



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



In the matter of:

REDACTED

Applicant for CAC Eligibility

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CAC Case No. 15-07490

**Appearances**

For Government: Ross Hyams, Esq., Department Counsel  
For Applicant: *Pro se*

03/14/2017

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**Decision**

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MENDEZ, Francisco, Administrative Judge:

Applicant did not mitigate Common Access Card (CAC) credentialing concerns raised by her criminal history and falsification of a federal employment form. Of particular concern is that Applicant was forced to resign her position with a former employer after she was caught stealing from other employees and she then deliberately failed to disclose this material information on a federal employment form. Applicant did not present sufficient evidence of reform and an insufficient amount of time has passed to safely conclude that granting her a CAC would not pose an unreasonable risk to U.S. personnel, property, or information systems. CAC eligibility is denied.

**History of the Case**

On December 7, 2015, pursuant to Homeland Security Presidential Directive – 12 (HSPD-12), the Department of Defense (DoD) issued a Statement of Reasons (SOR) to Applicant detailing concerns about her eligibility for a CAC. This action was taken under DoD Instruction (DoDI) 5200.46, *DoD Investigative and Adjudicative Guidelines for Issuing the Common Access Card*, dated September 9, 2014 (Instruction), and in accordance with the established administrative process set out in DoD Directive (DoDD) 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992) (Directive).

The CAC credentialing concerns cited in the SOR are Supplemental Adjudicative Standards (SAS) ¶ 2.a (criminal or dishonest conduct) and SAS ¶ 3.a (deliberate falsification, deception, or fraud). Applicant answered the SOR on December 21, 2015, and requested a decision on the written (administrative) record.

On April 7, 2016, Department Counsel prepared his written case, a file of relevant material (FORM), and sent it to Applicant. The FORM contains: the SOR (Item 1); Applicant's Answer (Item 2);<sup>1</sup> her application for a non-sensitive position (Item 3), her declaration for federal employment (Item 4), her criminal record (Item 5), and responses to pre-employment checks (Items 6 and 7). As further explained below, Items 1 – 7 were admitted into the administrative record without objection.

On May 12, 2016, Applicant submitted her response to the FORM (Item 8) and, without objection, it was admitted into the record.<sup>2</sup> On February 13, 2017, I was assigned Applicant's case.

### **Procedural Issue**

DOHA proceedings are designed to provide for a full, fair, and complete record of an applicant's eligibility, whether such eligibility is for a security clearance, a position of trust or, as in this case, a CAC.<sup>3</sup> In order to allow for the development of such a record, the Directive states that the technical rules of evidence "shall serve as a guide."<sup>4</sup> Furthermore, the DOHA Appeal Board has stated that DOHA judges should liberally apply the "technical rules of evidence" and err on the side of admitting relevant and material evidence to ensure the development of a full and complete record.<sup>5</sup>

The Directive, however, does contain two major exceptions to this liberal policy of admitting relevant evidence. Specifically, a DoD personnel background report of investigation ("ROI") and a third-party statement adverse to an applicant on a controverted issue are potentially inadmissible in a DOHA proceeding.<sup>6</sup>

Here, Department Counsel offered Items 6 and 7, which are standard Office of Personnel Management (OPM) forms that were sent to two of Applicant's former employers. They contain short, one-line handwritten notations from said employers denoting the purported adverse circumstances surrounding Applicant's employment

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<sup>1</sup> The two documents Applicant submitted with her Answer have been marked Exhibits A and B.

<sup>2</sup> The reference letter Applicant submitted with her Response has been marked Exhibit C.

<sup>3</sup> Directive, ¶ E3.1.19. *See generally*, CAC Case No. 15-06091 at 3 (App. Bd. Jan. 10, 2017) (Board's past decisions "interpreting and analyzing" procedural guidance in DoDD 5220.6 should be followed by DOHA judges in CAC cases). *See also*, ISCR Case No. 94-0084 (App. Bd. Dec. 13, 1994).

<sup>4</sup> Directive, ¶ E3.1.19.

<sup>5</sup> ISCR Case No 03-21434 at 5 (App. Bd. Feb. 20, 2007).

