DATE: October 31, 2006

In Re:

SSN: ----------

Applicant for Security Clearance

ISCR Case No. 04-05712

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Peregrine D. Russell-Hunter, Esq., Chief Department Counsel

FOR APPLICANT

Pro Se

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On April 21, 2005 DOHA issued a statement of reasons advising Applicant of the basis for that decision-security concerns raised under Guideline J (Criminal Conduct) pursuant to Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On February 8, 2006, after the hearing, Administrative Judge David S. Bruce denied Applicant's request for a security clearance. Applicant timely appealed pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raised the following issues on appeal: whether the Administrative Judge was biased against Applicant; and whether the Judge erroneously precluded Applicant from presenting or developing evidence that contradicted the SOR allegation that Applicant engaged in lewd acts with a minor, in violation of state law. For the reasons that follow, the Board remands the case for assignment to a new Administrative Judge for further processing consistent with the Board's rulings and instructions.

Whether the Record Supports the Judge's Factual Findings

A. Facts

The following findings of fact made by the Administrative Judge are pertinent to the issues raised on appeal:

Applicant is 54 years old. He has been married twice. He has three adult children by his first marriage which ended in divorce in May 1998. He married the second time in June 1998, and separated from his second wife on July 26, 2002. They had no children as a result of the marriage. A contested divorce action was pending between Applicant and his second wife at the time of the hearing.

Applicant's second wife has two daughters and two sons from prior marriages. The girls were 17 and 9 years old and her sons were 15 and 11 years old when the parties married in 1998. The girls were in the care and custody of their mother at the time. Concerns about Applicant's personal behavior were first expressed by Applicant's younger stepdaughter who described being inappropriately touched by him to a school counselor in March 2002. The allegations were conveyed by the counselor to Applicant's wife who later confronted Applicant. Among other matters, she demanded that Applicant

never again close the door to his computer room when in the room alone with her daughter. Applicant did not respond at the time but later said he was sorry, blaming his behavior on depression from having been unemployed, noting further that he had started drinking and this caused him not to care about what he was doing when around his stepdaughter. A short time later, while attending church, Applicant asked his wife as a Christian to forgive him for his behavior. After consulting with several local social agencies as well as her two daughters in subsequent months, Applicant's second wife concluded that Applicant's conduct had not been a one-time event, but had happened frequently. She then reported the matter to the police.

The facts presented by Applicant's younger stepdaughter, particularly, compelled an independent investigation to be undertaken. Sworn statements were taken from both stepdaughters about two months after Applicant moved out of the family home in July 2002. Each depicted subtle, sexually oriented, inappropriate and perverted touching of them by Applicant over a period of years. Their descriptions were similar, yet specific enough as to differing details to lend credibility to each, considering the respective ages of the children at the time.

Applicant was arrested on a criminal warrant on February 14, 2003, and later charged with Lewd Act on a Minor, a felony. Applicant's wife was the named complainant in an indictment issued against Applicant alleging he committed the crime on his stepdaughter over a five year period from January 1997 through January 2002. The charge was later reduced to simple assault and battery and Applicant pled guilty to the amended charge in January 2004. He paid a fine for the offense.

One of Applicant's sons testified that he never observed his father doing anything around the stepdaughters that was at all inappropriate. He recalled pleasant memories of times they all spent together as a family. Proffers from four other persons related to Applicant indicated that he had an altogether proper relationship with his two stepdaughters when they were all together at family gatherings and at other times. Applicant also proffered that he had numerous video recordings showing the wholesome relationship he had with his stepdaughters over a period of years. However, the critical aspect of the matter ostensibly involves Applicant's conduct when he was alone with his younger stepdaughter.

B. Discussion

The Appeal Board's review of the Administrative Judge's findings of fact is limited to determining if they are supported by substantial record evidence--such relevant evidence as a reasonable mind might accept as adequate to support such a conclusion in light of all the contrary evidence in the record. Directive ¶ E3.1.32.1. "This is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo* v. *Federal Maritime Comm'n*, 383 U.S. 607, 620-21 (1966). In evaluating the Administrative Judge's findings, we are required to give deference to the Administrative Judge's credibility determinations. Directive ¶ E3.1.32.1.

