



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



In the matter of:

Applicant for CAC Eligibility

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CAC Case No. 17-01634

**Appearances**

For Government: Andrew Henderson, Esq., Department Counsel  
For Applicant: Ryan C. Nerney, Esq.

07/25/2018

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**Decision**

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Goldstein, Jennifer I., Administrative Judge:

**Statement of the Case**

On August 14, 2017, the Department of Defense (DoD) issued a Statement of Reasons (SOR) to Applicant detailing eligibility concerns for Common Access Card (CAC) issuance pursuant to Homeland Security Presidential Directive–12 (HSPD-12). The action is based on the Adjudicative Standards found in DoD Instruction 5200.46, *DoD Investigative and Adjudicative Guidelines for Issuing the Common Access Card*, 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 2.a (Criminal or Dishonest Conduct).

Applicant answered the SOR on September 1, 2017 (Answer), and requested a hearing before an administrative judge. The case was assigned to me on September 29, 2017. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on January 8, 2018, scheduling the hearing for February 22, 2018. The hearing was convened as scheduled. The Government offered Exhibits (GE) 1 through 3, which

were admitted without objection. Applicant testified on his own behalf and presented Applicant Exhibit (AE) A. The record was left open until March 23, 2018, for receipt of additional documentation. On March 23, 2018, Applicant presented AE B through AE D, which were admitted over Department Counsel's objections. The record then closed. DOHA received the transcript of the hearing (Tr.) on March 1, 2018. Based on the record evidence and testimony presented in this case, Common Access Card eligibility is denied.

### **Findings of Fact**

Applicant is 47 years old. He works as an aircraft mechanic and has been with his current employer, a government contractor, for two-and-a-half years. He is married and has one child. (Tr. 13-15; AE B; AE C.)

The SOR alleged that Applicant's criminal or dishonest conduct raised concerns under DoDI 5200.46, Enclosure 4, Appendix 2, *Supplemental Adjudicative Standards*. Specifically, it alleged that Applicant was arrested on January 22, 2015, and charged with Hit/Run. He pled guilty and was sentenced to one year probation and five days community service. He was required to pay restitution to the victim of his crime.

Applicant explained that he was driving around a community looking for a recycling center to recycle items like cans and cardboard for money. He testified:

So, I'm looking and scouting around to see where I can recycle my, you know, materials from. And I'm going the speed limit, and this guy is rushing to get somewhere. And, so, we both stopped at a stoplight after he zooms across me or whatever. I look at him momentarily just to see what his intentions were. And then, after that, he started following me. (Tr. 17-18.)

The other driver allegedly followed Applicant for 15 minutes. Applicant claimed he was fearful that the driver of the other car might have a weapon, despite not seeing a weapon. Applicant accelerated. He had two cell phones in his vehicle, but did not call the police. He was traveling northbound in a business district, and decided to make a U-turn to get away from the person that was following him, instead of pulling into a business lot to seek help. Applicant accelerated to approximately 50 mph. As Applicant made the U-Turn, he struck two vehicles. However, he feared for his life because he believed the other driver was still following him, so he did not stop. Applicant also confessed to the police that he had an unconsumed open container of alcohol in his vehicle, which also contributed to his decision not to stop at the scene of the accident. About ten minutes later, when Applicant no longer believed he was being followed, he flagged down a police officer. (GE 3; Tr. 17-47.)

The police report of the accident, which referred to Applicant as "D-1," reflected: D-1 stated that the traffic light turned yellow and he attempted to beat the light by accelerating. The traffic light turned red prior to V-1 entering the intersection and D-1 applied the breaks causing the vehicle to skid into the

intersection. D-1 lost control of the vehicle and went into the northbound lanes. D-1 stated he accelerated in an attempt to regain control of V-1. The rear of V-1 collided into V-2 and the front of V-1 collided into V-3. D1 stated he fled the scene because he was scared and he had an open container in the vehicle. D-1 stated he knew he was supposed to stop but was scared and in shock. (GE 3.)

The report further reflected:

I was parked at [location omitted], when I saw a vehicle matching the description of the hit and run vehicle traveling westbound on [omitted] St. in the number two lane. The vehicle had front end damage and rear end damage. As I drove [omitted] to follow the vehicle, I saw it stopped along the curb and I saw the driver exit the vehicle. The male driver, flagged me down, stating someone was chasing him. The male was the vehicle's sole occupant. I identified him by his [state] driver's license as [Applicant].

[Applicant] told me he was involved in a traffic collision and left the scene because he was "scared." Later it was determined that no one was "chasing" him. [Applicant performed the SFST's and provided a breath sample of .02% BAC. I determined alcohol impairment was not a factor in the collision. He did not display symptoms of being under the influence of a controlled substance. (GE 3.)

Applicant was charged with misdemeanor hit and run. On October 22, 2016, he pled guilty to that charge. He was sentenced to unsupervised probation for one year and required to perform five days of community service. His insurance paid restitution to the victims. (AE A.)

Applicant presented two character reference letters from his safety manager and a coworker. Both attest that Applicant is a good worker. (AE D.)

### **Policies**

Every CAC eligibility decision must be a fair and impartial overall commonsense decision based on all available evidence, both favorable and unfavorable. The HSPD-12 credentialing standards 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 eligibility criteria is unacceptable risk.

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 the 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.)

## **Analysis**

### **Supplemental Adjudicative Standards, Paragraph 2.a**

DoDI 5200.46, Enclosure 4, Appendix 2, Supplemental Adjudicative Standards expresses concerns pertaining to criminal or dishonest conduct. Paragraph 2 of this section states:

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.

The disqualifying condition set forth in DoDI 5200.46, Enclosure 4, Appendix 2, Subparagraph 2.b that is raised by Applicant’s conduct as set out in the SOR is:

(2) Charges or admissions 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 was arrested and charged with misdemeanor hit and run. He admitted engaging in this conduct, which placed the safety of people at risk. He pled guilty to this charge and was sentenced to probation for one year. The above disqualifying condition in Subparagraph 2.b(2) applies.

Potentially mitigating conditions are set forth in DoDI 5200.46, Enclosure 4, Appendix 2, Subparagraph 2.c. The conditions that could apply to mitigate the security concerns raised by the evidence in this case are:

- (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 choice to flee the scene of the accident reflects poorly on his judgment. He has produced no evidence to show that similar conduct is unlikely in the future or that he has been rehabilitated. He vehemently justified his actions and showed little remorse for his choices. Applicant failed to meet his burden to establish mitigation under the conditions in DoDI 5200.46, Enclosure 4, Appendix 2, Subparagraph 2.c.

### **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.

As noted above, Applicant has not shown he has matured or documented sufficient rehabilitation. He did not take responsibility for his actions. For these reasons, Applicant's request for CAC eligibility is denied.

### **Formal Findings**

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by ¶ E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Criminal or Dishonest Conduct: AGAINST APPLICANT

Subparagraph 1.a: Against Applicant

### **Conclusion**

In light of all of the circumstances presented by the record in this case, CAC eligibility is denied.

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Jennifer I. Goldstein  
Administrative Judge