



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



In the matter of:

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CAC Case No. 17-00069

Applicant for CAC Eligibility

Appearances

For Government: Caroline Heintzelman, Esq., Department Counsel
For Applicant: *Pro se*

11/30/2017

Decision

KILMARTIN, Robert J., Administrative Judge:

Applicant mitigated Common Access Card (CAC) credentialing concerns raised under misconduct or negligence in employment supplemental adjudicative standards. CAC eligibility is granted.

Statement of the Case

On August 11, 2016, Applicant submitted a Questionnaire for non-sensitive positions (SF 85). On May 12, 2017, the Department of Defense (DOD) issued a Statement of Reasons (SOR) to Applicant detailing concerns for Common Access Card eligibility pursuant to Homeland Security Presidential Directive – 12 (HSPD-12). DOD was unable to find that granting Applicant CAC eligibility did not pose an unacceptable risk.

The action is based on the Supplemental Adjudicative Standards found in DoD Instruction 5200.46, DOD Investigative and Adjudicative Guidelines for Issuing the Common Access Card, 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 concern raised under the Supplemental Adjudicative Standards of DoDI 5200.46 is employment negligence or misconduct.

Applicant answered the SOR on June 9, 2017, and requested a hearing before a Defense Office of Hearings and Appeals (DOHA) administrative judge. The case was forwarded to the Hearing Office and assigned to me on August 7, 2017. On August 22, 2017, a Notice of Hearing was sent out scheduling the hearing for September 26, 2017. The hearing was held as scheduled.

Department Counsel offered Government Exhibits (GE) 1 through GE 5, which were received without objection. Applicant testified and offered Applicant Exhibit (AE) A, which was received without objection. It included a statement of earnings, two character reference letters, and 3 performance evaluations. The transcript (Tr.) was received on October 4, 2017. Based on the record evidence and testimony presented in this case, CAC eligibility is granted.

Findings of Fact

Applicant denied the single SOR allegation with explanations. His SOR answer is incorporated in my findings of fact. He contends that he was not involuntarily terminated from employment with the Kentucky Department of Juvenile Justice (DJJ) for misconduct. Instead, Applicant's attorney negotiated an agreement in March 2016 allowing him to resign his position and retire with a neutral reference. (Answer, GE 5, Tr. 55-56). He was paid for all of his accrued annual leave, and he is eligible to be re-hired by any state agency except the Kentucky DJJ. The evidence substantiated his contentions.

Background Information

Applicant is a 58-year-old. He has been unemployed since March 2016 pending employment by a defense contractor at a call center located aboard a large military installation. He was allowed to resign from Kentucky DJJ in the face of allegations of impropriety during his employment there. (Tr. 51 - 56) He receives a pension from DJJ presently. He seeks CAC eligibility as a condition of his continued employment. (GE 1; Tr. 53)

Applicant graduated from high school in 1977 and obtained a bachelor's degree in 2006. Applicant is married and he has five children and 13 grandchildren. He served honorably in the armed forces reserve for 20 years, retiring as an Staff Sergeant from the National Guard in 2008. (GE 1) Applicant is a 100% disabled veteran. He receives \$3,182 each month from the Department of Veterans Affairs (VA) in addition to his pension from the Kentucky DJJ in the amount of \$815 each month.

Applicant previously worked as a corrections officer and supervisor in the Maryland Department of Corrections (DOC) from 1984 – 1994, including seven years at Baltimore City Jail. He moved to Kentucky in 1994. (GE 1, Tr. 29) He worked in a factory for a few years, then as a truck driver, before working with the Kentucky DJJ from 1999 to 2016.

