



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



In the matter of:)
)
) CAC Case No. 23-01372
)
Applicant for CAC Eligibility)

Appearances

For Government: Mark Lawton, Esq., Department Counsel
For Applicant: *Pro se*

07/12/2024

Decision

HYAMS, Ross D., Administrative Judge:

Applicant mitigated the credentialing concerns raised under the criminal or dishonest conduct supplemental adjudicative standards. Common Access Card (CAC) eligibility is granted.

Statement of the Case

On September 13, 2023, the Department of Defense (DOD) issued a Statement of Reasons (SOR) to Applicant detailing credentialing concerns for CAC eligibility pursuant to Homeland Security Presidential Directive - 12 (HSPD-12). DOD was unable to find that granting Applicant CAC eligibility did not pose an unacceptable risk. The action is based on the Adjudicative Standards found in DOD Instruction (DODI) 5200.46, *DOD Investigative and Adjudicative Guidance for Issuing the CAC*, dated September 9, 2014; and 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 5220.46 are for criminal or dishonest conduct.

Applicant answered the SOR on October 5, 2023, and requested a hearing before an administrative judge from the Defense Office of Hearings and Appeals. The

hearing convened on April 9, 2024. Department Counsel submitted Government Exhibits (GE) 1-6, which were admitted in evidence without objection. Applicant did not submit any documentation at the hearing. I held the record open for two weeks after the hearing to provide Applicant with the opportunity to submit additional documentary evidence. He timely submitted Applicant Exhibits (AE) A-D, which were admitted in evidence without objection.

Amendment to the SOR

At the start of the hearing, the Government moved to amend SOR ¶ 1.b by changing the date in the allegation from May 23 to May 3. The motion to amend the SOR was granted without objection. (Tr. 9-10; HE 1)

Findings of Fact

In his answer, Applicant denied all the SOR allegations. Based on my review of the pleadings, evidence submitted, and testimony, I make the following findings of fact.

Applicant is 38 years old. He married in 2014 and divorced in February 2023. He has three minor children. He earned an associate degree in 2012, and a bachelor's degree in 2015. He served on active duty in the U.S. Army from 2005-2010 and received an honorable discharge. During his service, he was deployed for 15 months to Africa. He has worked for a defense contractor as a water quality specialist since 2021. Since 2021, he has possessed a CAC and worked on a military base. (Tr. 16-19; GE 1)

The SOR alleges the following criminal or dishonest conduct credentialing concerns:

SOR ¶ 1.a alleged in July 2021 Applicant was arrested and charged with simple assault family violence, cruelty to children 3rd degree (3 counts), and willful obstruction of law enforcement.

SOR ¶ 1.b alleged in May 2023 Applicant was indicted for the charges of: one count of aggravated battery – family violence; one count of aggravated assault; three counts of battery, family violence; two counts of simple battery, family violence; one count of simple assault, family violence; and one count obstruction of an officer. The charges are still pending.

SOR ¶ 1.c alleged that Applicant falsified material facts on his Declaration for Federal Employment regarding his July 2021 arrest, by stating that the arrest was made during a verbal (non-contact) argument with his wife in front of their children. The charges allege that Applicant grabbed and dragged his wife by her sweater and threw rocks at her on the day he was arrested.

Applicant met his ex-wife in 2007, and they knew each other for about five years before dating. They moved together several times for education and work opportunities, and deliberately started a family. When the COVID-19 Pandemic started in 2020, he

worked from home and his wife homeschooled their children. He reported that being home together with the children every day was tough, and eventually she wanted to divorce. He reported that they lived in a rural area, and marriage counseling was not available to them. (Tr. 20-54)

On a Saturday in July 2021, Applicant's wife went to lunch with a neighbor and left him home with the children. He was mowing the lawn and drinking beer, and he reported that she had consumed alcohol while at lunch. He stated after she returned, they had an argument. After the argument, she took one of their children and walked up the road to cool down, which he claimed was her usual behavior after an argument. (Tr. 20-54; GE 4)

Applicant asserted that this was a non-contact argument. The police report alleged that he grabbed her, dragged her outside, threw her belongings on the floor, and threw rocks at her. He claimed that these were false allegations. (Tr. 20-54; GE 4)

After his wife left their home, she reported him to police. The police report stated that she claimed to be in fear for her life. The police arrived at Applicant's home before dark, and he declined to voluntarily speak with them. He claimed his children were napping, and he did not want to leave them unsupervised. He told them that unless they had an arrest warrant, he declined to interact with them, which was within his right to do so. (Tr. 20-54; GE 4)

During his first interaction with police, Applicant was told his wife was at the liquor store. He called that business to speak with her and find out what was going on, but she refused to speak with him. Eventually the police returned with an arrest warrant, and he spent several days in jail. While in jail, his wife took the children and moved them to a state in another part of the country, where her family resides. He asserted that she used the false allegations to allow her the leverage to leave the marriage, get full custody of the children, and move to a location where he would not agree for the children to go. (Tr. 20-54)

Applicant has not had contact with his ex-wife since the arrest. They divorced in 2023. While the criminal case is ongoing, her parents serve as their liaison for communications. Although the arrest occurred in July 2021, he was not indicted until May 2023. There have been no further criminal proceedings to date. (Tr. 20-54; GE 3; 5)

