



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



In the matter of:

Applicant for CAC Eligibility

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CAC Case No. 16-02664

Appearances

For Government: Jeff Nagel, Esq., Department Counsel
For Applicant: *Pro se*

April 19, 2018

Decision

CEFOLA, Richard A., Administrative Judge:

Statement of the Case

On January 5, 2017, the Department of Defense (DoD) issued a Statement of Reasons (SOR) to Applicant detailing eligibility concerns for Common Access Card (CAC) issuance 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 Adjudicative Standards found in DoD Instruction (DoDI) 5200.46, *DoD Investigative and Adjudicative Guidelines for Issuing the Common Access Card*, dated September 9, 2014, and made pursuant to 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 Adjudicative Standards of DoDI 5200.46 are: Paragraph 1.a.-Misconduct or Negligence in Employment; Paragraph 2.a.-Criminal or Dishonest Conduct; and Paragraph 3.a.-Material, Intentional False Statement, Deception or Fraud in Connection with Federal or Contract Employment.

Applicant answered the SOR on February 2, 2017 (Answer), and requested a hearing before an administrative judge. The case was assigned to me on March 3,

2017. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on April 18, 2017, scheduling the hearing for May 8, 2017. The hearing was convened as scheduled. The Government offered Exhibits (GXs) 1 through 5, which were admitted into evidence. Applicant testified on her own behalf, as did her fiancé and her father. The record was left open until June 8, 2017, for Applicant to submit additional exhibits. After her hearing, on May 8, 2017, Applicant submitted an email, with attachments, which was marked Applicant's Exhibit (AppX) A. Department Counsel had no objections to AppX A, and it was admitted into evidence. DOHA received the transcript of the hearing (TR) on May 16, 2017. Based on the record evidence and testimony presented in this case, Common Access Card eligibility is granted.

Findings of Fact

The SOR alleged that Applicant's employment misconduct or negligence, dishonest or criminal conduct, and intentional false statement raised concerns under DoDI 5200.46, Enclosure 4, Appendix 2, *Supplemental Adjudicative Standards*. Specifically, it alleged that Applicant was fired by her fiancé, from working at his restaurant, in July of 2014; and that she failed to disclose this firing when she applied for her CAC. Applicant denies both allegations (subparagraphs 1.a. and 3.a). However, Applicant admits subparagraph 2.b. that she was arrested in March of 2009, as a teenager for shoplifting.

Misconduct or Negligence in Employment & Material, Intentional False Statement

1.a. and 3.a. In July of 2014, Applicant was working at her fiancé's restaurant, waiting on customers. (TR at page 19 line 6 to page 22 line 24, at page 25 line 26 to page 27 line 5, at page 27 lines 12~20, and at page 24 line 23 to page 27 line 24.) Unbeknownst to her fiancé, however, Applicant left the restaurant to go home to watch their children. (*Id.*) As a result, thinking she walked off the job without any notice, her fiancé filled out paperwork terminating Applicant's employment at his restaurant. (TR at page 19 line 6 to page 22 line 24, at page 25 line 26 to page 27 line 5, at page 27 lines 12~20, and at page 24 line 23 to page 27 line 24.) When her fiancé returned to their home and discovered the reason for Applicant's departure; he simply filed the paperwork in her employment file, a mistake he now regrets. (TR at page 24 line 23 to page 27 line 24.) The paperwork was later discovered, by investigators, in the course of their investigation. Applicant's fiancé did not consider her to be fired. (*Id.*) Furthermore, Applicant had no knowledge of the alleged firing. She, in fact, went to work the very next day, handling the paperwork for running the restaurant, which she still did as of the date of her hearing. (TR at page 19 line 6 to page 22 line 24, at page 25 line 26 to page 27 line 5, at page 27 lines 12~20, and at page 24 line 23 to page 27 line 24.)

Criminal or Dishonest Conduct

2.a. In March of 2009, Applicant's father was on active duty with the U.S. Army. (TR at page 29 line 10 to page 30 line 21.) Applicant, a 19 year-old teenager, shoplifted about \$100 worth of cosmetics from the Post Exchange (PX). (TR at page 16 line 1 to

page 19 line 5.) She was arrested and subsequently fined about \$250 for the admitted larceny.

Policies

Every CAC eligibility decision must be a fair and impartial overall commonsense decision based on all available evidence, both favorable and unfavorable. The HSPD-12 credentialing standards 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 eligibility criteria 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 the 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.

Analysis

Supplemental Adjudicative Standards, Paragraph 1.a

DoDI 5200.46, Enclosure 4, Appendix 2, *Supplemental Adjudicative Standards* expresses concerns pertaining to misconduct or negligence in employment. Paragraph 1 of this section states:

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. 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.