Although they certainly have potential impact upon the substantive findings and conclusions of the Administrative Judge, the issues raised by Applicant on appeal essentially involve matters of procedure. Therefore, the appeal issues will be discussed following an enumeration of the Judge's conclusions in the case.

Whether the Record Supports the Administrative Judge's Ultimate Conclusions

The Administrative Judge reached the following pertinent conclusions in the case:

Criminal Conduct Disqualifying Condition (CC DC) E2.A10.1.2.2 (A single serious crime or multiple lesser offenses) applies to this case. The essence of Applicant's case presented at hearing clearly emphasized his emphatic denial of any wrongdoing. Notwithstanding Applicant's attempts to re-try the criminal case at the hearing, he pled guilty to an assault and battery charge upon a female minor child, founded on facts raising serious concerns about Applicant's character.

Applicant's defense misses the mark. He passively apologized to his wife for his behavior when confronted with the initial allegations. He offered another tacit admission of his conduct by the comments he later made in church. While Applicant may be correct that the events described by the indictment are overstated, we have no way of knowing precisely. His specific motivation for pleading guilty to the lesser charge is incidental, as are the reasons the prosecutor exercised his discretion to reduce the charge. What is clear is Applicant placed himself in a position precariously on the

edge of sexually abusive criminal conduct time and time again with a vulnerable minor female with whom he enjoyed a relationship of trust. He then resorted to aggressively claiming all the allegations to be a complete fabrication by his wife to gain tactical advantage in their contentious divorce. Having carefully considered all aspects of Applicant's and his wife's testimony, Applicant's assertions of her motives is disingenuous and is not credible. Allegations concerning Applicant's behavior were first disclosed by his stepdaughter to her school counselor. It is not likely that her mother conspired with her daughters to fabricate such a well thought out self serving series of events.

Applicant failed to conscientiously pursue professional counseling as a means to achieve a full appreciation of the underlying basis and gravity of his behavior. Whether it is posturing for this case or not, simply accusing his wife of fabricating the events and continuing in complete denial that it was his conduct alone that created the difficulties does not meet his heavy burden of persuasion to effectively mitigate the government's security concerns. Applicant has not demonstrated by his actions a serious commitment to address the reasons for his self-destructive behavior. The Judge doubts that Applicant understands the psychological aspects of his conduct, nor has he demonstrated any personal accountability for his serious behavioral indiscretions. He has simply failed to show mature personal insight of his prior actions, typically illustrated by meaningful rehabilitation. Considering all the circumstances, Applicant's candor and credibility are questionable given the seriousness of the events. The nature and extent of Applicant's conduct create serious doubt about his judgment, reliability, and trustworthiness. He has failed to show clear evidence of rehabilitation, and has, accordingly, failed to successfully mitigate the security concerns raised by his criminal conduct.

Discussion

An Administrative Judge is required to "examine the relevant data and articulate a satisfactory explanation for" the decision, "including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n of the United States v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)). The Appeal Board may reverse the Administrative Judge's decision to grant, deny, or revoke a security clearance if it is arbitrary, capricious, or contrary to law. Directive ¶ E3.1.32.3. Our scope of review under this standard is narrow and we may not substitute our judgment for that of the Administrative Judge. We may not set aside an Administrative Judge's decision "that is rational, based on consideration of the relevant factors, and within the scope of the authority delegated to the agency . . . " *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 42. We review matters of law *de novo*.

