

KEYWORD: CAC

DIGEST: In analyzing the concerns in Applicant’s case, the Judge applied the wrong standard. In both the Policies and Conclusion sections of the Decision, the Judge cited to the “clearly consistent with the national interest” standard required for security clearance determinations. The Policies section also contains the following language: “In all adjudications, the protection of the national security is the paramount consideration. Therefore, any doubt concerning personnel being considered for CAC eligibility should be resolved in favor of national interest.” In a CAC case, however, the appropriate standard is whether the applicant’s conduct poses an “unacceptable risk.” The application of the wrong standard raises due process concerns and warrants corrective action. Given these circumstances, the best resolution is to remand the case to the Judge for correction of the identified error and issuance of a new decision consistent with the requirements of the Instruction. Adverse decision remanded.

CASENO: 17-04072.a1

DATE: 01/10/2019

DATE: January 10, 2019

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

Pro se

The Department of Defense (DoD) declined to grant Applicant eligibility for Common Access Card (CAC) credentialing. On January 19, 2018, DoD issued a statement of reasons (SOR) advising Applicant of the basis for that decision—Misconduct or Negligence in Employment concerns and Material, Intentional False Statement, Deception, or Fraud concerns, raised under the adjudicative standards in the appendices of DoD Instruction 5200.46 (Sep. 9, 2014) (Instruction). Applicant requested a hearing. On September 6, 2018, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Mark Harvey denied Applicant’s request for CAC eligibility. Applicant appealed pursuant to Instruction, Enclosure 4 ¶ 6.

In his appeal brief, Applicant claims that he was unaware of his right to be represented at the hearing and believes, if he had been represented, the Judge would have decided the case in his favor. We do not find Applicant’s argument persuasive. With the SOR, Applicant was provided a copy of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended), which in ¶ E3.1.7 sets forth his right to “appear with or without counsel or a personal representative” at the hearing. Prior to the hearing, Department Counsel also sent Applicant a letter that informed him that he could represent himself at the hearing, retain an attorney, or obtain the help of anyone else, such as a union representative or family advisor. Hearing Exhibit 4. At the hearing, the Judge advised Applicant of his right to be represented by an attorney or personal representative at his own expense and inquired whether Applicant was going to represent himself. Applicant responded to the Judge’s question in the affirmative. Tr. at 5-8. We conclude that Applicant was properly advised of his right to be represented by an attorney at his own expense or by a personal representative, and he waived his right to such representation.

In analyzing the concerns in Applicant’s case, the Judge applied the wrong standard. In both the Policies and Conclusion sections of the Decision, the Judge cited to the “clearly consistent with the national interest” standard required for security clearance determinations.¹ The Policies section also contains the following language: “In all adjudications, the protection of the national security is the paramount consideration. Therefore, any doubt concerning personnel being considered for CAC eligibility should be resolved in favor of national interest.” In a CAC case, however, the appropriate standard is whether the applicant’s conduct poses an “unacceptable risk.”² The application of the wrong standard raises due process concerns and warrants corrective action. Given these circumstances, the best resolution is to remand the case to the Judge for correction of the identified error and issuance of a new decision consistent with the requirements of the Instruction.

¹ *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).

² “[T]he overriding factor . . . is unacceptable risk.” Instruction, Encl. 4 ¶ 1(b). “The determination will be unfavorable . . . when there is a reasonable basis to conclude that derogatory information or conduct relating to the . . . CAC credentialing standards presents an unacceptable risk for the U.S. Government.” *Id.* at ¶ 4.

Order

The Decision is **REMANDED**.

Signed: Michael Ra'anan

Michael Ra'anan
Administrative Judge
Chairperson, Appeal Board

Signed: James E. Moody

James E. Moody
Administrative Judge
Member, Appeal Board

Signed: James F. Duffy

James F. Duffy
Administrative Judge
Member, Appeal Board