



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



In the matter of:

Applicant for CAC Eligibility

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CAC Case No. 15-02333

Appearances

For Government: Daniel F. Crowley, Esq., Department Counsel
For Applicant: [Redacted], Personal Representative

12/05/2016

Decision

LOUGHRAN, Edward W., 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 20, 2015, the Department of Defense (DOD) issued a Statement of Reasons (SOR) to Applicant detailing credentialing concerns for CAC eligibility pursuant to Homeland Security Presidential Directive – 12 (HSPD-12). The DOD was unable to find that granting Applicant CAC eligibility did not pose an unacceptable risk. The action was taken under 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). The concerns raised under the Adjudicative Standards of DODI 5200.46 are criminal or dishonest conduct.

Applicant responded to the SOR on June 17, 2015, and requested a hearing before an administrative judge. The case was assigned to me on January 6, 2016. The

Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on March 15, 2016, scheduling the hearing for March 29, 2016. The hearing was convened as scheduled. Government Exhibits (GE) 1 and 2 were admitted in evidence without objection. Applicant testified, called a witness, and submitted Applicant's Exhibit (AE) A through F, which were admitted without objection. The record was held open until May 16, 2016, for Applicant to submit additional information. He submitted documents that were marked AE G through I and admitted without objection. DOHA received the hearing transcript (Tr.) on April 6, 2016.

Applicant's CAC eligibility was denied on June 20, 2016. Applicant appealed. On November 16, 2016, the Appeal Board remanded the case to me to address certain matters, including whether Applicant's conduct included a specific intent to deceive or defraud and whether the conduct posed an unacceptable risk.

Findings of Fact

Applicant is 57 years old. He has worked for his current employer since April 2014. He served in the U.S. military from 1981 until he was honorably discharged in 1987. He has a master's degree. He married his current wife in 2008. He has three adult children.¹

Applicant has a history of financial problems, which he attributed to a long and acrimonious divorce and custody battle. He and his current wife filed a Chapter 7 bankruptcy case, and their dischargeable debts were discharged in September 2011.²

Applicant's student loans and delinquent taxes were not discharged in bankruptcy. As of April 22, 2016, he owed \$158,970 in defaulted student loans. On April 24, 2016, he entered into a rehabilitation agreement in which he agreed to make at least nine monthly payments of \$380. If he completes the nine payments, the loans will be rehabilitated and in good standing.³

Applicant owes his state about \$10,300 for overpaid unemployment compensation from 2013. There is no evidence that the overpayment was due to fraud. He is contesting the matter. He indicated that if it is determined that he owes the state, he will pay the debt. He paid the state \$100 in February 2016.⁴

Applicant admitted owing the IRS about \$20,000 in back taxes from 2009 through 2011.⁵ He wrote in response to the SOR:

¹ Tr. at 34-35, 38; GE 1, 2.

² Tr. at 19, 23; Applicant's response to SOR; AE E.

³ Tr. at 19, 26-27, 29-33; Applicant's response to SOR; GE 2; AE E-G.

⁴ Tr. at 25-26, 33-34; Applicant's response to SOR; GE 2; AE D.

⁵ Tr. at 19; Applicant's response to SOR.

During the years identified I was currently proceeding through a very long and contested divorce. Based on the advice of my attorney and CPA I filed my taxes claiming only the minimum exemptions allowed so as not to cause conflict with my divorce proceedings. I was informed that upon completion of my divorce I could amend my filings. I have retained the services of [CPA]. At this time my returns are in the process of being amended. It appears at this time the debt will be eliminated and I will receive approximately \$5,000.00 in returns for overpayment of income taxes. In the event that for some reason there is still a debt to the IRS I have full intentions to make payment in full to the IRS.

In October 2015, Applicant retained a CPA to file his tax returns. The CPA noted that as of March 1, 2016, Applicant owed \$2,508 for the CPA's services. The CPA wrote that he prepared Applicant's and his wife's tax returns for tax years 2011 through 2014. The 2014 tax return was filed, but the 2011 through 2013 returns were not filed as Applicant and his wife had not reviewed and signed the returns. The CPA also noted that he had been in discussions with the IRS about an Offer-in-Compromise as Applicant and his wife indicated that "they would have a difficult time paying the balances due for returns prepared and filed for years prior to 2011."⁶

Applicant initially testified that the 2011 through 2013 tax returns were amended returns. He later admitted they were not amended returns and that they were the original returns. IRS transcripts from April 22, 2016, indicate that Applicant's 2010 tax return was filed in August 2011, and that \$1,070 was transferred as a credit toward his 2008 tax liability. The transcripts do not show the 2011 through 2013 returns as filed. The 2014 return was filed in November 2015. The IRS transferred \$374 from his 2014 refund as a credit toward his 2008 tax liability. Applicant testified that he thought he owed the IRS about \$9,000. Applicant submitted a letter from the IRS about his 2009 back taxes, but the amount owed was not reflected in the letter. Tax transcripts for 2008 and 2009 and tax returns for 2011 through 2013 were not submitted. The exact amount owed cannot be determined.⁷

Applicant has not established that he filed all his tax returns. He still owes the IRS an indeterminate amount. However, I am not convinced that Applicant's conduct constituted a crime under 26 U.S.C. § 7201, which requires that a defendant "acted willfully and knowingly with specific intent to evade his income tax obligation." *U.S. v. Daniels*, 617 F.2d 146 at 148 (5th Cir. 1980).

Applicant's supervisor testified and Applicant submitted a letter attesting to his outstanding job performance, trustworthiness, reliability, and judgment.⁸

⁶ Tr. at 20-23; Applicant's response to SOR; AE C, I.

⁷ Tr. at 20-25, 27-29; AE A, C, I.

⁸ Tr. at 38-41; AE H.

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.

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)

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 owes more than \$158,000 in defaulted student loans, and he owes his state more than \$10,000 for overpaid unemployment compensation. However, there is no evidence that the overpayment was due to fraud. He also owes the IRS, but I am not convinced that he had the specific intent to evade his income tax obligation under 26 U.S.C. § 7201. Disqualifying condition ¶ 2.b.(6) states that "financial debt should not in and of itself be cause for denial." Applicant's debts do not raise a disqualifying condition.

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

Subparagraphs 1.a-1.c: 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.

Edward W. Loughran
Administrative Judge