<sup>6</sup> Directive, ¶¶ E3.1.20, E3.1.22.

termination. These pre-employment checks were conducted by OPM as a part of the Government's background investigation into Applicant's CAC eligibility.<sup>7</sup> The Appeal Board has held that similar documents are inadmissible in a DOHA proceeding, but only if the opposing party timely raises an objection.<sup>8</sup>

Accordingly, although the Directive does not specifically state that a party can waive an objection, the Board has in the past accepted the generally accepted legal proposition that a party's failure to timely raise an objection waives it.<sup>9</sup> However, this precedent has recently been called into question in cases where a *pro se* applicant elects a determination on the written record and the Government offers a portion of an ROI, namely, an unauthenticated summary of the person's subject interview ("SI").<sup>10</sup>

I have given due consideration to these recent decisions. I have also considered that the danger of admitting potentially unreliable information is arguably far greater when considering unverified information from a person's former employer versus a summary of an interview prepared by a government agent. However, in this case, Applicant did not raise an objection to the admission of any of the exhibits offered by Department Counsel with the FORM, including Items 6 and 7.<sup>11</sup> Moreover, she did not challenge the accuracy of the information contained in these exhibits. Therefore, I find that Applicant waived any potential objection to these exhibits and FORM Items 1 – 7 are admitted into the administrative record. Additionally, in exercising my authority

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<sup>7</sup> See generally Instruction, Enclosure 3, *CAC Investigative Procedures*.

<sup>8</sup> See, e.g., ISCR Case No. 95-0817 (App. Bd. Feb. 21, 1997) (Judge erred in *sua sponte* excluding portion of an ROI that was submitted by Department Counsel as evidence with a FORM under E3.1.20, because "[n]owhere in Applicant's energetic criticisms of various portions of the FORM does he challenge the completeness, accuracy, or truthfulness of FORM Item 5 [SI] or any portion of it.") See also ISCR Case No. 02-12199 at 8 (App. Bd. Oct. 7, 2004) (exclusion of ROI prepared by another government agency, containing SI, was upheld because applicant timely raised objection citing E3.1.20). See also ISCR Case No. 15-05252 (App. Bd. Apr. 13, 2016) (judge erred in excluding SI submitted with a FORM).

<sup>9</sup> ISCR Case No. 02-12199 at n. 6 (App. Bd. Oct. 7, 2004) ("An applicant can waive his or her objection to the admissibility of evidence even though the Directive is silent on the matter of waiver."). See also ISCR Case No. 14-06781 at 3 (App. Bd. Dec. 16, 2016) (failure to raise an objection to an exhibit offered by the Government with the FORM waives it).

<sup>10</sup> See generally ISCR Case No. 12-10933 at 4-5 (App. Bd. Jun. 29, 2016) (AJ Ra'anan's concurring opinion regarding potential due process concerns raised by SIs submitted with FORMs). See also ISCR Case No. 14-05232 at 2 (AJ Leonard Feb. 10, 2016) (notwithstanding explicit warning to applicant in FORM that he or she could object to the SI, judge ruled that the SI was inadmissible because "a *pro se* applicant's failure to respond to the FORM does not equate to a waiver of the authentication requirement."); ISCR Case No. 15-01554 at 2 (CAJ Hogan Feb. 24, 2016) (Applicant's failure to object to the admission of unauthenticated SI in response to the FORM is not a knowing waiver of E3.1.20's authentication rule); ISCR Case No. 15-01554 at 2 (AJ Duffy Feb. 12, 2015) (same) ("failure to object does not amount to authentication of the documents or a waiver of the rule [E3.1.20].").

<sup>11</sup> ISCR Case No. 02-12199 05-03307 at 2 (App. Bd. May 7, 2007) ("Although *pro se* applicants cannot be expected to act like a lawyer, they are expected to take timely, reasonable steps to protect their rights under the Directive. If they fail to take timely, reasonable steps to protect their rights, *that failure to act does not constitute a denial of their rights.*") (emphasis added)

under the Directive, I have given all the admitted exhibits the weight I deem appropriate in light all the facts and circumstances raised by the evidence.<sup>12</sup>

### Findings of Fact

Applicant, 51, is a contract employee of a national guard unit. Her former supervisor, a guard member, provided a favorable recommendation.<sup>13</sup>

In May 2010, Applicant was arrested and charged with domestic battery. She and her former husband were in a heated argument. Her ex-husband, a police officer, submitted a letter stating that during the argument, he “became loud” which led their neighbors to call police. He unequivocally states that Applicant did not physically hit him during the argument. Applicant entered a diversion program, she and her ex-husband received counseling, and the criminal charge was later dismissed. Applicant and her ex-husband eventually divorced, but they remain friends.<sup>14</sup>

Applicant did not disclose the May 2010 arrest on her declaration for federal employment form. But, the relevant question does not require an applicant to disclose all arrests. Instead, it only requires an applicant to disclose those arrests resulting in conviction, imprisonment, probation, or parole in the past seven years.<sup>15</sup> It is unclear from the limited record whether the diversion program was a term of probation.

