



**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. 15-06221

Appearances

For Government: Erin P. Thompson, Esq., Department Counsel
For Applicant: *Pro se*

03/23/2018

Decision

Foreman, LeRoy F., Administrative Judge:

Applicant has not mitigated the eligibility concerns raised by his criminal conduct, financial irresponsibility, and false statements in his Declaration for Federal Employment. CAC eligibility is denied.

Statement of the Case

On March 9, 2017, the Department of Defense (DOD) issued a Statement of Reasons (SOR) to Applicant, detailing concerns about his eligibility for a Common Access Card (CAC). The DOD found that granting Applicant CAC eligibility posed an unacceptable risk. The action was taken in accordance with Homeland Security Presidential Directive 12, *Policy for a Common Identification Standard for Federal Employees and Contractors* (August 27, 2004), and was based on the Adjudicative Standards found in DoD Instruction 5200.46, *DoD Investigative and Adjudicative Guidance for Issuing the Common Access Card* (September 9, 2014) (Instruction) 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 SOR alleges eligibility concerns under the Supplemental Adjudicative Standards (SAS) set out in Enclosure 4, Appendix 2 of the Instruction. The specific

concerns were alleged under the standards for Criminal or Dishonest Conduct (SAS ¶ 2) and Material, Intentional False Statement, Deception, or Fraud (SAS ¶ 3).

Applicant responded to the SOR on April 20, 2017, but he did not admit or deny any of the allegations and did not indicate whether he wanted a hearing before an administrative judge. The SOR was returned to him on July 20, 2017. He admitted all the allegations and requested a hearing before a DOHA administrative judge. Department Counsel amended the SOR on September 6, 2017, by adding an additional allegation. Applicant did not admit or deny the additional allegation. Department Counsel was ready to proceed on September 13, 2017, and the case was assigned to me on October 23, 2017. On November 13, 2017, DOHA notified Applicant that the hearing was scheduled for December 8, 2017. I conducted the hearing as scheduled. Department Counsel submitted Government Exhibits (GX) 1 through 6, which were admitted without objection. Applicant testified and presented the testimony of one witness. He did not submit any documentary evidence. I kept the record open until December 21, 2017, to enable him to submit documentary evidence. He timely submitted Applicant's Exhibit (AX) A through I, which were admitted without objection. DOHA received the transcript (Tr.) on December 15, 2017.

Findings of Fact

Applicant is a 64-year-old warehouse worker employed by a federal contractor since September 2014. He has worked as a contractor employee for about 30 years. (Tr. 39.)

The SOR, as amended, alleges six federal tax liens filed in 1996, 2002, 2007, 2009, 2012, and 2016. (SOR ¶¶ 1.a-1.e and 1.j.) The liens are reflected in credit reports from November 2002 and November 2015. (GX 3; GX 6.) Applicant testified that he and his wife accrued a federal tax debt due to insufficient withholding from their wages. His wife testified that they incurred a large tax debt in 1999, when she withdrew funds from her retirement account after 24 years, not realizing the tax consequences. (Tr. 46-48.) Applicant testified that he had not received any federal income tax refunds for 20 years. (Tr. 21.) The mortgage loan on their house was foreclosed around 2004, when they could not make the payment on a balloon loan, and the proceeds of the foreclosure sale were seized by the Internal Revenue Service (IRS). He testified that he had an installment agreement with the IRS, but he submitted no documentation of any agreement. (Tr. 24-25.) After the hearing, he submitted nine tax statements from the IRS, all dated December 4, 2017, reflecting that he owed \$4,710 for tax year 2006; \$599 for 2007; \$2,596 for 2008; \$3,167 for 2009; \$2,823 for 2010; \$1,278 for 2011; \$1,636 for 2012; \$1,261 for 2013; and \$796 for 2014. His total tax debt is \$18,866. (AX A through I.) His federal income tax refund for 2015 was retained to pay the taxes due for 2015. (Tr. 51.) The federal tax liens alleged in the SOR are not resolved.

The SOR alleges that Applicant was arrested in August 1982 for failure to appear at a court hearing. (SOR ¶ 1.f) Applicant testified that the court hearing was for an unpaid parking ticket. Department Counsel offered no documentary evidence of this

arrest or the disposition of the charge. Applicant testified that he spent the night in jail and appeared in court on the following day, when the charges were dismissed. (Tr. 27.)

The SOR alleges that Applicant was arrested in March 1999 for driving with an open container of alcohol in his car. (SOR ¶ 1.g.) He testified that he appeared in court and paid a fine. (Tr. 28.) Department Counsel offered no documentary evidence regarding this arrest and conviction.

The SOR alleges that Applicant was arrested in July 2012 and charged with violation of probation. (SOR ¶ 1.h.) He testified that he could not remember the offense for which he was on probation or the disposition of the charge of violating probation. (Tr. 31-32.) Department Counsel submitted evidence that Applicant's suspended sentence and probation imposed for a misdemeanor were revoked, but the evidence does not reflect the misdemeanor for which probation was imposed or the basis for the charge of violating probation. (GX 2.)

