



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



In the matter of:)
)
) CAC Case No. 17-04078
)
Applicant for CAC Eligibility)

Appearances

For Government: Jeff Nagel, Esq., Department Counsel
For Applicant: Steven Krupa, Esq.

12/21/2018

Decision

HEINTZELMAN, Caroline E., Administrative Judge:

Applicant has mitigated the misconduct or negligence in employment and material, intentional false statement, deception, or fraud eligibility concerns. CAC eligibility is granted.

Statement of the Case

On January 19, 2018, the Department of Defense (DOD) issued a Statement of Reasons (SOR) to Applicant, detailing concerns about her eligibility for a Common Access Card (CAC). The DOD found that granting Applicant CAC eligibility posed an unacceptable risk. The action was taken in accordance with Homeland Security Presidential Directive 12, *Policy for a Common Identification Standard for Federal Employees and Contractors* (August 27, 2004), and was based on the Adjudicative Standards found in DoD Instruction 5200.46, *DoD Investigative and Adjudicative Guidance for Issuing the Common Access Card* (September 9, 2014) (Instruction) 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 SOR alleges eligibility concerns under the Supplemental Adjudicative Standards (SAS) set out in Enclosure 4, Appendix 2 of the Instruction. The specific concerns were alleged under the standards for Misconduct or Negligence in

Employment (SAS ¶ 1) and Material, Intentional False Statement, Deception, or Fraud (SAS ¶ 3).

Applicant responded to the SOR on January 24, 2018 (Answer). She denied all the allegations and requested a hearing before a Defense Office of Hearings and Appeals administrative judge. The case was assigned to me on October 3, 2018, and I issued an order to both parties to produce their documentary evidence by November 2, 2018. On October 24, 2018, DOHA notified Applicant and her counsel that the hearing was scheduled for November 15, 2018. I conducted the hearing as scheduled. Department Counsel submitted Government Exhibits (GE) 1 through 3, which were admitted without objection. Applicant testified, and presented Applicant Exhibits (AE) A through H, which were admitted without objection. DOHA received the transcript (Tr.) on December 3, 2018, and the record closed.

Findings of Fact

Applicant is 33 years old, single, and has an eleven-year-old daughter. In 2005 she completed a dental assistant program, and since then she has worked as a registered dental assistant. Since January 2018, Applicant has worked at a large military installation as an oral surgical assistant. This is her first application for CAC eligibility, and it is required for her employment. (Tr. 15-17, 32-33)

In October 2016, Applicant started working as a licensed dental assistant for a private dental office. The clinic served underprivileged people in State A, and the state reimbursed the owner of the clinic for services it provided. The owner of the clinic was not a dentist. In April 2017, the owner ordered Applicant to take additional x-rays for a patient. The supervising dentist told Applicant that additional x-rays were unnecessary for the treatment of the patient. After Applicant refused to take the x-rays, her employer used profane language toward her and ordered her to leave the facility. (Tr. at 17-20; Answer; GE 3)

In April 2017, after Applicant's employment was terminated, she filed a claim for unemployment compensation with State A's Unemployment Security Department (USD). USD interviewed Applicant and her former employer as part of its investigation. Although her former employer reported that she was fired for insubordination, USD determined on May 9, 2017, that Applicant "did not deliberately refuse to follow reasonable directions or instructions from [her] employer. [Her] actions were not misconduct." USD sent this determination to Applicant and her former employer. (Tr. at 20-22; AE A) Additionally, Applicant filed a whistle-blower complaint with State A's Department of Health and Dental Quality Assurance Commission (DQAC) against both the owner of the clinic and his wife, based upon their business practices and how they were billing State A. (Tr. at 26-28, 33-34; AE H)

Shortly after her employment was terminated, the supervising dentist Applicant worked with at the private clinic wrote a letter of recommendation for her. He found her to be "hardworking, responsible and very dependable." He would not hesitate to hire her in the future. (AE B)

In early 2017, prior to leaving the private clinic, Applicant started looking for a new position as a dental assistant. She completed a Standard Form 85 (SF 85) on April 5, 2017, and listed her employment above. She disclosed that she worked for the private clinic “from 10/2016 to present.” (Tr. 22, 29; AE C)

In August 2017, Applicant completed an electronic questionnaire for investigations processing (e-QIP) and a declaration for federal employment (DFE). (Tr. at 25-26, 31; GE 1; GE 2) An employee of Applicant’s current company told Applicant to use the information in her SF 85 when she completed the e-QIP. Applicant did not hide the April 2017 termination from her company. (Tr. 24, 34)

In the DFE, Applicant did not disclose that she was terminated in April 2017 from her previous employer. Applicant did disclose other derogatory information, including an arrest for driving under the influence and terminations from employers in 2014 and 2015. (Tr. at 31-32; GE 2)

In September 2017, Applicant’s former employer completed a governmental investigative request for employment data and supervisor information (INV FORM 41). He reported that Applicant was fired for unfavorable employment or conduct because she refused to take x-rays for a patient. (GE 3)

At the hearing, Applicant testified that she was not trying to be evasive or misleading when she failed to disclose the April 2017 termination in her August 2017 DFE. (Tr. at 32) She believed her former employer was engaging in questionable conduct and subjecting underprivileged patients to subpar treatment to save his business money. Additionally, she did not believe that her termination was legitimate. (Tr. at 26, 34)

Applicant submitted numerous training certificates. In March 2018, the military command that she supports gave her an award recognizing her performance. Additionally, she submitted nine letters of recommendation from individuals with whom she currently works. These letters were written by civilian and active duty colleagues and her current managing supervisor. She is described as hardworking, honest, reliable, and professional. (Tr. at 16-; AE E; AE F; AE G) Applicant testified that serving her military clients is important to her, and she wants to continue to do her job. (Tr. at 29-30, 36)

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 concerns, standards, disqualifying conditions, and mitigating circumstances are listed in the Instruction, Enclosure 4, Appendix 1, Basic Adjudicative Standards (BAS), and Appendix 2, Supplemental Adjudicative Standards (SAS). The overriding factor for CAC eligibility decisions is “unacceptable risk,” which is defined as follows:

A threat to the life, safety, or health of employees, contractors, vendors, or visitors; to the U.S. Government physical assets or information systems; to personal property; to records, including classified, privileged, proprietary, financial, and medical records, or to the privacy rights established by The Privacy Act of 1974, as amended, or other law that is deemed unacceptable when making risk management determinations.

(Instruction, Glossary, Part II at 28.)

The objective of the 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. A CAC will not be issued if there is a reasonable basis to believe that issuance of a CAC poses an unacceptable risk. Each case must be judged on its own merits, taking into consideration all relevant circumstances, and applying sound judgment, mature thinking, and careful analysis.

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. (Instruction, Enclosure 4, paragraph 1.b.)

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.

Analysis

SAS ¶ 1, Misconduct or Negligence in Employment:

The concern under this standard is set out in SAS ¶ 1.a: "A CAC will not be issued to a person if there is a reasonable basis to believe, based on the individual's misconduct or negligence in employment, that issuance of a CAC poses an unacceptable risk."

The following disqualifying conditions are potentially applicable under is SAS ¶ 1.b:

(1) A previous history of intentional wrongdoing on the job, disruptive, violent, or other acts that may pose an unacceptable risk to people, property, or information systems.

(2) A pattern of dishonesty or rule violations in the workplace which put people, property or information at risk.

In this case, Applicant was terminated by her employer after she refused to take x-rays of a patient. Her employer owned the dental practice, but was not a dentist; as such, he was not authorized to give the order. Additionally, State A found that she did not conduct misconduct and awarded her unemployment benefits. Under these circumstances, none of the disqualifying conditions are applicable.

SAS ¶ 3, Material, Intentional False Statement, Deception, or Fraud

The concern under this guideline is set out in SAS ¶ 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.”

The relevant disqualifying condition is SAS ¶ 3.b:

[C]onditions 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).

Applicant’s failure to disclose the termination was unintentional, it is clear from the record evidence that she did disclose other derogatory information in her DFE and e-QIP. The record evidence also demonstrates that Applicant’s former employer was questionable in his business practices. State A found in her favor that she did not commit misconduct in the workplace. Applicant’s former supervising dentist and multiple current colleagues wrote glowing letters of recommendation for Applicant. Under these circumstances, the disqualifying condition is not applicable.

Formal Findings

My formal findings on the allegations set forth in the SOR are:

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|---------------------------------------------------------------------------|---------------|
| Paragraph 1 (Misconduct or Negligence in Employment): | FOR APPLICANT |
| Subparagraph 1.a: | For Applicant |
| Paragraph 2 (Material, Intentional False Statement, Deception, or Fraud): | FOR APPLICANT |
| Subparagraph 2.a: | For Applicant |

Conclusion

In light of all of the circumstances presented by the record in this case, I conclude that giving Applicant a CAC is not a risk. CAC eligibility is granted.

CAROLINE E. HEINTZELMAN
Administrative Judge