

KEYWORD: CAC

DIGEST: Applicant has worked for her current employer, a Defense contractor, since 2017. Before taking this job, she worked in the private sector from 1999 to 2017, when she was fired for misconduct. Applicant was fired because she disclosed to a family member information that Federal law requires be kept confidential. Later, when completing a Form 306, she failed to disclose her job termination. Applicant admitted this failure but attributed it to having paid insufficient attention to the question at hand because she was focused on other portions of the form. The Judge found this explanation to be implausible. Adverse decision affirmed.

CASENO: 18-00524.a1

DATE: 03/22/2019

DATE: March 22, 2019

In Re:	)	
	)	
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	)	
Applicant for CAC Eligibility	)	

**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 July 20, 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 decision on the written record. On December 14, 2018, after considering the record, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Robert E. Coacher denied Applicant’s request for CAC eligibility. Applicant appealed pursuant to Instruction, Encl. 4 ¶ 6.

Applicant raised the following issue on appeal: whether the Judge’s adverse decision was arbitrary, capricious, or contrary to law. Consistent with the following, we affirm.

### **The Judge’s Findings of Fact and Analysis**

Applicant has worked for her current employer, a Defense contractor, since 2017. Before taking this job, she worked in the private sector from 1999 to 2017, when she was fired for misconduct. Applicant was fired because she disclosed to a family member information that Federal law requires be kept confidential. Later, when completing a Form 306,<sup>1</sup> she failed to disclose her job termination. Applicant admitted this failure but attributed it to having paid insufficient attention to the question at hand because she was focused on other portions of the form. The Judge found this explanation to be implausible.

The Judge stated that Applicant’s misconduct at work was recent and significant enough to cost her a job. He concluded that Applicant had not mitigated the concerns arising from her job termination. He also stated that it was implausible that Applicant would not have remembered a significant life event such as having been fired for misconduct. He concluded that it was more reasonable to believe that Applicant left her job termination off the Form 306 because she was afraid that disclosure could cost her a job. The Judge concluded that the false statement was recent and intentional. He stated that he was not able to determine that future misconduct or false statements are unlikely to recur. He concluded that granting Applicant CAC eligibility posed an unacceptable risk as defined in the Instruction.

### **Discussion**

Instruction, Enclosure 4 ¶ 6 provides that appeals to DOHA of CAC cases are accorded the established administrative procedures set out in DoD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 1991, as amended). Accordingly, our prior decisions interpreting the Directive in industrial security cases are relevant in evaluating appeals of CAC decisions. *See, e.g.*, CAC Case No. 15-02333 at 3 (App. Bd. Nov. 16, 2016).

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<sup>1</sup>Declaration for Federal Employment.

In a CAC adjudication, “the overriding factor . . . is unacceptable risk.”<sup>2</sup> Instruction, Enclosure 4 ¶ 1(b). The Supplemental Adjudicative Standards, which apply in this case, are designed to ensure that the issuance of a CAC does not pose such a risk. *See, e.g.*, CAC Case No. 16-03527 at 2 (App. Bd. Jun. 11, 2018).

Applicant’s brief includes information from outside the record, including documents that post-date the Judge’s decision. We cannot consider new evidence on appeal. Directive ¶ E3.1.29. Applicant denies that she intentionally falsified her Form 306. However, considering the Judge’s finding of deliberate falsification in light of the record as a whole, we conclude that it is supported by substantial evidence. *See, e.g.*, CAC Case No. 16-03527 at 3. Applicant cites to various aspects of the record that she believes support her effort to obtain a favorable adjudication. Applicant has not rebutted the presumption that the Judge considered all of the evidence in the record, nor has she shown that the Judge weighed the evidence in a manner that was arbitrary, capricious, or contrary to law. *Id.*

The record supports a conclusion that the Judge examined the relevant data and articulated a satisfactory explanation for the decision, “including a ‘rational connection between the facts found and the choice made.’” *Motor Vehicle Mfrs. Ass’n of the United States v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)(quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)). The Judge’s conclusion that granting Applicant CAC eligibility poses an unacceptable risk is sustainable on this record.

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<sup>2</sup>The Glossary to the Instruction provides that “unacceptable risk” includes, among numerous other things, a “threat . . . to records, including classified, privileged, proprietary, financial, and medical records[.]”

**Order**

The Decision is **AFFIRMED**.

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