



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



In the matter of: )  
)  
) CAC Case No. 18-00524  
)  
Applicant for CAC Eligibility )

**Appearances**

For Government: Bryan Olmos, Esq., Department Counsel  
For Applicant: *Pro se*

12/14/2018

**Decision**

COACHER, Robert E., Administrative Judge:

Applicant did not mitigate the credentialing concerns raised under misconduct or negligence in employment and making intentional false statements supplemental adjudicative standards. CAC eligibility is denied.

**Statement of the Case**

On July 20, 2018, the Department of Defense (DOD) issued Applicant a Statement of Reasons (SOR) detailing credentialing concerns for CAC eligibility under the adjudicative standards concerning employment misconduct or negligence and making an intentional false statement. Applicant responded to the SOR on October 9, 2017, and elected to have the case decided on the written record in lieu of a hearing.

The Government's written case was submitted on August 20, 2018. A complete copy of the file of relevant material (FORM) was provided to Applicant, who was afforded an opportunity to file objections and submit material to refute, extenuate, or mitigate the credentialing concerns. Applicant received the FORM on August 28, 2018. She responded with exhibits (AE) A-D, which are admitted into evidence. The

Government exhibits (Items 1-6) included in the FORM are admitted in evidence. The case was assigned to me on November 2, 2018.

### **Findings of Fact**

Applicant is a 42-year-old employee of a defense contractor. She has worked for his current employer since September 2017. Before her current position, she worked for a private sector employer from May 1999 to July 2017, when she was fired for employee misconduct.<sup>1</sup>

The SOR alleged that Applicant was involuntarily terminated from her hospital position in July 2017 for committing a Health Insurance Portability and Accountability Act (HIPPA) violation. It further alleged that Applicant deliberately failed to disclose her termination when she completed a Declaration for Federal Employment (Form 306) on October 17, 2017.

Applicant's employer determined she committed a HIPPA violation while employed as a nurse with the hospital. She had texted confidential patient information to a family member. As a result, she was terminated by her employer on July 31, 2017. In her answer to the SOR, she admitted the allegation.<sup>2</sup>

Applicant submitted a Form 306 in October 2017 for a position she was seeking. She answered "No" to question 12, which asked: "During the last five years, have you been fired from any job for any reason?" In Applicant's answer to the SOR, she admitted answering the question in the negative. She explained that she was so focused on answering the question about her student loans that she did not pay enough attention to this question. I find this explanation implausible.<sup>3</sup>

### **Policies**

This case is adjudicated under Homeland Security Presidential Directive - 12 (HSPD-12); DOD Instruction (DODI) 5200.46, *DOD Investigative and Adjudicative Guidance for Issuing the CAC*, 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).

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.

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<sup>1</sup> Items 1, 5.

<sup>2</sup> Items 2, 5.

<sup>3</sup> Items 2, 4.

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, ¶ 1)

## **Analysis**

### **Employment Misconduct**

DODI 5200.46, Appendix 2 to Enclosure 4, Supplemental Adjudicative Standards, ¶ 1. provides:

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.

a. An individual’s employment misconduct or negligence may put people, property, or information systems at risk.

DODI 5200.46, Appendix 2 to Enclosure 4, Supplemental Adjudicative Standards, ¶ 1.b lists several conditions that could raise a CAC eligibility concern and may be disqualifying. The following are potentially applicable in this case:

(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;

(4) Violation of written or recorded commitments to protect information made to an employer, such as breach(es) of confidentiality or the release of proprietary or other information; and

(5) Failure to comply with rules or regulations for the safeguarding of classified, sensitive, or other protected information.

Applicant’s employment termination due to her disclosure of confidential patient information in violation of federal law is sufficient to establish the above disqualifying conditions.

DODI 5200.46, Appendix 2 to Enclosure 4, Supplemental Adjudicative Standards, ¶ 1.c lists circumstances relevant to the determination whether there is a

reasonable basis to believe there is an unacceptable risk. The following may be relevant:

- (1) The behavior happened so long ago, was minor, or happened under such unusual circumstances that it is unlikely to recur and does not cast doubt on the individual's current trustworthiness or good judgment relating to the safety of people and proper safeguarding of property and information systems;
- (2) The individual was not adequately warned that the conduct was unacceptable and could not reasonably be expected to know that the conduct was wrong;
- (3) The individual made prompt, good-faith efforts to correct the behavior; and
- (4) The individual responded favorably to counseling or remedial training and has since demonstrated a positive attitude toward the discharge of information-handling or security responsibilities.

Applicant's termination for committing a HIPPA violation was recent and significant enough to cost Applicant her nursing job of 18 years. Applicant failed to produce sufficient evidence establishing any of the circumstances listed above.

### **Intentional False Statement**

DODI 5200.46, Appendix 2 to Enclosure 4, Supplemental Adjudicative Standards, ¶ 3 provides:

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.

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.)

Applicant was fired from a job she held for 18 years because of her misconduct in violating federal law. Less than three months later, she completed a FORM 306. I find it implausible that Applicant would not remember a significant life event when completing the form. It is reasonable to infer that she intentionally failed to disclose this information because she was afraid it would harm her chances at obtaining the job. The above disqualifying conditions are established.

DODI 5200.46, Appendix 2 to Enclosure 4, Supplemental Adjudicative Standards, ¶ 3.c lists circumstances relevant to the determination whether there is a reasonable basis to believe there is an unacceptable risk. The following may be relevant:

- (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's false statement was recent and significant because it concerned her firing from her most recent employer for a federal law violation concerning unauthorized disclosure of confidential information. Her actions were intentional and she did not engage in efforts to correct the situation. Neither mitigating circumstance applies.

I am unable to determine that future employment misconduct or intentionally false statements are unlikely to recur. There is insufficient mitigation in the FORM to convince me that Applicant does not pose an unacceptable risk. I also considered the factors in DODI 5200.46, Enclosure 4, ¶ 1.

### **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, Employment Misconduct:	Against Applicant
Subparagraph 1.a:	Against 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, granting Applicant CAC eligibility poses an unacceptable risk. CAC eligibility is denied.

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Robert E. Coacher  
Administrative Judge