



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



In the matter of:)
)
) CAC Case No. 16-03332
)
Applicant for CAC Eligibility)

Appearances

For Government: Bryan J. Olmos, Esq., Department Counsel
For Applicant: *Pro se*

11/28/2018

Decision

CERVI, Gregg A., Administrative Judge:

Applicant mitigated Common Access Card (CAC) credentialing concerns raised under supplemental adjudicative standards (SAS) for criminal or dishonest conduct and Material, Intentional False Statement, Deception or Fraud. CAC eligibility is granted.

Statement of the Case

On May 26, 2017, the Department of Defense (DOD) issued a Statement of Reasons (SOR) to Applicant detailing credentialing concerns for CAC eligibility under Homeland Security Presidential Directive-12 (HSPD-12). The DOD was unable to find that granting Applicant CAC eligibility did not pose an unacceptable risk.¹ The concerns raised under the Adjudicative Standards of DODI 5200.46 are SAS ¶ 2.a, criminal or dishonest conduct; and SAS ¶ 3.a, material, intentional false statement, deception or fraud.

¹ The action was taken under 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).

Applicant responded to the SOR on August 2, 2017, and requested a hearing before an administrative judge. The case was assigned to me on November 20, 2017. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on February 22, 2018, scheduling the hearing for March 14, 2018. The hearing was convened as scheduled. Government Exhibits (GE) 1 through 4 and Applicant Exhibit (AE) A were admitted into evidence without objection. Applicant testified and after the hearing, submitted AE B, containing several documents attached to an e-mail, which was admitted without objection. DOHA received the hearing transcript (Tr.) on March 20, 2018.

Findings of Fact

Applicant is 29 years old. He worked as a motor-vehicle mechanic and fork-lift operator from 2014 to May 2018. He was first married in 2009. The marriage was annulled. He then remarried in 2016. He has two young children. He graduated from high school in 2006 and completed some college. He served in the U.S. Army on active duty from 2006 to 2009 when he received an honorable discharge. He reenlisted in 2009 and was administratively discharged in April 2010 with a general discharge under honorable conditions. He currently holds CAC eligibility for access to a government facility.

The SOR alleges five incidents of misdemeanor criminal conduct from 2006 to 2012. Applicant admitted the allegations with explanations. Applicant was arrested for fighting while he was in high school. The charge was dismissed. He was arrested for reckless driving and not having an operator license in 2009. Applicant was fined. In January 2010, Applicant was charged with disorderly conduct because of a confrontation with a person following too close to his vehicle. He was fined. In March 2010, Applicant was charged with having loud music and disorderly conduct after he yelled a comment out his window to the officer. He pleaded no contest and was fined. He was again arrested in 2012 for stealing games from a department store. He received a deferred adjudication to include one year of probation, restitution, a fine, and 80 hours of community service. He completed his sentence and the charge was dismissed.

Applicant completed a Federal Declaration of Employment (FORM 306) in August 2015 by hand. In it, he noted his traffic violations, loud music offense, and 2012 theft charge. He was instructed by his employer to sign a typed version of the FORM 306 and to remove the minor offenses because the employer believed they were not necessary to report. He signed the new Form 306 in February 2016, and listed only his 2012 theft offense. The SOR alleges he failed to report the March 2010 incident on his February 2016 FORM 306. Applicant testified that he did intentionally falsify the form as he did not recall the 2010 misdemeanor disorderly conduct incidents when he completed the forms, likely because they dated back five years, were minor incidents, and he was in the Army at the time. He did report the more recent and egregious misdemeanor theft offense from 2012.

