



**DEPARTMENT OF DEFENSE  
DEFENSE OFFICE OF HEARINGS AND APPEALS**



In the matter of:	)	
	)	
	)	CAC Case No. 17-04072
	)	
Applicant for CAC Eligibility	)	

**Appearances**

For Government: Mary Margaret Foreman, Esq., Department Counsel  
For Applicant: *Pro se*

01/25/2019

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**Remand Decision**

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HARVEY, Mark, Administrative Judge:

Misconduct or negligence in employment concerns are mitigated because Applicant’s rule violations did not pose an unacceptable risk to people, property, or information systems. Material, intentional false statement, deception, or fraud in connection with federal or contract employment concerns are not mitigated because Applicant’s intentional false statements pose an unacceptable risk to people, property, or information systems. Common access card (CAC) credentialing eligibility is denied.

**Statement of the Case**

On September 25, 2017, Applicant submitted a Questionnaire for Non-Sensitive Positions (SF 85). (Government Exhibit 1) On January 19, 2018, the Department of Defense (DOD) issued a statement of reasons (SOR) to Applicant, detailing concerns about his eligibility for a CAC. The DOD found that granting Applicant CAC eligibility posed an unacceptable risk. The action was taken in accordance with Homeland Security Presidential Directive 12, *Policy for a Common Identification Standard for Federal Employees and Contractors* (August 27, 2004), and was based on the Adjudicative Standards found in DOD Instruction 5200.46, *DOD Investigative and Adjudicative Guidance for Issuing the Common Access Card* (September 9, 2014) (DODI 5200.46) and the procedures set out in Enclosure 3 of DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive). The SOR alleges eligibility concerns for “misconduct or negligence

in employment,” and “material, intentional false statement, deception, or fraud in connection with federal or contract employment” in DODI 5200.46, Appendix (App.) 2 to Encl. 4, Supplemental Adjudicative Standards (SAS) ¶¶ 1 and 3.

On February 16, 2018, Applicant answered the SOR. Department Counsel was ready to proceed on April 23, 2018. The case was forwarded to the hearing office and assigned to me on April 26, 2018. On May 23, 2018, the Defense Office of Hearings and Appeals (DOHA) issued a Notice of Hearing scheduling the hearing for July 14, 2018. The hearing was held as scheduled. Department Counsel offered five documents and Applicant offered one exhibit. (Transcript (Tr.) 14, 16; Government Exhibit (GE) 1-5; Applicant Exhibit (AE) A) Applicant did not object to the Government’s documents; however, he noted that he objected to some of the information in the documents his former employer provided. (Tr. 14) All proffered exhibits were admitted into evidence. (Tr. 15-17) Applicant made a statement on his own behalf. The transcript was received on June 25, 2018. No post-hearing documents were received.

On September 6, 2018, I issued a decision indicating:

Misconduct or negligence in employment concerns are mitigated because Applicant’s rule violations did not pose an unacceptable risk to people, property, or information systems. Material, intentional false statement, deception, or fraud in connection with federal or contract employment concerns are not mitigated. Common access card (CAC) credentialing eligibility is denied.

Decision at 1; see *also id.* at 3-7 (discussing “unacceptable risk”). That decision also mentioned that CAC eligibility included a requirement for CAC access to be “clearly consistent with the national interest” and stated that CAC procedures were designed to ensure “the protection of national security.” Decision at 1, 3, 4, 7.

On January 10, 2019, the DOHA Appeal Board remanded the case because of the language concerning “national interest” and “national security,” indicated application of the wrong standard. CAC Case No. 17-04072 at 2-3 (App. Bd. Jan. 10, 2019). To alleviate the Appeal Board’s concerns, all references to the words “national interest” and “national security” have been expunged, and the record evidence has been reassessed based solely on the standard of whether Applicant’s proven conduct posed an unacceptable risk to people, property, or information systems.

### **Findings of Fact**

Applicant denied the allegations in SOR ¶¶ 1.a and 2.a. He also provided extenuating and mitigating information. His SOR admissions are incorporated in the findings of fact.