In August 2013, Applicant was charged with felony possession of cocaine. (GX 2.) (SOR 1.i.) The record reflects that he was convicted and placed on probation, but it provided no other details about his sentence. (GX 2.) He testified that he was arrested at the house of a neighbor, when the police raided the neighbor's house and found drugs and paraphernalia, and the neighbor told the police that they belonged to Applicant. He testified that he spent 21 days in jail and was required to perform 100 hours of community service. (Tr. 33-36.)

When Applicant submitted his "Declaration for Federal Employment" in August 2014, he answered "No" to questions asking if he had been convicted, imprisoned, placed on probation, or been on parole during the previous seven years; if he was currently under charges for any violations of law; and if he was delinquent on any federal debt. (GX 5.) He admitted that his answers were false. He explained that he wanted to keep the information to himself and did not want to be "out there like that." (Tr. 38.) He knew that the information probably would be discovered, but he was worried about losing his job. (Tr. 39.)

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 concerns, standards, disqualifying conditions, and mitigating circumstances are listed in the Instruction, Enclosure 4, Appendix 1, Basic Adjudicative Standards (BAS), and Appendix 2, Supplemental Adjudicative Standards (SAS). The overriding factor for CAC eligibility decisions is "unacceptable risk," which is defined 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.

(Instruction, Glossary, Part II at 28.)

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. A CAC will not be issued if there is a reasonable basis to believe that issuance of a CAC poses an unacceptable risk. Each case must be judged on its own merits, taking into consideration all relevant circumstances, and applying sound judgment, mature thinking, and careful analysis.

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. (Instruction, Enclosure 4, paragraph 1.b.)

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.

Analysis

SAS ¶ 2, Criminal or Dishonest Conduct

The concern under this standard is set out 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.

The following disqualifying conditions are potentially applicable:

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;

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; and

SAS ¶ 2.b(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.

SAS ¶¶ 2.b(1) and 2.b(2) are not established for the failure to appear alleged in SOR ¶ 1.f and the open-container violation alleged in SOR ¶ 1.g, because these offenses are not the type that put the safety of people at risk, threaten the protection of property or information, or relate to the protection of property or information systems. They also are not established for the probation violation alleged in SOR ¶ 1.h, because there is no evidence of the underlying crime for which probation was imposed or the basis for the charge of a probation violation. SAS ¶ 2.b(2) is established by Applicant's arrest and the charge of felony possession of cocaine. SAS ¶ 2.b(6) is established by Applicant's history of delinquent federal income taxes.

The following mitigating circumstances are potentially relevant:

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; and

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.

SAS ¶ 2.c(1) is not established for the probation violation in July 2012, because there is no evidence of the circumstances on which it was based. Neither mitigating condition is established for the drug offense or the federal income tax liens. The drug offense occurred more than four years ago, but it was not a minor offense.¹ Applicant's financial irresponsibility is recent, serious, and did not occur under unusual circumstances. He testified that he has an installment agreement with the IRS, but he submitted no evidence of payments or a payment agreement.

SAS ¶ 3, Material, Intentional False Statement, Deception, or Fraud

The concern under this guideline is set out in SAS ¶ 3.a: "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 relevant disqualifying condition is SAS ¶ 3.b:

¹ The SOR does not allege drug use under SAS ¶ 5, which recognizes that drug abuse may put people, property, or information systems at risk. SAS ¶ 5.b(3) lists illegal drug possession as a disqualifying condition. I have considered SAS ¶ 5.b(3) for the limited purpose of determining whether Applicant's conviction of felony drug possession was the type of crime that may raise an unacceptable risk to people, property, or information systems.

[C]onditions that may be disqualifying include 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).

This disqualifying condition is established by Applicant's admission that he intentionally falsified his Declaration for Federal Employment. The following mitigating circumstances are potentially relevant:

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.

Neither of these mitigating circumstances are established. Applicant's falsifications were serious, recent, intentional, and did not happen under unusual circumstances; and he made no effort to correct them.

Formal Findings

My formal findings on the allegations set forth in the SOR are:

Paragraph 1 (Criminal or Dishonest Conduct):	AGAINST APPLICANT
Subparagraphs 1.a-1.e:	Against Applicant
Subparagraphs 1.f-1.h:	For Applicant
Subparagraphs 1.i and 1.j:	Against Applicant
Paragraph 2 (Material, Intentional False Statement, Deception, or Fraud):	AGAINST APPLICANT
Subparagraphs 2.a-2.c:	Against Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, I conclude that giving Applicant a CAC would pose an unacceptable risk. CAC eligibility is denied.

LeRoy F. Foreman
Administrative Judge