In October 2012 and August 2013, Applicant was arrested and charged with shoplifting. She was placed in a first offender’s diversion program, which she successfully completed, and the criminal charges were subsequently resolved without an adjudication of guilt.<sup>16</sup> Applicant disclosed the October 2012 shoplifting arrest on her declaration for federal employment form, stating “Loss prevention felt I was guilty of putting items in my shopping bag. I was arrested. . . . Incident happened.”<sup>17</sup> In her Answer, Applicant stated the following regarding the shoplifting incidents:

**October 2012 Charged with Retail/Theft.** . . . I did take an item from this store. . . . I admit this happened, and it will appear I am minimalizing the circumstances, but obviously I was not proud of my conduct and had

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<sup>12</sup> ISCR Case No 03-21434 at 5 (App. Bd. Feb. 20, 2007) (“the DOHA process encourages Judges to err on the side of initially admitting evidence into the record, and then to consider . . . what, if any, weight to give to that evidence.”). See *also* ISCR Case No. 14-06011 (App. Bd. Dec. 9, 2015) (“The weight that a Judge assigns to evidence is a matter within his or her discretion.”).

<sup>13</sup> Items 2, 3, 9; Exhibit C.

<sup>14</sup> Items 2, 5; Exhibit A. The SOR alleges in ¶ 1.e a supposed arrest in 2008 for larceny. Applicant denied this allegation and her criminal record (Item 5) do not reflect any arrest before the 2010 domestic incident. No evidence was supplied to support the allegation. Accordingly, SOR 1.e is decided in Applicant’s favor.

<sup>15</sup> Items 2, 5.

<sup>16</sup> Items 2, 5; Exhibit B.

<sup>17</sup> Item 4.

hoped to only disclose what was absolutely necessary as I realize it does not portray a very good picture of my conduct.

**August 2013 Retail Theft.** I admit this happened and again, I minimized this because I was given a [citation]. This was something that was rolled into one court hearing in relation [to October 2012 charge]. I obtained an attorney and it was settled with a withhold [of adjudication.]<sup>18</sup>

Applicant worked for a county agency from 1995 to 2008, and then again from 2010 to 2013. She resigned in August 2013. Applicant claims that she resigned after a coworker told her supervisor about the shoplifting incidents. She further notes several matters that were going on in her personal life (bad marriage) and work (low morale) that contributed to her decision to resign.<sup>19</sup> A background check conducted by OPM revealed that Applicant's former employer, the county agency, let her resign after Applicant "was caught stealing from other employees."<sup>20</sup>

Applicant admits in her Answer she was forced to resign from the county agency in 2013 under threat that she would otherwise be fired. She did not disclose this adverse or derogatory employment information on her declaration for federal employment.<sup>21</sup> In response to the concerns raised about her criminal record and failure to disclose the adverse employment information, Applicant states the following:

I can most definitely understand your concern, and I realize the information doesn't present me in the best light, but that particular time period was an extremely difficult time and I most definitely made significant changes since then. I have been working with a counselor for [the] last two years and volunteer at my Church as the lead coordinator to counsel others who struggle with addiction and behavior problems.<sup>22</sup>

## **Policies**

As established in HSPD-12, CAC "credentialing adjudication considers whether or not an individual is eligible for long-term access to federally controlled facilities and/or

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<sup>18</sup> Item 2 (emphasis in original). The SOR alleges that Applicant falsified her declaration for federal employment by failing to disclose the 2013 shoplifting arrest. However, Applicant's criminal record, Item 5, notes the case was resolved by "adjudication withheld." This evidence supports Applicant's assertion that she was placed in a diversion program and there was no adjudication of guilt. Again, based on the limited record, I cannot find that such a program or adjudication amounts to a "conviction, imprisonment, probation, or parole," which applicant would have been required to disclose on her employment form.

