

CHAPTER FIVE

CRIMINAL PROCEDURE

DOHA cases where the employee is accused of criminal conduct, or where a past criminal arrest or conviction is at issue, require conversance with a broad range of sophisticated criminal procedure issues.

The most important concept when dealing with the proposed revocation of a security clearance based on criminal conduct is that the conduct remains at issue regardless of how the justice system handled it. In ISCR Case No. 00-0713 (App. Bd. February 15, 2002), *citing* ISCR Case No. 99-0382 (App. Bd. May 3, 2000), at 4; ISCR Case No. 95-0818 (App. Bd. January 31, 1997), at 4, the Board noted, “[t]he government can allege and prove that an applicant has engaged in criminal conduct even if the applicant has not been formally charged with a criminal offense by the relevant criminal justice authorities.”

This is similar to how federal employees are treated. In the federal employment context, when an employee engages in conduct that may form the basis for a criminal charge, the government may take adverse action against that employee for his or her conduct, without regard to whether the criminal charges result in a conviction. The misconduct charge may be sustained, notwithstanding the dismissal of the criminal charges. *Borrego v. DHS*, 107 LRP 60061, 2007 MSPB LEXIS 5540 (September 6, 2007), *citing* *Larry v. Dept. of Justice*, 76 MSPR 348 (1997); *see* *Brown v. Dept. of Justice*, 715 F.2d 662, 669 (D.C. Cir. 1983).

The Board has examined and analyzed many issues concerning the effect of all aspects of the criminal process, from the arrest, charge, trial, conviction, exoneration and plea, through rehabilitation and probation.

I. FEDERAL RULES OF CRIMINAL PROCEDURE

DOHA uses the Federal Rules of Civil Procedure as a guide, but it does not ever refer to the Federal Rules of Criminal Procedure. ISCR Case No. 96-0525 (App. Bd. June 17, 1997), at 3.

II. ADMISSIONS

Admissions come into play when the applicant has made a statement to the investigator, has responded to DOHA’s interrogatories, or has responded to the SOR. The Board has noted that a judge cannot simply ignore an applicant’s admissions. ISCR Case No. 94-1109 (January 31, 1996), at 5. Furthermore, an admission in an SOR is a form of judicial admission that has more binding effect on the applicant than nonjudicial admissions made by the applicant. *See* ISCR Case No. 95-0622 (App. Bd. April 18, 1997), at 4 (“Unlike an evidentiary admission, such a judicial admission is conclusive and binding on Applicant.”).

III. ARREST

The fact that an applicant was arrested, charged, or cited for a criminal offense does not, in itself, establish guilt. ISCR Case No. 93-0369 (App. Bd. October 26, 1994), at 4. Instead, DOHA looks to whether the underlying conduct has been proven. *Id.*

IV. COLLATERAL ESTOPPEL IN LIGHT OF PLEA OR CONVICTION

A claim of collateral estoppel typically arises when an applicant who has been convicted of a crime seeks to testify that he or she did not in fact commit the crime. The Board has held that an applicant is collaterally estopped from denying he or she engaged in conduct that underlies a felony criminal conviction, regardless of whether the conviction is based on a guilty plea or not. ISCR Case No. 02-03248 (App. Bd. April 27, 2005), *citing* ISCR Case No. 99-0116 (May 1, 2000), at 2.

Although many “criminal conduct” cases involve conduct that did not result in any police or court proceedings, many others require an understanding as to how DOHA treats a previous conviction or plea. DOHA applies the general rule that

an applicant convicted of a criminal offense is precluded from denying his guilt in subsequent civil proceedings. ISCR Case No. 99-0116 (App. Bd. May 1, 2000), at 2; ISCR Case No. (App. Bd. June 17, 1997), at 4; ISCR Case No. 94-1213 (App. Bd. June 7, 1996), at 3; ISCR Case No. 94-1213 (App. Bd. June 7, 1996), at 3. It is based upon the premise that an individual's right to administrative due process does not give him or her the right to litigate again matters properly adjudicated in an earlier proceeding. An AJ may not engage in a *de novo* review of an applicant's guilt or innocence of a criminal charge that led to the applicant's conviction in a criminal court. ISCR Case No. 99-0116 (App. Bd. May 1, 2000), at 2.

