



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



In the matter of:

Applicant for CAC Eligibility

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CAC Case No. 15-00895

Appearances

For Government: Adrienne Strzelczyk, Esq., Department Counsel
For Applicant: *Pro se*

12/02/2016

Remand Decision

LYNCH, Noreen A., Administrative Judge:

Applicant refuted Common Access Card (CAC) credentialing concerns raised under the criminal or dishonest conduct supplemental adjudicative standards. CAC eligibility is granted.

Statement of the Case

On May 22, 2015, the Department of Defense (DOD) issued a Statement of Reasons (SOR) to Applicant detailing criminal or dishonest conduct eligibility concerns. The DOD was unable to grant Applicant CAC eligibility. The action was taken under Homeland Security Presidential Directive – 12 (HSPD-12); the Adjudicative Standards found in DOD Instruction (DODI) 5200.46, *DOD Investigative and Adjudicative Guidelines for Issuing the CAC*, dated September 9, 2014; 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).

Applicant responded to the SOR on July 1, 2015, and requested a review based on the written record in lieu of a hearing. The case was assigned to me on June 29, 2016. Department Counsel submitted a File of Relevant Material (FORM), dated

November 5, 2015. Applicant received the FORM on November 17, 2015. Applicant submitted a timely response to the FORM.

Applicant's CAC eligibility was denied on July 25, 2016. Applicant appealed. On November 16, 2016, the Appeal Board remanded the case to me to address certain matters, including whether Applicant's delinquent taxes raised questions about conduct that included a specific intent to deceive or defraud, and whether the conduct posed an unacceptable risk.

Findings of Fact

Applicant is 61 years old. She has worked for her current employer since May 2014. She enlisted in the U.S. military from February 1983, until she received a General Discharge in April 1983. She has some college education and currently takes courses online. She is married. Applicant completed a questionnaire for non-sensitive positions on June 4, 2014. (Item 2)

Applicant has a history of financial problems, which she attributed to unforeseen mortgage and tax increases. She and her husband filed for Chapter 13 bankruptcy in 2007. She was unable to make the payments to the trustee. (Item 1) She noted that the stability of her family was the priority at the time.

Applicant disclosed her delinquent federal taxes for tax years 2005 to 2011 that total approximately \$9,200 when she completed her Declaration for Federal Employment. (Item 3) She noted in her answer to the SOR that she had a repayment plan with the IRS for \$75 a month to repay the delinquent taxes. (Item 3) The Offer in Compromise consists of payments for 24 months and settles 20% of the total debt.

In response to the FORM, Applicant submitted a letter from the IRS establishing an installment agreement. Applicant was to begin monthly payments of \$203 in January 2016. There was no evidence of any payments made to the IRS. However, I am not convinced that Applicant's conduct constituted a crime under 26 U.S.C. Section 7201, which requires that a defendant "acted willfully and knowingly with specific intent to evade her income tax obligation." *U.S. v. Daniels*, 617 F. 2^d 146 at 148 (5th Cir. 1980)

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 issues raised 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 conditions 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.

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.

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, ¶ 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

Criminal or Dishonest Conduct

DODI 5200.46, Appendix 2 to Enclosure 4, *Supplemental Adjudicative Standards*, ¶ 2 provides:

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 unacceptable risk.

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.

DODI 5200.46, Appendix 2 to Enclosure 4, *Supplemental Adjudicative Standards*, ¶ 2.b lists several conditions that could raise a CAC concern and may be disqualifying. The following are potentially applicable in this case:

(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 irresponsibility 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.

Applicant has a significant amount of delinquent debt from six years of taxes not fully paid. She has not provided evidence to establish that she has actually entered into the agreement and that she has made any payments. Applicant filed for Chapter 13 bankruptcy in 2007, but due to increases in mortgage payments and tax increases, had

to stop the plan. Disqualifying condition ¶ 2.b(6) states that “financial debt should not in and of itself be cause for denial.” There is no indication of fraud. She owes the IRS and has disclosed the information. I am not convinced that she had the specific intent to evade income tax obligations under U.S.C. Section 7201.

Applicant owes the IRS for tax years 2005-2011. The amount of delinquent tax is in the amount of \$9,200. Applicant’s debts do not establish a disqualifying condition because there is no evidence she intended to defraud her creditor, and her actions do not reflect dishonesty.

Formal Findings

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

Paragraph 1, Criminal or Dishonest Conduct: For Applicant

Subparagraph 1.a: For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, granting Applicant CAC eligibility does not pose an unacceptable risk. CAC eligibility is granted.

Noreen A. Lynch
Administrative Judge