

KEYWORD: CAC

DIGEST: We conclude that application of the wrong standard raises due process concerns and warrants corrective action. Given these circumstances, the best resolution is to remand the case to the Judge for correction of the identified error and issuance of a new decision consistent with the requirements of the Instruction. Adverse decision remanded.

CASENO: 17-01990.a1

DATE: 09/19/2018

DATE: September 19, 2018

)	
In Re:)	
)	
-----)	CAC Case No. 17-01990
)	
Applicant for CAC Eligibility)	
)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

Pro se

The Department of Defense (DoD) declined to grant Applicant eligibility for Common Access Card (CAC) credentialing. On November 9, 2017, DoD issued a statement of reasons (SOR) advising Applicant of the basis for that decision—Criminal, Dishonest Conduct, or Financial Irresponsibility concerns and Material, Intentional False Statement, Deception, or Fraud concerns, raised under the adjudicative standards in the appendices of DoD Instruction 5200.46 (Sep. 9, 2014) (Instruction). Applicant requested a hearing. On June 15, 2018, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Robert J. Kilmartin 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 decision.

The Judge’s Findings of Fact and Analysis

Applicant is a 40-year-old disabled employee of a Federal contractor. She has been working for her current employer at a military installation since late 2016. The SOR alleges several minor offenses or infractions, including that Applicant was charged with reckless driving in 2013; arrested for theft by deception - passing two bad checks in 2012; arrested for giving a false name to a police officer and possession of marijuana in 2011; and arrested for cruelty to animals in 2010. She admitted the reckless driving allegation, was found guilty of the bad check offenses, and was sentenced to serve 20 days in jail for the false name and drug offenses. The Judge found portions of her testimony to be not credible. She has not been arrested since 2013.

In completing a Declaration for Federal Employment (Form 306) in 2016, Applicant answered “Yes” to the question that asked if she had been convicted, imprisoned, on probation, or on parole in the last seven years. She only disclosed the 2012 check offenses and 2011 arrest for providing false information to a policeman. She attributed her Form 306 omissions to “simple forgetfulness.” Decision at 3. She provided character reference letters attesting to her hard work and kindness.

With the exception of two minor charges,¹ the Judge found that Applicant had not mitigated the criminal and dishonest conduct concerns. She omitted information about the most serious offenses from her Form 306. The Judge did not find her explanation for the omissions to be forthright or candid. She did not mitigate the material, intentional, false statement, deception, or fraud concerns.

Discussion

¹ The Judge found in favor of Applicant on two harassing communication charges from 2008.

In this case, the Judge applied the wrong standard for adjudicating CAC eligibility.² In the Policies Section of the decision, the Judge stated, “The decision must be arrived at by applying the standard that the grant of CAC eligibility is clearly consistent with the national interest.” Decision at 3. The Judge further stated, “Therefore, any doubt concerning personnel being considered for CAC eligibility should be resolved in favor of the national interest.” Decision at 4. In his conclusion, the Judge found, “it is not clearly consistent with the national interest to grant Applicant CAC eligibility.” Decision at 8. The “clearly consistent with national interest” standard is not applicable in CAC adjudications.³

In a CAC adjudication, “the overriding factor . . . is unacceptable risk.”⁴ Instruction, Enclosure 4 ¶ 1(b). In this case, the SOR alleged CAC eligibility concerns under Paragraphs 2.a and 3.a of the Supplemental Adjudicative Standards (Instruction, App. 2 to Encl. 4). Consequently, the correct adjudication standard is generally set out in Paragraph 4 of the CAC Adjudicative Procedures (Instruction, Encl. 4 ¶ 4), which states: “The determination will be unfavorable . . . when there is a reasonable basis to conclude that derogatory information or conduct relating to the supplemental CAC credentialing standards presents an unacceptable risk for the U.S. Government[,]” and is more specifically set out in the initial paragraph of each supplemental adjudicative standard.

We conclude that application of the wrong standard raises due process concerns and warrants corrective action. Given these circumstances, the best resolution is to remand the case to the Judge for correction of the identified error and issuance of a new decision consistent with the requirements of the Instruction. Applicant raised other issues on appeal that are not ripe for discussion at this time.

² 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* (January 1991, as amended)(Directive). Appeal Board security clearance decisions interpreting and analyzing the administrative procedures in the Directive apply equally in our review of CAC adjudications under the Instruction. *See, e.g.*, CAC Case No. 15-00895 at 2 (App. Bd. Nov. 16, 2016).

³ The “clearly consistent with the national interest” standard applies to security clearance adjudications. *See*, Exec. Order No. 10865 ¶ 2 (1960, as amended); Directive ¶¶ 2.3; 3.2; and Encl. 2, App. A ¶ 2(c). *See also*, *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).

⁴ “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.

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