



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



In the matter of: )  
)  
) CAC Case No. 16-01524  
)  
Applicant for CAC Eligibility )

**Appearances**

For Government: Bryan J. Olmos, Esq., Department Counsel  
For Applicant: Clarice Attaway Allen, Esq.

01/09/2018

**Decision**

LOUGHRAN, Edward W., Administrative Judge:

Applicant did not mitigate Common Access Card (CAC) credentialing concerns raised under the criminal or dishonest conduct supplemental adjudicative standards. CAC eligibility is denied.

**Statement of the Case**

On May 16, 2016, the Department of Defense (DOD) issued a Statement of Reasons (SOR) to Applicant detailing credentialing concerns for CAC eligibility under the adjudicative standards of criminal or dishonest conduct. Applicant responded to the SOR on August 5, 2016, and requested a hearing before an administrative judge. The Government amended the SOR on October 6, 2016, by adding another allegation. Applicant responded to the additional allegation on October 14, 2016.

The case was originally assigned to me on December 1, 2016. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on December 20, 2016, scheduling the hearing for January 26, 2017. A continuance was granted at Applicant's request. The case was reassigned to me on May 10, 2017. DOHA issued another notice of hearing on May 16, 2017, scheduling the hearing for June 27, 2017. The hearing was convened as scheduled.

Government Exhibits (GE) 1 through 5 were admitted in evidence without objection. Applicant testified and submitted Applicant's Exhibits (AE) A through F, which were admitted without objection. The record was held open for Applicant to submit additional information. The deadline was extended several times at Applicant's request. He submitted documents that I have marked AE G and H and admitted without objection. DOHA received the hearing transcript (Tr.) on July 7, 2017.

### **Findings of Fact**

Applicant is a 47-year-old employee of a defense contractor. He has worked for his current employer since August 2014. He served on active duty in the U.S. military from 1991 until he received a general under honorable conditions discharge in 1995. He is a high school graduate. He is twice married and divorced. He married his second wife in 2001, and they divorced in 2005. They continued to live together in the house that was awarded to her in the divorce decree. He considered it a common-law marriage that ended in 2013. He has a daughter from his first marriage.<sup>1</sup>

Applicant's criminal history includes four incidents. He was arrested in 2002 for assault causing bodily injury on a family member. Applicant's second wife told the deputy that Applicant pushed her onto a bed and held her down. She kicked him off and went to the door where Applicant shoved her out the door from behind. She told the deputy that she was afraid because Applicant broke her nose in the past. The deputy noted that she had scratches on her leg. Applicant told the deputy that she initiated the incident, threw things, and kicked at him. He grabbed her, pushed her out the door, and locked it. Applicant then called the sheriff's office. Applicant admitted that he broke her nose in the past, but did so in self-defense.<sup>2</sup>

Applicant's second wife contacted the investigator a few days after the incident and stated that she wanted to drop the charges against Applicant. After conferring with the county attorney, the investigation was dropped without charges being filed against Applicant.<sup>3</sup>

Applicant's testimony about the incident was consistent with what he told the deputy. He testified that he broke his second wife's nose after she grabbed his wallet. They were struggling over the wallet when he punched her, breaking her nose.<sup>4</sup>

The second incident occurred in 2007 when Applicant was arrested and charged with criminal mischief. Applicant testified that he was walking in the crosswalk of a

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<sup>1</sup> Tr. at 19-20, 22, 26-27, 46, 50-51, 70-71; GE 1, 2; AE C.

<sup>2</sup> Tr. at 20-21; Applicant's response to SOR GE 3-5; AE H. The broken-nose incident was not specifically alleged in the SOR. Any matter that was not alleged in the SOR will not be used for disqualification purposes. It may be considered in assessing Applicant's credibility, in the application of mitigating conditions, and in the whole-person analysis.

<sup>3</sup> Tr. at 21-22; Applicant's response to SOR; GE 3-5; AE H.

<sup>4</sup> Tr. at 51-54.

department store parking lot when a woman bumped him with her car. She called him a \*\*\*\*ing moron and drove off. He ran after her; she stopped suddenly; and he slammed into her car. He got angry and kicked the car. He stated that he believed the damage to her car was from when she hit him. He paid the damages, and the charge was dismissed.<sup>5</sup>

The third incident occurred in 2009 when Applicant was arrested and charged with the felony offenses of aggravated assault with a deadly weapon and obstruction or retaliation. His second wife told the deputy that Applicant came home drunk at about 11:00 p.m. He told her that she had five seconds to get out or he was going to kick her out. He then slapped and hit her. He pulled her hair while holding her down on the floor. She reached for a Bowie knife to hit him. He took the knife off her and hit her with the handle of the knife in the back of the head. While the deputy was placing him in custody Applicant said to his wife: “\*\*\*\*”, you had better be gone when I get out or they’re going to need a body bag.” The deputy further reported that while Applicant was being transported to jail, he stated that he was going to kick his wife’s \*\*\* when he was released from jail. The charges were dismissed about four months later.<sup>6</sup>

