

DATE: January 10, 2017

<p>In Re:</p> <p style="text-align: center;">-----</p> <p>Applicant for CAC Eligibility</p>	<p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p>	<p>CAC Case No. 15-06091</p>
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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 September 10, 2015, DoD issued a statement of reasons (SOR) advising Applicant of the basis for that decision—criminal or dishonest conduct concerns and illegal use of controlled substances concerns, raised under the adjudicative standards in the appendices of DoD Instruction 5200.46 (Sep. 9, 2014) (Instruction). Applicant requested a hearing. On September 29, 2016, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Robert Robinson Gales granted Applicant’s request for CAC eligibility. Department Counsel appealed pursuant to Instruction, Enclosure 4 ¶ 6.

Department Counsel raised the following issue on appeal: whether the Judge’s favorable decision was arbitrary, capricious, or contrary to law in that it ran contrary to the weight of the record evidence. Consistent with the following, we reverse.

The Judge's Findings of Fact

Applicant is a 45-year-old employee of a Defense contractor. He has worked in his current job since February 2014 and has held CAC eligibility since 2006. Divorced, he has five children. Applicant has a lengthy record of involvement with the law. The SOR alleges incidents of assault, including assault and battery with intent to kill; domestic violence; illegal substance charges; contempt of court; and theft. The domestic violence charges originated from a dysfunctional marriage, in which Applicant's wife would attack him and he would defend himself. She would call the police but later refuse to sign the complaints or testify. Most of the charges were dismissed or *nolle prossed*, while others were reduced to lesser offenses. Applicant was unable to recall the specifics of many of the allegations due to the passage of time.

In one of the drug allegations, Applicant was in a bar with some friends. Someone walked up to one of the people in the group and gave that person \$20. Applicant borrowed the money in order to buy food. Soon after, the police raided the bar and the money that Applicant had borrowed turned out to have been marked. He was arrested and charged with distribution of crack and distribution of crack in the proximity of a school. Upon advice of counsel Applicant pled guilty to possession of less than one gram of cocaine, a felony. The court fined Applicant \$5,000 and sentenced him to five years confinement, suspended. The other charges were dismissed, *nolle prossed*, or resulted in acquittals.

In the other drug allegation, Applicant was being driven to his mother's home by another person. The police pulled the car over and discovered drugs under the driver's seat. Though he denied knowing about the drugs, Applicant was arrested and charged with possession of crack with intent to distribute, possession with intent to distribute within proximity of a school, and false police report. All of the charges were subsequently dismissed, *nolle prossed*, or resulted in acquittals.

Applicant enjoys an excellent reputation for his work performance as well as his trustworthiness and integrity. Applicant's landlady considers him to be a wonderful tenant, and his pastor characterizes him as honest and hardworking. Applicant's sister related incidents from Applicant's youth in which he was harassed by police. She stated that he has changed from his old ways. His girlfriend testified that Applicant is honest about his past mistakes and that he no longer associates with friends from his former life. She stated that he has not displayed hostility or used any controlled substances since she has known him.

The Judge's Analysis

The Judge found that Applicant's conduct raised criminal or dishonest conduct concerns as well as drug use concerns.¹ In concluding that Applicant had mitigated these concerns, the Judge

¹The Judge noted that the allegations did not describe drug use, but possession and distribution. He concluded, however, that the evidence was sufficient to raise the following disqualifying conditions: a pattern of drug-related arrests (Instruction, Enclosure 4, Appendix 2 ¶ 5(b)(2)) and illegal drug possession (Instruction, Enclosure 4, Appendix 2 ¶ 5(b)(3)).

cited to evidence of Applicant's troubled youth, the participation of his ex-wife in the domestic violence incidents, Applicant's character evidence, and the disposition without conviction of many of the offenses, including all of the ones involving his ex-wife. He also cited to Applicant's exculpatory testimony about the two drug offenses. The Judge stated that, based on Applicant's character evidence, he was convinced that Applicant had been rehabilitated. Regarding the drug offenses in particular, the Judge cited to the length of time since their occurrence and Applicant's evidence of rehabilitation.

