

KEYWORD: Common Access Card

DIGEST: The two convictions at issue—DUI and domestic violence—entail risk of harm to persons or property and could foreseeably result in an unfavorable employment decision. The Judge recognized this. The subject matter of Applicant’s omissions is material. Applicant’s failure to have disclosed these offenses raises a concern that he is lacking in honesty, trustworthiness, and reliability such that, were he granted access to Federal installations, he poses a foreseeable risk of harm to persons, property, and/or information.

Instruction, Enclosure 4, Appendix 2 ¶ 3(c) sets forth criteria to assist in determining whether that risk is unacceptable:

- (1) The misstated or omitted information was so long ago, was minor, or happened under such unusual circumstances that it is unlikely to recur.
- (2) The misstatement or omission was unintentional or inadvertent and was followed by a prompt, good-faith effort to correct the situation.

Given his findings about Applicant’s experience in completing OF 306s, and given that the question at issue specifically includes misdemeanor offenses among those that must be disclosed, the Judge’s conclusion that the omission was deliberate is sustainable. Adverse decision affirmed.

CASENO: 15-00898.a1

DATE: 12/09/2016

DATE: December 9, 2016

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In Re:)
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-----) CAC Case No. 15-00898
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Applicant for CAC Eligibility)
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APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

Maryam Khajavi, Esq.

The Department of Defense (DoD) declined to grant Applicant eligibility for Common Access Card (CAC) credentialing. On May 22, 2015, DoD issued a statement of reasons (SOR) advising Applicant of the basis for that decision—criminal or dishonest conduct concerns; material, intentional false statement concerns; and alcohol abuse concerns, raised under the adjudicative standards in the appendices of DoD Instruction 5200.46 (Sep. 9, 2014) (Instruction). Applicant requested a hearing. On August 29, 2016, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Mark Harvey denied Applicant’s request for CAC eligibility. Applicant appealed pursuant to Instruction, Enclosure 4 ¶ 6.

Applicant raised the following issue on appeal: whether the Judge erred in finding that his false statements were deliberate. The Judge’s favorable findings regarding the criminal conduct and alcohol abuse concerns are not at issue in this appeal. Consistent with the following, we affirm.

The Judge’s Findings of Fact

The Judge made the following findings pertinent to the issue raised on appeal: In 2010 Applicant was convicted of DUI and sentenced to 13 days community service, a fine, and five years probation. Later that year he was convicted of battery upon his spouse and sentenced to a fine. He was also required to attend a domestic violence course.

In November 2013, Applicant completed an OF 306.¹ He answered “no” to a question about whether, within the prior seven years, he had been convicted or on probation, which was false, given his criminal history. He claimed that at the time he completed the form he believed that seven years had passed since his last offense. He is familiar with the OF 306, having completed them in 2001,

¹Optional Form 306, Declaration for Federal Employment. Government Exhibit (GE) 2.

2003, 2007, and 2008 or 2009. He did not list his convictions in 2010 because he did not think the government would check on misdemeanor offenses.²

The Judge's Analysis

The Judge cleared Applicant of all concerns except the failure to disclose his two convictions and his probation status. He stated that the falsification is recent, intentional, and serious and concluded that none of the mitigating conditions merit full application on the facts of this case.

Discussion

Applicant contends that the Judge erred in concluding that he posed an unacceptable risk. He cites to his testimony that he was confused about the amount of time that had elapsed since his last conviction and that, in any event, he understood the question to be limited to felonies.

In a CAC adjudication, “the overriding factor . . . is unacceptable risk.” Instruction, Enclosure 4 ¶ 1(b). The Supplemental Adjudicative Standards, which apply in this case, are designed to ensure that the issuance of a CAC does not pose such a risk.³ The concern at issue in this appeal is found in Instruction, Enclosure 4, Appendix 2 ¶ 3: “A CAC will not be issued to a person if there is a reasonable basis to believe, *based on the individual's material, intentional false statement, deception, or fraud in connection with federal or contract employment, that issuance of a CAC would pose an unacceptable risk.*” (emphasis added)

The two convictions at issue—DUI and domestic violence—entail risk of harm to persons or property and, especially in combination, could foreseeably result in an unfavorable employment decision. The Judge appears to have recognized this in his comment that it is not good for a mechanic to have a DUI in his record. *See* footnote 2, *supra*. Accordingly, the subject matter of Applicant's omissions is material. Applicant's failure to have disclosed these offenses raises a concern that he is lacking in honesty, trustworthiness, and reliability such that, were he granted access to Federal installations, he poses a foreseeable risk of harm to persons, property, and/or information.

² “[Judge]: Okay. So, why didn't you just go ahead and put those misdemeanors on here? [Applicant]: Because I didn't think you guys were going to look at it . . . [Judge]: You didn't want them to know? I mean, why? DUIs are pretty bad for mechanics, right? But – [Applicant]: Well, like I seen every[body] has, almost a lot of people have them there. [Judge]: Yes. [Applicant]: And, I don't know. [Judge]: So, you can't give me a reason why you put no? . . . [Applicant]: I just—I didn't think it was going to come out. [Judge]: You didn't think the Government would find out about them? [Applicant]: Yes, I guess.” Tr. at 87-88.

³ “In this context, an unacceptable risk refers to an unacceptable risk to the life, safety, or health of employees, contractors, vendors, or visitors; to the Government's physical assets or information systems; to personal property; to records, including classified, privileged, proprietary, financial, or medical records; or to the privacy of such data subjects.” Instruction, Enclosure 4 ¶ 2(b).

Instruction, Enclosure 4, Appendix 2 ¶ 3(c) sets forth criteria to assist in determining whether that risk is unacceptable:

- (1) The misstated or omitted information was so long ago, was minor, or happened under such unusual circumstances that it is unlikely to recur.
- (2) The misstatement or omission was unintentional or inadvertent and was followed by a prompt, good-faith effort to correct the situation.

Given his findings about Applicant's experience in completing OF 306s, and given that the question at issue specifically includes misdemeanor offenses among those that must be disclosed,⁴ the Judge's conclusion that the omission was deliberate is sustainable. Moreover, his conclusion that the mitigating conditions do not apply is consistent with the record that was before him. In light of the record as a whole, we conclude that the Judge examined the relevant evidence and articulated a satisfactory explanation for the decision. The decision is sustainable on this record.

⁴"During the last 7 years, have you been convicted, been imprisoned, been on probation, or been on parole? (Includes felonies, firearms or explosive violations, *misdemeanors, and all other offenses*)." GE 2 at p. 1. (emphasis added)

Order

The Decision is **AFFIRMED**.

Signed: Michael Y. Ra'anan
Michael Y. Ra'anan
Administrative Judge
Chairperson, Appeal Board

Signed: James E. Moody
James E. Moody
Administrative Judge
Member, Appeal Board

Signed: James F. Duffy
James F. Duffy
Administrative Judge
Member, Appeal Board