Applicant is a 33-year-old controls technician employed at a DOD hospital for the previous six months. (Tr. 7) He seeks continued CAC eligibility as a condition of his employment. (Tr. 38) In 2003, he graduated from high school. (Tr. 6) In 2004, he

married, and in 2007, he divorced. (Tr. 6) In 2014, he married. (Tr. 6) His children are ages 13 and 16. (Tr. 7) He has never served in the military. (Tr. 7; GE 1) There is no evidence of security violations, felony convictions, or illegal drug abuse.

In 2016, Applicant's employer, E, authorized him to use E's truck for business purposes. (Tr. 18) E authorized him to use the truck to drive from home to construction work sites. (Tr. 19) Applicant said a Global Positioning System (GPS) in E's truck that Applicant was assigned incorrectly indicated the truck was being used at 1:00 am. (Tr. 20) E also accused Applicant of using E's truck at a place and time when E did not have an active construction site. (Tr. 21) Applicant denied driving E's truck on the weekend and at 1:00 am. (Tr. 20, 26) On December 16, 2016, Applicant ended his employment with E. (Tr. 18) Applicant said he quit because he was not going to be allowed to drive E's truck from home to work, and he was unhappy about the way E was conducting operations. (Tr. 27, 30) He contended that he left employment with E voluntarily. (Tr. 30) He did not provide two weeks of notice before leaving employment with E. (Tr. 30)

In response to a DOD request for information, E said Applicant was "fired for work-related misconduct," including "falsifying company documents and misuse of company credit cards." (Tr. 23-24; GE 3) In response to a state request for information, E said Applicant was "[f]ired for work-related misconduct" and explained that he "falsif[ied] company documents and misuse[d] company credit cards." (GE 5) According to a state document, Applicant told the state in his request for unemployment benefits that he was "fired" and "I was terminated for taking my work truck home." (GE 4)

At his hearing, Applicant said he was supposed to use the company credit card for ice, water, and fuel. (Tr. 24) Applicant asserted the credit card was misused by someone other than himself or maybe the credit card account was "hacked." (Tr. 24) He said someone improperly charged about \$80 at a grocery store on his assigned credit card. (Tr. 35-36) He denied that he falsified any company documents. (Tr. 25)

Applicant received unemployment benefits from the state for about three weeks after leaving his employment from E. (Tr. 29) In order to receive unemployment benefits from the state, he told the state that he was terminated for taking his truck home. (Tr. 33) He denied that he lied to the state to get money, and he said the truth was he and E "just parted ways." (Tr. 33-34) He explained that he did not really lie to the state because E said he was fired, and he said, "[b]asically, I guess, I was terminated, but I left, because I never went back." (Tr. 34-35)

On September 13, 2017, Applicant completed and signed an OF 306. (GE 2) He answered, "no" to question 12, which asked, "During the last 5 years, have you been fired from any job for any reason, did you quit after being told that you would be fired, did you leave any job by mutual agreement because of specific problems, . . . ?"

Applicant said that at the time he completed his September 13, 2017 OF 306 he did not fully read question 12. (Tr. 36-37) At his hearing, he was asked to explain the inconsistency between his statement to the state that he was fired and his statement to the federal government on his OF 306 that he was not fired. He explained that his

statement to the state related to his desire for unemployment benefits. The error on his OF 306 was because he filled out his OF 306 quickly, and “he was trying to get back to work.” (Tr. 37)

## **Policies**

Every CAC eligibility decision must be a fair and impartial overall commonsense decision based on all available evidence, both favorable and unfavorable. The specific concerns, standards, disqualifying conditions, and mitigating circumstances are listed in the Instruction, Enclosure 4, Appendix 1, Basic Adjudicative Standards (BAS), and Appendix 2, SAS. The overriding factor for CAC eligibility decisions is “unacceptable risk,” which is defined as follows:

A threat to the life, safety, or health of employees, contractors, vendors, or visitors; to the U.S. Government 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 at 28.)

