



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



In the matter of:

Applicant for CAC Eligibility

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CAC Case No. 16-03527

Appearances

For Government: Daniel F. Crowley, Esq., Department Counsel
For Applicant: *Pro se*

03/13/2018

Decision

DAM, Shari, Administrative Judge:

Applicant mitigated the Common Access Card (CAC) eligibility concerns raised under the misconduct or negligence in employment supplemental adjudicative standards, but not those concerns raised under the material, intentional, and false statement supplemental adjudicative standards. CAC eligibility is denied.

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 CAC eligibility pursuant to Homeland Security Presidential Directive – 12 (HSPD-12). The DOD was unable to find that granting Applicant CAC eligibility did not pose an unacceptable risk. The action was based on the Adjudicative Standards found in DOD Instruction (DODI) 5200.46, *DOD Investigative and Adjudicative Guidelines for Issuing the CAC*, 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, and Paragraph 3.a - Material, Intentional False Statement, Deception, or Fraud.

Applicant answered the SOR on January 17, 2017, and elected to have her case decided on the written record (Answer). (Item2) On February 23, 2017, Department Counsel submitted the Government's File of Relevant Material (FORM), containing five Items. She received it on March 25, 2017. Applicant was afforded an opportunity to file objections and submit material in refutation, extenuation, or mitigation within 30 days of receipt of the FORM. Applicant submitted a Response, with attachments, to the FORM. Applicant did not object to the Government's documents and Department Counsel did not object to Applicant's Response. All Items and Applicant's Response are admitted into evidence without objection. The case was assigned to me on October 1, 2017.

Findings of Fact

Applicant is 42 years old. She is a widow, and has two children, who are young adults. In 2006, her husband was killed in action while serving in the Army. She has lived on or near Army bases for over ten years. She attended a culinary arts school from 2008 to 2015, when she completed a degree in the field. (Item 3, Item 5, Response) She worked as a manager for a coffee shop from February 2012 to March 2016, at which time she was fired for "repeated poor and unacceptable work performance." (Item 5)

Applicant thinks she was dismissed as the result of a problem she encountered with her regional manager regarding supplies on one particular day. (Response)

In April 2016, Applicant completed a Declaration for Federal Employment (DFE) form. She answered "no" to question 12, which asked if during the last five years she had been fired from any job for any reason.

In her Answer to the SOR, Applicant admitted that she was "involuntarily terminated" from her position, but stated she did not receive a termination paper and was not given the reason for her termination, other than being told she "was no longer a good fit for the company." (Item 2.) She denied that she intentionally falsified her DFE by not disclosing the termination. She said it was an oversight. (Item 2)

Applicant has been a volunteer on base for the Survivor Outreach Services for many years. She remains active in school programs, although her children are now grown. She was nominated for Volunteer of the Year. She submitted numerous letters of recommendation from other volunteers and people in the community. She submitted numerous letters of appreciation she received through her work with the Army. She submitted a performance evaluation from her current employer, and Army recruiting command. Her supervisor rated her as "outstanding." (Response)

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 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.

Analysis

Paragraph 1.a - Misconduct or Negligence in Employment

DODI 5200.46, Appendix 2 to Enclosure 4, Supplemental Adjudicative Standards, Paragraph 1.a articulates the CAC concerns:

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.

1.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 lists five conditions that raise a CAC concern and may be disqualifying:

1.b.(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.

1.b.(2): A pattern of dishonest or rule violations in the workplace which put people, property or information at risk.

1.b.(3): A documented history of misusing workplace information systems to view, download, or distribute pornography.

1.b.(4) Violation of written or recorded commitments to protect information made to an employer, such as breach(es) of confidentiality or the release of proprietary or other information.

1.b.(5) Failure to comply with rules or regulations for the safeguarding of classified, sensitive, or other protected information.

The Government did not establish any of the above disqualifying conditions. The only derogatory evidence in the record pertinent to this allegation is the employer's statement that Applicant was terminated for "repeated poor and unacceptable work performance." There is no information documenting a pattern of dishonesty or rule violations, or that she had a previous history of intentional wrongdoing on the job that placed people, property, or information at risk. There is no evidence of her violating written commitments to protect confidential information or failure to comply with rules for safeguarding information. That one sentence, without amplifying evidence, is insufficient to conclude that her possession of a CAC poses an unacceptable risk.

Based on the above finding, an analysis, under DODI 5200.46, Appendix 2 to Enclosure 4, Supplemental Adjudicative Standards, of the circumstances relevant to the determination of whether there is a reasonable basis to believe there is an unacceptable risk is not relevant.

Paragraph 3.a - Material, Intentional False Statement, Deception or Fraud

DODI 5200.46, Appendix 2 to Enclosure 4, Supplemental Adjudicative Standards, Paragraph 3.a articulates the CAC concerns:

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.

3.a The 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.

DODI 5200.46, Appendix 2 to Enclosure 4, Supplemental Adjudicative Standards lists a condition that raise a CAC concern and may be disqualifying:

3.b [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.)

Applicant denied that she intended to mislead the Government when she completed the April 2016 DFE and failed to disclose a May 2016 employment termination. She contended that she made a mistake and checked the incorrect box on the form. Without further evidence, her denial is not credible. The DFE is short and clearly written. Additionally, the termination of employment and her application for a new position were only a month apart, such that it is difficult to conclude that she mistakenly checked the wrong box. The evidence established the above disqualifying condition.

DODI 5200.46, Appendix 2 to Enclosure 4, paragraph 3.c, Supplemental Adjudicative Standards lists circumstances relevant to the determination of whether there is a reasonable basis to believe there is an unacceptable risk. The following may be relevant:

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.

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

Applicant submitted a DFE in April 2016, about two years ago, and one month after she was terminated from a position. Her intentional decision not to disclose that termination is not a minor offense. Sufficient time has not passed since Applicant's failure to disclose it. The evidence does not establish mitigation under either circumstance.

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.

Applicant presented some evidence of good character and successful work performance, but it is insufficient to mitigate the recent falsification allegation..

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 or Negligence in Employment For APPLICANT

Subparagraph 1.a:

For Applicant

Paragraph 3, Material, Intentional False Statement

AGAINST APPLICANT

Subparagraph 3.b:

Against applicant

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.

Shari Dam
Administrative Judge