishonest conduct, and misconduct or negligence in employment. Applicant responded to the SOR on June 15, 2017, and requested a hearing before an administrative judge.

The case was assigned to me on September 22, 2017. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on November 8, 2017, scheduling the hearing for December 8, 2017. The hearing was convened as scheduled. Government Exhibits (GE) 1 through 3 were admitted in evidence without objection. Applicant testified and submitted Applicant's Exhibits (AE) A through E, which

were admitted without objection. DOHA received the hearing transcript (Tr.) on December 18, 2017.

Findings of Fact

Applicant is a 59-year-old employee of a defense contractor. He has worked for his current employer since June 2016. He served on active duty in the U.S. military from 1978 until 1984. He was honorably discharged from his first enlistment. His second enlistment ended with a general under honorable conditions discharge. He is a high school graduate with additional certifications and licenses. He is divorced. He and his fiancée have cohabitated for about nine years. He has two adult children.¹

Applicant has a history of alcohol-related offenses. He was arrested and charged with driving under the influence (DUI) on six occasions: twice about 30 years ago, once about 15 years ago, and in 2008, 2009, and 2012. He was arrested and charged with public intoxication in 2003. He had been drinking and driving and stopped at a convenience store for directions. A police officer arrested him before he could get back in his car. The results of the first three DUIs are unknown. The last four arrests resulted in convictions. He completed all the terms of his probation for his last DUI in May 2016.²

Applicant was terminated from his job in July 2015 when he tested positive for alcohol on a random test. His blood alcohol concentration (BAC) was .025%. Applicant testified that he could not sleep the night before. He got up between about 3:00 a.m. and 4:00 a.m. and had about three to four glasses of cognac on ice with a little water to get back to sleep. He drove to work at 8:00 a.m., and the test was at 11:42 a.m.³

After he was terminated, Applicant received intensive outpatient alcohol counseling, which he completed in December 2015. He regularly attended Alcoholics Anonymous meetings. He asserted that he learned a costly lesson, and that he will never drink and drive again. He served 20 days in jail for his last DUI, and another DUI will be a felony with a likely sentence of a year or more. He stated that he no longer abuses alcohol. He does not drink outside the home. He works the second shift. He may have a beer or two when he gets home from work to help him sleep, and then he is in bed by midnight.⁴

¹ Tr. at 13, 23-25, 50, 58, 63; GE 1, 2.

² Tr. at 26-43, 58-60; GE 2, 3; AE B; Applicant's response to SOR. The SOR did not allege the first three DUIs. Any matter that was not alleged in the SOR will not be used for disqualification purposes. It may be considered in the application of mitigating conditions and during the whole-person analysis.

³ Tr. at 17-19, 45-50; Applicant's response to SOR; GE 1, 2; AE C, D.

⁴ Tr. at 34-35, 40, 54-57, 62-63; Applicant's response to SOR; AE A.

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).

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

Alcohol Abuse

DODI 5200.46, Appendix 2 to Enclosure 4, Supplemental Adjudicative Standards, ¶ 4 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 alcohol abuse without evidence of substantial rehabilitation, that issuance of a CAC poses an unacceptable risk.

a. 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, Appendix 2 to Enclosure 4, Supplemental Adjudicative Standards, ¶ 4.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 pattern of alcohol-related arrests; and
- (2) Alcohol-related incidents at work, such as reporting for work or duty in an intoxicated or impaired condition, or drinking on the job.

Applicant had alcohol-related arrests in 2003, 2008, 2009, and 2012. He was terminated from his job in 2015 when he tested positive for alcohol on a random test. The above disqualifying conditions are established.

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

- (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 has six DUIs and another alcohol-related arrest that could have been a DUI. When he lost his job, his BAC was .025% at 11:42 a.m. He drove to work about four hours earlier. He currently drinks a beer or two before he goes to bed, and he insists that he will never drink and drive again. Applicant may believe that he has his drinking under control. The evidence shows otherwise. Applicant's alcohol issues, which go back decades, create an unacceptable risk. None of the above circumstances are sufficient to alleviate that risk.

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; and

(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.

Applicant's criminal history, as reflected by alcohol-related arrests in 2003, 2008, 2009, and 2012, is sufficient to establish the above disqualifying conditions.

DODI 5200.46, Appendix 2 to Enclosure 4, Supplemental Adjudicative Standards, ¶ 2.c lists circumstances relevant to the determination of 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.

The discussion under alcohol abuse applies equally here. Applicant has not mitigated his well-established pattern of criminal conduct. I am unable to determine that criminal behavior is unlikely to recur. Applicant has not convinced me that he does not pose an unacceptable risk.

The evidence does not establish misconduct or negligence in employment concerns independent of the alcohol abuse and criminal or dishonest conduct concerns. SOR ¶ 1.a is concluded for Applicant. I also considered the factors in DODI 5200.46, Enclosure 4, ¶ 1.

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, Misconduct or Negligence in Employment:	For Applicant
Subparagraph 1.a:	For Applicant
Paragraph 2, Alcohol Abuse:	Against Applicant
Subparagraphs 2.a-2.e:	Against Applicant
Paragraph 3, Criminal or Dishonest Conduct:	Against Applicant
Subparagraph 3.a:	Against 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