KEYWORD: CAC

DIGEST: The disposition of an arrest or a criminal charge in a manner that is favorable to an applicant, such as the dropping or dismissal of a charge, does not preclude a Judge from finding the applicant engaged in the underlying criminal conduct. In cases of this nature, the key issue is an applicant's criminal or dishonest conduct, not what actions law enforcement authorities may have taken regarding that conduct. Adverse decision affirmed.

CASENO: 16-01524.a1

DATE: 04/19/2018

DATE: April 19, 2018

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
Clarice Attaway Allen, 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 October 6, 2016, the Government amended the SOR by adding another allegation. On January 9, 2018, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Edward W. Loughran denied Applicant's request for CAC eligibility. Applicant appealed the decision pursuant to Instruction, Enclosure 4 ¶ 6.

Applicant raises the following issue on appeal: whether the Judge's adverse decision was arbitrary, capricious, or contrary to law. Consistent with the following, we affirm.

The Judge's Finding of Fact

Applicant, who is 47 years old, has worked for his current employer, a defense contractor, since 2014. He served in the military from 1991 to 1995 and received a general discharge under honorable conditions. He has been married and divorced twice. After his latest divorce in 2005, he continued to live with his ex-wife in a house that she was awarded in the divorce. He considered the ongoing relationship a common-law marriage that ended in 2013.

In 2002, Applicant was arrested for assault causing bodily injury on a family member. Applicant's second wife told a deputy that he pushed her onto a bed and held her down. He later shoved her out a door. She also told the deputy that he broke her nose in the past. Applicant claimed she initiated the incident and he called the sheriff's office after pushing her out the door. He admitted to breaking her nose in the past in self-defense. A few days after the incident, Applicant's second wife advised the investigator she wanted the matter dropped. The investigation was terminated without charges being filed against Applicant. At the hearing, Applicant testified that he broke his second wife's nose after she grabbed his wallet, and he punched her while they struggled over the wallet.

In 2007, Applicant was arrested and charged with criminal mischief. While walking in a crosswalk in a parking lot, a women bumped him with her car. She addressed him using foul language and drove off. He ran after her, slammed into her car, and kicked her car. He claimed the damage to her car was caused when she hit him. He paid the damages and the charges were dropped.

In 2009, Applicant was arrested and charged with felony offenses, *i.e.*, aggravated assault with a deadly weapon and obstruction or retaliation. His second wife told a deputy that he came home drunk, told her she had five seconds to get out or he was going to kick her out, slapped and hit her, and pulled her hair while holding her down. At some point, she reached for a knife, but he took it from her and hit her in the back of the head with its handle. As the deputy was taking him into custody, he told his wife, "*****, you had better be gone when I get out or they're going to

need a body bag." Decision at 3. He also told the deputy that he was going to batter his wife when he was released. The charges were later dismissed. At the hearing, Applicant testified his second wife was mentally unstable and he acted in self-defense.

In June 2014, Applicant was living with a woman and her children. Deputies were called to the house when the woman's pregnant daughter complained that Applicant pushed her in the stomach following an argument he had with her sister. The pregnant daughter, her fiancé, and her sister also told a deputy that Applicant choked the pregnant daughter and punched the fiancé about two or three months earlier. The pregnant daughter told the deputy that she did not want charges filed against Applicant, but wanted him to leave her alone. An incident report was generated, but no charges were filed. At the hearing, Applicant admitted to drinking during the June incident, claimed the two sisters assaulted him, and denied hitting the girl. He moved out of the house that night and ended his relationship with the family.

In 2017, Applicant completed an anger management program. His daughter stated that his second wife had to be institutionalized for a period. In 2017, a court expunged his arrests in 2002, 2007, 2009 as well as the report for the 2014 incident. He submitted numerous letter attesting to his excellent job performance and praising his character.

The Judge's Analysis

Applicant has never been convicted of any offenses. The incidents involving his interaction with law enforcement have been expunged from his record. He denied committing most of the underlying offenses. He attended an anger management program. However, the Judge noted that he did not find Applicant's testimony credible and found sufficient evidence supported the underlying offense without a conviction. In concluding that Applicant did not mitigate his well-established pattern of criminal conduct, the Judge also stated that he was not convinced that Applicant was rehabilitated and that additional criminal conduct is unlikely to recur.