After the 2012 charge, Applicant realized he had to change his life. He considers himself to have been a naive young man when his past offenses occurred, and that he no longer displays such behavior. He has not had any interaction with the police since 2012. He began a job with a government contractor in 2014, and has had no safety or

security violations. He married in 2016 and has two children for whom he is responsible. He has returned to college and believes his troubled past is permanently behind him. His direct supervisor described Applicant as a “good, dependable employee with no disciplinary action.” He does not view him as a risk of any type. While employed, Applicant was awarded a certificate of outstanding service in recognition of his high standards of excellence. He testified credibly to his change in lifestyle, was remorseful, completed community service and restitution for his theft offense, and showed that he is dedicated to staying out of trouble.

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.

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, ¶ 1)

Analysis

Criminal or Dishonest Conduct

DODI 5200.46, Appendix 2 to Enclosure 4, SAS ¶ 2 provides:

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.

SAS ¶ 2.b lists several conditions that could raise a CAC concern and may be disqualifying. The following 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;

(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

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

Applicant has a history of minor criminal conduct involving safety of people and theft. SAS ¶¶ 2.b (1)-(3) apply.

SAS ¶ 2.c provides circumstances relevant to the determination of whether there is a reasonable basis to believe Applicant poses an unacceptable risk. Relevant conditions include:

(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; 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 has not had a recurrence of criminal conduct since 2012. His history of minor offenses when he was young has not been repeated. He has matured and changed his lifestyle, returned to school, and was a trusted, highly valued employee from 2014 to 2018. He married and is raising a family. He has shown remorse for his past conduct, and paid restitution and community service for his theft offense resulting in the dismissal of the charge. There is sufficient evidence that Applicant's past criminal conduct has been mitigated. SAS ¶¶ 2.c (1), (2) and (4) apply.

Material, Intentional Falsification, Deception or Fraud

DODI 5200.46, Appendix 2 to Enclosure 4, SAS ¶ 3 provides:

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.

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.

b. Therefore, 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.)

Applicant completed a handwritten Form 306 in August 2015, and generally disclosed traffic and some past criminal offenses. He was then requested by his employer to sign a revised, typed form, eliminating all criminal conduct except for the 2012 theft offense. When he completed the forms, Applicant did not recall two minor five-year-old misdemeanor disorderly conduct offenses from 2010. He testified that they were minor, occurred while he was in the Army, and that he did not remember them when he completed the forms. He did not intentionally leave them off and did report the more egregious theft offense from 2012.

SAS ¶ 3.c provides circumstances relevant to the determination of whether there is a reasonable basis to believe there is an unacceptable risk include:

(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

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

I find insufficient evidence of intentional falsification of the federal form. I also find that based on Applicant's testimony, he was confused over what was to be included in the form, and did not recall the incidents due to their minor nature and passage of time. Mitigating conditions ¶¶ 3.c (1) and (2) are applicable. Issuance of a CAC to Applicant no longer poses an unacceptable risk.

Whole-Person Assessment

DODI 5200.46, Encl. 4, *CAC Adjudicative Procedures*, ¶ 1, *Guidance for Applying Credentialing Standards During Adjudication* provides the following mitigating factors:

As established in Reference (g),² credentialing adjudication considers whether or not an individual is eligible for long-term access to federally

² Reference (g) is HSPD-12.

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).³

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.

³ Reference (c) is U.S. Office of Personnel Management Memorandum, *Final Credentialing Standards for Issuing Personal Identity Verification Cards under HSPD-12*, July 31, 2008.

I have carefully considered the facts of this case and applied the adjudicative and whole-person standards in DODI 5200.46. Based on the record and Applicant's testimony, there is sufficient evidence to find that the SOR allegations have been mitigated and granting CAC eligibility does not pose an unacceptable risk.

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:	FOR APPLICANT
Subparagraphs 1.a-1.e:	For Applicant
Paragraph 2, Material, Intentional False Statement, Deception or Fraud:	FOR APPLICANT
Subparagraph 2.a:	For Applicant

Conclusion

In light of all of the circumstances, granting Applicant CAC eligibility does not pose an unacceptable risk. CAC eligibility is granted.

Gregg A. Cervi
Administrative Judge