



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



In the matter of:

Applicant for CAC Eligibility

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CAC Case No. 17-04091

Appearances

For Government: Adrienne Driskill, Esq., Department Counsel
For Applicant: *Pro se*

10/10/2018

Decision

Goldstein, Jennifer I., Administrative Judge:

Statement of the Case

On January 19, 2018, the Department of Defense (DoD) issued a Statement of Reasons (SOR) to Applicant detailing eligibility concerns for Common Access Card (CAC) issuance pursuant to Homeland Security Presidential Directive-12 (HSPD-12) because it found it was an unacceptable risk to grant Applicant CAC eligibility. The action is based on the Adjudicative Standards found in DoD Instruction 5200.46, *DoD Investigative and Adjudicative Guidelines for Issuing the Common Access Card*, dated September 9, 2014, and made pursuant to 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: paragraph 1.a - misconduct or negligence in employment; and paragraph 3.a - material, intentional false statement, deception, or fraud.

Applicant answered the SOR on February 10, 2018 (Answer), and requested a hearing before an administrative judge. The case was assigned to me on April 5, 2018. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on April 18, 2018, scheduling the hearing for May 9, 2018. The hearing was convened as scheduled. The Government offered Exhibits (GE) 1 through 3, and they were admitted.

(Tr. 13.) Applicant testified on her own behalf. The record was left open until May 30, 2018, for Applicant to submit exhibits. On May 30, 2018, Applicant submitted Exhibits (AE) A through C, which were admitted without objection. DOHA received the transcript of the hearing (Tr.) on June 5, 2018. Based on the record evidence and testimony presented in this case, CAC eligibility is denied.

Findings of Fact

Applicant is 34 years old and single. She has completed some college classes. She has three surviving children, ages 15, 11, and 9. She has been offered a position as a medical support administrator at a military base and seeks CAC eligibility in connection with that employment offer. (Tr. 19-21.)

Applicant worked as an on-call emergency room clerk at a hospital from March 2014 to February 2016. Her hours would fluctuate between 16 to 36 hours per week depending on the demand. In February 2016, her hours declined significantly. (Tr. 16-28.)

In August 2014, Applicant was injured in a car accident. She experienced on-going pain as a result of her injuries and arthritis. Her primary care physician prescribed Tylenol and Ibuprofen to treat her pain. One day while at work more than a year after the accident, she requested the emergency room doctor at work to write her a prescription for pain medication. She testified that she was awaiting a referral to a pain medication doctor at that time. She claimed she was prescribed 20 Vicodin pills by the emergency room physician. She filled the prescription at the hospital's pharmacy. Two weeks later, her supervisor called her and accused Applicant of altering the prescription. Applicant denied altering it and requested a hearing. But because she was an on-call employee and not part of the union, she was not entitled to a hearing. She decided that if the company refused to hear her out that she would resign, and she claims she told that to her manager. She claimed that she did not get a letter from human resources notifying her she had been terminated. She did not file for unemployment compensation with her state. (AE A; Tr. 16-35, 47-50.)

On an Office of Personnel Management INV Form 41 sent to Applicant's former employer, the human resources department indicated that Applicant was employed by the hospital from March 2014 to February 2016. It listed that she was "terminated for altering a document." (GE 3.)

The SOR alleged that Applicant's material, intentional false statement, deception, or fraud raised concerns under DoDI 5200.46, Enclosure 4, Appendix 2, *Supplemental Adjudicative Standards*. Specifically, it alleged that Applicant falsified material facts on a Declaration for Federal Employment form (306), signed by Applicant on August 24, 2017, when she failed to disclose she was discharged by her employer in February 2016. She answered "No" on that declaration to the question that asked whether in the past five years she had been fired, quit after being told she would be fired, or left a job by mutual agreement because of specific problems. She claimed that she was never told that she would be fired and did not leave by mutual agreement. (GE 2; Tr. 44.)

Applicant presented two letters of recommendation from coworkers. The first letter indicated that Applicant is “dependable, honorable, and loyal.” (AE B.) The second, a co-worker at the hospital in question reflected that Applicant has integrity and pride in her work. (AE B.)

Policies

Every CAC eligibility decision must be a fair and impartial overall commonsense decision based on all available evidence, both favorable and unfavorable. The HSPD-12 credentialing standards 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 eligibility criteria is unacceptable risk.

The objective of 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 the 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, paragraph 1.)

Analysis

Supplemental Adjudicative Standards, Paragraph 1.a

DoDI 5200.46, Enclosure 4, Appendix 2, *Supplemental Adjudicative Standards* expresses concerns pertaining to misconduct or negligence in employment. Paragraph 1 of this section states:

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.