Misconduct or Negligence in Employment

CAC credentialing concerns were identified when Applicant disclosed that he left his job with DJJ in March 2016 by mutual agreement because of specific problems, in response to question 12 on a Declaration for Federal Employment signed on August 29, 2016. (GE 2) At that time, Applicant's appeal of his recommended termination from DJJ was pending. It was resolved by a Settlement Agreement entered into in January 2017, wherein the state capitulated and he was allowed to resign and retire. (AE A)

Applicant was alleged to have, on multiple occasions between May 2015 and February 2016, used his position at DJJ to obtain and secure information from a secured database about a client of DJJ, who was not under his assigned supervision. He passed that information to the client's incarcerated mother, with whom he was engaged in an intimate relationship. (GE 5, Appendix A, Count 1) Employees of DJJ routinely shared such information with the parents of detainees. (Tr. 44) No evidence of a quid pro quo arrangement was developed. Applicant testified that he worked for seven years in DJJ counseling youth offenders. He has an unblemished record working a total of 27 years in the criminal justice system in two states. (Tr. 31-32)

Between May 2015 and February 2016, Applicant used his private e-mail account on a state computer to send approximately 118 e-mails to Ms. L., who was incarcerated from March 2014 to February 2015. (Tr. 40) Applicant also received 27 phone calls from Ms. L. while he was at work. She was the mother of two juvenile detainees. One had been Applicant's client a few years before Applicant started a carnal relationship with the mother. Applicant admitted that it was a mistake to use the state computer to send e-mails that often contained off-color, racy language, to his lover. He was fully aware that his e-mails might be monitored but he was under the mistaken impression that it was permissible because it was a private e-mail account, albeit on a state computer. (Tr. 25, 36) He was not trying to hide this relationship from DJJ. (Tr. 49) His mistake cost him his career as he was terminated on March 18, 2016 from DJJ. (GE 2, GE 5, AE A)

Applicant's wife became aware of his affair after he was forced to resign. (Tr. 38, 42) Applicant fully disclosed his employment problems at DJJ in his Declaration for Federal Employment. (Tr. 56) He has cooperated fully in the DJJ investigation and the ensuing background investigation. He recognizes his mistakes and maintains that this was an isolated incident in an otherwise unblemished career. Applicant provided two character reference letters and several performance evaluations showing that he is well respected, and he was a highly effective employee of DJJ. (AE A)

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 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 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

Misconduct or Negligence in Employment

DODI 5200.46, Appendix 2 to Enclosure 4, Supplemental Adjudicative Standards, Paragraphs 1, 1.a., and 1.b.(1) articulate the CAC concern:

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.

DODI Instruction 5200.46, Appendix 2, Supplemental Adjudicative Standards lists the following condition that raises 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.

The Government established this disqualifying condition through Applicant's admissions and evidence presented as a result of his resignation under pressure from DJJ.

DODI 5200.46, Appendix 2 to Enclosure 4, Supplemental Adjudicative Standards, Paragraph 1.c provides a list of circumstances relevant to the determination of whether there is a reasonable basis to believe there is an unacceptable risk. In particular, Paragraph 1.c.(1) is applicable:

1.c.(1) – The behavior happened so long ago, was minor, or happened under such circumstances that it is unlikely to recur and does not cast doubt on the individual's current trustworthiness or good judgment relating to the safety of people and proper safeguarding of property and information systems.

DODI 5200.46, Enclosure 4, CAC Adjudicative Procedures, Paragraph 1, Guidance For Applying Credentialing Standards During Adjudication provides the following factors to be considered in each case:

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.

When Applicant was forced to resign from DJJ, he was involved in an extramarital affair, which he doesn't deny. His wife and former employer are fully aware of the offense. Previously, he served 20 years in the military reserve, and 27 years in corrections, without any issues. It is unlikely that all of the circumstances surrounding this affair will ever be determined with certainty. What is noteworthy is that Applicant disclosed this on his Declaration for Federal Employment, and he has cooperated fully in the investigation. Applicant's former employer considered him to be a highly effective employee and he has a long career in public service. Having carefully considered the facts of this case, I find ¶¶ 1.b. (1) and (3) of the credentialing standards are applicable. This use of state resources to perpetuate an affair was an isolated incident and not serious in nature. It happened nearly two years ago and is not likely to recur.

For these reasons, I conclude 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 section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Misconduct - Negligence in Employment: FOR APPLICANT

Subparagraphs 1.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.

ROBERT J. KILMARTIN
Administrative Judge