<sup>19</sup> Item 2, 3.

<sup>20</sup> Item 6. Applicant was sent Item 6 with the FORM and did not raise an objection to its admission, nor did she contest the accuracy or truthfulness of the information provided by her former employer.

<sup>21</sup> Items 2, 4.

<sup>22</sup> Item 2. No evidence was submitted to corroborate Applicant's assertions of having received counseling, documenting the type of counseling received, or indicating if a favorable prognosis was given.

information systems.” Instruction, Enclosure 4, ¶ 1.a. The Instruction recognizes that each CAC case is unique and a fair and impartial overall commonsense decision should examine all available evidence, both favorable and unfavorable.

The “overriding factor” or standard in all CAC adjudications is “unacceptable risk.” *Id.* This term is specifically defined by the Instruction as follows:

A threat to the life, safety, or health of employees, contractors, vendors, or visitors; to the U.S. Government physical assets or information systems; to personal property; to records, including classified, privileged, proprietary, financial, and medical records; or to the privacy rights established by The Privacy Act of 1974, as amended, or other law that is deemed unacceptable when making risk management determinations.<sup>23</sup>

Directive ¶ E3.1.14, requires Department Counsel to present evidence to establish controverted facts alleged in the SOR, i.e., allegation(s) denied. On the other hand, pursuant to Directive ¶ E3.1.15, an applicant is responsible for presenting “witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel.” An applicant has the ultimate burden of persuasion to establish his or her eligibility for a CAC.

Adjudicative factors to be applied consistently in all CAC cases 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. Instruction, Enclosure 4, ¶ 1.b. Any reasonable doubt concerning an applicant’s CAC eligibility should be resolved in favor of protecting the Government’s vital interests in making certain that only persons that do not pose an unacceptable risk are granted a CAC.

## **Analysis**

### **Criminal or Dishonest Conduct**

SOR 1.a – 1.d allege Applicant’s domestic battery arrest and shoplifting arrests. (SOR 1.e alleges a purported 2008 arrest for larceny, but no evidence was offered to support this allegation.) These allegations of criminal conduct raise the CAC credentialing concern set forth in SAS ¶ 2.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.

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<sup>23</sup> See Instruction, Glossary. *See also* CAC Case No. 15-00898 at 2-3 (App. Bd. Dec. 7, 2016)

In assessing whether Applicant's criminal history raises a reasonable basis to believe there is an unacceptable risk to people, property, or information systems, I considered the following disqualifying conditions and potentially mitigating circumstances:

SAS ¶ 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.

SAS ¶ 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.

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

SAS ¶ 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.

SAS ¶ 2.c(1): The behavior happened so long ago, was minor in nature, or happened under such unusual circumstances that it is unlikely to recur.

SAS ¶ 2.c(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.

SAS ¶ 2.c(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's criminal history continues to call into question her present eligibility for a CAC. Although the domestic incident involving her former spouse appears to have been an isolated event that took place some seven years ago during a turbulent marriage, her shoplifting is part of a much larger and serious credentialing concern. Notably, the shoplifting was not a one-time occurrence, as Applicant committed the same offense just a year after being arrested for the first offense. More disconcerting from a CAC eligibility perspective is that Applicant's criminal behavior did not end after the second shoplifting incident. As reflected in Item 6, Applicant was forced to resign from her former job after it was discovered that she was stealing from other employees. This type of criminal behavior is directly tied to the credentialing concern at issue, in that Applicant might pose a risk to other U.S. Government employees or property.

Applicant's criminal conduct continued after she was forced to resign. Specifically, she deliberately omitted the information about the forced resignation on her recent declaration for federal employment. Notwithstanding, Applicant's claims of reform and rehabilitation, as well as apparent recent good employment record, she failed to provide sufficient evidence to mitigate the credentialing concerns raised by a pattern of criminally deceptive conduct.

Accordingly, I find that Applicant mitigated credentialing concerns raised by the 2010 domestic incident, but did not mitigate the credentialing concerns raised by her shoplifting arrests in 2012 and 2013. The disqualifying conditions identified at SAS 2.b(1) – 2.b(4) apply. The potential mitigating circumstances do not fully apply and, for all the above reasons, do not mitigate the credentialing concerns raised by Applicant's history of criminally deceptive behavior.