Applicant testified that his second wife was mentally unstable. She was jealous and did not take her medication. He described the incident as “she assaulted [him] with a knife, and [he] injured her when [he] took it away from her.” He also stated that she initiated the incident by hitting him. He stated that he hit her with his fist about three or four times as she came at him with the knife. He stated the butt of the knife hit the back of her head when he yanked it out of her hand. He admitted that he made the comments about the body bag and that he was going to kick her \*\*\* when he was released from jail.<sup>7</sup>

The fourth incident occurred in June 2014. Applicant was living with a woman and her children. The deputies were called to the house by the woman’s pregnant daughter who complained that Applicant pushed her in the stomach after an argument between Applicant and her sister. The daughter stated that she went to her room, but Applicant followed her. She told him that he could not enter the room, but he attempted to walk through her to the room. She pushed him slightly, and he shoved her in the stomach with both hands. The second daughter provided a similar statement. The deputy noticed slight redness on the pregnant daughter’s stomach.<sup>8</sup>

The pregnant daughter, her fiancé, and her sister told the deputy that about two to three months before the June 2014 incident, Applicant slapped and choked the pregnant daughter and punched her fiancé in the face. She told the deputy that she did not want to file criminal charges against Applicant; she only wanted him to leave her

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<sup>5</sup> Tr. at 22-25; GE 4, 5; Applicant’s response to SOR; AE A, H.

<sup>6</sup> Tr. at 22, 25-26, 37; GE 3-5; Applicant’s response to SOR; AE B, H.

<sup>7</sup> Tr. at 19-20, 25-32, 55-59.

<sup>8</sup> Tr. at 33-36; GE 3; AE H.

alone. An incident report was generated for assault by contact and assault causing bodily injury-impeding breathing or circulation, but no charges were filed.<sup>9</sup>

Applicant stated that he was living with the woman as a roommate and that they were not cohabitating. He admitted drinking during the June 2014 incident. He testified that he was assaulted by the two girls, and they jumped in front of him so that he could not pass. He denied hitting the girl during this incident. He stated that he was not arrested or charged. He moved out of the house that night and ended his relationship with the family.<sup>10</sup>

Applicant stated the incident with the two daughters and the fiancé happened after one daughter and her mother were arguing. Applicant asked her why she acted that way. The daughter told him it was none of his \*\*\*\* business. He told the daughter that if she talked to him like that he would slap her. She then “hit [him] with closed fists, and [he] hit her with [an] open hand.” He had her in a headlock, when her mother and fiancé jumped on him. The fiancé had Applicant in a choke hold, and Applicant started choking the daughter to stop her from hitting him in the private area. When the fiancé let go of the choke hold, Applicant hit him.<sup>11</sup>

Applicant completed an anger-management program in March 2017. His daughter stated that Applicant’s second wife was jealous, angry, and had to be institutionalized for a period. Applicant’s arrests in 2002, 2007, and 2009, and his 2014 incident report were expunged by the district court on December 15, 2017.<sup>12</sup>

Applicant submitted numerous letters attesting to his excellent job performance. He is praised for his trustworthiness, dependability, work ethic, dedication, patriotism, and honesty.<sup>13</sup>

## Policies

This case is adjudicated under Homeland Security Presidential Directive – 12 (HSPD-12); 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).

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

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<sup>9</sup> GE 3; AE H.

<sup>10</sup> Tr. at 33-38, 60-61, 64-69.

<sup>11</sup> Tr. at 61-64.

<sup>12</sup> Tr. at 38-39; AE D-H.

<sup>13</sup> AE F.

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)

## **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. A person’s convictions for burglary may indicate that granting a CAC poses an unacceptable risk to the U.S. Government’s physical assets and to employees’ personal property on a U.S. Government facility;

(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; and

(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. For example, convictions for sexual assault may indicate that granting a CAC poses an unacceptable risk to the life and safety of persons on U.S. Government facilities.

Applicant's criminal history as reflected by the incidents in 2002, 2007, 2009, and 2014 is sufficient to establish the above disqualifying conditions.

DODI 5200.46, Appendix 2 to Enclosure 4, Supplemental Adjudicative Standards, ¶ 2.c lists circumstances relevant to the determination of 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.

Applicant was never convicted of any of the offenses. His arrests in 2002, 2007, and 2009, and the 2014 incident report were expunged by the district court on December 15, 2017. He denied committing most of the underlying offenses, stating his second wife was angry, jealous, and mentally unstable; the alleged victims were untruthful; he acted in self-defense; or he was provoked. He attended anger management.

I did not find Applicant's testimony credible. The common denominator in the incidents is not Applicant's second wife; there were other victims and witnesses. The common denominator is Applicant and his anger. I find sufficient evidence that he committed the underlying offenses even without a conviction. I am not convinced Applicant is rehabilitated or that additional criminal conduct is unlikely to recur.

Applicant has not mitigated his well-established pattern of criminal conduct. I am unable to determine that criminal behavior is unlikely to recur. Applicant has not convinced me that he does not pose an unacceptable risk. I also considered the factors in DODI 5200.46, Enclosure 4, ¶ 1.

## **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: Against Applicant

Subparagraphs 1.a-1.d: Against Applicant

## **Conclusion**

In light of all of the circumstances presented by the record in this case, granting Applicant CAC eligibility poses an unacceptable risk. CAC eligibility is denied.

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Edward W. Loughran  
Administrative Judge