Discussion

There is no presumption of error below, and the appealing party has the burden of raising claims of harmful error with specificity and demonstrating factual or legal error that warrants remand or reversal. DoD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Jan. 2, 1992, as amended) (Directive) ¶ E3.1.32. *See also* CAC Case No. 15-02333 at 3 (App. Bd. Mar. 22, 2017).[1] In this case, Applicant emphasizes that he has no criminal convictions, his criminal records have been expunged, and he has removed himself from contact with all persons

[1] Instruction, Enclosure 4 ¶ 6 provides that appeals to DOHA of CAC cases are accorded the established administrative procedures set out in the 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 revocations, our decisions interpreting and analyzing those procedures apply equally here for reviewing a judge's actions, rulings, findings, and conclusions in CAC cases. Decisions of the Appeal Board are available to the public at DOHA's website: http://www.dod.mil/dodgc/doha/.

involved in the alleged incidents. He argues that the alleged criminal concerns are mitigated because, among other matters, there has been a sufficient change in circumstances, he has attended an anger management program, and he has an unblemished work record.

The applicable Supplemental Adjudicative Standards for determining Applicant's eligibility for a CAC are set forth in Instruction, Enclosure 4, Appendix 2 ¶ 2, which provide:

> 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 poses an unacceptable risk.[2]
>
> a. An individual's conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about his or her reliability or trustworthiness and may put people, property, or information systems at risk. An individual's past criminal or dishonest conduct may put people, property, or information systems at risk.
>
> b. Therefore, conditions that may be disqualifying include:
>
> (1) A single serious crime or multiple lesser offenses which put the safety of people at risk or threaten the protection of property or information. . . .
>
> (2) Charges or admission of criminal conduct relating to the safety of people and proper protection of property or information systems, regardless of whether the person was formally charged, formally prosecuted, or convicted.
>
> * * *
>
> (5) Actions involving violence . . . that pose an unacceptable risk if access is granted to federally-controlled facilities and federally-controlled information systems. . . .

To the extent that Applicant is arguing that Judge erred in considering his expunged criminal record, we do not find that argument persuasive. It is well-settled that officers of the Federal Government are not bound by state law when carrying out their official duties unless there is a specific act of Congress that expressly indicates otherwise, and the Federal Government is not bound

[2] In a CAC adjudication, "the overriding factor . . . is unacceptable risk." Instruction, Enclosure 4 ¶ 1(b). "Unacceptable risk" is defined as "[a] threat to life, safety, or health of employees, contractors, vendors, or visitors; to the U.S. Government['s] physical assets or information systems; to personal property; to records, including classified, privileged, proprietary, financial, and medical records; or to the privacy rights established by The Privacy Act of 1974, as amended, or other law that is deemed unacceptable when making risk management determinations." Instruction, Glossary, Part II Definitions.

by state law concerning the expungement of state criminal records. *See, e.g.*, ISCR Case No. 03-22563 at 4 (App. Bd. Mar. 8, 2006).

To the extent that Applicant is arguing that a criminal conviction is required to establish criminal or dishonest conduct disqualifying conditions, we do not find that argument persuasive. The disposition of an arrest or a criminal charge in a manner that is favorable to an applicant, such as the dropping or dismissal of a charge, does not preclude a Judge from finding the applicant engaged in the underlying criminal conduct. *See* subparagraph 2.b., above. In cases of this nature, the key issue is an applicant's criminal or dishonest conduct, not what actions law enforcement authorities may have taken regarding that conduct.

Applicant's remaining arguments, such as there has been a sufficient change in his circumstances, amount to a disagreement with the Judge's weighing of the evidence. The presence of some mitigating evidence, however, does not alone compel the Judge to make a favorable CAC determination. As the trier of fact, the Judge has to weigh the evidence as a whole and decide whether the favorable evidence outweighs the unfavorable evidence, or *vice versa*. A party's disagreement with the Judge's weighing of the evidence, or an ability to argue for a different interpretation of the evidence, is not sufficient to demonstrate the Judge weighed the evidence or reached conclusions in a manner that is arbitrary, capricious, or contrary to law. *See, e.g.,* CAC Case No. 16-00427 at 3 (App. Bd. Aug. 11, 2017).

Applicant has not identified any harmful error likely to change the outcome of the case. The Judge examined the relevant evidence and articulated a satisfactory explanation for the decision. The decision is sustainable on this record.

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