Discussion

Instruction, Enclosure 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* (Jan. 2, 1992, as amended) (Directive). 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.²

In a CAC adjudication, "the overriding factor . . . is unacceptable risk." Instruction, Enclosure 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.³ Applying the Directive's procedures to CAC adjudications, we hold that once the Government presents evidence raising a reasonable basis to believe that an applicant poses a risk within the meaning of the Instruction,⁴ the applicant bears the burden of persuasion on the question of whether the risk is unacceptable.⁵

In deciding whether the Judge's rulings or conclusions are erroneous, we will review the decision to determine whether: 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

²Decisions of the Appeal Board are available to the public at DOHA's website: <http://www.dod.mil/dodgc/doha/>.

³"In this context, an unacceptable risk refers to an unacceptable risk to the life, safety, or health of employees, contractors, vendors, or visitors; to the Government's physical assets or information systems; to personal property; to records, including classified, privileged, proprietary, financial, or medical records; or to the privacy of such data subjects." Instruction, Enclosure 4 ¶ 2(b).

⁴Directive ¶ E3.1.14: "Department Counsel is responsible for presenting witnesses and other evidence to establish the facts alleged in the SOR that have been controverted."

⁵Directive ¶ 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, and has the ultimate burden of persuasion as to obtaining a favorable . . . decision."

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. 15-00895 at 3 (App. Bd. Nov. 16, 2016).

Turning to the case before us, Applicant's conduct is alleged to raise concerns under two sections of the Instruction. Instruction, Enclosure 4, Appendix 2 ¶ 2 provides that a "*CAC will not be issued to a person if there is a reasonable basis to believe, based on the individual's criminal or dishonest conduct, that issuance of a CAC would pose an unacceptable risk.*" (emphasis added) Instruction, Enclosure 4, Appendix 2 ¶ 5 provides that a "*CAC will not be issued to a person if there is a reasonable basis to believe, based on the nature or duration of the individual's illegal use of narcotics, drugs, or other controlled substances without evidence of substantial rehabilitation, that issuance of a CAC poses an unacceptable risk.*" In this case, the Judge's conclusion that the Government had produced evidence sufficient to raise a reasonable belief that Applicant poses a risk to persons or property is not at issue. It is his conclusion that Applicant has met his burden of persuasion that this is not unacceptable that Department Counsel has appealed.

Department Counsel argues that the Judge did not evaluate the evidence as a cumulative whole. Rather, he argues that the Judge considered the various instances of misconduct in isolation from one another.

An Administrative Judge must consider all of the facts as a whole, rather than analyzing each separate aspect in a piecemeal fashion. In this instance, only by intentionally parsing the facts in a manner that individually rationalizes a series of similar events could the Administrative Judge have reached the conclusion that Applicant's multiple arrests were mitigated. Appeal Brief at 6.

We find merit in this argument. We conclude that Instruction, Enclosure 4 ¶ 1 requires a Judge to consider an applicant's conduct and/or circumstances as a whole rather than in a piecemeal fashion. Though in the case before us, the Judge devoted considerable space to his analysis of Applicant's misconduct, he did not address it in its cumulative significance. We note his findings, and record evidence supporting those findings, that Applicant was arrested on numerous occasions for assault, including one time for assault and battery with intent to kill; for offenses involving illegal drugs; for theft; and for contempt of court, one instance of which was due to delinquency in child support payments. Tr. at 64. These offenses occurred over a period of twenty years or more, his most recent assault having taken place at a time when he was in his forties.

The Judge noted the relative age of many of the allegations. However, reliance upon this would have more force were those the only ones at issue. A Judge must evaluate whether misconduct has been attenuated by time in light of more recent offenses, subsequent misconduct being of a nature to impugn an applicant's effort at rehabilitation. As it stands, the Judge's treatment of Applicant's misconduct did not do justice to its lengthy history and to its persistence into his adult maturity, and he did not address the extent to which the sheer volume of Applicant's infractions enhances the significance of incidents which, in and of themselves, might have been of limited concern, such as old instances of assault in which he ex-wife may have born some responsibility.

