



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



In the matter of:)
)
) CAC Case No. 15-06228
)
Applicant for CAC Eligibility)

Appearances

For Government: Chris Morin, Esq., Department Counsel
For Applicant: *Pro se*

09/27/2016

Decision

HEINY, Claude R., Administrative Judge:

Applicant failed to mitigate Common Access Card (CAC) credentialing concerns raised under criminal or dishonest conduct supplemental adjudicative standards. CAC eligibility is denied.

History of the Case

Acting under the relevant DoD Directive, on November 17, 2015, the DoD issued a Statement of Reasons (SOR) detailing eligibility concerns for Common Access Card eligibility 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 *Supplemental Adjudicative Standards* (SAS) found in DoD Instruction 5200.46, *DoD Investigative and Adjudicative Guidelines for Issuing the Common Access Card*, 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 *Supplemental Adjudicative Standards* of DoDI 5200.46 are “criminal or dishonest conduct.”

On November 27, 2015, Applicant answered the SOR and elected to have the matter decided without a hearing. Defense Office of Hearings and Appeals (DOHA) Department Counsel (DC) submitted the Government's case in a File of Relevant Material (FORM), dated January 19, 2016. The FORM contained six attachments (Items 1-6).

On January 27, 2016, Applicant received a copy of the FORM, along with notice of his opportunity to file objections and submit material to refute, extenuate, or mitigate the potentially disqualifying conditions. The FORM specifically stated he had failed to adequately mitigate the security concern raised in the SOR. Applicant was afforded a period of 30 days to file objections and submit material. No additional information was received from Applicant within the 30-day period. On May 24, 2016, the case was assigned to me.

Findings of Fact

In Applicant's Answer to the SOR, he admitted, without explanation, to the allegation that he had been arrested on March 7, 2014, and charged with felony embezzlement and misdemeanor theft. And he admitted that in August 2014, he was convicted of misdemeanor larceny and sentenced to probation and a fine. I incorporate Applicant's admission as fact. After a thorough review of the pleadings, exhibits, and submissions, I make the following additional findings of fact.

Applicant is a 22-year-old contractor employee, who seeks CAC eligibility. The record is silent as to his current job. From July 2014 to October 2014, he worked for a fast food restaurant. (Item 3) In June 2012, he graduated from high school.

In Applicant's Declaration for Federal Employment (Item 4), he responded “yes” to question 9, which asked him if during the last seven years he had been convicted, been imprisoned, been on probation, or been on parole. He indicated he was placed on probation in August 2014 for larceny from his employer, a large chain-store. (Item 4) He had been charged with felony embezzlement from his employer, but pleaded guilty to a misdemeanor larceny. (Item 5)

Applicant was required to make restitution, was fined \$599, and required to serve 12 months-supervised probation. The cost of supervision fees would be remitted after three months if he had paid restitution in full and had no probation violations. (Item 5) Additionally, if the terms were met, the probation could be transferred to unsupervised probation. (Items 5, 6) The record is silent as to Applicant making restitution or completing probation.

Applicant provided no information about the embezzlement or his actions after sentencing. He provided no information as to his motivation for the conduct, the

presence of rehabilitation, positive changes in behavior, or any information as to the likelihood that the conduct would recur in the future.

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.

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 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.

Criminal or Dishonest Conduct

DODI 5200.46, Appendix 2 to Enclosure 4, *Supplemental Adjudicative Standards*, Paragraphs 2.a., 2.b.(1) and (2) articulate the CAC concern:

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 Instruction 5200.46, Appendix 2, *Supplemental Adjudicative Standards* lists four conditions that raise a CAC concern and may be disqualifying:

2.b.(1) – A single serious crime or multiple lesser offenses which put the safety of people at risk or threaten the protection of property or information. A person's convictions for burglary may indicate that granting a CAC poses an unacceptable risk to the U.S. Government's physical assets and to employees' personal property on a U.S. Government facility;

2.b.(2) – Charges or admission of criminal conduct relating to the safety of people and proper protection of property or information systems, regardless of whether the person was formally charged, formally prosecuted, or convicted;

2.b.(3) Dishonest acts (e.g., theft, accepting bribes, falsifying claims, perjury, forgery, or attempting to obtain identity documentation without proper authorization); and

2.b.(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.

The Government established these four disqualifying conditions through Applicant's admission and evidence presented as a result of his 2014 arrest and conviction for larceny.

DODI 5200.46, Appendix 2 to Enclosure 4, Supplemental Adjudicative Standards, ¶ 2.c lists circumstances relevant to the determination of whether there is a reasonable basis to believe there is an unacceptable risk. The following may be relevant:

(1) The behavior happened so long ago, was minor in nature, or happened under such unusual circumstances that it is unlikely to recur;

(2) Charges were dismissed or evidence was provided that the person did not commit the offense and details and reasons support his or her innocence;

(3) Improper or inadequate advice from authorized personnel or legal counsel significantly contributed to the individual's omission of information. When confronted, the individual provided an accurate explanation and made prompt, good-faith effort to correct the situation; and

(4) Evidence has been supplied of successful rehabilitation, including but not limited to remorse or restitution, job training or higher education, good employment record, constructive community involvement, or passage of time without recurrence.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. I find none of the mitigating factors are applicable. Applicant was 20 years old when arrested. The record is silent as to when the larceny occurred, but obviously occurred prior to his arrest. It has been two-and-a-half years since his arrest.

In requesting an administrative determination, Applicant chose to rely on the written record. In so doing, however, he failed to submit sufficient evidence to supplement the record with relevant and material facts regarding his circumstances, articulate his position, and mitigate the criminal or dishonest CAC concerns. By failing to provide such information, and by only admitting the SOR allegation, insufficient information concerning the facts and circumstance surrounding his conduct, arrest, and actions he has taken since his conviction has been provided. There is no evidence in the record that he successfully completed his probation.

To Applicant's credit, he reported his arrest and conviction on his Declaration for Federal Employment. The Government has an interest in examining all relevant and material adverse information about an applicant before granting CAC eligibility. The Government relies on applicants to truthfully disclose that adverse information in a timely fashion, not when it is perceived to be prudent or convenient. Further, an applicant's willingness to report adverse information about himself provides some indication of his willingness to report inadvertent concerns in the future.. As stated, Applicant revealed his arrest and conviction. His age, the reporting of the arrest and conviction, and the time since his arrest are favorable factors, but they are insufficient to meet his ultimate burden of persuasion to show that it is clearly consistent with the national interest to grant his CAC eligibility.

After weighing the relevant disqualifying and mitigating conditions and evaluating the evidence in light of the whole-person concept, I conclude Applicant did not present sufficient evidence to explain, extenuate, and mitigate the criminal or dishonest conduct concerns.

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: AGAINST APPLICANT

Subparagraph 1.a: Against Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant Applicant CAC eligibility. CAC eligibility is denied.

CLAUDE R. HEINY II
Administrative Judge