



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



In the matter of:

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CAC Case No. 17-01990

Applicant for CAC Eligibility

**Appearances**

For Government: Andrew H. Henderson, Esq., Department Counsel  
For Applicant: *Pro se*

10/11/2018

**Remand Decision**

KILMARTIN, Robert J., Administrative Judge:

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

**Statement of the Case**

On December 29, 2016, Applicant submitted a Questionnaire for Non-Sensitive Positions (SF 85). On November 9, 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 criminal or dishonest conduct and material, intentional false statement.

Applicant answered the SOR on December 13, 2017, and follow-up email dated January 26, 2018, and requested a hearing before a Defense Office of Hearings and

Appeals (DOHA) administrative judge. Applicant admitted all of the allegations in the SOR and stated that she wanted “to discuss further in court.” The case was forwarded to the Hearing Office and assigned to me on March 8, 2018. On August 22, 2018, a Notice of Hearing was sent out scheduling the hearing for April 12, 2018. The hearing was held as scheduled.

The Government’s Exhibits (GE) were not available for the hearing.<sup>1</sup> I left the record open until April 26, 2018, for Department Counsel to provide the GEs to Applicant. She did not object and GE 1 through 4 were later admitted into evidence without objection. After the hearing, Applicant also submitted a one-page document entitled closing statement that was marked as Applicant’s Exhibit (AE A) and admitted without objection. At the hearing, Applicant testified on her own behalf. Based on the record evidence and testimony presented in this case, CAC eligibility was denied.

I issued my original decision on June 15, 2018, denying Applicant’s CAC eligibility. Applicant appealed that decision. On September 19, 2018, the Appeal Board remanded the case for a new decision based on the fact that I applied the wrong standard for adjudicating CAC eligibility. I erroneously stated that “any doubt concerning personnel being adjudicated for CAC eligibility should be resolved in favor of the national interest.” (Policies section of original decision) In the Conclusion section, I stated that “it is not clearly consistent with the national interest to grant Applicant CAC eligibility.” The correct standard is set forth in Paragraph 4 of the CAC Adjudicative Procedures (DOD Instruction 5200.46, Encl. 4 ¶ 4), which states “The determination will be unfavorable . . . when there is a reasonable basis to conclude that derogatory information or conduct relating to the supplemental CAC credentialing standards presents an unacceptable risk for the U.S. Government [.]” and is repeated in the initial paragraph of each supplemental adjudicative standard. Although the correct “unacceptable risk” standard was repeatedly referenced in the original decision, the erroneous references to “consistent with the national interest” left confusion. I have now applied the correct standard and reach the same result for the same reasons.

### **Findings of Fact**

Applicant admitted the SOR allegations. Her SOR answer is incorporated in my findings of fact. She contends that she would not deliberately or intentionally falsify a government form, and she has not been arrested for over five years, and has worked on a military installation with a CAC credential for over one year.

### **Background Information**

Applicant is 40 years old. She has been employed - using her CAC since December 12, 2016 by a federal contractor, aboard a military installation. (AE B, Tr. 24) Applicant graduated high school in 1996 and had some college courses. She was

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<sup>1</sup> Department Counsel’s briefcase was sidetracked en route to the hearing. I left the record open for him to submit the GEs, which had already been provided in discovery, to Applicant. I also allowed time for Applicant to object. She did not raise an objection.

married in 2004, and recently separated in 2015. She had no children by that marriage, but she has a 25-year old son who still lives with her. (Tr. 24-25) She is profoundly disabled. She seeks CAC eligibility as a condition of her continued employment. (GE 1; Tr. 10)

The SOR alleges in ¶ 1 several minor offenses or infractions committed by Applicant between 2008 and 2013. SOR ¶ 1.a alleges she was charged with reckless driving on March 29, 2013. Applicant admitted this and testified that she drove off at a high rate of speed after a dispute with her husband. (Tr. 24) SOR ¶¶ 1.b and 1.c allege Applicant was arrested on April 27, 2012, for theft by deception for passing bad checks under \$50, and other bad checks under \$10. She admitted to both and testified that it was one arrest but she was subsequently found guilty on all counts. (Tr. 15-16) SOR ¶ 1.d alleges that on January 14, 2011, Applicant gave a false name to a police officer, and she was also charged with possession of marijuana (MJ) and drug paraphernalia. She admitted these allegations and she was sentenced to 20 days (served over 10 weekends) in jail. (Tr. 28) Applicant testified that she went out to walk her dog in the middle of the night and discovered a police officer hiding in her bushes. She was scared and refused to provide her correct name and address. (Tr. 29) Within minutes, several police officers showed up and entered her home to find a remnants of an MJ cigarette, and MJ residue in an ashtray. (Tr. 31) She claimed that the MJ belonged to her husband and cousin. I did not find this testimony to be credible. She pled guilty to all charges. (Tr. 31-32)

SOR ¶ 1.e alleges Applicant was arrested for cruelty to animals on May 21, 2010. She testified that she came home from work to discover her dog missing. She conferred with her son and they determined that the dog was mysteriously taken by animal control officers, from inside the home, because it was deprived of water. (Tr. 33-34) Applicant offered few details of this taking, and I did not find her to be complete or credible.

