KEYWORD: CAC Criminal or Dishonest Conduct

DIGEST: We find the Judge's findings of fact about the charges against Applicant and their disposition were based on substantial evidence. Furthermore, even if the Judge's finding of a conviction was in error, we conclude it would not have been harmful, since a finding of non-adjudication with five years probation would likely have produced an adverse decision. Adverse decision affirmed.

CASE NO: 15-06229.a1

DATE: 02/15/2017

DATE: February 15, 2017

In Re:	)
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------------	) CAC Case No. 15-06229
	)
	)
Applicant for CAC Eligibility	)
	)

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT
James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT
Rodney A. Ray, Esq.

The Department of Defense (DoD) declined to grant Applicant eligibility for Common Access Card (CAC) credentialing. On November 17, 2015, DoD issued a statement of reasons (SOR) advising Applicant of the basis for that decision–criminal or dishonest conduct or financial irresponsibility concerns raised under the adjudicative standards in the appendices of DoD Instruction 5200.46 (Sep. 9, 2014) (Instruction). Applicant requested a decision on the written record. On October 28, 2016, after considering the record, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Carol G. Ricciardello 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 her findings of fact. Consistent with the following, we affirm.

The Judge's Findings of Fact

In completing a Declaration of Federal Employment application in 2014, Applicant, who is 54 years old, answered "yes" to the question that asked if in the last seven years she had been convicted, been imprisoned, been on probation, or been on parole. In response to a follow-up question, she listed the violation as "uttering forgery" and provided the date and place of occurrence, but provided no other details.

An FBI criminal report noted that Applicant was arrested in 2008 and charged with "making fraudulent statements/misrepresentations." The charge was later amended to three counts of felony "uttering forgery." In 2011, she was convicted of three felony counts of "uttering forgery" and sentenced to five years of probation. In her answer to the SOR, Applicant stated, "I deny conviction," but did not provide any additional information.

The Judge's Analysis

Applicant failed to provide any information as to the facts and circumstances surrounding her arrest and conviction for "uttering forgery" or whether she completed her probation. Despite evidence from the FBI report, she denied the conviction in her SOR answer. Insufficient evidence was presented to conclude the offense occurred under unusual circumstances or is unlikely to recur. Applicant failed to mitigate the concerns raised by her past criminal conduct.

Discussion

Applicant contends that the Judge erred in concluding that she was convicted of three felony counts of uttering forgery and was sentenced to five years of probation. In her appeal, she provided court documents that were not previously submitted to the Judge. Those documents constitute new evidence that the Appeal Board can neither receive nor consider. *See* Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive) ¶ E.3.1.29.

When a Judge's findings of fact are challenged, we examine the record to see if they are supported by "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the same record." Directive ¶ E3.1.32.1. In this case, the FBI criminal report reflected that Applicant was "CONVICTED (CONVICT 2011 . . . GUILTY)" of three felony counts of uttering forgery and was sentenced to "SUPERVISION: 5Y PROBATION NON-ADJ - CTS 2 & 3 RETIRED." As the Judge noted, no information was provided to show that Applicant completed her probation. In also merits noting that Applicant was provided the opportunity to respond to Department Counsel's File of Relevant Material and provide information explaining how the charges were processed, but she did not submit a response. Without knowing that Applicant successfully completed her probation and that a criminal court later granted her a petition for relief based on her successful completion of the probation, insufficient evidence

was presented to conclude the charges resulted in a "non-adjudication" of guilt. We find the Judge's findings of fact about the charges against Applicant and their disposition were based on substantial evidence. Furthermore, even if the Judge's finding of a conviction was in error, we conclude it would not have been harmful, since a finding of non-adjudication with five years probation would likely have produced an adverse decision.

The applicable Supplemental Adjudicative Standards do not require that an applicant be convicted of a crime to determine that issuance of a CAC to him or her presents an "unacceptable risk." *See*, Instruction, Enclosure 4 ¶¶ 2.b(1), 2.b(2), and 2.b(3).   In this case, the FBI criminal report reflected that Applicant was charged with three felony counts of uttering forgery, that she was "GUILTY" of those charges, and that she was sentenced. Government Exhibit 5. Although we do not know the underlying facts that resulted in those charges, the record evidence is sufficient for the Judge to conclude that Applicant presents an unacceptable risk (*e.g.*, a threat to the safety of U.S. Government physical assets, information systems, and records) to deny her CAC eligibility.

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.

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