In ISCR Case No. 96-0525 (App. Bd. June 17, 1997), the Board summarized its position:

It is well-settled that the doctrine of collateral estoppel applies in industrial security proceedings and precludes applicants from contending they did not engage in the criminal acts for which they were convicted. See ISCR Case No. 96-0587 (March 24, 1997) at pp. 2-3; ISCR Case No. 95-0817 (February 21, 1997) at p. 3; ISCR Case No. 94-1213 (June 7, 1996) at pp. 3-4; DISCR Case No. 92-1283 (App. Bd. August 26, 1993) at p. 3; DISCR Case No. 88-2271 (App. Bd. October 18, 1991) at pp. 5-6; DISCR Case No. 88-2903 (App. Bd. February 13, 1990) at pp. 3-4. Due process of law does not give a person the right to relitigate matters that have been adjudicated in a prior due process proceeding. See, e.g., *Montana v. United States*, 440 U.S. 147, 153-54 (1979); *Chisholm v. Defense Logistics Agency*, 656 F.2d 42, 46 (3rd Cir. 1981). Accordingly, unless a recognized exception to the collateral estoppel doctrine is applicable, it is arbitrary, capricious, and contrary to law for an Administrative Judge to permit an applicant to relitigate the issue of guilt or innocence of a crime for which the applicant was convicted. [Citations omitted.]

If charges are still pending, collateral estoppel does not apply. ISCR Case No. 04-06152 (Initial Decision June 9, 2008), citing *Coffey v. Dean Witter Reynolds, Inc.*, 961 F. 2d 922 (10th Cir. 1992). But collateral estoppel does apply where the conviction is pending on appeal at the time of the security adjudication. ISCR Case No. 96-0587 (ID December 2, 1996; App. Bd. March 24, 1997), at n.2, citing *Rice v. Dept. Of Treasury*, 998 F.2d 997, 999 (Fed. Cir. 1993). In ISCR Case No. 96-0578 (January 14, 1997), the applicant was convicted of sexual misconduct with a minor boy. The judge held that he was not estopped from denying his guilt. She ruled against the employee on the sexual behavior and criminal conduct criteria because she determined he had committed the alleged acts, as demonstrated by his conviction. The Board sustained the adverse determination, and noted that it was error for the AJ to have permitted the applicant to introduce exculpatory evidence.

The Board has generally held that the doctrine of collateral estoppel applies in DOHA proceedings. In addition, if the applicant has been convicted of the accused criminal acts, he or she cannot argue their innocence in the matter. ISCR Case No. 95-0817 (App. Bd. February 21, 1997), at 2-3. The concept is based upon the premise that an individual's right to administrative due process does not give him or her the right to litigate matters a second time that were properly adjudicated in an earlier proceeding. An exception to the general principle exists where the conviction involved a guilty plea to a misdemeanor offense. ISCR Case No. 94-1213 (App. Bd. June 7, 1996), at 3 (citing *Otherson v. Dept. of Justice*, 711 F.2d 267 (D.C. Cir. 1983)).

In ISCR Case No. 94-1213 (App. Bd. January 16, 1996, Remand Decision February 21, 1996, App. Bd. June 7, 1996), DOHA ruled that when a defendant enters a guilty plea, he or she is admitting all the elements of the accused offense. The applicant in the case asked a friend for a joint of marijuana to smoke before a motorcycle race. Instead of giving the applicant just one joint, the friend placed an entire brown bag of marijuana on the applicant's motorcycle. The applicant took the bag and placed it in his van. He was then arrested in a sting operation. The applicant also had misdemeanor arrests 20, 16, eight, and seven years previously. Two of the arrests resulted in convictions (for disorderly conduct and writing a worthless check).

The applicant pled guilty to violation of 21 USC 841(a)(1), possession of marijuana with intent to distribute, a felony. After his arrest and guilty plea, the applicant was placed on five years probation and required to participate in an eight-month drug abuse program. He actively participated in this program, had 22 negative urinalysis samples, and became involved in Narcotics Anonymous. His discharge summary rated his prognosis as "good."

Even though the applicant pled guilty to possession with intent to distribute, the AJ considered his testimony as to why he agreed to a guilty plea. The applicant stated that he pled guilty because he had no defense to the charge of possession, but that he had no intent to sell any of the marijuana and that he simply made a pragmatic decision to plead guilty. The judge took the applicant's mitigating circumstances into account, and entered a favorable finding on the criminal conduct criterion.

