



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



In the matter of: )  
)  
) CAC Case No. 17-01992  
)  
Applicant for CAC Eligibility )

**Appearances**

For Government: Chris Morin, Esq., Department Counsel  
For Applicant: *Pro se*

08/10/2018  
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**Decision**  
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CREAN, Thomas M., Administrative Judge:

Applicant failed to provide sufficient information to mitigate Common Access Card (CAC) credentialing concerns raised under criminal or dishonest conduct supplemental adjudicative standards. He provided sufficient information to mitigate the material, intentional false statement, deception, or fraud allegation. CAC eligibility is denied.

**Statement of the Case**

On July 20, 2016, Applicant submitted a Questionnaire for non-sensitive positions (Item 3, SF 85). On November 8, 2017, the Department of Defense (DOD) issued a Statement of Reasons (Item 1) to Applicant detailing eligibility concerns for Common Access Credential eligibility pursuant to Homeland Security Presidential Directive – 12 (HSPD-12). Specifically, the concerns raised were criminal or dishonest conduct, and false statement, deception, or fraud. 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 Department of Defense Instruction (DODI) 5200.46, *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).

Applicant answered the SOR on November 22, 2017, and requested a decision based on the record (Item 2). He admitted the criminal or dishonest allegations, but denied the allegation concerning material, intentional false statement. Department Counsel submitted the Government's written case on November 30, 2017. Applicant received a complete file of relevant material (FORM) on December 12, 2017, and was provided the opportunity to file objections and to submit material to refute, extenuate, or mitigate the disqualifying conditions. Applicant did not submit a response to the FORM. The case was assigned to me on March 9, 2018.

### **Findings of Fact**

Applicant is 33 years old, and a 2003 high school graduate. He has been employed as a communications technician by a DOD contractor since June 2016. He was steadily employed in non-DOD positions from 2011 until 2016. He seeks CAC eligibility as a condition of his employment with the DOD contractor. (Item 3, e-QIP).

Applicant admits, and criminal records (Item 5) confirm, that Applicant was convicted of driving under the influence (DUI) in December 2010, indecent exposure and open container in December 2011, and simple assault with hands and fists in April 2016. He failed to list these convictions on his Declaration of Federal Employment submitted on July 11, 2016. (Item 4).

CAC credentialing concerns were identified during Applicant's background investigation. Applicant was 24 years old when he was arrested for the misdemeanor offense of DUI, 26 years old when arrested for the misdemeanor offense of indecent exposure and open container, and 30 years old when convicted of the misdemeanor offense of simple assault with hands and fist. The criminal records do not contain the details of the offenses or the sentences imposed for the convictions.

Applicant submitted a Declaration for Federal Employment on July 11, 2016. He responded "no" to the question asking if in the last seven years he had been convicted of any offense, including misdemeanors. (Item 4) In his answer to the SOR, Applicant noted that he misunderstood the criminal conduct question. He thought the question pertained only to felonies and imprisonment time. He did not realize he had to list misdemeanor offenses. He denied intentional falsification of the information. (Item 2, at page 3)

### **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**

### **Criminal or Dishonest Conduct**

A CAC will not be issued to a person if there is a reason to believe, based on the individual's criminal or dishonest conduct, that issuance of a CAC poses an unacceptable risk. An individual's conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations, and can raise questions about his or her reliability or trustworthiness. 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)

DODI 5200.46, Appendix 2 to Enclosure 4, Supplemental Adjudicative Standards, lists at paragraph 2.b two conditions that raise CAC concerns and may be disqualifying:

- (1) A single crime or multiple lesser offenses which put the safety of people at risk or threaten the protection of property or information . . . and
- (2) charges or admission of criminal conduct relating to safety of people and proper protection of property or information systems, regardless of whether the person was formally charged, formally prosecuted, or convicted.

The Government established these two disqualifying conditions through Applicant's admissions and the information contained in the criminal history reports.

DODI Instruction 5200.46, Appendix 2 to Enclosure 4, sets out relevant factors that may mitigate an unacceptable risk. The mitigating factors at paragraph 2c include:

- (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;
- (3) Improper or inadequate advice from authorized personnel or legal counsel significantly contributed to the individual's omission of information. When confronted, the individual provided an accurate explanation and made prompt, good-faith effort to correct the situation;
- (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 mitigating conditions do not apply. Applicant pled guilty to the offense so there is sufficient evidence that the charges are established and correct. The offenses are recent, having been started eight years ago and continuing until two years ago. There is no evidence to suggest that the criminal conduct happened under unusual circumstances and is not likely to recur. While the offenses are misdemeanors, they are the type of offenses that pose a direct threat to the safety of people and property. Applicant has failed to present sufficient information to mitigate the CAC eligibility concerns.

#### **Intentional false statement, deception, or fraud**

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. Applicant's failure to report his criminal conviction on the federal employment application raises the following disqualifying conditions at paragraph 3 of DODI 5200.46, Appendix 2 to Enclosure 4:

- (a) An 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; and

(b) 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).

Circumstances that may mitigate the unacceptable risk at paragraph 3.c are:

(1) the misstated or omitted information was so long ago, was minor or happened under such unusual circumstances that it is unlikely to recur; and

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

The mitigating conditions apply. Applicant misunderstood the question concerning criminal offenses and did not realize he had to include misdemeanor offenses on employment application. The notation that misdemeanors should be included is contained in parenthesis at the end of the notice and can be confusing to a reader. I find that the omission was unintended and inadvertent. In his response to the FORM, Applicant admitted his error and admitted the criminal behavior. Applicant's explanation for his omission is credible. The intentional false statement allegation is mitigated. After a careful consideration of the facts of this case, I conclude Applicant's request for CAC eligibility should be denied.

### **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
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Subparagraphs 1.a – 1.c:	Against Applicant
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Paragraph 2, Material, Intentional False Statement:	FOR APPLICANT
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Subparagraph 2.a:	For Applicant
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## **Conclusion**

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant Applicant CAC eligibility. CAC eligibility is denied.

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THOMAS M. CREAN  
Administrative Judge