



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



In the matter of:	)	
	)	
	)	CAC Case No. 15-06088
	)	
Applicant for CAC Eligibility	)	

**Appearances**

For Government: Andrew Henderson, Esq., Department Counsel  
For Applicant: *Pro se*

June 20, 2016

**Decision**

Goldstein, Jennifer I., Administrative Judge:

**Statement of the Case**

On September 10, 2015, the Department of Defense (DoD) issued a Statement of Reasons (SOR) to Applicant detailing eligibility concerns for Common Access Card (CAC) issuance pursuant to Homeland Security Presidential Directive–12 (HSPD-12). DOD was unable to find that it was clearly consistent with the national interest to grant Applicant CAC eligibility. The action is based on the Adjudicative Standards found in DoD Instruction 5200.46, *DoD Investigative and Adjudicative Guidelines for Issuing the Common Access Card*, dated September 9, 2014, and made pursuant to 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 concerns raised under the Adjudicative Standards of DoDI 5200.46 are: Paragraph 1.a-Misconduct or Negligence in Employment.

Applicant answered the SOR on September 27, 2015 (Answer), and requested a hearing before an administrative judge. The case was assigned to me on February 29, 2016. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on February 29, 2016, scheduling the hearing for March 23, 2016. The hearing was

convened as scheduled. The Government offered Exhibits (GE) 1 through 4. GE 1, GE 2, and GE 4 were admitted without objection. GE 3 was admitted over Applicant's objection. The Government also offered a letter it sent to Applicant along with GE 1 through 4, marked Hearing Exhibit (HE) I. Applicant offered Exhibits (AE) A through I, which were admitted without objection. Applicant testified on her own behalf. The record was left open until April 6, 2016, for Applicant to submit additional exhibits. On March 28, 2016, Applicant submitted two emails, with attachments, which were marked AE J and AE K. Department Counsel had no objections to AE J and AE K, and they were admitted. DOHA received the transcript of the hearing (Tr.) on March 30, 2016. Based on the record evidence and testimony presented in this case, Common Access Card eligibility is granted.

### **Findings of Fact**

Applicant is a 37-year-old veterinarian. She has been employed by a Government contractor in Afghanistan since 2014. She is divorced and has no children. (GE 1; Tr. 38-39.)

The SOR alleged that Applicant's employment misconduct or negligence raised concerns under DoDI 5200.46, Enclosure 4, Appendix 2, *Supplemental Adjudicative Standards*. Specifically, it alleged that Applicant was fired by three different employers in March 2011, January 2013, and June 2014. Applicant admitted subparagraphs 1.a and 1.c. She denied 1.b, in part.

In March 2011 Applicant's employment was terminated by her employer, as alleged in SOR subparagraph 1.a. This termination was retaliatory in nature and occurred after Applicant reported her employer to a state board for violations of state law. It was the subject of law suits and ended in a confidential settlement, as documented by Applicant in her post-hearing exhibits. (GE 2; AE K; Tr. 23-25, 29-31.)

In January 2013 Applicant's employment was terminated by a second employer for disregarding the employer's policies, as alleged in SOR subparagraph 1.b. Her employer, a veterinary clinic, had a policy that pets were not allowed in the staff doctors' office during work hours. Applicant admitted that she violated this policy once when the heater was broken in the staff-run kennels and the temperatures were near freezing, and at other times to feed her dog for brief periods of time. She acknowledged that she was aware of the policy, but chose to disregard it. She also acknowledged her unprofessional conduct in July 2012 relating to a mock license she created as a joke while employed in this position. (GE 2; GE 3; AE H; Tr. 26-27, 31-35.) According to a letter from the personnel manager at this employer:

Though there were rules that were disregarded toward the end of [Applicant's] employment, it was never anything that would cause harm, physically or emotionally, to any of the team members or patients. There was no vocal blatant disregard for the rules, rather a disagreement involving a protocol that was ultimately the reason she was terminated.

This protocol has since been adjusted and I do not believe that [Applicant] would have been terminated if she were currently employed. (AE C.)

In June 2014 Applicant's employment was terminated by a third veterinary clinic, as alleged in SOR subparagraph 1.c. Applicant testified that the causes for this termination varied, but cited disagreements with her employer's minimalistic approach to the care of stray animals; an unhappy referring hospital; and her employer's critiques of her unprofessional appearance, to include coming to work with wet hair and wearing no make-up. (GE 2; GE 4; AE G; Tr. 28, 35-38.)

Applicant testified:

A lot of things in my life have changed. I learned a lot, actually, through these different employments – things about myself and other people. I feel that I really have made an effort to correct some of my more immature and deficient behaviors . . . as well as trying to maintain appropriate medical and ethical standards. (Tr. 41-42.)