The record supports Department Counsel’s argument that the Judge performed a piecemeal analysis of Applicant’s misconduct, thereby failing properly to engage the record as a whole.

Department Counsel cites to other deficiencies in the Judge’s analysis. He notes that much of Applicant’s presentation consisted of uncorroborated claims of factual innocence. He argues that, as a consequence, the Judge’s decision appears to rest in large measure upon a favorable credibility determination. The Directive requires us to give deference to a Judge’s credibility determinations. Directive ¶ E3.1.32.1. However, that deference is not without limits. It would be arbitrary and capricious to accept uncritically a witness’s testimony without considering whether it is plausible and consistent with other evidence. *See, e.g.*, ISCR Case No. 14-01894 at 6 (App. Bd. Aug. 18, 2015). Where the record contains a basis to question an applicant’s credibility the Judge should address that aspect of the record explicitly, explaining why he finds an applicant’s version of events to be worthy of belief. Failure to do so suggests that a Judge has merely substituted a favorable impression of the applicant’s demeanor for record evidence. *See, e.g.*, ISCR Case No. 14-04437 at 4-5 (App. Bd. Apr. 15, 2016).

In this case, the record contains reasons to question the extent to which Applicant’s presentation was worthy of belief, such as inconsistent statements. *See* ISCR Case No. 14-01056 at 3 (App. Bd. Aug. 17, 2015) regarding the significance of inconsistent statements in evaluating credibility. We note, for example, that Applicant attributed the earliest SOR allegation, an assault, to the conduct of his ex-wife. “The arrest . . . [was] due to my ex-wife at the time [she] called the police after an argument that did not result in any physical altercation.” Answer to SOR, dated October 21, 2015, at 1. At the hearing, however, he claimed to have no memory of this incident.

Q: Tell me what happened on that day? . . .

A: That was a long time ago to be honest . . .

Q: What is it that you remember?

A: To be honest with you I really don’t remember the situation at all . . .

Q: . . . [Y]ou don’t even remember who was involved with that incident . . .

A: No . . . I don’t. Tr. at 44.

The Judge did not address the apparent conflict between Applicant’s testimony and his SOR answer. Neither did he address another inconsistency. In the SOR Answer concerning the allegation of theft of electrical current, Applicant stated as follows: “I deny. I did not reside nor was anyone residing in the home in which the officer questioned me[.]” SOR Answer at 2. The most reasonable interpretation of this answer is that Applicant was charged for a theft of electrical power that took place at a location where his presence was purely fortuitous and that he was factually innocent. However, at the hearing, he admitted his guilt. “Yeah, I did do it. I put the meter in the house. I did it . . . I knew it was illegal. I did it.” Tr. at 82. While a Judge cannot be expected to address

every piece of evidence, which would be an impossibility, he should note evidence that a reasonable person would expect to be taken into account. In this case, Applicant's inconsistencies were not minor but, rather, were such that a reasonable review of the evidence should have disclosed them. Each applicant provides an answer to the SOR, and some, like Applicant, provide detailed comments. It is not unreasonable to expect that a Judge has considered an applicant's testimony in light of any prior comments and to have noted any obvious inconsistencies among them. The Judge's failure to have included a discussion of these inconsistencies among Applicant's various statements impairs his credibility determination and, accordingly, his favorable ultimate conclusions.

Another significant matter that undermines Applicant's credibility is his claims of innocence regarding the vast majority of the allegations. As stated above, Applicant testified that he did not commit the underlying misconduct regarding the assaults, including the assault and battery with intent to kill. At worst, he described mutual affrays, some of which he claimed to have been acting in self-defense. He also denied having committed the drug allegations, contending that he had been an innocent bystander on both occasions. His claims of innocence extended even to incidents in which he was found guilty at trial. The sheer number of these claims raises a serious question as to whether Applicant was being truthful in his denials, both in his Answer to the SOR and in his hearing testimony.

