

KEYWORD: CAC

DIGEST: We agree with Applicant that the Judge’s analysis is insufficient. In a CAC adjudication, “the overriding factor . . . is unacceptable risk 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. The guiding concern is that there must be “a reasonable basis to believe, based on the individual’s criminal or dishonest conduct, that issuance of a CAC would pose an unacceptable risk.” Adverse decision remanded

CASENO: 15-02333

DATE: 11/16/2016

DATE: November 16, 2016

In Re: ----- Applicant for CAC Eligibility)))))))	CAC Case No. 15-02333
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APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

Hal Baird, Esq.

The Department of Defense (DoD) declined to grant Applicant eligibility for Common Access Card (CAC) credentialing. On May 20, 2015, DoD issued a statement of reasons (SOR) advising Applicant of the basis for that decision—criminal and dishonest conduct concerns raised under the adjudicative standards in the appendices of DoD Instruction 5200.46 (Sep. 9, 2014) (Instruction). Applicant requested a hearing. On June 20, 2016, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Edward W. Loughran 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’s adverse decision was arbitrary, capricious, or contrary to law. Consistent with the following, we remand.

The Judge’s Finding of Fact

Applicant has worked for his current employer since 2014. He served in the military from 1981 until 1987 and has a master’s degree. He is married with three adult offspring.

Applicant has a history of financial problems. He owes the IRS around \$20,000 in Federal income taxes from 2009 through 2011. He attributed his tax delinquencies to a contentious divorce from a previous spouse. He stated that he followed the advice of his attorney and his CPA by claiming only the minimal exemptions so as not to conflict with his divorce proceeding, resulting in greater tax liability than he otherwise would have owed. He states that his CPA is in the process of filing amended returns and that he will actually receive a refund.

The CPA provided a letter in which he stated that he had prepared tax returns for 2011 through 2014. The returns for 2011 through 2013 had yet to be filed. The CPA stated that he was in discussions with the IRS regarding an offer in compromise. He also stated that Applicant would have a hard time paying any amounts due for returns filed prior to 2011.

Applicant’s IRS transcripts show that Applicant’s 2010 return resulted in a refund that was credited toward an earlier year’s liability. The transcripts do not reveal whether the 2011 through 2013 returns have been filed. Applicant did not present all of his returns for the years in question, so the exact amount he may owe the IRS cannot be determined.

Applicant’s supervisor testified on his behalf and has provided a character letter commending his outstanding job performance, trustworthiness, reliability, and judgment.

The Judge’s Analysis

The Judge cited to Instruction, Enclosure 4, Appendix 2 ¶ 2(b), which lists conditions that could raise concerns about an applicant’s eligibility for a CAC. He concluded that two of these conditions were relevant: “Deceptive or illegal financial practices such as embezzlement, employee

theft, check fraud, income tax evasion,¹ expense account fraud, filing deceptive loan statements, or other intentional financial breaches of trust” (*Id.* at ¶ 2(b)(4)); and “Financial irresponsibility [that raises] questions about the individual’s honesty and put[s] people, property or information systems at risk, although financial debt should not in and of itself be a cause for denial” (*Id.* at ¶ 2(b)(6)).

The Judge cleared Applicant on two of the three SOR allegations. Regarding his tax problems, the Judge’s analysis consisted of the following:

Applicant owes the IRS for tax year 2009. He does not owe for 2010, but he did not file his 2011 return, so the amount owed has not been determined. The above disqualifying conditions have been established. Decision at 5.

He also concluded that, insofar as Applicant has not filed all of his tax returns, the mitigating conditions have not been established.²

Discussion

Instruction, Enclosure 4 ¶ 6 provides that appeals to DOHA of CAC cases are accorded the established administrative procedures set out in DoD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Jan. 2, 1992, as amended) (Directive). Since its inception, the Appeal Board has been issuing decisions that interpret and analyze the administrative procedures set forth in the Directive. Because those same administrative procedures are used in appeals of CAC revocations, our decisions interpreting and analyzing those procedures apply equally here for reviewing a judge’s actions, rulings, findings, and conclusions in CAC cases.³

Applicant contends that the Judge’s analysis is flawed. He states that he has never engaged in intentional misrepresentation. Citing to evidence of his educational attainments, job performance, and the efforts of his CPA, he argues that there is no basis to conclude that he poses an unacceptable risk. He argues that the Judge did not properly apply the whole-person concept.

¹See 26 U.S.C. ¶ 7201. To sustain a conviction, the prosecutor must show that the defendant “acted willfully and knowingly with specific intent to evade his income tax obligation.” *U.S. v. Daniels*, 617 F.2d 146 at 148 (5th Cir. 1980).

²See Instruction, Enclosure 4, Appendix 2 ¶ 2(c): “Circumstances relevant to the determination of whether there is a reasonable basis to believe there is an unacceptable risk 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[;] (3) Improper or inadequate advice from authorized personnel or legal counsel significantly contributed to the individual’s omission of information. When confronted, the individual provided an accurate explanation and made prompt, good-faith effort to correct the situation[;] [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.”

³Decisions of the Appeal Board are available to the public at DOHA’s website: <http://www.dod.mil/dodgec/doha/>.

We agree with Applicant that the Judge’s analysis is insufficient. 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. The guiding concern of Instruction, Enclosure 4, Appendix 2 ¶ 2 is that there must be “a reasonable basis to believe, based on the individual’s *criminal or dishonest conduct*, that issuance of a CAC would pose an unacceptable risk.” (emphasis added) *Id.* at ¶ 2(a) elaborates:

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 at risk. An individual’s past criminal or dishonest conduct may put people, property, or information systems at risk.

Both of the disqualifying conditions that the Judge applied incorporate deception or dishonesty as part of their meaning. The examples of illegal practices listed under *Id.* at ¶ 2(b)(4) each entail knowledge and a specific intent to deceive or defraud. Disqualifying incidents of financial irresponsibility under *Id.* at ¶ 2(b)(6) are those that raise questions about an applicant’s honesty. The Judge’s conclusory discussion did not address the issues of *scienter*, intent, or dishonesty, nor did it explain why it is reasonable to believe that Applicant’s circumstances put people, property, or information systems at risk. Without such analysis, the Judge was in no position to consider further whether there is a reasonable basis to believe that any such risk is unacceptable within the meaning of the Instruction. As it stands, the Judge’s decision is not sustainable. We conclude that the best resolution is to remand the case to the Judge for a new decision that addresses the issues discussed above.

Order

The Decision is **REMANDED**.

Signed: Michael Ra’anan
Michael 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