



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



In the matter of:

Applicant for CAC Eligibility

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CAC Case No. 15-06225

Appearances

For Government: Ross Hyams, Esquire, Department Counsel

For Applicant: *Pro se*

11/15/2016

Decision

GALES, Robert Robinson, Administrative Judge:

Applicant mitigated the Common Access Card (CAC) eligibility concerns raised under the misconduct or negligence in employment, as well as the criminal or dishonest conduct, supplemental adjudicative standards. CAC eligibility is granted.

Statement of the Case

On November 4, 2014, Applicant submitted a Declaration for Federal Employment (DFE).¹ On November 19, 2014, he submitted an Electronic Questionnaire for Investigations Processing (e-QIP).² On September 10, 2015, the Department of Defense (DOD) issued a Statement of Reasons (SOR) to him, pursuant to Homeland Security Presidential Directive – 12, *Policy for a Common Identification Standard for Federal Employees and Contractors*, dated August 27, 2004 (HSPD-12); DOD Instruction 5200.46, *DOD Investigative and Adjudicative Guidance for Issuing the Common Access Card*, dated September 9, 2014 (DODI); Regulation 5200.2-R, *Personnel Security Program*, dated January 1987, as amended and modified (Regulation); and DOD

¹ GE 2 (DFE, dated November 4, 2014).

² GE 1 (e-QIP, dated November 19, 2014).

Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended and modified (Directive). The SOR alleged concerns pertaining to “misconduct or negligence in employment” under ¶ 1.a., Appendix 2, Enclosure 4, and “criminal or dishonest conduct” under ¶ 2.a., Appendix 2, Enclosure 4, Supplemental Adjudicative Standards, and detailed reasons why the DOD adjudicators were unable to find that granting Applicant CAC eligibility did not pose an unacceptable risk. The SOR recommended referral to an administrative judge to determine whether such eligibility should be granted, continued, denied, or revoked.

It is unclear when Applicant received the SOR as there is no receipt in the case file. In a sworn statement, dated December 4, 2015, Applicant responded to the SOR allegations and elected to have his case decided on the written record in lieu of a hearing.³ On February 18, 2016, Applicant changed his mind and requested a hearing before an administrative judge. On May 18, 2016, Department Counsel indicated the government was prepared to proceed. The case was assigned to me on August 4, 2016. A Notice of Hearing was issued on August 31, 2016. I convened the hearing, as scheduled, on September 21, 2016.

During the hearing, four government exhibits (GE 1 through GE 4), two Applicant exhibits (AE A and AE B), and one administrative exhibit were admitted into evidence without objection. Applicant testified. The transcript (Tr.) was received on September 29, 2016. I kept the record open to enable Applicant to supplement it. Applicant took advantage of that opportunity. He timely submitted a number of additional documents, which were marked as AE C through AE E that were admitted into evidence without objection. The record closed on October 19, 2016.

Findings of Fact

In his Answer to the SOR, Applicant admitted, with explanations, only one of the factual allegations pertaining to criminal or dishonest conduct (¶ 2.b.) of the SOR. He denied, also with comments, the remaining factual allegations related to misconduct or negligence in employment, as well as criminal or dishonest conduct. Applicant's admissions, as well as his explanations and comments related to those allegations which he denied, are incorporated herein as findings of fact. After a complete and thorough review of the evidence in the record, and upon due consideration of same, I make the following additional findings of fact:

Applicant is a 51-year-old employee of a defense contractor. He has been an operations manager for his employer since January 2007. He had previously been a foreman or superintendent for other employers from at least January 1990 until January 2007.⁴ He is seeking to retain his CAC eligibility which was initially granted to him 25

³ Applicant's Answer to the SOR, dated December 4, 2015.

⁴ GE 1, *supra* note 2, at 8-10.

years earlier.⁵ Applicant graduated from high school in 1983.⁶ He completed two years of college, but did not earn a degree.⁷ He has never served in the U.S. military.⁸ Applicant was married the first time in 1985 and divorced in 2005 or 2006.⁹ He was married the second time in 2007 and divorced in 2015.¹⁰ He has two biological children: sons born in 1990 and 1995; as well as the three step-children his second wife abandoned when she left the marital home: a daughter born in 2000, and sons born in 2002 and 2003.¹¹ Until recently, Applicant was also the legal guardian of his second wife's minor niece and nephew.¹²

Misconduct or Negligence in Employment & Criminal or Dishonest Conduct¹³

(SOR ¶ 2.c.): In October 2005, Applicant and his fiancé were seated in the car arguing when she started pushing or hitting him. Applicant was trying to keep her from doing so. A neighbor called the police. Applicant was arrested and charged with assault – domestic violence 3rd degree and harassment. On November 30, 2005 – approximately a decade before the SOR was issued – after hearing Applicant's version of the events, supported by the testimony of his fiancé, the charges were *nolle prossed*.¹⁴

(SOR ¶ 2.b.): On January 12, 2012, while driving on a two-lane road, Applicant came upon a vehicle traveling in the same direction, at about 10 to 20 miles per hour, weaving all over the road. As he passed the vehicle he honked the horn and noticed that the driver, an older woman, was telephone texting. He continued on for about one-half mile without incident, and pulled into a service station. The driver of the other vehicle followed him to the station and started screaming profanity at him. Applicant continued pumping gasoline into his vehicle, and when the other driver continued her tirade, he said a "few choice words" and flipped her "the finger." The other driver called the police and alleged that Applicant beat on her car and threatened her life. The police arrived and

⁵ Tr. at 24.