Applicant claimed the actions of the Judge showed the Judge was biased against him. There is a rebuttable presumption that an Administrative Judge is impartial and unbiased, and a party seeking to rebut that presumption has a heavy burden of persuasion. ISCR Case No. 04-12911 at 2 (App. Bd. July 25, 2006). A resolution of a bias claim involves examination of the record for any indication that the Judge acted in a manner that would lead a reasonable person to question the fairness and impartiality of the Judge. ISCR Case No. 04-10821 at 2 (App. Bd. Jul. 19, 2006). Bias is not demonstrated merely because the Judge made adverse findings or reached unfavorable conclusions. Moreover, even if an appealing party demonstrates error by the Judge, proof of such error, standing alone, does not demonstrate the Judge was biased. ISCR Case No. 04-12911 at 2 (App. Bd. Jul. 25, 2006). After reviewing the record and the Judge's decision, and taking into consideration the Judge's error in deciding not to admit some of Applicant's proffered evidence (which is discussed later in this opinion), the Board concludes that Applicant has not met his heavy burden of persuasion on the issue of bias.

Applicant's principal assertion on appeal is that the Administrative Judge 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. At the hearing the Applicant attempted to contradict the SOR allegation and the government's case that he had engaged in lewd conduct of a sexual nature with his stepdaughter.[(1)] When it became clear from comments made by Applicant in his opening statement that he was planning to introduce evidence to call into question whether the conduct alleged by the government was, in fact, true, and that he was challenging the credibility of the principal government witness, the Judge intervened with the following comments:

"I'm a little concerned that this forum is going to be used to try those issues, and that's not what this case is about. In fact, it's not about that at all. What it is about is what has happened up to this point relative to those charges the SOR succinctly defines what happened. We're not here to retry that case . . . " (TR. 23).

". . . the criminal case . . . was also a reduced charge to simple assault and battery. That case is resolved, it's on your record, it's there, it's done. It's not for you to come in and say oh, I plead guilty, but I wasn't really guilty, I want to try the case all over again in front of me. And again, with all due respect, that's not the premise of this court. This case has to do with your security clearance. It doesn't have to do with retrying your criminal cases." (TR. 25).

"And what is always important in any of these cases is that there is clear evidence of successful rehabilitation. That's the mitigating factors. So when we talk about presenting evidence that's relevant and material to the issues involved in the case, according to the directive, we're talking about issues that are relevant to those mitigating factors, understand? So we're not talking about retrying a criminal case. And I'm a little concerned that that's what we're about to do, and it's not going to happen." (TR. 27).

"The record speaks for itself, there is a conviction, period. What we want to know is what's happened from that time forward. Rehabilitation, how old has the case been, have you been productive and all that sort of thing since then, are the circumstances no longer there that could result in this type of behavior occurring again." (TR. 28).

The Administrative Judge also told Applicant that he could not challenge the credibility of the witnesses in regard to their description of his conduct relating to his misdemeanor conviction, but they could testify about Applicant's character and they could "mitigate the inferences of his trustworthiness." (TR. 25-28). Department Counsel indicated that he wanted to call Applicant's spouse, and his stepdaughter, with whom Applicant was charged with engaging in lewd acts (hereinafter "S"), because the initial criminal charge and allegations were more serious than the conviction that resulted from the plea bargain and guilty plea (TR. 30-32). The Judge suggested that the testimony might be appropriate on rebuttal, and deferred his ruling.

Department Counsel offered affidavits into evidence, including a detailed affidavit from S indicating Applicant had engaged in lewd touchings of her over a five year period. The Judge asked Applicant whether he objected to the Judge's consideration of the affidavit. Applicant replied that the Judge previously determined his exhibits were not relevant, and Applicant did not understand because it seemed that the government's exhibits were retrying the case, and he seemed to be precluded from responding to the allegations in regard to the 2003 offense (Tr. 33). Without explaining why Department Counsel's exhibits were relevant, or indicating he was admitting them for some limited purpose, the Judge reiterated that he was not going to permit Applicant to retry the case. The Judge then admitted the affidavits, concluding "what the government has presented are the usual things that we see in a Guideline J case." (TR. 35).