Applicant presented six letters of recommendation, including one from her direct supervisor since 2014. He indicated, "I consider her a highly professional and trustworthy individual with no record of disciplinary issues." (AE J.) The vice president of her current employer also wrote a letter on Applicant's behalf, noting that she is trustworthy and loyal. (AE A.) An army deputy commander that Applicant worked with in Afghanistan indicated Applicant was extremely meticulous, honest, and had no security violations. (AE B.) Additionally, Applicant presented a certificate of training in operational security.

### **Policies**

Every CAC eligibility decision must be a fair and impartial overall commonsense decision based on all available evidence, both favorable and unfavorable. The HSPD-12 credentialing standards are listed in DoDI 5200.46, Enclosure 4, Appendix 1, *Basic Adjudicative Standards*, and Appendix 2, *Supplemental Adjudicative Standards*. The overriding factor for all of these eligibility criteria is unacceptable risk. The decision must be arrived at by applying the standard that the grant of CAC eligibility is clearly consistent with the national interest.

The objective of 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. Each case must be judged on its own merits, taking into consideration all relevant circumstances, and applying sound judgment, mature thinking, and careful analysis.

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 the applicant or proven by Department Counsel.” The applicant has the ultimate burden of persuasion to obtain CAC eligibility.

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. (DoDI 5200.46, Enclosure 4, paragraph 1.) In all adjudications, the protection of the national interest is the paramount consideration. Therefore, any doubt concerning personnel being considered for CAC eligibility should be resolved in favor of the national interest.

## **Analysis**

### **Supplemental Adjudicative Standards, Paragraph 1.a**

DoDI 5200.46, Enclosure 4, Appendix 2, *Supplemental Adjudicative Standards* expresses concerns pertaining to misconduct or negligence in employment. Paragraph 1 of this section states:

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.

The disqualifying conditions set forth in DoDI 5200.46, Enclosure 4, Appendix 2, Subparagraph 1.b that are raised by Appellant’s misconduct or negligence in employment are:

(1) A previous history of intentional wrongdoing on the job, disruptive, violent, or other acts that may pose an unacceptable risk to people, property, or information systems; and

(2) A pattern of dishonesty or rule violations in the workplace which put people, property or information at risk.

Applicant was terminated twice by different employers for misconduct, in 2013 and 2014. In those instances, she knowingly and willfully violated her employer’s rules when she disagreed with her employer’s policies. Her 2011 termination was retaliatory in nature and does not appear to be a direct result of any misconduct. As such, it does not raise a significant concern. The above disqualifying conditions apply.

Potentially mitigating conditions are set forth in DoDI 5200.46, Enclosure 4, Appendix 2, Subparagraph 1.c. The conditions that could apply to mitigate the security concerns raised by the evidence in this case are:

(1) The behavior happened so long ago, was minor, or happened under such unusual circumstances that it is unlikely to recur and does not cast doubt on the individual's current trustworthiness or good judgment relating to the safety of people and proper safeguarding of property and information systems; and

(4) The individual responded favorably to counseling or remedial training and has since demonstrated a positive attitude toward the discharge of information-handling or security responsibilities.

Applicant's misconduct was minor and isolated to two periods of employment. She has matured since accepting a position with a Government contractor. She has no record of disciplinary actions with her current employer and is considered a highly professional and trustworthy individual. Her past misconduct with two previous employers does not cast doubt on her current trustworthiness or good judgment relating to the safety of people and proper safeguarding of property and information systems. Further, she demonstrates a positive attitude toward the discharge of information-handling or security responsibilities. The concerns are mitigated.

### **Further Mitigation**

DODI 5200.46, Enclosure 4, *CAC Adjudicative Procedures*, Paragraph 1, *Guidance For Applying Credentialing Standards During Adjudication* provides the following:

a. As established in Reference (g), 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 Reference (c).

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.

As noted above, Applicant provided details concerning the three alleged terminations. She documented that her 2011 termination was in retaliation for reporting her employer's workplace violations to a state agency. The other two terminations occurred over two years ago, and were the result of minor rule violations. She has acknowledged her improper behavior. She has now matured and has demonstrated positive behavior in her current position, as documented in her letters of support. She demonstrated sufficient rehabilitation. For these reasons, Applicant's request for CAC eligibility should be granted.

### **Formal Findings**

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

Paragraph 1, Misconduct or Negligence in Employment:      **FOR APPLICANT**

Subparagraph 1.a:	For Applicant
Subparagraph 1.b:	For Applicant
Subparagraph 1.c:	For Applicant

## **Conclusion**

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant Applicant CAC eligibility. CAC eligibility is granted.

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Jennifer I. Goldstein  
Administrative Judge