⁶ GE 1, *supra* note 2, at 7.

⁷ Tr. at 5, 46.

⁸ GE 1, *supra* note 2, at 11; Tr. at 48.

⁹ Tr. at 47.

¹⁰ Tr. at 47.

¹¹ Tr. at 49-50.

¹² Tr. at 50.

¹³ General source information pertaining to the alleged incidents of misconduct or negligence in employment and criminal or dishonest conduct discussed below can be found in the following exhibits: GE 4 (Criminal History Record, dated December 1, 2014); Applicant's Answer to the SOR, *supra* note 2; GE 2, *supra* note 1; GE 3 (Military Police Report, dated June 10, 2014); AE C (Criminal Docket, dated September 16, 2014); AE B (Evidence/Property Custody Document, dated November 24, 2014); AE A (Commander's Report of Disciplinary or Administrative Action, dated August 15, 2014).

¹⁴ GE 4, *supra* note 13, at 4; Tr. at 25-27; Applicant's Answer to the SOR, *supra* note 2, at 3.

arrested him. He was charged with simple assault – reckless endangerment; crimes against person – harassment; disorderly conduct; and traffic offense – safe and prudent speed. Applicant engaged the professional services of an attorney to represent him. During a court hearing, the service station surveillance video was viewed, and the judge determined that none of the allegations reported by the other driver, with the exception of the “flipped finger” had taken place, and that Applicant had never left the side of his vehicle while pumping gasoline. Nevertheless, to avoid a protracted and potentially costly trial, Applicant’s attorney advised him to plead guilty to disorderly conduct. On September 13, 2012, Applicant was convicted of disorderly conduct, and the remaining charges were dismissed.¹⁵ The judge fined the other driver for filing false warrants and allegations.¹⁶

(SOR ¶¶ 1.a. and 2.a.): During the week leading up to June 10, 2014, Applicant had been on annual leave at a campground festival in another part of the state. In the console of his vehicle he had his licensed handgun. Returning home after vacation, with his vehicle still filled with his camping and vacation gear, Applicant decided to check up on one particular job site on the military facility where he was employed. Upon arriving at the front gate, it was noticed that a full security inspection of all vehicles was taking place. Hoods were raised, mirrors checked under the vehicles, trunks were inspected, seats were lifted, and glove boxes were opened. Applicant opened his console glove box to get his credentials and realized his pistol was still in his vehicle. Unable to turn around, Applicant approached the gate guard and advised him that he was on vacation and had forgotten to remove his handgun. Applicant was ordered to step out of the vehicle without touching the handgun. Military police were called. They took possession of the handgun. Applicant was issued a violation notice for violating a security regulation and then permitted to continue onto the facility without further incident.¹⁷

Applicant appeared *pro se* in the federal district court before a magistrate. Prosecuting the case against him were an assistant U.S. attorney and a judge advocate (JAG). On August 12, 2014, the magistrate convicted Applicant of the offense of security violation – prohibited weapon, and sentenced him to one year of probation.¹⁸ Upon receiving written notice of the court action, Applicant sought out the JAG to explain what had happened. The JAG responded that he was under the impression that Applicant had been caught on base with the weapon, but Applicant explained the true facts. On September 12, 2014, the government filed a motion to dismiss the charge, and on September 16, 2014, the order dismissing the charge was issued by the magistrate.¹⁹ On October 1, 2014, the handgun was returned to Applicant.²⁰

¹⁵ GE 2, *supra* note 1, at 2; GE 4, *supra* note 13, at 5; Tr. at 25-27; Applicant’s Answer to the SOR, *supra* note 2, at 2; Tr. at 27-30.

¹⁶ Tr. at 29-30.

¹⁷ Tr. at 30-35; GE 3, *supra* note 13, at 13; AE A, *supra* note 13.

¹⁸ Tr. at 35; AE A, *supra* note 13, at 1, 4

¹⁹ AE C, *supra* note 13; Applicant’s Answer to the SOR, *supra* note 2, at 1; Tr. at 36-37.

²⁰ AE B, *supra* note 13.

