



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



In the matter of:)	
)	
[NAME REDACTED])	CAC Case No. 15-07604
)	
Applicant for CAC Eligibility)	

Appearances

For Government: Benjamin R. Dorsey, Esq., Department Counsel
For Applicant: *Pro se*

02/16/2017

Decision

BORGSTROM, Eric H., Administrative Judge:

Applicant did not mitigate the Common Access Card (CAC) credentialing concerns raised under the misconduct in employment and the criminal or dishonest conduct supplemental adjudicative standards. CAC eligibility is denied.

Statement of the Case

On November 9, 2015, the Department of Defense (DOD) issued a Statement of Reasons (SOR) to Applicant detailing credentialing concerns for CAC eligibility. The DOD was unable to find that granting Applicant CAC eligibility did not pose an unacceptable risk. This 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). In the present case, the CAC eligibility concerns raised under the Adjudicative Standards of DODI 5200.46 are: misconduct or negligence in employment; criminal or dishonest conduct or financial responsibility; and material, intentional false statement, deception, or fraud.

Applicant answered the SOR on December 14, 2015, and she requested a decision based on the written record in lieu of a hearing. On March 9, 2016, the Government submitted its file of relevant material (FORM) and provided a complete copy to Applicant. She received the FORM on March 14, 2016. Applicant was afforded an opportunity to respond to the FORM within 30 days of its receipt and to file objections and submit material to refute, extenuate, or mitigate the security concerns. She did not respond to the FORM. The case was assigned to me on December 15, 2016.

Procedural Issues

In the FORM, Department Counsel references FORM Items 1-5. FORM Items 3-5 are admitted into evidence as Government Exhibits (GE) 3-5, respectively, without objection.¹ In the FORM, Department Counsel withdrew the allegation under SOR ¶ 3, regarding material, intentional false statement, deception, or fraud. Accordingly, I will not address that matter.

Findings of Fact

Applicant is 39 years old. Between January 2012 and October 2014, she attended undergraduate-level classes at three different institutions. Since April 2015, she has been employed by a DOD contractor.²

From July 2014 to March 2015, Applicant worked for a private company. In March 2015, Applicant was fired for dishonesty. Specifically, she used the corporate credit card for personal purchases, and she improperly recorded her time for payroll purposes. On her April 2015 Declaration for Federal Employment, she listed that she had been fired for using the company credit card for personal use, but she did not list the timesheet issues.³

In her SOR response, Applicant admitted the misuse of the company credit card and the discrepancies on her timesheet. She admitted the misconduct and the resulting termination, but she did not acknowledge that she knowingly violated company policy with her misuse of the company credit card. Her work duties at times required her to respond to customers after-hours or off-site. Her misunderstanding of recording these situations on her timesheet was reasonable; however, she knowingly permitted her

¹ See ISCR Case No. 14-06781 at 3 (App. Bd. Dec. 16, 2016) (By not responding to the Government's FORM, "Applicant waived any objection he might have had to this document."). FORM Items 1 and 2, consisting of the SOR and Applicant's response to the SOR, are the pleadings and are included in the record.

² GE 3.

³ GE 4; GE 5.

timesheet to be submitted reflecting bereavement pay, for which she knew she was ineligible.⁴ Her willful failure to correct this error reflects dishonesty.

Applicant did not submit any documentation demonstrating that she had remedied the credit card misuse and timesheet discrepancies with her former employer.

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 the 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.

⁴ Response to SOR.

Analysis

Misconduct in Employment

DODI 5200.46, Appendix 2 to Enclosure 4, Supplemental Adjudicative Standards, ¶ 1 articulates the 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.

- a. An individual's employment misconduct or negligence may put people, property, or information systems at risk.

DODI 5200.46, Appendix 2 to Enclosure 4, Supplemental Adjudicative Standards, ¶ 1.b. lists several conditions that could raise a CAC concern and may be disqualifying. The following are potentially applicable in this case:

- (1) A previous history of intentional wrongdoing on the job, disruptive, violent, or other acts that may pose an unacceptable risk to people, property, or information systems; and
- (2) A pattern of dishonesty or rule violations in the workplace which put people, property or information at risk.

