



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



In the matter of:

Applicant for CAC Eligibility

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CAC Case No. 15-05881

Appearances

For Government: Andre M. Gregorian, Esq., Department Counsel
For Applicant: [Applicant's husband], Personal Representative

10/25/2016

Decision

LOUGHRAN, Edward W., Administrative Judge:

Applicant refuted Common Access Card (CAC) credentialing concerns raised under the intentional false statement, deception, or fraud Adjudicative Standards, and she mitigated the concerns raised under the misconduct or negligence in employment Adjudicative Standards. CAC eligibility is granted.

Statement of the Case

On November 13, 2015, the Department of Defense (DOD) issued a Statement of Reasons (SOR) to Applicant detailing credentialing concerns for CAC eligibility pursuant to Homeland Security Presidential Directive – 12 (HSPD-12). The DOD was unable to find that granting Applicant CAC eligibility did not pose an unacceptable risk. The action was taken under the Adjudicative Standards found in DOD Instruction (DODI) 5200.46, *DOD Investigative and Adjudicative Guidelines 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). The concerns raised under the Adjudicative Standards of DODI 5200.46 are fraudulent information concerning identity; intentional false statement, deception, or fraud; and misconduct or negligence in employment.

Applicant responded to the SOR on December 7, 2015, and elected to have the case decided on the written record in lieu of a hearing. On February 26, 2016, she changed her request to a hearing before an administrative judge. The case was assigned to me on May 5, 2016. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on June 10, 2016, scheduling the hearing for July 19, 2016. The hearing was convened as scheduled. DOHA received the hearing transcript (Tr.) on July 27, 2016.

Procedural and Evidentiary Rulings

Evidence

Government Exhibits (GE) 1 and 2 were admitted in evidence without objection. The objection to GE 3 was sustained. GE 4 was admitted in evidence over Applicant's objection. Applicant testified, called a witness, and submitted Applicant's Exhibits (AE) A through F, which were admitted without objection. The record was held open for Applicant to submit additional information. She submitted documents that were marked AE G and H and admitted without objection.

SOR Amendment

Department Counsel amended the SOR by withdrawing the fraudulent information concerning identity allegations in SOR ¶¶ 1.a and 2.a.

Findings of Fact

Applicant is 39 years old. She has worked for her current employer since October 2014. She was born in another country and became a U.S. citizen in 2014. She is a high school graduate, and she attended a trade school in her native country. She is married for the second time. She does not have children.¹

Applicant worked as a part-time personal trainer at a fitness center from about October 2013 to September 2014. In September 2014, Applicant was upset that another employee received a promotion instead of her. Applicant's supervisor discussed the matter with her. Another employee complained that Applicant violated the company's gossip policy, created a hostile-work environment, and discussed confidential information with other employees. The complaint included that Applicant asked the employee about her compensation; Applicant told the employee that a third employee "will be the next to leave, she has another job with [another fitness center]"; and that Applicant stated that she did not like another employee. The supervisor asked Applicant to sign a letter of resignation. Applicant refused. The supervisor told her that she was being released from employment. Applicant had an angry reaction to the news.²

¹ Tr. at 27, 39-41, 62-63; GE 1, 2.

² Tr. at 25-32, 41-45, 60-62; Applicant's response to SOR; GE 4; AE B, E.

Applicant described a personality conflict with her supervisor. She stated that she did not believe she was fired. English is her second language, and there may have been a language barrier. Applicant verified that she received unemployment compensation through her state, which cannot be awarded when an employee is fired or quits. The exceptions to those limitations do not apply in Applicant's case.³ The state provides in its website:

Types of Job Separation

To be eligible for benefits based on your job separation, you must be either unemployed or working reduced hours through no fault of your own. Examples include layoff, reduction in hours or wages not related to misconduct, being fired for reasons other than misconduct, or quitting with good cause related to work.

Laid Off

Layoffs are due to lack of work, not your work performance, so you may be eligible for benefits. For example, the employer has no more work available, has eliminated your position, or has closed the business.

Fired

If the employer ended your employment but you were not laid off as defined above, then you were fired. If the employer demanded your resignation, you were fired.

You may be eligible for benefits if you were fired for reasons other than misconduct. Examples of misconduct that could make you ineligible include violation of company policy, violation of law, neglect or mismanagement of your position, or failure to perform your work adequately if you are capable of doing so.

The state noted in its determination of unemployment benefits that Applicant's employer "did not object to the payments of benefits on [Applicant's claim]." Applicant's former manager later offered her another position in a different fitness center operated by the same chain. In accordance with state law and the state's determination of unemployment benefits, I conclude that Applicant was not fired; she did not quit; and she did not leave the job by mutual agreement (she did not agree to leave). Applicant was in essence laid off.⁴

Applicant submitted a Declaration for Federal Employment in November 2014. Section 12 asked: "During the last 5 years, have you been fired from any job for any reason, did you quit after being told that you would be fired, did you leave any job by

³ Tr. at 27-32, 35, 44-460; Applicant's response to SOR; GE ; AE E, F .

⁴ Applicant's response to SOR; AE G.

mutual agreement because of specific problems . . . ?” Applicant was not fired; she did not quit; and she did not leave by mutual agreement. She correctly answered “No” to the question. I further conclude that Applicant did not have any intent to deceive when she answered the question.⁵

Applicant submitted letters from clients that she trained at the fitness center, the assistant manager at the fitness center for most of her time there, and workers at her current job. She is praised for her excellent job performance, efficiency, dedication, professionalism, work ethic, leadership, reliability, dependability, positive attitude, and honesty.⁶

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 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 CAC eligibility is clearly consistent with the national interest.

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. 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 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) In all adjudications, the protection of the national interest is the paramount consideration. Therefore, any doubt concerning personnel being considered for CAC eligibility should be resolved in favor of the national interest.

⁵ Tr. at 33-35; Applicant’s response to SOR; GE 1.

⁶ AE C, D, H.

Analysis

Misconduct or Negligence in Employment

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 employment 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 lists several conditions that could raise a CAC concern and may be disqualifying. The following are potentially applicable in this case:

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;

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

1.f.(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

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

Applicant's employment issues at the fitness center are sufficient to raise the above disqualifying conditions.

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

1.c.(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;

1.c.(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;

1.c.(3) The individual made prompt, good-faith efforts to correct the behavior; and

1.c.(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 had favorable comments from the assistant manager at the fitness center for most of her time there and from her clients. The issues were at least partially attributable to a personality conflict and a language barrier. She is highly regarded at her current job. The above mitigating circumstances are established.

Intentional False Statement, Deception, or Fraud

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 did not intentionally falsify the Declaration for Federal Employment. There are no applicable disqualifying conditions. Intentional false statement, deception, or fraud credentialing concerns are concluded for Applicant.

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, Fraudulent Information Concerning Identity:	Withdrawn
Subparagraph 1.a:	Withdrawn
Paragraph 2, Intentional False Statement, Deception, or Fraud:	For Applicant
Subparagraph 2.a:	Withdrawn
Subparagraph 2.b:	For Applicant
Paragraph 3, Misconduct or Negligence in Employment:	For Applicant
Subparagraph 3.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 CAC eligibility. CAC eligibility is granted.

Edward W. Loughran
Administrative Judge