The objective of the CAC credentialing process is the fair-minded commonsense assessment of a person’s life to make an affirmative determination that the person is an acceptable risk to have CAC eligibility. A CAC will not be issued if there is a reasonable basis to believe that issuance of a CAC poses an unacceptable risk. Each case must be judged on its own merits, taking into consideration all relevant circumstances, and applying sound judgment, mature thinking, and careful analysis.

Factors to be applied consistently to all information available include: (1) the nature and seriousness of the conduct; (2) the circumstances surrounding the conduct; (3) the recency and frequency of the conduct; (4) the individual’s age and maturity at the time of the conduct; (5) contributing external conditions; and (6) the absence or presence of efforts towards rehabilitation. (Instruction, Enclosure 4, paragraph 1.b.)

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, the applicant is responsible for presenting “witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel.” The applicant has the ultimate burden of persuasion to obtain CAC eligibility.

## Analysis

### Misconduct or Negligence in Employment

DODI 5200.46, App. 2 to Encl. 4, SAS ¶ 1 describes the concern:

1. A CAC will not be issued to a person if there is a reasonable basis to believe, based on the individual's misconduct or negligence in employment, that issuance of a CAC poses an unacceptable risk.

a. An individual's employment misconduct or negligence may put people, property, or information systems at risk.

DODI 5200.46, App. 2 to Encl. 4, SAS ¶ 1.b. indicates a condition that may be disqualifying in this case is "(2) A pattern of dishonesty or rule violations in the workplace which put people, property or information at risk."

The record does not establish SAS ¶ 1.b(2). The SOR alleges, and the record establishes, that Applicant was terminated from his employment at E because he committed work-related misconduct, including falsifying company documents and misuse of company credit cards. This conduct showed poor judgment and incorporated deception and dishonesty. An employee who uses dishonesty in the workplace in connection with employer documents and credit cards does not, without more evidence, pose an unacceptable risk to people, property, or information systems. The scope of his dishonesty and magnitude of his misuse of the truck and credit card were not established because his employer did not provide specific information about what Applicant did to merit termination. See CAC Case No. 15-02333 at 3-4 (App. Bd. Nov. 16, 2016) (discussing CAC issues and focusing on causing risk to people, property, or information systems). Misconduct or negligence in employment concerns are refuted.

### Material, Intentional False Statement, Deception, or Fraud in Connection with Federal or Contract Employment

DODI 5200.46, App. 2 to Encl. 4, SAS, ¶ 3 articulates the CAC concern:

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 poses an unacceptable risk.

a. The individual's conduct involving questionable judgment, lack of candor, or unwillingness to comply with rules and regulations can raise questions about an individual's honesty, reliability, trustworthiness, and put people, property, or information systems at risk.

DODI 5200.46, App. 2 to Encl. 4, SAS, ¶ 3.b indicates a condition that "may be disqualifying include[s] material, intentional falsification, deception or fraud related to

answers or information provided during the employment process for the current or a prior federal or contract employment (e.g., on the employment application or other employment, appointment or investigative documents, or during interviews.)”

The evidence establishes DODI 5200.46, App. 2 to Encl. 4, SAS, ¶ 3.b because the documents showed that after Applicant was terminated from employment with E, he told the state that he was terminated from employment with E. Nevertheless, he denied that he was terminated from employment in the past five years at the time he completed his September 13, 2017 OF 306.

DODI 5200.46, App. 2 to Encl. 4, SAS, ¶ 3.c describes “[c]ircumstances relevant to the determination of whether there is a reasonable basis to believe there is an unacceptable risk [including]: (1) The misstated or omitted information was so long ago, was minor, or happened under such unusual circumstances that it is unlikely to recur”; and “(2) The misstatement or omission was unintentional or inadvertent and was followed by a prompt, good-faith effort to correct the situation.”

Applicant intentionally provided false information on his September 13, 2017 OF 306 about his employment history when he denied that he had been terminated from employment in the previous five years. This falsification is recent, intentional, and serious. He did not take responsibility for his intentional false statement on his OF 306 at his hearing. Material, intentional false statement, deception, or fraud in connection with federal or contract employment concerns are not mitigated.