It is not impossible for a person to find himself at the wrong place at the wrong time, resulting in criminal liability. However, when a person asserts, without corroboration, that this is a regular and ongoing feature of his life, a Judge should rigorously scrutinize whether such assertions are credible. *See* ISCR Case No. 13-00596 at 5-6 (App. Bd. Jun. 26, 2015), a security clearance decision that is persuasive authority for the proposition that the multiple nature of criminal charges is a reason to doubt an applicant's claims of innocence. In the cited case, the applicant had been charged with numerous criminal offenses which he claimed that he had never committed. We noted a comment by a Hearing Office Judge that it was improbable for a person to be charged more than once based purely on accidental circumstances. "Such scepticism is even more warranted when the innocent explanations have multiplied to the extent present [here]." *Id.* In the case currently under review, the Judge should have extended similar scepticism to Applicant's testimony that he had not committed many of the offenses for which he was charged. That he did not do so fatally undermines his analysis. For example, the Judge concluded that Applicant had shown rehabilitation, particularly in regard to the drug offenses. However, if Applicant were in fact innocent to the extent that he claimed, it is not clear from what he has rehabilitated himself.

The Judge cited to evidence that many of the charges had been dismissed or *nolle prossed*. However, evidence that charges have been dismissed, in and of itself, is not a meaningful basis to conclude that the defendant did not commit the offenses, insofar as charges can be resolved without conviction for many reasons other than innocence. *See, e.g.*, ISCR Case No. 10-05039 at 3 (App. Bd. Oct. 17, 2011) for the proposition that dismissal of charges is not inconsistent with guilt. Under the facts of this case, the extensive and long-standing nature of Applicant's infractions diminishes the weight to which the dismissals were entitled on the question of factual guilt or innocence. Based on the above, we find persuasive Department Counsel's argument that the Judge's credibility determination did not take into account contrary evidence, thereby detracting from his favorable

findings and conclusions.⁶ This lends force Department Counsel's argument that the Judge substituted a favorable impression of Applicant's demeanor at the hearing for record evidence.

To sum up, Applicant was arrested and/ or charged with numerous offenses over a period of two decades. These included assault, one of which was charged as assault and battery with intent to kill. The most recent, in 2011, occurred at a time when Applicant held a CAC and, therefore, enjoyed access to Government installations. These assault allegations involved three different victims—Applicant's ex-wife, a girlfriend, and an unidentified man. Tr. at 48, 60. He was charged twice for crimes involving illegal drugs, including distribution of crack cocaine in the vicinity of a school. He was charged with contempt of court, one instant arising from his having failed to make child support payments. Applicant has spent time in jail, testifying that during one week he was jailed every single night due to allegations of assault. Tr. at 53. These incidents are reasons to believe that Applicant's presence on a Government installation poses a risk to persons or property.

Applicant's presentation included inconsistent statements and other reasons to doubt his credibility, such as denials of culpability that a reasonable person could find to be self-serving. This evidence undercuts Applicant's effort to show rehabilitation and significantly impairs his effort to show that the risks associated with his misconduct are acceptable. The Judge's decision failed to consider important aspects of the case and ran contrary to the weight of the evidence, viewed as a whole. Given the totality of the evidence, the Judge's conclusion that Applicant had met his burden of persuasion that he did not pose an unacceptable risk is unsustainable.

⁶Another reason to question the Judge's credibility determination is Applicant's claims of faulty memory. As noted above, despite having discussed the July 1991 assault in his SOR Answer, Applicant testified that he remembered nothing about it. At one point he testified that he did not remember whether any of the incidents with his ex-wife involved physical altercations. Tr. at 57. He also initially denied memory of the assault that took place in mid-2011. Tr. at 60-61. The Judge did not discuss whether these claims were worthy of belief or whether they actually detracted from Applicant's presentation.

Order

The Decision is **REVERSED**.

Signed: Michael Y. Ra'anan

Michael Y. 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