The disqualifying condition set forth in DoDI 5200.46, Enclosure 4, Appendix 2, Subparagraph 1.b that is raised by Applicant's misconduct or negligence in employment is:

- (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.

Applicant was terminated following allegations of misconduct in February 2016 after she altered a prescription. Her conduct raises a significant concern because it poses an unacceptable risk. The above disqualifying conditions apply.

Potentially mitigating conditions are set forth in DoDI 5200.46, Enclosure 4, Appendix 2, Subparagraph 1.c. The conditions that could apply to mitigate the security concerns raised by the evidence in this case are:

- (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 decision to alter a prescription for a controlled substance is serious and recent misconduct. She has not been forthright about her actions. This misconduct casts doubt on her current trustworthiness or good judgment relating to the safety of people and proper safeguarding of property and information systems. The concern is not mitigated.

Supplemental Adjudicative Standards, Paragraph 3.a

DoDI 5200.46, Enclosure 4, Appendix 2, *Supplemental Adjudicative Standards* expresses concerns pertaining to misconduct or negligence in employment. Paragraph 3 of this section states:

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.)

The disqualifying conditions set forth in DoDI 5200.46, Enclosure 4, Appendix 2, Subparagraph 3.b are raised by Applicant's falsification on her Declaration for Federal Employment form (306), signed on August 24, 2017. Her claim that she was ignorant of that fact that she was terminated or left by mutual agreement is not credible.

Potentially mitigating conditions are set forth in DoDI 5200.46, Enclosure 4, Appendix 2, Subparagraph 3.c. The conditions that could apply to mitigate the unacceptable risk concerns raised by the evidence in this case are:

(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.

After considering the mitigating conditions outlined above in Subparagraph 3.c, it is apparent that neither of them were established in this case. Applicant failed to take responsibility for her actions. Falsifying material information raises serious concerns and Applicant has done nothing to show that similar dishonesty is unlikely to recur. Applicant did not make prompt or good-faith efforts to correct her falsification and concealment. She has not provided sufficient evidence to meet her burden of proof to overcome her material, intentional false statement, deception, or fraud in connection with her federal or contract employment.

Further Mitigation

DODI 5200.46, Enclosure 4, *CAC Adjudicative Procedures*, Paragraph 1, *Guidance For Applying Credentialing Standards During Adjudication* provides the following:

a. As established in Reference (g), credentialing adjudication considers whether or not an individual is eligible for long-term access to federally controlled facilities and/or information systems. The ultimate determination to authorize, deny, or revoke the CAC based on a credentialing determination of the PSI must be made after consideration of applicable credentialing standards in Reference (c).

b. Each case is unique. Adjudicators must examine conditions that raise an adjudicative concern, the overriding factor for all of these conditions is unacceptable risk. Factors to be applied consistently to all information available to the adjudicator are:

(1) The nature and seriousness of the conduct. The more serious the conduct, the greater the potential for an adverse CAC determination.

(2) The circumstances surrounding the conduct. Sufficient information concerning the circumstances of the conduct must be obtained to determine whether there is a reasonable basis to believe the conduct poses a risk to people, property or information systems.

(3) The recency and frequency of the conduct. More recent or more frequent conduct is of greater concern.

(4) The individual's age and maturity at the time of the conduct. Offenses committed as a minor are usually treated as less serious than the same offenses committed as an adult, unless the offense is very recent, part of a pattern, or particularly heinous.

(5) Contributing external conditions. Economic and cultural conditions may be relevant to the determination of whether there is a reasonable basis to believe there is an unacceptable risk if the conditions are currently removed or countered (generally considered in cases with relatively minor issues).

(6) The absence or presence of efforts toward rehabilitation, if relevant, to address conduct adverse to CAC determinations.

(a) Clear, affirmative evidence of rehabilitation is required for a favorable adjudication (e.g., seeking assistance and following professional guidance, where appropriate; demonstrating positive changes in behavior and employment).

(b) Rehabilitation may be a consideration for most conduct, not just alcohol and drug abuse. While formal counseling or treatment may be a consideration, other factors (such as the individual's employment record) may also be indications of rehabilitation.

Applicant presented little evidence of good character, rehabilitation, or other positive changes. While she offered two letters of support, she failed to acknowledge responsibility for her actions. Her falsification was recent and material. She has not demonstrated she has the requisite judgment to have CAC eligibility. Applicant's request for CAC eligibility is denied.

Formal Findings

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by ¶ E3.1.25 of Enclosure 3 of the Directive, are:

SOR Paragraph 1:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant
SOR Paragraph 2:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is an unacceptable risk to grant Applicant CAC eligibility. CAC eligibility is denied.

Jennifer I. Goldstein
Administrative Judge