Department Counsel called Applicant's wife as a witness. She testified about matters related to the alleged sexual touching of her daughter by Applicant. On cross-examination however, Applicant was not permitted to ask questions of his estranged wife on matters in the same area, including questions that appeared to be directed toward the motives and biases of the witness.[(2)]

Department Counsel called S as a witness, but the Administrative Judge refused to permit her testimony. Without giving Applicant an opportunity to state his position on whether or not S should testify, the Judge stated:

". . . Because I can see where it's going, her stepfather is going to interrogate her about all this behavior that we just heard a little bit about. And I don't think it's in [S's] best interest to be subjected to that, Mr. Blank. I don't know how much more - - again, we're talking about our issue in the beginning . . . of retrying this case. And in effect, that's what you're doing, especially if [S] is the one that's going to be testifying about things that you did, and you're trying to cross examine her to say that you didn't do that to convey the impression that you're "not guilty" of the offense. That's not going to happen. So, at this point, unless something comes up later, I'm not sure [S's] presence is going to be meaningful." (TR. 60).

Applicant subsequently offered the following exhibits: (1) an affidavit from Applicant's attorney concerning why Applicant pleaded guilty to assault and battery (Applicant's Exhibit A); (2) a court record of expungement relating to a shoplifting charge against Applicant (Applicant's Exhibit B);[(3)] (3) documents relating to Applicant's loss of a job (Applicant's Exhibit C); and (4) a document from Applicant's estranged wife (Applicant's Exhibit D). Applicant's Exhibit E was offered by Applicant but then withdrawn when Department Counsel objected. Only Applicant's Exhibits B and C were admitted into evidence. At the hearing, Applicant indicated his desire to introduce numerous other

exhibits (designated Applicant's Exhibits F through CC) including a DVD that Applicant indicated would cover a number of subjects relating to the allegations of unlawful sexual touching. These exhibits were ultimately not offered by Applicant, presumably because the Judge had ruled generally that he would not allow Applicant to offer evidence relating to the sexual touching issue. These items are not in the case file. Similarly, at the start of the hearing, Applicant said his intention was to call six witnesses to testify [Tr. 10]. Ultimately, only one of the witnesses testified. In lieu of the testimony of the other witnesses, the Judge accepted limited proffers of testimony that Applicant had always been an excellent father and family man, and appeared to have an altogether proper relationship with his two stepdaughters whenever they were together with him at family gatherings or similar events.

The Administrative Judge's preclusion of large portions of the case Applicant wished to present at the hearing and Applicant's subsequent appeal raise the issue of the applicability of the doctrine of collateral estoppel to the case. The Board has generally held that the doctrine of collateral estoppel applies in DOHA proceedings and precludes applicants from contending they did not engage in criminal acts for which they were convicted. ISCR Case No. 95-0817 at 2-3 (App. Bd. Feb. 21, 1997). This 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 a second time matters properly adjudicated in an earlier proceeding. The Board has also recognized some exceptions to this general proposition. In so doing, the Board indicated that where the conviction involved a guilty plea to a misdemeanor offense, an applicant could avoid the collateral estoppel effect of a criminal conviction. *See* ISCR Case No. 94-1213 at 3 (App. Bd. June 7, 1996)(citing *Otherson v. U.S. Department of Justice*, 711 F.2d 267 (D.C. Cir. 1983)). The Board recognizes that *Otherson* ultimately held that the federal misdemeanor conviction resulting from a contested trial and based on a conduct issue that was before the Merit Systems Protection Board for hearing collaterally estopped the defendant from denying the underlying conduct at his MSPB hearing. Thus, there have been instances where federal courts have given collateral estoppel effect to misdemeanor convictions and any language of the Board suggesting otherwise is overstated. Applicant's appeal in the instant case requires the Board to consider what circumstances dictate the appropriateness of applying the doctrine of collateral estoppel to misdemeanor convictions.

Applicant was convicted of a misdemeanor in a state court. 28 U.S.C. § 1738[(4)] requires federal courts to give preclusive effect to state-court judgments whenever the courts of the State from which the judgments emerged would do so, *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 preclusion effect of judgement); *Haring v. Prosise*, 462 U.S. 306, 313 (1983). However, numerous federal circuit courts have held that notwithstanding the applicability of 28 U.S.C. § 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. Department of Transportation*, 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 DOT is an **agency**, not a court.")(emphasis supplied); *N.L.R.B. v. Yellow Freight Systems Inc.*, 930 F. 2d 316 (3rd Cir. 1991). In the absence of a governing statute, it is necessary to determine what guidance federal common-law rules of preclusion provide in determining the appropriateness of applying collateral estoppel in DOHA cases where an applicant's case involves a misdemeanor conviction. The federal case law indicates 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). 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.

The separate opinion cites two cases from the Federal Circuit in support of its contention that 28 U.S.C. § 1738 requires DOHA Administrative Judges to refer to state law in deciding whether or not to give collateral estoppel effect to a misdemeanor conviction obtained in a state court. Instead of any legal *requirement* that DOHA Administrative Judges follow 28 U.S.C. § 1738, there is, at most, a split of authority among the federal circuits on this issue. The Board views the four federal circuit cases previously cited in this decision as the better reasoned ones, inasmuch as they pay particular attention to, and give appropriate deference to, the precise language of the statute. The ability of the separate opinion to distinguish these cases on factual or technical grounds does not, in our opinion, undercut their viability as support for the basic proposition that 28 U.S.C. § 1738 does not require DOHA Judges to refer to state law when resolving collateral estoppel issues.[(5)]

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. [(6)]

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.[(7)] 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.

It should be pointed out that in the instant case, the evidence of record that establishes Applicant's misdemeanor conviction does not reveal the name, age, or gender of the victim of the battery. Nor is the nature of the circumstances of the battery disclosed in the final judgment. Moreover, sexual activity or lewd or indecent conduct is not an element of the offense of simple assault and battery in the jurisdiction where Applicant was convicted. 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 error was compounded by the fact that the Judge allowed Department Counsel to introduce evidence from Applicant's stepdaughter that tended to establish Applicant's involvement in unlawful sexual or lewd behavior. The Judge's error was harmful since the government's theory of the

case was clearly that Applicant had engaged in unlawful sexual activity and the Judge thoroughly discussed Applicant's sexual offenses involving S in his findings and conclusions. If the Judge had determined that Applicant had not committed any offense involving S there would be no basis for denying Applicant a security clearance. If the Judge had determined that the offense was a simple assault and battery without being aggravated by its sexual aspects, he had a significantly better case for granting Applicant a clearance.

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.

Applicant's appeal brief raises numerous objections to the Administrative Judge's exclusion of specific items of evidence that Applicant sought to introduce. The Judge's exclusion of this evidence was, for the most part, a product of his erroneous application of the collateral estoppel doctrine to the issue of sexual conduct and the resultant erroneous constriction of the issues in the case. The Board need not address the Judge's rulings on individual portions of evidence. On remand, the Administrative Judge should determine anew the admissibility of evidence in keeping with the guidelines set forth in this decision. The Judge should include in the record of the case all proffered evidence, whether ultimately admitted or excluded.

The Board notes that the Administrative Judge who heard the case below is no longer employed by DOHA. Therefore, the case should be remanded to a new Administrative Judge for a new hearing to be conducted in a manner consistent with the Board's rulings in this decision.

Order

The judgment of the Administrative Judge denying Applicant a clearance is REMANDED.

Signed: Michael Y Ra'anan

Michael Y. Ra'anan

Administrative Judge

Chairman, Appeal Board

Signed: Jeffrey D. Billett

Jeffrey D. Billett

Administrative Judge

Member, Appeal Board

Separate Opinion of Member Mark W. Harvey

I agree with my colleagues' ultimate disposition of the two issues in this case, and that remand is warranted. I write separately because I respectfully disagree with my colleagues' decision that state law regarding application of collateral estoppel does not apply to Defense Office of Hearing and Appeals (DOHA) industrial security clearance proceedings.