### **Falsification, Deception, or Fraud**

SOR 2.a alleges that Applicant falsified her declaration for federal employment form by failing to disclose a number of her arrests, none of which resulted in conviction, imprisonment, probation, or parole. Department Counsel failed to provide sufficient evidence to establish this allegation and it is decided in Applicant's favor.

On the other hand, the evidence does establish SOR 2.b, which alleges that Applicant falsified her declaration for federal employment by deliberately omitting the adverse or derogatory information about her 2013 forced resignation from the county agency.<sup>24</sup> SAS ¶ 3 states, in pertinent part, the following:

A CAC will not be issued to a person if there is a reasonable basis to believe, based on the individual's material, intentional false statement, deception, or fraud in connection with federal or contract employment, that issuance of a CAC poses an unacceptable risk.

The individual's conduct involving questionable judgment, lack of candor, or unwillingness to comply with rules and regulations can raise questions about an individual's honesty, reliability, trustworthiness, and put people, property, or information systems at risk

The following disqualifying conditions and mitigating circumstances were potentially raised by the evidence:

SAS ¶ 3.b: . . . material, intentional falsification, deception or fraud related to answers or information provided during the employment process for the current or a prior federal or contract employment (e.g., on the employment application or other employment, appointment or investigative documents, or during interviews.);

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<sup>24</sup> The specific question at issue asked Applicant to disclose whether "[d]uring the last 5 years, have you been fired from any job for any reason, did you quit after being told you would be fired, did you leave any job by mutual agreement because of specific problems . . . ?"



SAS ¶ 3.c(1): The misstated or omitted information was so long ago, was minor, or happened under such unusual circumstances that it is unlikely to recur; and

SAS ¶ 3.c(2): The misstatement or omission was unintentional or inadvertent and was followed by a prompt, good-faith effort to correct the situation.

The crux of the Government's credentialing concern is that Applicant deliberately falsified her declaration for federal employment by failing to disclose the adverse or derogatory circumstances that led her to resign from the county agency in 2013. The omission of material, adverse information standing alone is not enough to establish that an applicant intentionally falsified a federal form used for CAC credentialing purposes. An omission is not deliberate if the person genuinely forgot the information requested, inadvertently overlooked or misunderstood the question, or sincerely thought the information did not need to be reported. An administrative judge must examine the facts and circumstances surrounding the omission to determine an applicant's true intent.<sup>25</sup>

Applicant admits in her Answer that she was embarrassed about her past misconduct and did not want to disclose more than was "absolutely necessary" on the declaration for federal employment. She continues to provide misleading information about the facts and circumstances leading to her forced resignation from the county agency in 2013. She now readily admits that she was forced to resign, but does not acknowledge it was because she was caught stealing from other employees. After considering all the evidence and reasonable inferences to be drawn therefrom, I find that Applicant deliberately falsified her declaration for federal employment. She did not want the Government to know the true adverse reasons that led to her forced resignation. Applicant's deliberate falsification of the declaration of the federal employment form raises serious questions about her honesty, reliability, and trustworthiness. She failed to provide sufficient evidence to establish any of the applicable mitigating conditions. She also failed to demonstrate that she has reformed the past conduct that raised credentialing concerns.<sup>26</sup>

### **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
Subparagraphs 1.a and 1.e:	For Applicant
Subparagraphs 1.b – 1.d:	Against Applicant

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<sup>25</sup> See *generally* ISCR Case No. 02-12586 (App. Bd. Jan. 25, 2005).

<sup>26</sup> See ISCR Case No. 15-04856 (Mar. 9, 2017) (notwithstanding 15-year gap between applicant deliberating omitting material information from a federal application form and adverse decision, the decision was affirmed by Board because applicant failed to acknowledge his past misconduct )

Paragraph 2, Falsification, Deception, or Fraud:  
Subparagraph 2.a:  
Subparagraph 2.b:

AGAINST APPLICANT  
For Applicant  
Against Applicant

### **Conclusion**

In light of all of the circumstances presented by the record in this case, I find that Applicant did not meet her burden of persuasion. CAC eligibility is denied.

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Francisco Mendez  
Administrative Judge