

KEYWORD: CAC

DIGEST: Applicant contends that the Judge erred in finding that he had killed the child. We conclude that the challenged finding is supported by substantial evidence. Adverse decision affirmed.

CASENO: 16-00427.a1

DATE: 08/11/2017

DATE: August 11, 2017

In Re:	)	)	
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Applicant for CAC Eligibility	)	)	

**APPEAL BOARD DECISION**

**APPEARANCES**

**FOR GOVERNMENT**

James B. Norman, Esq., Chief Department Counsel

**FOR APPLICANT**

John Seaburn Delk II, Esq.

The Department of Defense (DoD) declined to grant Applicant eligibility for Common Access Card (CAC) credentialing. On May 16, 2016, DoD issued a statement of reasons (SOR) advising Applicant of the basis for that decision—Criminal or Dishonest Conduct concerns, raised under the adjudicative standards in the appendices of DoD Instruction 5200.46 (Sep. 9, 2014) (Instruction). Applicant requested a hearing. On April 20, 2017, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Edward W. Loughran denied Applicant’s request for CAC eligibility. Applicant appealed pursuant to Instruction, Enclosure 4 ¶ 6.

Applicant raised the following issues on appeal: whether the Judge’s findings of fact were

erroneous and whether the Judge's overall decision was arbitrary, capricious, or contrary to law. Consistent with the following, we affirm.

### **The Judge's Findings of Fact**

In early 2000, Applicant was arrested and charged with attempted burglary of a vehicle and evading arrest. About a month later he was arrested and charged with theft. Applicant does not deny committing these offenses. In March 2004, Applicant was arrested and charged with capital murder and held on \$1 million bail. The District Attorney subsequently "declined to indict and/or prosecute" on the ground of insufficient evidence. Decision at 2.

The victim was the eight-month-old child of Applicant's then-girlfriend. About two and a half months before the death, the child suffered fractures of the right femur and right tibia, "consistent with spiral fractures." *Id.* The girlfriend reported that, a few days prior to these injuries, the child fell from a sofa at the girlfriend's mother's house. On the day of the child's death, Applicant went to his girlfriend's house. Others present stated that the child seemed normal, except that she cried for a while when Applicant held her.

Applicant took the child to his house. He stated that she started choking on a cookie, so he lifted her arm and patted her on the back until she stopped. Applicant told the police that the child had spat out the cookie, though they found no evidence to support this. Applicant returned the child to the girlfriend's mother's house. He stated that she was not out of his sight and he noticed nothing wrong with her. He stated that the child had a seizure, so he and his girlfriend took her to the hospital. A doctor who examined the child concluded that she had injuries caused by having been shaken excessively. An autopsy revealed that the child "died as the result of blunt force injuries." *Id.* at 3. These included contusions to the head, trunk, and extremities; hemorrhages, including subdural ones; and deep muscular hemorrhages. The pathologist advised the police that the injuries were most likely inflicted a short time before the child was taken to the hospital. A forensic dentist concluded that bite marks found on the child's body could have been made by Applicant, although there was insufficient evidence to be able to identify the marks with any degree of medical certainty.

Applicant contended that his girlfriend killed the child or knew who did. He stated that the early injuries to the ribs were inflicted before he entered into a relationship with his girlfriend. However, the police report contained evidence that contradicted this, and Applicant later admitted that he was involved with the mother when the fractures occurred.

### **The Judge's Analysis**

The Judge noted the earlier arrest for burglary. He stated that the state had a *prima facie* case against Applicant for murder but not enough evidence to sustain a conviction. The Judge found that there is substantial evidence that Applicant killed the child. He noted the following: Applicant was the only person alone with the child after he left the house; the child seemed happy that day except when Applicant held her; the dentist found that teeth like Applicant's could have caused the bite marks found on the child; and Applicant made inconsistent statements. The Judge found that there were no applicable mitigating circumstances.

## Discussion

Instruction, Encl. 4 ¶ 6 provides that appeals to DOHA of CAC cases are accorded the established administrative procedures set out in DoD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 1991, as amended). Since its inception, the Appeal Board has been issuing decisions that interpret and analyze the administrative procedures set forth in the Directive. Because those same administrative procedures are used in appeals of CAC cases, our decisions interpreting and analyzing them apply equally here for reviewing a Judge's actions, rulings, findings, and conclusions in accordance with the Instruction. *See, e.g.*, CAC Case No. 15-02333 at 3 (App. Bd. Nov.16, 2016). In a CAC adjudication, "the overriding factor . . . is unacceptable risk." Instruction, Encl.4 ¶ 1(b). The Supplemental Adjudicative Standards, which apply in this case, are designed to ensure that the issuance of a CAC does not pose such a risk.

In deciding whether the Judge's rulings or conclusions are erroneous, we will review the decision to determine: it does not examine relevant evidence; it fails to articulate a satisfactory explanation for its conclusions, including a rational connection between the facts found and the choice made; it does not consider relevant factors; it reflects a clear error of judgment; it fails to consider an important aspect of the case; it offers an explanation for the decision that runs contrary to the record evidence; or it is so implausible that it cannot be ascribed to a mere difference of opinion. *See, e.g.*, CAC Case No. 15-06091 at 3-4 (App. Bd. Jan. 10, 2017).

Applicant contends that the Judge erred in finding that he had killed the child. He argues that the Judge did not properly interpret the District Attorney's decision not to indict or prosecute. He contends that there is no evidence that the District Attorney had found there to be a *prima facie* case against Applicant. He also argues that the Judge did not extend sufficient weight to the possibility that the girlfriend could have killed the child. The Directive requires us to evaluate a Judge's findings to see if they are supported by "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the same record." Directive ¶ E3.1.32.1.

We have considered this assignment of error in light of the record as a whole. Although we give due consideration to his argument about the significance of the decision not to prosecute, we note that the Judge cited to other evidence in explaining his finding that Applicant had committed the offense, including that Applicant was alone with the child prior to the injuries that led to death and that he made inconsistent statements about the earlier injuries the child had suffered. As the Judge acknowledged, the fact that criminal charges were dropped, dismissed, or resulted in an acquittal does not preclude a Judge from finding an applicant engaged in the conduct underlying those criminal charges. ISCR Case No. 10-05039 at 3 (App. Bd. Oct. 17, 2011). We conclude that the challenged finding is supported by substantial evidence. We note Applicant's argument that his girlfriend could have been responsible for the killing. However, an alternative interpretation of the evidence is not enough to show that the Judge weighed the evidence in a manner that was arbitrary, capricious, or contrary to law. Moreover, we find no reason to disturb the Judge's conclusion that Applicant failed to meet his burden of persuasion on the question of unacceptable risk. Accordingly, the Judge's adverse decision is sustainable.

**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