On appeal, the Board reversed the judge's finding on the effect of the guilty plea. It held that the applicant was bound by his admissions to the conduct. It reasoned that if the applicant wanted to enter a plea without admitting the underlying conduct, he could have entered a *nolo contendere* plea. Where the applicant gained the benefit of the plea bargain in court, it would be inequitable for him to retain that benefit and then seek to repudiate his guilty plea and its legal effect in another federal forum. In so doing, the Board offered a list of circumstances that would allow an applicant to avoid the collateral estoppel effect of a criminal conviction, ISCR Case No. 94-1213 (App. Bd. June 7, 1996), at 3:

- The conviction was constitutionally infirm, *U.S. v Broce*, 488 U.S. at 574-576.
- The conviction was reversed on appeal. DISCR Case No. 88-0060 (January 25, 1989), at 4.
- The conviction was based on a *nolo contendere* plea. ISCR Case No. 88-2116 (October 13, 1989) at 4-5. Fed. R. Crim. P. 11(e)(6)(B).
- The conviction involved a guilty plea to a misdemeanor offense. *Otherson v. U.S. Dept. of Justice, supra*, 711 F.2d at 276.
- The conviction is being used collaterally to estop a person concerning a matter not legally determined by the conviction. *Otherson*, 711 F.2d at 273.

Applying those rules to the facts, DOHA noted that applicant's guilty plea in federal court established his intent to distribute the marijuana in his possession. It noted that a federal district court cannot accept a guilty plea from a defendant without elaborate procedural protections, and it cannot enter a judgment of conviction on such a plea without making a determination that there is a factual basis for the plea. *Id.*, citing Fed. R. Crim. P. 11; *U.S. v. Broce*, 488 U.S. 563, 570 (1989) ("[A] guilty plea is more than a confession that admits that the accused did various acts. It is an admission that he committed the crime charged against him."); *McCarthy v. U.S.*, 394 U.S. 459, 466 (1969) (guilty plea is an admission of all the elements of criminal charge); ISCR Case No. 94-1213 App. Bd. and Reversal Order, at 3-4.

Significantly, when an applicant has pled guilty to an offense, it is that offense only that he is collaterally estopped from denying. In ISCR Case No. 93-0369 (App. Bd. March 22, 1995), the applicant was accused of sexually molesting his wife's minor daughters. He was charged with taking indecent liberties with a child, a felony, but pled to a lesser offense, child abuse, defined as creating a risk of physical injury to a child by other than accidental means. Notably, the offense he pled guilty to was not a sexual offense. Before DOHA, the applicant was charged with sexual misconduct, although he denied the claim.

The judge had to determine whether sexual misconduct occurred. He found that the crime the applicant pled guilty to involved sexual misconduct. On October 26, 1994, the Board found error, stating in its order for remand in ISCR Case No. 93-0369, at 3-4:

At most, Applicant's guilty plea is evidence that he engaged in misconduct covered by the statute to which he pleaded guilty. Regardless of the statute Applicant was initially charged with violating, his guilty plea only covers the statute to which he pleaded guilty. As a matter of law, a guilty plea has no probative value with respect to any crime not covered by the guilty plea.

....

Applicant's guilty plea to a statute that, on its face, does not refer to sexual misconduct with a minor, is not proof that he engaged in such sexual misconduct... (C)ourts in the state in question have construed that statute as not being a lesser included offense of other criminal statutes.

V. STATE COURT PROCEEDINGS

DOHA takes the position that compliance with state law is not required because security clearance adjudications are conducted by the DOD pursuant to federal law. ISCR Case No. 00-0423 (App. Bd. June 8, 2001), at 3, citing *US Constitution, Art. VI, Cl. 2 (Supremacy Clause)*.

In 2006, the Board addressed whether a federal administrative agency, like DOHA, must apply the law of the state where the conviction occurred when determining whether to apply collateral estoppel to a state conviction. ISCR Case No.

