



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



In the matter of:

Applicant for CAC Eligibility

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CAC Case No. 17-01632

Appearances

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

06/07/2018

Decision

LOUGHRAN, Edward W., Administrative Judge:

Applicant refuted Common Access Card (CAC) credentialing concerns raised under the intentional false statement supplemental adjudicative standards, but he did not mitigate the credentialing concerns raised under the criminal or dishonest conduct supplemental adjudicative standards. CAC eligibility is denied.

Statement of the Case

On August 14, 2017, the Department of Defense (DOD) issued a Statement of Reasons (SOR) to Applicant detailing credentialing concerns for CAC eligibility under the adjudicative standards of criminal or dishonest conduct and intentional false statement. Applicant responded to the SOR on October 9, 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 January 12, 2018. 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 credentialing concerns. Applicant received the FORM on January 25, 2018.

As of March 27, 2018, he had not responded. The case was assigned to me on June 6, 2018. The Government exhibits included in the FORM are admitted in evidence.

Findings of Fact

Applicant is a 55-year-old employee of a defense contractor. He has worked for his current employer since September 2015.¹

Applicant was arrested in December 2012 and charged with aggravated driving under the influence (DUI), defective vehicle, and failure to maintain lane. He pleaded guilty to the aggravated DUI charge, and he received a deferred adjudication with a sentence that included a fine and attendance at a victim impact panel and a DUI class. Applicant completed the terms of the deferred adjudication, and the charge was dismissed and expunged from his record in April 2014.²

Applicant was charged in October 2016 with felony value-false pretense/bogus check/con game. He pleaded guilty the same month to the misdemeanor charge of bogus check. He received a two-year deferred adjudication, which included a fine of \$1,442 and unsupervised probation during the duration of the deferred adjudication.³

Applicant submitted a Declaration for Federal Employment in May 2016. He answered “No” to Section 9, which asked: “During the last 7 years, have you been convicted, been imprisoned, been on probation, or been on parole?” The instructions stated that “any conviction for which the record was expunged under Federal or state law” should be omitted. Because the 2012 charge was expunged in 2014, that charge did not have to be reported. Applicant was not sentenced and placed on probation for the 2016 offense until five months after the declaration was submitted, so that did not have to be reported.⁴

Policies

This case is adjudicated under Homeland Security Presidential Directive - 12 (HSPD-12); 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).

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

¹ Item 4.

² Items 2, 6.

³ Items 2, 7.

⁴ Item 5.

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

Intentional False Statement

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.)

Applicant did not intentionally falsify the Declaration for Federal Employment. There are no applicable disqualifying conditions. Intentional false statement credentialing concerns are concluded for Applicant.

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; and

(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.

Applicant's criminal history 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 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;

(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.

The 2012 aggravated DUI charge was dismissed and expunged in 2014. Under the circumstances of the deferred adjudication, that is insufficient to establish that Applicant was innocent of the charge. Applicant is still on unsupervised probation for the 2016 bogus check charge.

I am unable to determine that criminal behavior is unlikely to recur. There is some mitigation, but the limited information in the FORM has not convinced me that Applicant does not pose an unacceptable risk. I also considered the factors in DODI 5200.46, Enclosure 4, ¶ 1.

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:	Against Applicant
Subparagraphs 1.a-1.b:	Against Applicant
Paragraph 2, 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, granting Applicant CAC eligibility poses an unacceptable risk. CAC eligibility is denied.

Edward W. Loughran
Administrative Judge