Applicant stated that his ex-wife made other claims of abuse in their divorce proceedings, including: he hit her with a broom; punched her face; broke a rib; and that he constantly abused her. He stated these were false allegations. There is no evidence of other instances of police involvement in their relationship prior to his arrest. He claimed her motivation for making these allegations was to get full custody of the children in the divorce and to continue to live near her parents in another state. (Tr. 20-54)

When Applicant completed paperwork for his position, he received assistance from a security specialist on base who filled out the Declaration for Federal Employment form and typed in a brief synopsis of the incident he reported relating to the arrest. (Tr. 20-54; GE 2)

After his arrest, Applicant started seeing a therapist, and has been seeing him for over three years. He reported that they worked on feelings of depression from his divorce and not seeing his children, changing thinking patterns, controlling stress and reacting to stress. In a letter, Applicant's counselor stated that he has been open and cooperative, he is perusing personal growth, and his life stressors have been temporary. He also stated that Applicant is trustworthy and fit to perform his professional duties. Applicant has not had other arrests, and there have been no incidents at work. (Tr. 20-54; GE 6; AE B)

After Applicant's arrest, he attended a state intervention alternatives program for domestic violence and completed 24 classes in 2021. In 2023, he participated in online group sessions which discussed strategies for stopping violence and abuse in relationships. A January 2024 letter reported that he had completed 14 group sessions and a four-hour online course, and his participation is ongoing. (AE C, D)

Applicant pays about \$1,000 monthly in child support and has not missed a payment. He has regular contact with his children in video-calls. Applicant submitted two character letters. The first states that Applicant has been forthcoming and honest with his employer about the incident, that his job performance and conduct are good, and he poses no risk to people, property, or information systems. The second states that he is a good employee and is reliable and trustworthy. (GE 6; AE A)

Policies

Every CAC eligibility decision must be a fair and impartial overall commonsense decision based on all available evidence, both favorable and unfavorable. The specific issues raised 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 conditions is unacceptable risk.

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 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, ¶ 1) Therefore,

any doubt concerning personnel being considered for CAC eligibility should be resolved in favor of the national interest.

Analysis

Criminal or Dishonest Conduct

DODI 5200.46, Appendix 2 to Enclosure 4, Supplemental Adjudicative Standards, ¶ 2 provides:

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.

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.

DODI 5200.46, Appendix 2 to Enclosure 4, Supplemental Adjudicative Standards, ¶ 2.b lists several conditions that could raise a CAC eligibility concern and may be disqualifying. The following are potentially applicable in this case:

(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 or sexual behavior of a criminal nature that poses an unacceptable risk if access is granted to federally-controlled facilities and federally-controlled information systems..; and

(7) Deliberate omission, concealment, or falsification of relevant facts or deliberately providing false or misleading information to an employer, investigator, security official, competent medical authority, or other official U.S. Government representative, particularly when doing so results in personal benefit or which results in a risk to the safety of people and proper safeguarding of property and information systems.

The Government presented sufficient evidence to establish the credentialing concerns in ¶¶ 2.b(1), (2), (5), and (7),

DODI 5200.46, Appendix 2 to Enclosure 4, Supplemental Adjudicative Standards, ¶ 2.c lists circumstances relevant to the determination whether there is a reasonable basis to believe there is an unacceptable risk. The following may be relevant:

- (1) The behavior happened so long ago, was minor in nature, or happened under such unusual circumstances that it is unlikely to recur;
- (2) Charges were dismissed or evidence was provided that the person did not commit the offense and details and reasons support his or her innocence; and
- (4) Evidence has been supplied of successful rehabilitation, including but not limited to remorse or restitution, job training or higher education, good employment record, constructive community involvement, or passage of time without recurrence.

¶¶ 2.c (1) and (4) apply. The incident for which Applicant was arrested in July 2021, is mitigated by time, and it happened under unusual circumstances that are unlikely to recur. He provided evidence that he has been consistently involved in counseling, taking rehabilitative training and education, maintained a good employment record, and established a track record of good behavior without recurrence of criminal involvement.

Applicant's marriage was strained during an unusual amount of close-quarter living and interaction during the COVID-19 Pandemic. He reported that his wife wanted to divorce prior to the argument that led to his arrest. Applicant admits there was a verbal argument but denies he assaulted her. Three year later, this case has not been brought to trial. His ex-wife used the arrest to move far away with their children during a time when he could not contact her or act to contest removing them from their home state. She made other claims in the divorce to assist her in retaining custody of the children. They had a long relationship, and there was no evidence of a pattern of police involvement or arrests stemming from conflict in the marriage. Similarly, no evidence was presented that Applicant has a criminal record or was involved in other violent conflicts or arguments with other persons. Applicant is remorseful for what happened, and the loss of his marriage and custody of his children. He has taken significant action to better himself and maintain contact with his children.

Applicant stated that the base security specialist typed the synopsis statement regarding his July 2021 arrest into his Declaration for Federal Employment. This statement reports the incident in a way that is consistent with his assertion that this was a non-contact argument with his wife. Without further adjudication, the allegations are a "he said, she said" situation, and I cannot find that he falsified his Declaration for Federal Employment.

There is sufficient evidence to find that Applicant's alleged conduct is mitigated, and he does not pose an unacceptable risk. The criminal and dishonest conduct credentialing concerns are mitigated.

Formal Findings

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

Paragraph 1, Criminal or Dishonest Conduct: FOR APPLICANT

Subparagraphs 1.a-1.c: For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, granting Applicant CAC eligibility does not pose an unacceptable risk. CAC eligibility is granted.

Ross D. Hyams
Administrative Judge