Applicant's earliest arrests were for harassing communications on April 14, 2008, and again on April 30, 2008. (SOR ¶¶ 1.f and 1.g) She testified that both arrests stemmed from a dispute with another woman with whom Applicant's husband was cheating. (Tr. 36) This interloper supposedly followed Applicant everywhere. So, Applicant threatened to beat her up and the woman reported this to police. (Tr. 37-38) Applicant testified that a restraining order was entered mandating that she stay away from the woman for six months and then the charges were dismissed. (Tr. 38). Applicant has no additional arrests since 2013. Applicant provided two positive character-reference letters attesting to her hard work and kindness. (AE A and B) She notes that she is in good standing with her employer, which made special accommodations for her.

When Applicant completed her Declaration for Federal Employment (Form 306) on December 12, 2016, she answered yes to item 9, which asked "During the last 7 years, have you been convicted, been imprisoned, been on probation, or been on parole?" (GE 2, Tr. 40) However, she only disclosed the 2012 check offenses and the 2011 arrest for providing false information to a policeman. She filled out the Form 306 in a classroom setting. She testified that it was not her intent to falsify a government form.

(Tr. 19-20) She simply forgot about all the various misdemeanors. In particular, she forgot to list the only offense for which she went to jail at SOR 1.d. The only reason Applicant could ascribe for her omissions was “simple forgetfulness.” (Tr. 42)

## **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 determination made will be unfavorable . . . when there is a reasonable basis to conclude that derogatory information or conduct relating to the supplemental CAC credentialing standards presents an unacceptable risk to the U.S. Government.”<sup>2</sup>

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 avoidance of unacceptable risk is the paramount consideration. Therefore, any doubt concerning personnel being considered for CAC eligibility should be resolved against the Applicant.

## **Analysis**

### **Criminal or Dishonest Conduct**

DODI 5200.46, Appendix 2 to Enclosure 4, Supplemental Adjudicative Standards, Paragraphs 2.a., and 2.b(1)(3)(4) and (7) articulate the CAC concern:

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<sup>2</sup> DOD Instruction 5200.46, Enclosure 4 ¶ 4 (Sep. 9, 2014).

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.

DODI Instruction 5200.46, Appendix 2 to Enclosure 4, Supplemental Adjudicative Standards lists the following conditions that raises a CAC concern and may be disqualifying:

2.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.

2.b Therefore, conditions that may be disqualifying include:

(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;

(3) Dishonest acts (e.g., theft, accepting bribes, falsifying claims, perjury, forgery, or attempting to obtain identity documentation without proper authorization); and

(4) Deceptive or illegal financial practices such as embezzlement, employee theft, check fraud, income tax evasion, expense account fraud, filing deceptive loan statements, or other intentional financial breaches of trust.

The Government established this disqualifying condition through Applicant's admissions and evidence presented in the criminal history reports (GE 4).

DODI 5200.46, Appendix 2 to Enclosure 4, Supplemental Adjudicative Standards, Paragraph 2.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 2.c.(1) is applicable:

2.c.(1) – The behavior happened so long ago, was minor in nature, or happened under such unusual circumstances that it is unlikely to recur.

The allegations in SOR ¶¶ 1.f and 1.g concern a minor personal dispute that occurred over 10 years ago, and the charges were dismissed. I find that these allegations have been mitigated by the passage of time and are not likely to recur. However, SOR ¶¶ 1.a through 1.f have not been mitigated.

## **Intentional 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 raise 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; and

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; and

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

Applicant answered yes to a question in section 9 of her Declaration for Federal Employment (Form 306) that asked about any convictions during the last seven years. However, she only listed two of her misdemeanor arrests, for check fraud and providing false information to a police officer. She omitted the most serious offenses, for possession of MJ and drug paraphernalia and cruelty to animals. Applicant's only explanation was that she forgot to list these offenses. I did not find her explanation to be forthright or candid in this regard. The disqualifying condition in ¶ 3.b above is applicable. She did not provide sufficient information to mitigate her lack of complete disclosure on her Declaration for Federal Employment.

DODI 5200.46, Enclosure 4, CAC Adjudicative Procedures, Paragraph 1, Guidance For Applying Credentialing Standards During Adjudication provides the following factors:

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.

Applicant has overcome tremendous physical challenges and disadvantages. Her last offense was committed in 2013, so her misconduct has been partially mitigated by the passage of time. However, she has established a pattern of minor violations of the law. This undermines any assurance that she will be trustworthy and reliable in complying with responsibilities of her fiduciary relationship with the government. Her failure to provide a completely honest response to item 9 of her Form 306 occurred recently in December 2016. It is hard to imagine how she could forget about the animal cruelty conviction and drug possession arrest – for which she spent 20 days in jail. These were her most significant offenses. Applicant provided no explanation other than her forgetfulness for this glaring omission. She provided no evidence of restitution for the cold checks, and her explanation for the MJ possession conviction is unavailing.

Having carefully considered the facts of this case, I find ¶¶ 2.b. (1), (4) and (7) of the credentialing standards are applicable. Applicant's minor violations were frequent, and her falsification of the Form 306 was recent. Even making allowances for her disability and economic circumstances, Applicant has not met her burden in mitigating the Government's concerns.

### **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.e	Against Applicant
Subparagraphs 1.f – 1.g	For Applicant
Paragraph 2, Intentional False Statement:	Against APPLICANT
Subparagraph 2.a:	Against Applicant

### **Conclusion**

In light of all of the circumstances presented by the record in this case, issuance of a CAC card would present an unacceptable risk. CAC eligibility is denied.

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ROBERT J. KILMARTIN  
Administrative Judge