Applicant knowingly used the company credit card for personal use, and she willfully failed to correct the timesheet discrepancies concerning the bereavement pay. While she did not explicitly state that she knowingly violated company policy about the use of the company credit card, she stated, "Again, I was not made aware of the severity of this until I was fired."⁵ In the context of her SOR response, she appears to be admitting that she knowingly violated company policies concerning both the credit card and the timesheets. Moreover, she never claimed that she was unaware that she was prohibited from using her corporate credit card for personal use. The Government established Applicant's intentional wrongdoing and pattern of dishonesty in the workplace. I conclude that ¶¶ 1.b.(1) and (2) apply.

The Government established its case for disqualification, thereby shifting the burden to Applicant to produce evidence to rebut, explain, extenuate, or mitigate the facts. An applicant has the burden of proving a mitigating condition, and the burden of disproving it never shifts to the Government.⁶ DODI 5220.46, Appendix 2 to Enclosure 4, Supplemental Adjudicative Standards, ¶ 1.c. lists circumstances relevant to the determination of whether there is a reasonable basis to believe there is an unacceptable risk. The following mitigating circumstance is potentially relevant:

⁵ Response to SOR.

⁶ See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

(1) The behavior happened so long ago, was minor, or happened under such unusual circumstances that it is unlikely to recur and does not cast doubt on the individual's current trustworthiness or good judgment relating to the safety of people and proper safeguarding of property and information systems.

Applicant's termination for misconduct occurred in March 2015, following a pattern of dishonesty and rule violations. This misconduct was recent, significant, and did not occur under unusual circumstances. She willfully failed to correct the improperly recorded timesheet to her financial benefit. She has not provided any documentation to demonstrate changed circumstances or successful rehabilitation. As a result, her misconduct continues to cast doubt on her trustworthiness and judgment. I conclude that ¶ 1.c.(1) does not apply. Absent evidence of changed circumstances or successful rehabilitation, an unacceptable risk remains due to Applicant's misconduct in employment.

Criminal or Dishonest Conduct

DODI 5200.46, Appendix 2 to Enclosure 4, Supplemental Adjudicative Standards, ¶ 2.a. articulates the 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 at risk.

DODI 5200.46, Appendix 2 to Enclosure 4, Supplemental Adjudicative Standards, ¶ 2.b. lists one potentially applicable disqualifying condition:

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

Applicant was terminated for dishonesty based on her misuse of the company credit card and her timesheet discrepancies. Although she violated company policies with her misuse of the company credit card for her own financial benefit, this conduct does not fall within the dishonest conduct or acts outlined by the Supplemental Adjudicative Standards ¶ 2.b.(3).⁷ Applicant's falsified timesheets do establish ¶ 2.b.(3).

DODI 5200.46, Appendix 2 to Enclosure 4, Supplemental Adjudicative Standards, ¶ 2.c. lists two potentially applicable mitigating conditions or circumstances:

⁷ See CAC Case No. 15-02333 at 4 (App. Bd. Nov. 16, 2016) (DODI Enclosure 4, Appendix 2 ¶ 2 requires criminal or dishonest conduct).

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

As discussed above, Applicant's dishonest acts were significant, recent, and did not occur under unusual circumstances. Furthermore, she has supplied no evidence of successful rehabilitation or restitution. Beyond admitting the termination, she has not provided any evidence to show that such misconduct or dishonest acts are unlikely to recur. Because Applicant's credit card misuse and timesheet discrepancies had financial consequences for her employer, I conclude that an unacceptable risk remains as to her ability to adequately safeguard people, property, or information systems.

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 in Employment:	AGAINST APPLICANT
Subparagraph 1.a.:	Against Applicant
Paragraph 2, Criminal or Dishonest Conduct	AGAINST APPLICANT
Subparagraph 2.a.:	Against Applicant
Paragraph 3, Material, False Statement	WITHDRAWN
Subparagraph 3.a.:	Withdrawn

Conclusion

In light of all of the circumstances presented by the record in this case, granting Applicant CAC eligibility poses an unacceptable risk. CAC eligibility is denied.

Eric H. Borgstrom
Administrative Judge