Conduct raising concerns under this paragraph includes:

- (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.

The disqualifying conditions set forth in DoDI 5200.46, Enclosure 4, Appendix 2, Subparagraph 1.b are raised by Appellant's alleged firing for insubordination. However, as set forth above, there was no termination of employment here. As such, there is no need to examine the mitigating conditions are set forth in DoDI 5200.46, Enclosure 4, Appendix 2, Subparagraph 1.c.

Supplemental Adjudicative Standards, Paragraph 2.a

DoDI 5200.46, Enclosure 4, Appendix 2, Supplemental Adjudicative Standards expresses concerns pertaining to criminal or dishonest conduct. Paragraph 2 of this section states:

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.

The disqualifying conditions set forth in DoDI 5200.46, Enclosure 4, Appendix 2, Subparagraph 2.b. that is raised by Applicant's conduct in being arrested for shoplifting in 2009 as set out in the SOR is:

- (2) Charges or admissions 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.

Potentially mitigating conditions are set forth in DoDI 5200.46, Enclosure 4, Appendix 2, Subparagraph 2.c. The conditions that could apply to mitigate the security concerns raised by the evidence in this case are:

(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.

Applicant's one-time arrest for shoplifting occurred when she was a teenager nearly nine years ago. There is absolutely no evidence of any such recurrence. Applicant met her burden to establish mitigation under the conditions in DoDI 5200.46, Enclosure 4, Appendix 2, Subparagraph 2.c.

Supplemental Adjudicative Standards, Paragraph 3.a

In Applicant's case, overall CAC eligibility concerns are raised under DoDI 5200.46, Appendix 2 to Enclosure 4, Supplemental Adjudicative Standards, paragraph 3:

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 security risk.

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; and

3.b. Therefore, the conditions 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).

I find neither of these applicable here. Simply stated, there was no willful falsification, since there was no termination of employment. As such, there is no need to examine the mitigating conditions are set forth in DoDI 5200.46, Enclosure 4, Appendix 2, Subparagraph 3.c.

Further Mitigation

DODI 5200.46, Enclosure 4, *CAC Adjudicative Procedures*, Paragraph 1, *Guidance For Applying Credentialing Standards During Adjudication* provides the following:

a. As established in Reference (g), credentialing adjudication considers whether or not an individual is eligible for long-term access to federally controlled facilities and/or information systems. The ultimate determination to authorize, deny, or revoke the CAC based on a credentialing determination of the PSI must be made after consideration of applicable credentialing standards in Reference (c).

b. Each case is unique. Adjudicators must examine conditions that raise an adjudicative concern, the overriding factor for all of these conditions is unacceptable risk. Factors to be applied consistently to all information available to the adjudicator are:

(1) The nature and seriousness of the conduct. The more serious the conduct, the greater the potential for an adverse CAC determination.

(2) The circumstances surrounding the conduct. Sufficient information concerning the circumstances of the conduct must be obtained to determine whether there is a reasonable basis to believe the conduct poses a risk to people, property or information systems.

(3) The recency and frequency of the conduct. More recent or more frequent conduct is of greater concern.

(4) The individual's age and maturity at the time of the conduct. Offenses committed as a minor are usually treated as less serious than the same offenses committed as an adult, unless the offense is very recent, part of a pattern, or particularly heinous.

(5) Contributing external conditions. Economic and cultural conditions may be relevant to the determination of whether there is a reasonable basis to believe there is an unacceptable risk if the conditions are currently removed or countered (generally considered in cases with relatively minor issues).

(6) The absence or presence of efforts toward rehabilitation, if relevant, to address conduct adverse to CAC determinations.

(a) Clear, affirmative evidence of rehabilitation is required for a favorable adjudication (e.g., seeking assistance and following professional guidance, where appropriate; demonstrating positive changes in behavior and employment).

(b) Rehabilitation may be a consideration for most conduct, not just alcohol and drug abuse. While formal counseling or treatment may be a consideration, other factors (such as the individual's employment record) may also be indications of rehabilitation.

As noted above, there was no job termination; and as such, no requirement for disclosure. She has acknowledged her improper behavior as a teenager involved with shoplifting. She has now matured and has demonstrated positive behavior in her current position, as documented in her letters of support. (AppX A.) She demonstrated sufficient rehabilitation. For these reasons, Applicant's request for CAC eligibility should be granted.

Formal Findings

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by ¶ 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

Paragraph 3, Material, Intentional False Statement: FOR APPLICANT

Subparagraph 3.a: 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 Applicant CAC eligibility. CAC eligibility is granted.

Richard A. Cefola
Administrative Judge