Character References and Community Activities

The president of the company for which Applicant works has known Applicant for 20 years. He characterized Applicant in extremely positive terms, referring to him as a hard worker, honest, and very conscientious.²¹ The fire protection engineer for the military installation on which Applicant works, has known Applicant for seven years. He, too, is very supportive of Applicant's retention of his CAC eligibility. He feels that Applicant is a person of good moral character who is trustworthy and very reliable. He also noted that Applicant always follows the rules and regulations.²² Applicant is active in community affairs, especially in the area of youth sports. He previously coached youth football and baseball, and he is currently the co-captain for a youth fishing team.²³

Policies

Every CAC eligibility decision must be a fair and impartial overall common sense 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 the CAC credentialing process is the fair-minded common sense 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. An administrative judge need not view the standards as inflexible, ironclad rules of law. Instead, acknowledging the complexities of human behavior, these standards are applied in conjunction with the factors listed below in the adjudicative process.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. If there is evidence sufficient to present a reasonable basis to conclude that a disqualifying factor in accordance with the basic CAC credentialing standards is substantiated, or when there is a reasonable basis to conclude that derogatory information or conduct relating to the supplemental CAC credentialing standards presents an unacceptable risk for the U.S. Government, under Directive ¶ E3.1.15, the applicant has the burden of persuasion to present witnesses and other evidence in refutation, explanation, extenuation or mitigation, sufficient to overcome the doubts raised by the Government's case. The applicant has the ultimate burden of persuasion to obtain CAC eligibility.

²¹ AE D (Character Reference, dated September 27, 2016).

²² AE E (Character Reference, dated September 27, 2016).

²³ Tr. at 48-49.

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.

A person who seeks CAC eligibility enters into a fiduciary relationship with the Government predicated upon trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours as well. It is because of this special relationship that the Government must be able to repose a high degree of trust and confidence in those individuals to whom it grants CAC eligibility for access to information systems and installation access. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, unacceptable risk. In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

Analysis

DODI 5200.46, Appendix 2 to Enclosure 4, *Supplemental Adjudicative Standards*, ¶ 1 articulates the CAC concern:

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.

DODI 5200.46, Appendix 2 to Enclosure 4, *Supplemental Adjudicative Standards*, ¶ 5. lists several conditions that could raise a CAC concern and may be disqualifying. However, under the evidence presented, none of those conditions raised in ¶ 5 are applicable in this case.

There is no previous history or patterns of intentional wrongdoing or rule violations associated with Applicant's employment that could pose an unacceptable risk to individuals, property, or proprietary, protected, or classified information. The sole incident alleged that Applicant had attempted to bring a prohibited weapon onto a military installation. In fact, before Applicant entered the facility, upon realizing that his handgun was still in his vehicle, Applicant informed the gate guard of its presence to avoid bringing it onto the facility. While the facts were not developed before the U.S. magistrate, leading to his conviction, they were eventually developed to the satisfaction of the Government and the charge was withdrawn. The handgun was returned to Applicant, a testament by the Government that Applicant's possession of a handgun did not pose an unacceptable risk to life, limb, or property. In some ways, this incident is similar to the one that created an international incident in 2013 when a member of the U.S. Marine Corps was arrested

at the Mexican border after realizing he had a weapon in his vehicle but was unable to turn back into the United States.

DODI 5200.46, Appendix 2 to Enclosure 4, *Supplemental Adjudicative Standards*, ¶ 2 articulates the CAC concern:

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 conditions are potentially applicable in this case:

(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) 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;

(5) Actions involving violence or sexual behavior of a criminal nature that poses an unacceptable risk if access is granted to federally-controlled facilities and federally-controlled information systems. For example, convictions for sexual assault may indicate that granting a CAC poses an unacceptable risk to the life and safety of persons on U.S. Government facilities;

Applicant's history of criminal conduct is sufficient to establish all of the above disqualifying conditions.

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 mitigating conditions 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;

(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.

Applicant was involved in three incidents of a criminal nature, and two of those incidents eventually resulted in the charges being dismissed. The October 2005 incident occurred a decade before the SOR was issued. The January 2012 incident involved essentially false allegations made against Applicant, and based on his attorney's guidance and the fear of a costly and drawn-out battle, Applicant pled guilty to disorderly conduct – flipping the finger to an offensive provocateur. The most recent incident, in June 2014, eventually resulted in a wrong being corrected. The handgun was returned to Applicant.

Based on the extremely positive information presented by his character references, as well as Applicant's own comments, I am convinced Applicant is "rehabilitated," to the extent that he needed rehabilitation. His history as a justice-involved individual from the past does not pose an unacceptable risk. The above mitigating circumstances are established.

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, Misconduct or Negligence

In Employment:

FOR APPLICANT

Subparagraph 1.a.:

For Applicant

Paragraph 2, Criminal or Dishonest

Conduct:

FOR APPLICANT

Subparagraph 2.a.:

For Applicant

Subparagraph 2.b.:

For Applicant

Subparagraph 2.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 or continue Applicant's CAC eligibility. CAC eligibility is granted.

ROBERT ROBINSON GALES
Administrative Judge