



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



In the matter of:

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CAC Case No. 17-00922

Applicant for CAC Eligibility

Appearances

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

12/01/2017

Decision

KILMARTIN, Robert J., Administrative Judge:

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

Statement of the Case

On November 16, 2016, Applicant submitted a Questionnaire for Non-Sensitive Positions (SF 85). On May 26, 2017, the Department of Defense (DOD) issued a Statement of Reasons (SOR) to Applicant detailing concerns for CAC eligibility pursuant to Homeland Security Presidential Directive – 12, Policy for Common Identification Standard for Federal Employees and Contractors, dated August 27, 2004 (HSPD-12). DOD was unable to find that granting Applicant CAC eligibility posed an acceptable 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 concerns raised under

the Supplemental Adjudicative Standards of DoDI 5200.46 are employment misconduct and material, intentional false statement, deception or fraud.

Applicant answered the SOR on June 28, 2017, and requested a hearing before a Defense Office of Hearings and Appeals (DOHA) administrative judge. Applicant attached a letter from the Department of the Army Medical Activity, dated October 2, 2016, reflecting his diagnoses of PTSD, sleep apnea, and a chipped bone in his foot. 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 27, 2017. The hearing was held as scheduled.

Department Counsel offered Government Exhibits (GE) 1 through GE 4, which were received without objection. Applicant testified on his own behalf. Based on the record evidence and testimony presented in this case, CAC eligibility is granted.

Findings of Fact

Applicant denied the two SOR allegations with explanations. His SOR answer is incorporated in my findings of fact. He contends that he was not involuntarily terminated from employment with the [a] glass company (company) for violation of the company's attendance policy. Instead, he chose to voluntarily quit due to his PTSD condition, when the adverse work conditions, pressure and stress became too much. (Answer, Tr. 32) Since it was Applicant's reasonable understanding that he voluntarily ended employment at company, there was no adverse employment action to report on his subsequent Declaration of Federal Service Form. The evidence substantiated his contentions.

Background Information

Applicant is a 33-year-old. He has been employed since November 7, 2016, by a federal contractor. Applicant graduated high school in 2001 and enlisted in the Army. He was deployed to Iraq in 2003 – 2004, where he chipped a bone in his foot jumping off a five-ton truck. Applicant received numerous decorations and awards for his service and he received an honorable discharge when he left active duty as an E-4 Specialist in 2004. (Tr. 22) Applicant met his wife, a Sergeant First Class, while he was in Iraq. They married in 2004, and have three children. He is rated by the Department of Veterans Affairs (VA) as 70% disabled. (Tr. 25) He seeks CAC eligibility as a condition of his continued employment. (GE 1; Tr. 23)

Applicant worked as a furnace operator creating windshields at a company from February 1, 2016, to September 28, 2016, when he quit due to the work conditions. (Tr. 13, 31) The company notified Applicant three weeks later, by letter dated September 28, 2016, that his employment ended that day due to violations of the attendance policy. (GE 3) It states: "You were scheduled to work on September 8, 2016, but you did not report to work or call your coordinator to report your absence . . . Not calling in will be considered a no call/ no show . . . If an associate does not give notification of absence

for 24 consecutive scheduled work hours it will be considered a voluntary quit.” (GE 3) Applicant testified credibly that this is exactly what happened. (Tr. 19) He quit.

Applicant testified credibly that he notified his supervisor and human resources (HR) manager beforehand that he was a disabled veteran. (Tr. 20) He told the HR manager “I can’t do it no more. I can’t. I was working at 100 degree plus temperatures, I would have, you know, just the feeling of being in Iraq once again. Or I would be under so much pressure, and I was not in a happy place in my life.” (Tr. 20 -21, 32) He could not work 12 hour-shifts anymore. (Tr. 34) He discussed his medical conditions with the HR manager during the first week of September 2016. (Tr. 35) He agreed to provide medical documentation from the Army. Somehow, due to miscommunications from his supervisor about his scheduled shifts, Applicant missed work on September 8–9, 2016. (Tr. 34-36) He disputes that he was ever scheduled to work those two days. (Tr. 42-43) This misunderstanding resulted in the September 28, 2016, letter ending Applicant’s employment. (GE 3) I find that the letter, sent three weeks after the fact, is confusing, opportunistic, and easily misunderstood. Applicant did not interpret it to say he was terminated. (Tr. 38) It does not expressly use the word “terminated”. (GE 3, Tr. 52)

When Applicant completed his Declaration for Federal Employment on November 4, 2016, he answered no to the salient questions because he reasonably believed he was not fired by the company. (Tr. 37) He quit. It was not his intent to falsify a government form. (Tr. 40)

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 conditions 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 evidence presented as a result of his departure from the company (GE 2, GE 3, and GE 4). Although it is patently obvious that the company had a struggling combat veteran who was confused, the company nonetheless wrote him up for a putative violation of the attendance policy.

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.

Material, Intentional, or False Statement, Deception or Fraud

DODI 5200.46, Appendix 2 to Enclosure 4, Supplemental Adjudicative Standards, Paragraphs 3, 3.a., and 3.b. articulate the CAC concern:

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 risk.

DODI Instruction 5200.46, Appendix 2, Supplemental Adjudicative Standards lists the following conditions that raises a CAC concern and may be disqualifying:

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;

3.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).

3.c 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.

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

Applicant reasonably believed that he quit the company. There was no reason for him to list any issues with his employment history on his Declaration for Federal Employment. None of the disqualifying conditions above apply.

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); and

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 resigned from the company, he was experiencing duress, which he doesn't deny. He asked his supervisor and HR manager for help and explained that he couldn't work 12-hour shifts anymore. He is a disabled combat veteran who served honorably in the Army. It is clear that the company knew this and made no accommodations. It is unlikely that all of the circumstances surrounding this resignation will ever be determined with certainty. What is noteworthy is that Applicant had asked his employer for help before he quit. Many weeks later, the company created GE 3. There was no reason for Applicant to disclose an adverse employment event on his Declaration for Federal Employment, and he has cooperated fully in the investigation. Having carefully considered the facts of this case, I find ¶¶ 1.b. (1), (2) and (3) of the credentialing standards are applicable. This sudden departure from the company was

an isolated incident and not serious in nature. It happened more than one year 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

Paragraph 2, Material Intentional False Statement: FOR APPLICANT

Subparagraph 2.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