04-05712 (App. Bd. February 8, 2006). The case involved a 58-year-old man who was charged with a felony, lewd act on a minor. The charge was based on his wife's complaint that he had engaged in inappropriate sexual touching of her daughter (his stepdaughter) over a five-year period. The charge was later reduced to a misdemeanor, simple assault and battery; the applicant pled guilty to the charge and paid a fine. At his hearing, applicant sought to introduce documents and testimony intended to demonstrate that he was not guilty of the crime to which he pled guilty. The AJ did not accept the evidence or allow the witnesses to testify, and in his decision, ruled against the applicant.

On appeal, the issue was whether, when the applicant was convicted in state court, DOHA must apply the law of the state where the conviction occurred. The Board concluded that it did not. It noted that 28 USC § 1738 required federal courts to give preclusive effect to state-court judgments whenever the courts of the state where the judgments emerged would do so, citing *Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373, 380 (1985) (reversing and remanding because federal court did not first apply state law on preclusive effect of judgment); *Haring v. Prosise*, 462 U.S. 306, 313 (1983). It observed that numerous federal circuit courts have held that notwithstanding the applicability of 28 USC § 1738 to federal courts, its language does not apply to federal executive branch agencies. *Taylor v. Sawyer*, 284 F.3d 1143, 1152 (9th Cir. 2002); *Arapahoe County Public Airport Authority v. Federal Aviation Administration*, 242 F.3d 1213 (10th Cir. 2001); *American Airlines, Inc. et al. v. Dept. of Transp.*, 202 F.3d 788 (5th Cir. 2000) ("The plain language of this section establishes that it does not apply here: § 1738 applies only to "every court within the United States," and the Department of Transportation is an agency, not a court.") (emphasis supplied); *NLRB v. Yellow Freight Systems Inc.*, 930 F.2d 316 (3rd Cir. 1991).

The Board in ISCR Case No. 04-05712¹ then determined that it would abide by the three-part test articulated by federal law:

First, the party against whom the earlier decision is asserted must have been afforded a "full and fair opportunity" to litigate that issue in the earlier case. *Haring v. Prosise*, 462 U.S. at 313; *Allen v. McCurry*, 449 U.S. 90, 95 (1980). Second, the issues presented for collateral estoppel must be the same as those resolved against the opposing party in the first trial. *Montana v. United States*, 440 U.S. 147, 155 (1979). Collateral estoppel extends only to questions "distinctly put in issue and directly determined" in the criminal prosecution. *Frank v. Mangum*, 237 U.S. 309, 334 (1915). Third, the application of collateral estoppel in the second hearing must not result in unfairness. *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 330 (1979) (detailing circumstances where allowing the use of collateral estoppel would result in unfairness); *Montana v. United States*, 440 U.S. at 155 (court should consider whether other special circumstances warrant an exception to the normal rules of preclusion). Federal courts decline to apply collateral estoppel where the circumstances indicate a lack of incentive to litigate the original matter. "Preclusion is sometimes unfair if the party to be bound lacked an incentive to litigate the first trial, especially in comparison to the stakes of the second trial." *Otherson v. U.S. Dept. of Justice*, 711 F.2d at 273. The arguments for not giving preclusive effect to misdemeanor convictions are that an individual may not have the incentive to fully litigate a misdemeanor offense because there is so much less at stake, or that plea bargains create an actual disincentive to litigate these particular issues. See *Otherson*, 711 F.2d at 276.

Then there is the matter of *Department of the Navy v. Egan*, 484 U.S. 518 (1987). In *Egan*, the Supreme Court recognized that the granting of a security clearance is a sensitive and inherently discretionary decision and is a predictive judgment that must be made by those with the necessary expertise in protecting classified information. *Id.* at 527-529. On its face, of course, *Egan* speaks to *substantive* decisions in the security clearance adjudication process. We note the "necessary expertise" language used by the Court, and language where it indicates that "...the protection of classified information must be committed to the broad discretion of the agency responsible, and this must include broad discretion to determine who may have access to it." *Id.* at 529. It only follows that the broad discretion encompasses the agency's ability to determine what information and arguments it will consider in the course of making such a predictive judgment. Thus, it is difficult to imagine a justification for a requirement that DOHA Judges defer to the state law in deciding what the scope of their factual inquiries will be at a hearing.

¹ Those who are interested in pursuing further the issue of the application of state versus federal law might wish to read AJ Mark Harvey's lengthy separate opinion, where he concludes that state law should apply.

