



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



In the matter of:

Applicant for CAC Eligibility

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CAC Case No. 16-03736

**Appearances**

For Government: Ross Hyams, Esq., Department Counsel  
For Applicant: *Pro se*

10/30/2017

**Decision**

GARCIA, Candace Le'i, Administrative Judge:

Applicant mitigated Common Access Card (CAC) credentialing concerns raised under the supplemental adjudicative standards for criminal or dishonest conduct; misconduct or negligence in employment; and material, intentional false statement, deception, or fraud. CAC eligibility is granted.

**Statement of the Case**

On March 9, 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. The action was taken under the adjudicative standards found in DOD Instruction (DODI) 5200.46, *DOD Investigative and Adjudicative Guidance 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). The concerns raised under the adjudicative standards of DODI 5200.46 are criminal or dishonest conduct; misconduct or negligence in employment; and material, intentional false statement, deception, or fraud.

Applicant responded to the SOR on March 24, 2017, and elected to have the case decided on the written record in lieu of a hearing. The Government's written case was submitted on April 30, 2017. A complete copy of the file of relevant material (FORM) was provided to Applicant, who was afforded an opportunity to file objections and submit material to refute, extenuate, or mitigate the security concerns. He received the Government's FORM on May 20, 2017, and I have marked his response as Applicant's Exhibit (AE) A. The case was assigned to me on October 1, 2017. The Government's documents identified as Items 1 through 9 and AE A are admitted in evidence without objection.

### **Findings of Fact**

Applicant is 34 years old. He has worked as a painter's helper for his current employer since August 2015. He obtained a high school diploma in 2001. As of his February 2016 Questionnaire for Non-Sensitive Positions (SF85 Format), he was unmarried and did not have any children.<sup>1</sup>

Applicant was cited in January 2011 with possession of marijuana and no driver's license. He was found guilty, sentenced to probation, and fined. The court placed him on a payment plan since he was unable to pay the fine in full. He was arrested on a warrant in February 2014 while he was on probation, for failure to obey a court order, when he was unable to stay current on his monthly payments. In February 2016, he paid \$350, and the court reinstated his payment plan and gave him community service to assist him with resolving the outstanding fine. He provided a copy of the court's order from February 2016 in corroboration.<sup>2</sup>

In July 2012, Applicant was fired by his then-employer for unsatisfactory work quality and insubordination. Applicant stated that prior to his firing, he had given the employer two-week's notice that he would be leaving for another job. During his last few days at work, his foreman picked on him and threatened to fire him if he did not do the job to the foreman's satisfaction. An argument ensued, and the foreman reported Applicant to the head boss. The boss told Applicant to leave since he had already given notice. Applicant quit and did not return. He maintains that he was never told he was fired. Applicant had worked for this employer since September 2008 and the employer indicated that it had no other adverse information to report.<sup>3</sup>

Applicant submitted a Declaration for Federal Employment in February 2016. Section 9 asked: "During the last 7 years, have you been convicted, been imprisoned, been on probation, or been on parole . . . ?" Applicant marked "Yes" and listed an arrest in February 2014 for a "Traffic Violation (speeding) which resulted in a Warrant for unpaid fines . . . ." He did not list his January 2011 conviction and consequent probation, as set forth above. He stated in his response to the SOR:

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<sup>1</sup> Item 4.

<sup>2</sup> Applicant's response to SOR; Items 5-7; AE A.

<sup>3</sup> Applicant's response to SOR; Items 4, 8; AE A.

I assumed that it was only a traffic stop and I went to court and was placed on a payment plan when I didn't comply with the payments a warrant was issued and I had to go back to court to get back on the payment plan.

He did list, however, his February 2014 arrest that stemmed from a warrant for unpaid fines related to his January 2011 conviction.<sup>4</sup>

In addition, Section 12 asked: "During the last 5 years, have you been fired from any job for any reason, did you quit after being told that you would be fired, did you leave any job by mutual agreement because of specific problems, or were you debarred from Federal employment by the Office of Personnel Management or any other Federal agency . . . ?" Applicant marked "No."<sup>5</sup>

While he was fired by his employer in May 2012, Applicant maintained he was never told of his firing, but quit when his boss told him to leave since he had already given notice that he would be leaving for another job.<sup>6</sup> Applicant was also fired by another employer in February 2013 for unfavorable employment or conduct. He was discharged for three consecutive unexcused absences. However, Applicant indicated in his response to the Government's FORM that he had been sent home for three days without pay for an incident that occurred without his knowledge when he was off for two days, and that he decided not to return to the job since he had been offered another job.<sup>7</sup> Applicant listed both employments above on his February 2016 Questionnaire for Non-Sensitive Positions.<sup>8</sup>

Applicant stated in his response to the SOR that he misunderstood and did not understand the questions. He reiterated in his response to the Government's FORM that ". . . the first time I received the information I rushed through it and didn't write my statement out correctly so I wanted to provide additional information to explain."<sup>9</sup>

## **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.

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<sup>4</sup> Applicant's response to SOR; Items 5-7; AE A.

<sup>5</sup> Applicant's response to SOR; Items 5, 8; AE A.

<sup>6</sup> Applicant's response to SOR; Items 5, 8; AE A.

<sup>7</sup> Applicant's response to SOR; Items 5, 9; AE A.

<sup>8</sup> Item 4.

<sup>9</sup> Applicant's response to SOR; AE A.

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, Supplemental Adjudicative Standards, ¶ 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.

DODI 5200.46, Appendix 2 to Enclosure 4, Supplemental Adjudicative Standards, ¶ 2.b lists several conditions that could raise a CAC eligibility 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. A person’s convictions for burglary may indicate that granting a CAC poses an unacceptable risk to the U.S. Government’s physical assets and to employees’ personal property on a U.S. Government facility;

(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

(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.

Applicant's criminal history and failure to abide by the court-ordered payment plan in connection with his January 2011 conviction is sufficient to establish the above disqualifying conditions.

DODI 5200.46, Appendix 2 to Enclosure 4, Supplemental Adjudicative Standards, ¶ 2.c 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:

(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 January 2011 conviction and related February 2014 arrest for failure to abide by the court-ordered payment plan are isolated incidents. He paid \$350 in February 2016 and the court reinstated his payment plan and gave him community service to assist him with resolving his outstanding fine. I find evidence of successful rehabilitation and that criminal conduct is unlikely to recur. The mitigating circumstances in ¶¶ 2.c(1) and 2.c(4) are established. I also considered the factors in DODI 5200.46, Enclosure 4, ¶ 1.

### **Misconduct or Negligence in Employment**

DODI 5200.46, Appendix 2 to Enclosure 4, Supplemental Adjudicative Standards, ¶ 1 provides:

A CAC will not be issued to a person if there is a reasonable basis to believe, based on the individual's employment 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 lists the following conditions that could 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 dishonesty 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; and

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

Prior to his firing, Applicant stated that he had given his employer two-week's notice that he would be leaving for another job. During his last few days at work, his foreman picked on him and threatened to fire him if he did not do the job to the foreman's satisfaction. An argument ensued, and the foreman reported Applicant to the head boss. The boss told Applicant to leave since he had already given notice. Applicant quit and did not return. He maintains that he was never told he was fired. Applicant had worked for this employer since September 2008 and the employer indicated that it had no other adverse information to report. There are no applicable disqualifying conditions nor does the incident fall under the general concern. Misconduct or negligence in employment credentialing concerns are concluded for Applicant.

### **Material, Intentional False Statement, Deception, or Fraud**

DODI 5200.46, Appendix 2 to Enclosure 4, Supplemental Adjudicative Standards, ¶ 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.)

I conclude that Applicant did not have any intent to deceive when he answered the questions on the Declaration for Federal Employment. His disclosure in response to section 9 was not perfect, but it contained sufficient adverse information about his criminal history. He did not believe he was fired by his employers in 2012 or 2013. There are no applicable disqualifying conditions. Material, intentional false statement, deception, or fraud credentialing concerns are concluded for Applicant.

### **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.b:	For Applicant
Paragraph 2, Misconduct or Negligence in Employment:	For Applicant
Subparagraph 2.a:	For Applicant
Paragraph 3, Material, Intentional False Statement, Deception, or Fraud:	For Applicant
Subparagraphs 3.a-3.c:	For Applicant

### **Conclusion**

In light of all of the circumstances presented by the record in this case, granting Applicant CAC eligibility does not pose an unacceptable risk. CAC eligibility is granted.

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Candace Le'i Garcia  
Administrative Judge