

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. However, “DOHA proceedings are civil in nature and DOHA applicants are not afforded the procedural protections received by criminal defendants.” ISCR Case No. 12-04540 (App. Bd. March 19, 2014), *citing* ISCR Case No. 11-06925 at 4 (App. Bd. Dec. 13, 2013).

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. The “Criminal Conduct” Adjudicative Guideline ¶ 31 describes conditions that could raise a security concern and may be disqualifying, including an “allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted.” In ISCR Case No. 00-0713 (App. Bd. February 15, 2002), 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 proceedings are administrative and civil in nature, and they are not conducted with the strict application of evidentiary rules required in criminal cases. DOHA will rely upon the Federal Rules of Evidence (FRE) as a guide in its hearings. Directive ¶ E3.1.19. ISCR Case No. 11-12461 (App. Bd. March 14, 2013), *citing* ISCR Case No. 03-06770 at 4 (App. Bd. Sep. 9, 2004).

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. It is error for an AJ to fail to discuss the legal effect of an applicant’s admissions. ISCR Case No. 09-01652 (App. Bd. August 08, 2011). The Board has noted that a judge cannot simply ignore an applicant’s admissions. ISCR Case No. 94-1109 (App. Bd. January 31, 1996), at 5. Furthermore, an admission in an SOR is a form of judicial admission that is more binding 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 is proven. *Id.* The arrest can still have security significance. ISCR Case No. 04-07714 (App. Bd. October 19, 2006).

IV. COLLATERAL ESTOPPEL IN LIGHT OF PLEA OR CONVICTION

A claim of collateral estoppel typically arises when a convicted applicant 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. ISCR Case No. 04-05712 (App. Bd. October 31, 2006); 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. 11-02234 (App. Bd. May 15, 2013); ISCR Case No. 99-0116 (App. Bd. May 1, 2000), at 2. 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. 04-00963 (App. Bd. September 30, 2005).

In ISCR Case No. 11-06937 (January 10, 2013), the applicant had earlier pled guilty to a felony, structuring his monetary transactions for the purpose of evading the requisite reporting requirements. In issuing a favorable decision, the AJ concluded that the applicant lacked criminal intent. On appeal, the Board held that this was reversible error. The applicant admitted that he pled guilty and discussed the plea in his security clearance interview and at the hearing:

Although at the hearing he claimed that he did not intend wrongdoing, a plea of guilty is an admission not only of the facts underlying the offense but of the crime itself. *See, e.g., United States v. Broce*, 488 U.S. 653, 570 (1989)....The doctrine of collateral estoppel applies in DOHA hearings. Although there are exceptions, none is pertinent in this case. Under the doctrine, Applicant is not permitted to contend that he did not engage in the criminal acts of which he was convicted. *See, e.g., ISCR Case No. 04-05712* at 7 (App. Bd. Oct. 31, 2006); *ISCR Case No. 95-0817* (App. Bd. Feb. 21, 1997).

ISCR Case No. 11-00180 (App. Bd. June 19, 2012), involved an applicant who had been found guilty, in a civil lawsuit, of violations of nondisclosure employment agreements, breach of fiduciary duty, violation of the state computer crimes act, violation of the state conspiracy act, common law conspiracy, violation of the state uniform trade secrets act, and conversion. At the first hearing, the judge applied collateral estoppel. On appeal, the Board ruled that application of the doctrine was problematic in that it prevented the applicant from fully explaining his conduct and presenting a case in mitigation:

Implicit in the adoption of the test for the collateral estoppel doctrine is the acknowledgment that applying the doctrine may not be appropriate in all circumstances. The case before us is not like most other cases in that, owing to the technical and complex nature of the proceedings in the civil trial, the underlying facts are not readily discernable. The current state of the record supports a conclusion that Applicant’s conduct or circumstances raise a security concern. It is not sufficient, however, to afford a meaningful evaluation of security significant conduct in the context of mitigation. Considerations of procedural due process require that Applicant be given the chance to explain the conduct, present it in a meaningful context, and ultimately to mitigate it, if that is what the facts support. The way the hearing proceeded effectively prevented him from doing these things. At the heart of the matter is the notion that DOHA ought not deny an applicant access to classified information unless the record establishes with specificity an applicant’s conduct or circumstances of security significance, so as to place them in a proper context, and whether or not the conduct or circumstances have been mitigated. *See Directive*, ¶ E3.1.3 and ¶ E3.1.15. The Board is not convinced that such a threshold has been reached on the current record.

The problem becomes most apparent upon a consideration of the Judge’s remarks regarding mitigation. The Judge concluded that “Applicant failed to demonstrate that he understood the gravity of the conduct the jury found him responsible for.” The Judge further concluded that “He also failed to demonstrate that he understood what had caused his unreliable conduct and, as a result, was unable to ensure that such behavior was unlikely to occur.” The Board concludes that the Judge cannot make such assessments based on the current record. The gravity of the conduct, Applicant’s attitude toward it, and the cause of the conduct cannot be properly assessed until more is known about the underlying facts and circumstances of the case. Thus, the Judge erred in her mitigation analysis. The error was a result of her stated intent to adhere to the collateral estoppel doctrine in a setting where it was not appropriate, i.e., where it resulted in unfairness to Applicant by preventing him from presenting a case for mitigation, rebuttal, extenuation, or explanation.

The Board's remand order contained instructions that both parties should be afforded the opportunity to present any additional evidence regarding the civil trial and the applicant's underlying conduct.

Following a second hearing, the judge again issued an unfavorable determination. On appeal, the Board affirmed the unfavorable decision. ISCR Case No. 11-00180 (App. Bd. March 14, 2013). In a concurring opinion, Judge James E. Moody noted that the second hearing showed "even more extensive misconduct than was apparent from the Judge's original findings of fact."

ISCR Case No. 11-03095 (October 02, 2012), presented an interesting initial decision involving collateral estoppel; the favorable determination was not appealed. The SOR involved an allegation that the applicant had a judgment against him for breach of contract and interference with business relations. The applicant filed a "Motion *in Limine* Regarding Application of Collateral Estoppel and *Res Judicata*," arguing that since two essential witnesses were prevented from testifying in his earlier civil trial, he had been denied the opportunity to fully litigate the merits. He argued that had these witnesses testified, he might have won the case.

Department counsel opposed the motion, arguing that collateral estoppel applies to preclude re-litigation of issues already decided in the earlier civil action. The government argued that applicant's civil trial afforded him a complete opportunity to litigate the issues that he should not be allowed to re-litigate in the DOHA security clearance hearing. The judge agreed and denied the motion.

On reconsideration, the judge allowed the parties to introduce additional evidence from the civil trial record, including additional evidence in explanation or mitigation by the applicant.

In ISCR Case No. 09-02752 (App. Bd. April 06, 2010), the applicant was previously convicted of carrying a concealed firearm. At his criminal trial, he denied the charge. At his DOHA hearing, in a discussion about the issue of collateral estoppel, the judge stated that he had not yet decided whether collateral estoppel would apply, and that he would have to research it. In his testimony at the hearing, the applicant denied that he had been carrying a concealed weapon. In the initial decision denying the clearance, the judge ruled that collateral estoppel applied and found that the applicant had in fact carried a concealed weapon. The judge then found that the applicant, by testifying that he denied the charge, had testified falsely. Even though falsification was not a charge in the SOR, the judge ruled:

Having decided that the criminal court's finding that he possessed a concealed firearm is binding, I logically must conclude Applicant's denial was the presentation of false information at his security clearance hearing. An Applicant who provides materially false information at his security clearance hearing raises security concerns that cannot be mitigated. His decision to deny possession of the firearm was knowledgeable, voluntary, and intentional.

The Appeal Board found that this was a denial of due process:

[R]ather than exclude the evidence as irrelevant, the Judge in fact considered it, and then used it to resolve the essential issue of the case. He considered it as demonstrating that Applicant had not successfully mitigated the security concern arising from his conviction, and, indeed, he further considered it as evidence of an additional security concern, that of providing false information during the clearance process. This is a security concern usually addressed under Guideline E (Personal Conduct), which is not alleged in this case. See Directive ¶ E2.15. Applicant's alleged lack of forthrightness at the hearing is unrelated to his eligibility for access to classified information under the allegations cited in the SOR. By advising Applicant that he could proceed as if there were no barrier to his denial of guilt, the Judge in effect invited him to present the very evidence which later formed the basis for concluding that Applicant had raised "security concerns that cannot be mitigated." Providing materially false information at the hearing not being alleged in the SOR, the Judge erred in relying on such a finding in concluding Applicant was ineligible for access to classified information. See, e.g., DISCR OSD Case No. 93-0519 at 5 (App. Bd. Apr. 14, 1994); ISCR Case No. 02-12789 at 7 (App. Bd. May 13, 2005) (It was error for the Judge to conclude that Applicant's having minimized the case against him raised additional security concerns not alleged in the SOR).

The Appeal Board also noted:

Of course, a Judge is free to amend the SOR, to include adding new allegations, in order to conform the SOR to the evidence adduced at the hearing. However, if he does so, the Judge must give the parties an opportunity to request additional time to prepare, which was not done in this case. Directive ¶ E3.1.17.

Accordingly, the Appeal Board remanded for a new hearing before a different judge. On remand, the applicant wisely did not deny carrying the concealed weapon and expressed remorse for his conduct. But it was to no avail. The judge ruled that the applicant did not mitigate the criminal conduct. He found that a significant period of time had passed and that applicant had engaged in some rehabilitation, including charitable activities and education. However, he concluded, "I am not satisfied that sufficient time has passed to demonstrate reform or rehabilitation" and noted particularly that the applicant "did not express remorse for his conduct until he testified at the hearing."

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 (App. Bd. 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.

In ISCR Case No. 04-05712 (App. Bd. Oct. 31, 2006), the applicant was arrested and charged with "Lewd Act on a Minor," a felony, based on allegations concerning his conduct with his stepdaughter. He pled guilty to a misdemeanor, simple assault and battery, and paid a fine. At his DOHA hearing, he emphatically denied any wrongdoing, aggressively claiming all the allegations to be a complete fabrication by his ex-wife to gain tactical advantage in their contentious divorce. The AJ did not allow him to introduce evidence that he did not engage in the underlying conduct and found his denials not credible.

On appeal, the applicant asserted that the AJ erroneously prevented him from presenting evidence that would establish he did not engage in lewd acts or touchings of a sexual nature with his stepdaughter. Relying on federal law, the Appeal Board adopted a three-part test to determine the appropriateness of applying collateral estoppel:

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).

The Board also observed:

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.

Turning to the charges against the applicant, the Board noted:

The record as it relates to the conviction provides no information about the issue of any unlawful sexual activity on the part of Applicant. Thus, even if Applicant were precluded from challenging the simple assault and battery, Applicant would nevertheless be free to challenge or contest whether or not he touched S in a sexual manner. The Administrative Judge committed error below when he effectively precluded Applicant from contesting the government's basic assertion that he had engaged in unlawful conduct of a sexual nature with his stepdaughter.

The Board concluded:

Whether Applicant can challenge the underlying facts directly supporting the elements of simple assault and battery is a more difficult issue. 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.

At a second hearing, the applicant was permitted to introduce evidence at length denying the charges. The AJ found that the lewd conduct occurred as alleged and issued an unfavorable determination. Remand Decision, April 30 2007.

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. 06-08653 (May 14, 2007), *citing* U.S. Constitution, Art. VI, Cl. 2 (Supremacy Clause); ISCR Case No. 00-0423 at 3 (App. Bd. June 8, 2001); ISCR Case No. 03-17708 at 2, n. 5 (App. Bd. June 9, 2006). *See* ISCR Case No. 03-22563 at 4 (App. Bd. Mar. 8, 2006).

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), involved a 54-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. DOHA issued an SOR based on the security concerns raised by his criminal conduct. At his hearing, applicant sought to introduce documents and testimony intended to demonstrate that he was not guilty of the crime. 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 was required to 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) and *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. FAA*, 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."); *NLRB v. Yellow Freight Systems Inc.*, 930 F. 2d 316 (3rd Cir. 1991).

The Board in ISCR Case No. 04-05712 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.

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