Apart from the fact that DOHA Administrative Judges are not required to reference state law in deciding whether or not to apply collateral estoppel in state misdemeanor cases, there are sound, practical reasons for not doing so. If 28 U.S.C. § 1738 were applicable to the DOHA hearing process, then the scope of DOHA hearings would be dependent upon the states' varying treatment of claim or issue preclusion. It would impair DOHA's ability to treat all applicants in a uniform manner. Inasmuch as the Defense Industrial Personnel Security Clearance Review Program is national in scope and deals with a uniform set of guidelines to be adjudicated, it makes no sense to have cases treated differently based on the mere accident of geography. Moreover, requiring deference to state law on the collateral estoppel issue will place additional burdens upon the parties, especially applicants. Cases may involve misdemeanor convictions that are many years old and arise from a state where an applicant no longer lives and whose law is unfamiliar territory for applicant's attorney. The concern increases in the significant number of cases where applicants appear *pro se* or appear with a personal representative who has no legal training. Assuming Department Counsel recognizes the collateral estoppel issue in cases where it comes up and does the necessary research into state law prior to the hearing, *pro se* applicants and those with personal representatives who are not lawyers will be at a distinct disadvantage even if they receive prior notice of the issue. Many applicants cannot afford legal counsel. The use of the three-part test established by this decision applies a fair and uniform standard and lessens the burden since the inquiry is a more general, factually-based one that the parties and the Judge will usually be able to resolve without reference to sources outside the hearing room. [Footnotes omitted.]

On the merits, the Board remanded. First, with regard to the evidence to be allowed, the Board observed that the applicant's misdemeanor conviction was for assault and battery, and did not include sexual activity or lewd or indecent conduct as an element of the offense. They concluded, he was free to contest the SOR allegation that he engaged in unlawful conduct of a sexual nature with his stepdaughter. Second, with regard to whether the applicant was collaterally estopped from challenging the underlying facts supporting the elements of simple assault and battery, they opined:

The parties at the hearing did not litigate this question, and we have insufficient record evidence about the factual basis for Applicant's misdemeanor guilty plea and the detailed circumstances under which the conviction was obtained. Therefore, on remand, the Administrative Judge is required to determine the effect, if any, of the collateral estoppel doctrine on Applicant's conviction for simple assault and battery with reference to the guidelines set forth in this decision.

The issue of expungement also is affected by DOHA's position on state court proceedings. Where an applicant has had his or her criminal conviction expunged, or where a state governor has issued a pardon, the applicant naturally argues that he or she is not obligated to disclose the incident, and that the incident cannot be used against the applicant in connection with any security clearance actions. DOHA does not agree:

Expungement of an offense does not relieve Applicant of the responsibility to provide truthful answers. The only exception pertains to the Federal Controlled Substances Act, which is not the case here. Applicant's argument is further weakened by the fact that the court which ordered the expungement was a state court. See ISCR Case No. 03-22563 at 4 (App. Bd. March 8, 2006) ("[T]he federal government is not bound by state law concerning the expungement of state criminal convictions...[and] can require a person applying for a...security clearance to disclose information about his criminal record even if it has been expunged.") [Internal citations omitted.]

The Board, relying on the Federal Supremacy Clause of Article VI of the US Constitution, has consistently maintained that post conviction state remedies, such as pardons or expungements, do not nullify the prohibition set forth under 10 USC § 986. Subsequent state actions that set aside a conviction or dismiss the prosecution, even if the dismissal has the same effect as an acquittal, do not negate a conviction for purposes of 10 USC § 986. ISCR 01-00407 (App. Bd. September 18, 2002).

VI. PLEA OF "NOLO CONTENDERE"

Where the applicant has entered a plea of "*nolo contendere*," a different outcome may result. Where an applicant entered a "*nolo contendere*" plea, he or she is not collaterally estopped from contending he or she is really innocent of the conduct that led to the conviction. ISCR Case No. 94-1213 (June 7, 1996), at 3. In Latin, *nolo contendere* means "I do not wish to contest;" it is a plea where the criminal defendant neither admits nor disputes a charge. Practitioners should note that in ISCR Case No. 02-03248 (App. Bd. April 27, 2005), the Board observed: