



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



In the matter of:)
)
) CAC Case No. 15-01110
)
)
Applicant for CAC Eligibility)

Appearances

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

12/23/2015

Decision

HEINY, Claude R., Administrative Judge:

In 2010, Applicant operated a vehicle while intoxicated (OWI) and operated with prohibited blood alcohol content (BAC). She did not list this incident when completing her employment form. The form asked about previous “convictions.” Under state law the offenses were not criminal matters, but municipal ordinance violations. She was not “convicted” of an offense, because that term, under state law, applies only to crimes. Applicant has rebutted the government’s security concerns under criminal conduct and under material and intentional false statement. Common Access Credentialing (CAC) eligibility is granted.

Statement of the Case

On May 18, 2015, the Department of Defense (DoD) issued a Statement of Reasons (SOR) to Applicant detailing eligibility concerns for Common Access

Credential eligibility pursuant to Homeland Security Presidential Directive – 12 (HSPD-12). DoD was unable to find that it was clearly consistent with national interest to grant Applicant CAC eligibility. 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 forth 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: criminal or dishonest conduct and material, intentional false statement, deception, or fraud.

Applicant contests the DoD's intent to deny or revoke her CAC eligibility. On June 10, 2015, Applicant answered the SOR and requested a hearing. On September 18, 2015, a Notice of Hearing was issued for the hearing convened on October 8, 2015. At the hearing, Government's Exhibits (Ex) 1 through 3 and Applicant's Exhibits A through D were admitted without objection. Applicant and her husband testified at the hearing. On October 16, 2015, DOHA received the hearing transcript (Tr.).

Findings of Fact

In Applicant's Answer to the SOR, she admitted she was arrested for Operating While Intoxicated (OWI) and Operating with Prohibited BAC. She denied falsifying her Declaration for Federal Employment form (Form 306). I incorporate Applicant's admissions as facts. After a thorough review of the pleadings, exhibits, and testimony, I make the following additional findings of fact.

Applicant is a 32-year-old psychologist who has worked for a defense contractor since July 1, 2014, and is seeking a Common Access Card (CAC). Her most recent work evaluation states, she eagerly takes on challenges, takes the initiative to learn new skills, is a critical thinker, hard-working, enthusiastic, and is "an incredible asset to this team." (Ex. C) She is warm, gentle, kind, and clients routinely praised her approachable demeanor. She has demonstrated an impressive ability to develop and maintain rapport. (Ex. D) She is expecting her first baby.

In August 2010, Applicant attended a wedding at which she had more to drink than she should have. The vehicle she was driving was stopped and she was cited for Operating While Intoxicated (OWI) and Operating with Prohibited BAC. She hired an attorney to represent her. She was found guilty of the offense and paid a fine¹.

The Federal Bureau of Investigation (FBI) report indicates Applicant was convicted of operating while intoxicated: "NONCRIM." The prohibited alcohol concentration; "NONCRIM" charge was dismissed. (Ex.3) Both charges are listed as non-criminal. (Ex. 3)

In June 2014, Applicant completed a Declaration for Federal Employment, Form 306. (Ex. 2) The form stated traffic offenses with fines of \$300 or less could be omitted.

¹ The file failed to indicate the amount of fine.

Question 9 asked if, during the previous seven years, Applicant had been convicted, been imprisoned, been on probation, or been on parole. When completing the form, Applicant contacted the attorney who had handled her OWI and the attorney informed her that under the state law an OWI first offense is a municipal ordinance violation and was not classified as a crime. As such, she was not “convicted” because that term, under state law, refers only to crimes. (Ex. A, B) Relying on her attorney’s advice, she answered “no” to question 9. Applicant’s June 2014 Electronic Questionnaires for Investigations Processing, e-QIP was an abbreviated form which did not ask her any questions about alcohol use or arrests. (Ex. 1)

In the future, Applicant will fully disclose the 2010 arrest. Applicant is extremely remorseful. The incident and the completion of her employment form has had a great impact on her and on her husband. She is keenly aware of her need to disclose the incident. She is clearly very concerned about the initial incident, the completion of the form, and the impact on her CAC eligibility. Base on her visible concern, it is highly unlikely such conduct would ever be repeated.

Policies

Every Common Access Credential 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 Common Access Credential 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 Common Access Credential 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 Common Access Credential 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 Common Access Credential eligibility should be resolved in favor of the national interest.

Analysis

Disqualifying conditions are set forth in *DoDI 5200.46, September 9, 2014*, Appendix 2 to Enclosure 4, Supplemental Adjudicative Standards. Paragraph 2 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 when:

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.

b. Therefore, conditions that may be disqualifying include:

(7) Deliberate omission, concealment, or falsification of relevant facts or deliberately providing false or misleading information to an employer, investigator, security official, competent medical authority, or other official U.S. Government representative, particularly when doing so results in personal benefit or which results in a risk to the safety of people and proper safeguarding of property and information systems.

In August 2010, Applicant, then age 27, attended a wedding at which she had too much to drink. The vehicle she was driving was stopped, she was cited, and later found guilty of OWI and operating with a prohibited BAC. In June 2014, Applicant completed her Federal employment form. The form stated traffic offenses with fines of \$300 or less could be omitted. Not knowing how to respond to a question, she sought legal assistance, and followed the legal advice she received. However, Question 9 asked if, during the previous seven years, she had been convicted. When she contacted the attorney who had handled her OWI she was informed that under state law she was found guilty of a municipal ordinance violation, which was not classified as a crime. As such, she was not "convicted" because that term, under state law, refers only to crimes. Relying on her attorney's advice, she answered "no" to the question concerning convictions. There was no intent to deceive. There was no deliberate omission, concealment, or falsification.

The five year old OWI is conduct involving questionable judgment or an unwillingness to comply with rules and regulations. Conditions that could mitigate the conduct are set forth in paragraph 2.c, which lists circumstances relevant to the determination of whether there is a reasonable basis to believe there is an unacceptable risk. These circumstances 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 OWI incident occurred following a wedding in 2010. The conduct has not been repeated. Applicant has matured and is unlikely to repeat the conduct. There has been successful rehabilitation including remorse, higher education, job training, and an outstanding employment record. Mitigating conditions AG ¶ 2.c (1) and (4) apply. AG ¶ 2.c (3) does not apply because the advice was not "improper advice." Additionally, she never made a deliberate omission or falsification.

Paragraph 3 states 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. Conditions that may be disqualifying include:

- 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.)

In June 2014, Applicant did not list her OWI when asked about whether she had been "convicted" on her employment form. Applicant was never convicted because the offense was non-criminal. She was therefore not required to list the incident. When faced with a question Applicant did not know how to answer, she appropriately contacted her attorney and relied on his advice. There is no showing she made an intentionally false statement or was deceptive.

Applicant's work performance is outstanding. She has been and is willing to maintain conduct expected of one entrusted with CAC access. Her employer and family support her. She has a history of stable employment and a strong work ethic. This support and self-introspection should ensure her continued success. She demonstrated the correct attitude and commitment to security matters. Considering her demeanor and testimony, I believe Applicant has learned from this incident, and in the future she will fully disclose the 2010 incident. In sum, I find Applicant has presented sufficient evidence of rehabilitation. Applicant is living an approbate lifestyle, is expecting her first baby, and is a responsible and contributing member of society. She presented sufficient evidence to explain, extenuate, or mitigate the CAC eligibility concerns raised. 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, Criminal or Dishonest Conduct: FOR APPLICANT

Subparagraph 1.a: For Applicant

Paragraph 2, Material, Intentional False Statement, Deception, or Fraud:

Criminal or Dishonest Conduct: 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 eligibility for Common Access Credentialing eligibility. CAC eligibility is granted.

CLAUDE R. HEINY II
Administrative Judge