### **Whole-Person Assessment**

DODI 5200.46, Encl. 4, *CAC Adjudicative Procedures*, ¶ 1, *Guidance For Applying Credentialing Standards During Adjudication* provides the following mitigating factors:

As established in [HSPD-12] credentialing adjudication considers whether or not an individual is eligible for long-term access to federally controlled facilities and/or information systems. The ultimate determination to authorize, deny, or revoke the CAC based on a credentialing determination of the PSI must be made after consideration of applicable credentialing standards in [U.S. Office of Personnel Management Memorandum, *Final Credentialing Standards for Issuing Personal Identity Verification Cards Under HSPD-12*, July 31, 2008].

b. Each case is unique. Adjudicators must examine conditions that raise an adjudicative concern, the overriding factor for all of these conditions is unacceptable risk. Factors to be applied consistently to all information available to the adjudicator are:

(1) The nature and seriousness of the conduct. The more serious the conduct, the greater the potential for an adverse CAC determination.

(2) The circumstances surrounding the conduct. Sufficient information concerning the circumstances of the conduct must be obtained to determine whether there is a reasonable basis to believe the conduct poses a risk to people, property, or information systems.

(3) The recency and frequency of the conduct. More recent or more frequent conduct is of greater concern.

(4) The individual's age and maturity at the time of the conduct. Offenses committed as a minor are usually treated as less serious than the same offenses committed as an adult, unless the offense is very recent, part of a pattern, or particularly heinous.

(5) Contributing external conditions. Economic and cultural conditions may be relevant to the determination of whether there is a reasonable basis to believe there is an unacceptable risk if the conditions are currently removed or countered (generally considered in cases with relatively minor issues).

(6) The absence or presence of efforts toward rehabilitation, if relevant, to address conduct adverse to CAC determinations.

(a) Clear, affirmative evidence of rehabilitation is required for a favorable adjudication (e.g., seeking assistance and following professional guidance, where appropriate; demonstrating positive changes in behavior and employment).

(b) Rehabilitation may be a consideration for most conduct, not just alcohol and drug abuse. While formal counseling or treatment may be a consideration, other factors (such as the individual's employment record) may also be indications of rehabilitation.

Applicant is a 33-year-old controls technician employed at a DOD hospital for the previous six months. In 2003, he graduated from high school. There is no evidence of security violations, felony convictions, or illegal drug abuse.

On September 13, 2017, Applicant completed and signed an OF 306. He answered "no" to question 12, which asked, "During the last 5 years, have you been fired from any job for any reason, did you quit after being told that you would be fired, did you leave any job by mutual agreement because of specific problems, . . . ?" Applicant answered, no, despite being fired or terminated from E after an allegation of misconduct.

Applicant's falsification raises serious risk concerns. Applicant cannot be trusted to disclose potentially derogatory information. The DOD relies on CAC applicants to self-report conduct that poses a risk to people, property, or information systems even when that disclosure might damage the applicant's career or economic interests.

I have carefully considered the facts of this case and applied the standards in DODI 5200.46. None of the mitigating conditions are sufficient to fully resolve CAC eligibility concerns because his submission of an OF 306 containing false information on September 13, 2017, is recent, demonstrates a serious lapse in judgment, and was an intentional act of deception. Applicant's request for CAC eligibility is denied.

### **Formal Findings**

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by section E3.1.25 of Encl. 3 of the Directive, are:

Paragraph 1, Misconduct or Negligence in Employment:	FOR APPLICANT
Subparagraph 1.a:	For Applicant
Paragraph 2, Material, Intentional False Statement, Deception, or Fraud in Connection with Federal or Contract Employment:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant

### **Conclusion**

In light of all of the circumstances presented by the record in this case, I conclude that giving Applicant a CAC would pose an unacceptable risk. CAC eligibility is denied.

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MARK HARVEY  
Administrative Judge