

KEYWORD: CAC

DIGEST: Applicant challenges the Judge's finding that she deliberately omitted material information from her Form 306. However, the Judge's finding is a reasonable inference from the evidence. The Judge's material findings are supported by substantial evidence. Adverse decision affirmed.

CASENO: 17-01990.a2

DATE: 01/11/2019

DATE: January 11, 2019

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 November 9, 2017, DoD issued a statement of reasons (SOR) advising Applicant of the basis for that decision—Criminal, Dishonest Conduct, or Financial Irresponsibility 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 hearing. On June 15, 2018, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Robert J. Kilmartin denied Applicant's request for CAC eligibility. Applicant appealed pursuant to Instruction, Enclosure 4 ¶ 6.

On September 19, 2018, we remanded the case to the Judge to correct an identified error. On October 11, 2018, the Judge issued a Remand Decision in which he again denied Applicant's request for a CAC. Applicant appealed pursuant to DoD Directive 5220.6.

Applicant raised the following issue on appeal: whether the Judge erred in finding that she had deliberately omitted information from a Declaration for Federal Employment and 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 is a 40-year-old severely disabled employee of a Federal contractor. She has been working for her current employer at a military installation since late 2016. The SOR alleges several minor offenses or infractions, including that Applicant was charged with reckless driving in 2013; arrested for theft by deception - passing two bad checks in 2012; arrested for giving a false name to a police officer and possession of marijuana and drug paraphernalia in 2011; and arrested for cruelty to animals in 2010. She admitted the reckless driving allegation, was found guilty of the bad check offenses, and was sentenced to serve 20 days in jail for the false name and drug offenses. The Judge found portions of her testimony to be not credible. She has not been arrested since 2013. Her character references attest to her hard work and kindness.

In completing a Declaration for Federal Employment (Form 306) in 2016, Applicant answered "Yes" to the question that asked if she had been convicted, imprisoned, on probation, or on parole in the last seven years. She only disclosed the 2012 check offenses and 2011 arrest for providing false information to a policeman. She denied that she had deliberately omitted the other offenses from her form. She attributed her omissions to forgetfulness. The Judge found that Applicant had failed to list the only offense for which Applicant went to jail.

With the exception of two minor charges,¹ the Judge found that Applicant had not mitigated the criminal and dishonest conduct concerns. She omitted information about the most serious offenses from her Form 306. The Judge did not find her explanation for the omissions to be forthright or candid. She did not mitigate the material, intentional, false statement, deception, or fraud concerns. In the whole-person analysis, the Judge stated that Applicant had overcome

¹ The Judge found in favor of Applicant on two harassing communication charges from 2008.

“tremendous physical challenges and disadvantages.” Decision at 8. However, he concluded that her pattern of law violations undermined her trustworthiness; that she did not provide a meaningful explanation for her omissions; and that she did not provide restitution for her bad check offenses.

Discussion

Applicant’s brief cites to new evidence, which we cannot consider. *See, e.g.*, CAC Case No.15-06228 at 1 (App. Bd. Dec. 22, 2016). Applicant challenges the Judge’s finding that she deliberately omitted material information from her Form 306. However, the Judge’s finding is a reasonable inference from the evidence. The Judge’s material findings are supported by substantial evidence. *See, e.g.*, CAC Case No. 16-03527 at 3 (App. Bd. Jun. 11, 2018). Applicant requests that we consult a web site that she claims would provide medical substantiation for her memory loss.² We have no authority to investigate a case, insofar as we have no fact-finding power. *See, e.g.*, ISCR Case No. 14-02394 at 3 (App. Bd. Aug. 17, 2015).

Applicant notes that the Judge cited to a provision of the Instruction that lists an individual’s age and maturity as relevant factors in CAC adjudications. *See* Instruction, Encl. 4 ¶ 1(b)(4). She argues that she developed late and was not mature at the time of her misconduct. Applicant has not demonstrated that the Judge weighed the evidence in a manner that was arbitrary, capricious, or contrary to law. *See, e.g.*, CAC Case No. 16-01524 at 5 (App. Bd. Apr. 19, 2018).

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.

²Applicant argues she is subject to difficulties with concentration, memory, and decision-making. Even if the record demonstrated these difficulties, it is not clear that the result would be mitigating. Holders of CAC eligibility may not create an unacceptable risk to people or property. Applicant’s purported difficulties could diminish that responsibility.

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