



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



In the matter of:

Applicant for CAC Eligibility

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CAC Case No. 17-03164

Appearances

For Government: Daniel F. Crowley, Esq., Department Counsel
For Applicant: *Pro se*

08/30/2018

Decision

MURPHY, Braden M., Administrative Judge:

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

Statement of the Case

On November 8, 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). DOD was unable to find that granting Applicant CAC eligibility did not pose an unacceptable risk. The action is based on the Adjudicative Standards found in 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). The concerns raised under the Adjudicative Standards of DODI 5220.46 are 1) Criminal or Dishonest Conduct; and 2) Alcohol Abuse. All but one of the criminal and dishonest conduct allegations are also cross-alleged under the alcohol abuse concern.

Applicant answered the SOR on December 4, 2017, and elected to have the case decided on the written record in lieu of a hearing. His Answer was not considered complete, because he did not formally “admit” or “deny” each allegation, as required, though he gave a general narrative explanation. Applicant submitted a more complete Answer by e-mail on January 3, 2018. (Items 1, 2)

The Government’s written case was submitted on February 12, 2018. A complete copy of the file of relevant material (FORM) was provided to Applicant, who was afforded 30 days to file objections and submit material to state objections, and to refute, extenuate, or mitigate the credentialing concerns. Applicant received the FORM on March 3, 2018. As of May 4, 2018, he had not responded. The case was assigned to me on June 27, 2018.

Items 1 and 2 are the pleadings in the case. Item 3 is Applicant’s SF-85P questionnaire. Item 4 is his Declaration for Federal Employment. Item 5 is Applicant’s FBI criminal record, as of January 2017. Item 6 is a portion of the Report of Investigation (ROI) from Applicant’s DOD background investigation for his CAC eligibility referencing court records for some of the SOR allegations.

Applicant did not answer the FORM, so he did not express an opinion as to the admissibility of the Government’s proposed exhibits. Items 3, 4 and 5 are admitted into evidence. Item 6 is not admitted, as addressed below.

Procedural Issue

Directive, ¶ E3.1.20 governs admission of documents such as the ROI excerpt in Item 6, and generally requires witness authentication as a prerequisite of admissibility. An exception to this is when an Applicant waives his objection to admissibility of the document.¹

In the FORM, Department Counsel did not advise Applicant of his options under ¶ E3.1.20 of the Directive.² Applicant did not respond to the FORM. He therefore did not express an opinion as to the admissibility of Item 6. Absent specific notice to Applicant of his options, I find Applicant’s apparent waiver of objection to the admissibility of Item 6 was not a knowing and fully-informed decision. Item 6 is therefore not admitted. Accordingly, I have not considered Item 6 in reaching my decision in this case.

¹ ISCR Case No. 02-12199 at 5 (App. Bd. Oct. 7, 2004) (An ROI is “not admissible unless: (a) Applicant waives any objection to its admission; or (b) Department Counsel satisfies the requirements” of Directive, ¶ E3.1.20.

² In the FORM’s concluding paragraph, Department Counsel cited Directive, ¶ E3.1.7, and noted that Applicant had 30 days from receipt of the FORM “to submit a documentary response setting forth objections, rebuttal, extenuation, mitigation, or explanation, as appropriate.” (FORM at 3).

Findings of Fact

Applicant is a 57-year-old employee of a defense contractor. He submitted an SF-85P questionnaire in February 2017. (Item 3) He submitted a Declaration for Federal Employment a month later. (Item 4) In his December 2017 SOR Response, Applicant indicated that he has held the same job for 10 years, and has worked at the same DOD military installation for the last two years. (Item 2)

The SOR allegations concern multiple arrests for driving under the influence of alcohol from 1985 to May 2017, among other charges. Applicant admitted each allegation in his second Answer. He provided a brief word or two about how the charges were adjudicated, but he provided no factual details about what happened. (Item 2)

In October 1979, when he was 18 years old, Applicant was arrested in State 1 and charged with misdemeanor disorderly conduct (intoxication) in a public place, causing a disturbance. (SOR ¶¶ 1.g, 2.a) Applicant admitted the allegation, while noting the offense occurred many years ago, when he was 18 years old. (Item 2) Applicant's criminal record reflects that he was found guilty in October 1979, and sentenced to five days in jail. (Item 5)

In May 1985 and again in October 1986, Applicant was arrested in State 1 and charged with driving under the influence of alcohol (DUI). (SOR ¶¶ 1.f and 1.e, respectively; SOR ¶ 2.a) (Item 5) Applicant admitted both allegations, noting that one was "dropped" and that he went to "school" for the other. (Item 2) I infer from this reference that Applicant was required to attend some form of alcohol education. The record does not reflect how either charge was resolved.

