

KEYWORD: CAC

DIGEST: Based upon our review of the record, we do not find persuasive Department Counsel’s arguments that Applicant’s debts clearly evidence a lack of honesty. While Applicant could possibly have taken greater steps to resolve his debts, any shortcoming in Applicant’s handling of the debts do not, on this record, equate to or establish a lack of honesty. Favorable decision affirmed.

CASE NO: 15-02333.a1

DATE: 03/22/2017

DATE: March 22, 2017

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

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

John Bayard Glendon, Esq., Deputy 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 the decision. On November 16, 2016, the Appeal Board remanded the case to the Judge for further processing. On December 5, 2017, the Judge issued a remand decision granting Applicant CAC eligibility. Department Counsel appealed pursuant to Instruction, Enclosure 4 ¶ 6.

Department Counsel raised the following issue on appeal: whether the Judge's favorable decision was arbitrary, capricious, or contrary to law. Consistent with the following, we affirm.

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 children.

Applicant has a history of financial problems. He was granted a Chapter 7 bankruptcy discharge in 2011, but his student loans and delinquent taxes were not discharged in that proceeding. In April 2016, he owed over \$150,000 in defaulted student loans, but entered into a rehabilitation agreement in which he agreed to make nine monthly payments of \$380. If he makes those payments, the student loans will be in good standing.

Applicant owes his state about \$10,300 for an overpayment of unemployment compensation from 2013. No evidence was presented that the overpayment was due to fraud. He is contesting this debt. If it is determined that he owes the money, he indicated he would pay the debt. He made a \$100 payment to the state in early 2016.

Applicant owes the IRS around \$20,000 in past-due income taxes for 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 his 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 establish that he filed all of his tax returns, so the exact amount he may owe the IRS cannot be determined. The Judge noted that he was not convinced that Applicant's conduct constituted a crime under 26 U.S.C § 7201, which requires a defendant "acted willfully and knowingly with specific intent to evade his income tax obligation." Decision at 3, citing *U.S. v Daniels*, 617 F.2d 146 at 148 (5th Cir. 1980).

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 concluded that Applicant's debts do not raise a disqualifying condition. Noting that financial debt should not in and of itself be cause for denial of a CAC, the Judge stated that there was no evidence that the unemployment compensation overpayment was due to fraud, and that he was not convinced that Applicant had the specific intent to evade his income tax obligations.

Discussion

There is no presumption of error below, and the appealing party has the burden of raising claims of harmful error with specificity and demonstrating factual or legal error that warrants remand or reversal. DoD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Jan. 2, 1992, as amended) (Directive) ¶ E3.1.32. *See also* ISCR Case No. 03-19011 at 2 (App. Bd. Jul. 27, 2005).¹ In this case, Department Counsel contends that the Judge's analysis is flawed because the decision relies upon an erroneously limited interpretation of the applicable adjudicative standards and upon a piecemeal analysis of the concerns raised by Applicant's actions over the years. He specifically argues that each of Applicant's debts reflect a lack of honesty.

The applicable Supplemental Adjudicative Standards for determining Applicant's eligibility for a CAC are set forth in Instruction, Enclosure 4, Appendix 2 ¶ 2, which provide:

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 unreasonable risk.²

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.

¹ Instruction, Enclosure 4 ¶ 6 provides that appeals to DOHA of CAC cases are accorded the established administrative procedures set out in the 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. Decisions of the Appeal Board are available to the public at DOHA's website: <http://www.dod.mil/dodgc/doha/>.

² In a CAC adjudication, "the overriding factor . . . is unacceptable risk." Instruction, Enclosure 4 ¶ 1(b). "Unacceptable risk" is defined as "[a] threat to life, safety, or health of employees, contractors, vendors, or visitors; to the U.S. Government[s] physical assets or information systems; to personal property; to records, including classified, privileged, proprietary, financial, and medical records; or to the privacy rights established by The Privacy Act of 1974, as amended, or other law that is deemed unacceptable when making risk management determinations." Instruction, Glossary, Part II, Definitions.

b. Therefore, conditions that may be disqualifying include:

* * *

(4) Deceptive or illegal financial practices such as embezzlement, employee theft, check fraud, income tax evasion, expense account fraud, filing deceptive loan statements, or other intentional financial breaches of trust; [and]

* * *

(6) Financial irresponsibly may raise questions about the individual's honesty and put people, property or information systems at risk, although financial debt should not in and of itself be cause for denial[.]

In the Appeal Brief, Department Counsel focuses on ¶¶ 2a and 2b(6) and argues that Applicant's debts evidence a lack of honesty, integrity, and judgment. His arguments cite to the amount of the debts, the nature of the debts, the identity of the creditors, the periods that the debts have been delinquent, the absence of evidence that Applicant filed all of his income tax returns, and Applicant's actions or inactions in attempting to resolve the debts.³ While these cited matters may be relevant in evaluating whether financial irresponsibility poses an unacceptable risk, they are not necessarily dispositive. As provided in ¶ 2a, the key issue is whether the financial irresponsibility was the result of illegal or deceptive practices or raises questions about an individual's honesty.

In this case, Applicant attributed his financial problems to his divorce from his first wife. He testified that the divorce was initiated in 2004 and not finalized until 2014. He went through nine or ten rounds of litigation that ended up at the state's supreme court. He maintained custody of his children throughout the divorce proceeding and testified it came at a big price. Transcript (Tr.) at 19, 34. He also encountered some employment difficulties. *Id.* He was granted a Chapter 7 bankruptcy discharge during the divorce litigation. In his Declaration of Federal Employment signed in May 2014, Applicant disclosed the three debts and stated his student loans fell in a default status after the bankruptcy. Government Exhibit 2. During the CAC hearing, he provided evidence that he is taking steps to address his financial problems. Based upon our review of the record, we do not find persuasive Department Counsel's arguments that the debts clearly evidence a lack of honesty. While Applicant could possibly have taken greater steps to resolve his debts, any shortcoming in Applicant's handling of the debts do not, on this record, equate to or establish a lack of honesty.

Department Counsel has not challenged the Judge's conclusion that the evidence did not support a determination that Applicant had the specific intent to evade his tax obligations. In a footnote, however, Department Counsel contends "[i]n essence, Applicant admitted that he was seeking to manipulate his taxes to defraud his ex-wife and mislead the court in divorce proceedings." Appeal Brief n. 11 at 4. We do not view the reporting of fewer tax exemptions than one is eligible to claim, particularly when based on the advise of counsel during legal proceedings, as a fraudulent

³ The SOR did not allege that Applicant did not file his tax returns as required by law.

activity.

We also do not find persuasive Department Counsel's argument that the Judge engaged in a piecemeal analysis of the evidence. As provided in Supplemental Adjudicative Standard ¶ 2b(6), indebtedness alone is not a cause for denial of CAC eligibility. In this case, the SOR only alleged delinquent debts and did not assert that Applicant engaged in any illegal conduct, deceptive practice, or that the debts raised any question about his honesty. By admitting the SOR debts, Applicant did not admit to any conduct contained in the disqualifying conditions and the burden remained on Department Counsel to establish that Applicant engaged in disqualifying conduct. Based on our review of the record evidence, the Judge's determination that the evidence failed to establish any of the disqualifying conditions is supportable.

Department Counsel has not identified any harmful error likely to change the outcome of the case. The record viewed as a whole supports the Judge's decision.

Order

The Decision is **AFFIRMED**.

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