In December 2001, Applicant was arrested in State 1 and charged with DUI. (SOR ¶¶ 1.d; 2.a). (Item 5) Applicant admitted the allegation, but noted that it was "dropped" to a lesser charge. (Item 2) The record does not reflect how the charge was resolved.

In January 2011, Applicant was arrested in State 2 and charged with hindering prosecution or apprehension, second degree. (SOR ¶ 1.c) Applicant admitted the allegation, and noted that the charge was dismissed. (Item 2) Beyond Applicant's admission, the only evidence offered by the Government in support of this allegation is Item 6, which was not admitted.

In February 2015, Applicant was arrested in State 2 and charged with operating a motor vehicle under the influence of alcohol (OUI). He was subsequently convicted of wanton endangerment, second degree. (SOR ¶¶ 1.b, 2.a) Applicant stated, "never blew, plea agreement" in his first answer, and stated, "admit, charge dropped, Choices Program" in his second answer. (Item 2) Applicant reported the offense on his Declaration of Federal Employment. He disclosed the location of the offense, the court address, case number and disposition date, and the name and address of his counsel. (Item 4 at 2).

He also said the following:

Violation: 1st offense DUI, failure to give a turn signal and failure to produce proof of insurance. The turn signal and insurance failures were dropped. The DUI was amended to 2nd degree Wanton Endangerment to which I [pled] guilty in an effort to get my operator's license reinstated and maintain my CDL [commercial driver's license]. I was sentenced to 12 months conditionally discharged for 24 months on condition I submit to random drug and alcohol screens, complete the choices program and not commit any further violations of local, state and/or federal law.³

In May 2017, after he submitted his SF-85P, Applicant was arrested in State 2 and charged with OUI. (SOR ¶¶ 1.a, 2.a) In his first SOR response (December 2017), Applicant stated that the charge was "pending, did not blow Have License." (Emphasis in original). In his second answer (January 2018), he said "admit charge with not guilty." (Item 2) He provided no documentation. Beyond Applicant's admission, the only evidence offered by the Government in support of this allegation is Item 6, which was not admitted.

Concerning his pattern of alcohol consumption, Applicant stated in his Answer that, "I don't abuse alcohol. I do not drink at work or before work." He also said, "I would never do anything to jeopardize my career." (Item 2) He gave no further details.

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) Therefore, any doubt concerning personnel being considered for CAC eligibility should be resolved in favor of the national interest.

³ Item 4 at 2.

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; 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 admitted all of the criminal allegations in the case. The offenses that occurred in State 1 (SOR ¶¶ 1.d-1.g) are also documented by other record evidence. The offenses that occurred in State 2 (SOR ¶¶ 1.a, 1.b, and 1.c) are not documented, but are nevertheless proven through Applicant's admissions. Applicant's criminal history 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 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 explained that several of his charges were “dropped” and that one was “dismissed.” He claimed, but did not document, that he was “not guilty” of the 2017 charges. He offered no corroborating evidence that he was innocent of any of the charges. I cannot conclude that ¶ 2.c (2) applies.

I am unable to determine that criminal behavior is unlikely to recur. Applicant has been arrested five times for DUI or OUI in 32 years. His most recent such arrest occurred in May 2017, after he submitted his SF-85P. That offense occurred only months after Applicant would have completed his two years of probation for his 2015 offense. 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.

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.

Applicant had alcohol-related arrests in 1979, 1985, 1986, 2001, 2015, and in May 2017. The above disqualifying condition is 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.

In addressing his current pattern of alcohol use. Applicant said only that he does not drink at work or before work. He provided no details. He also stated, "I don't abuse alcohol." This statement is vague and conclusory. Applicant's statements are insufficient to establish mitigating condition ¶ 4.c (1). There is no evidence to suggest that the other mitigating conditions should apply. Applicant's alcohol issues, which go back decades, create an unacceptable risk. None of the above circumstances are sufficient to alleviate that risk.

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.g:	Against Applicant
Paragraph 2, Alcohol Abuse:	Against Applicant
Subparagraph 2.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.

Braden M. Murphy
Administrative Judge