Scope of Review

On appeal, the Board does not review a case *de novo*. Rather, the Board addresses the material issues raised by the parties to determine whether there is factual or legal error. There is no presumption of error below, and the appealing party must raise claims of error with specificity and identify how the Administrative Judge committed factual or legal

error. Directive ¶ E3.1.32. *See also* ISCR Case No. 00-0050 at 2-3 (App. Bd. July 23, 2001)(discussing reasons why party must raise claims of error with specificity).

When the rulings of an Administrative Judge are challenged, the Board must consider whether they are contrary to law. Directive ¶ E3.1.32.3. The Board considers whether they are contrary to provisions of Executive Order 10865, the Directive, or other applicable federal law. Compliance with state or local law is generally not required because security clearance adjudications are conducted by the Department of Defense pursuant to federal law. *See* U.S. Constitution, Article VI, clause 2 (Supremacy Clause). *See* ISCR Case No. 00-0423 at 3 (App. Bd. June 8, 2001) (citing Supreme Court decisions). If an appealing party demonstrates error, then the Board determines whether the error is harmless. ISCR Case No. 03-22912 at 2 (App. Bd. Dec. 30, 2005) (citing ISCR Case No. 00-0250 at 6 (App. Bd. July 11, 2001) (discussing harmless error doctrine)). And if the Judge's decision cannot be affirmed, whether the case should be reversed or remanded. ISCR Case No. 04-04008 at 2 (App. Bd. Dec. 29, 2005) (citing Directive ¶¶ E3.1.33.2 and E3.1.33.3)).

Whether the Judge's decision to precluded Applicant from contradicting the factual basis of his misdemeanor conviction or the aggravating facts related to that conviction was error

A. Hearing evidence concerning whether the issues of admissibility of evidence and collateral estoppel are waived

At the beginning of Applicant's hearing, the Judge explained that he had reviewed Applicant's file, and Applicant's response to the statement of reasons (SOR) included a DVD and a variety of documents, including a 36-page statement from Applicant and a 32-page description of documents that he wanted to submit (TR. 6-8). The Judge said that none of these items were evidence in the case, "unless it relates to the actual SOR," and that Applicant's evidence had to be presented at the hearing (TR. 8).[(8)]

During his opening statement, Applicant stated he wanted to call seven witnesses including himself, and present documents that would show that his wife attempted to blackmail him before filing any charges, and when that failed she went to the police (TR. 22). Financial records would show that Applicant's wife was dishonest. Photographs and videotaped evidence would show that the victim, even after the alleged sexual abuse was affectionate and physically "clingy" towards Applicant (TR. 20). In response, the Judge explained the impact of Applicant's prior misdemeanor conviction, stating:

[t]he criminal case, I guess it was in this state, was also a reduced charge to simple assault and battery. That case is resolved, it's on your record, it's there, it's done. It's not for you to come in and say oh, I plead guilty, but I wasn't really guilty, I want to try the case all over again in front of me. And again, with all due respect, that's not the premise of this [hearing]. This case has to do with your security clearance. It doesn't have to do with retrying criminal cases. . . . So we're not talking about retrying a criminal case. And I'm a little concerned that that's what we're about to do, and it's not going to happen.

TR. 24-25.

The Judge essentially told Applicant that he could not challenge the credibility of the witnesses in regard to their description of the 2003 offense, but they could testify about Applicant's character and they could "mitigate the inferences of his trustworthiness." He could show "clear evidence of rehabilitation," but he could not retry the criminal case (TR. 25-28).

Department Counsel responded that he wanted to call Applicant's spouse, and his stepdaughter, whom Applicant was charged with sexually abusing [hereinafter "S"], because the initial criminal charge and allegations were more serious than the conviction that resulted from a plea bargain and guilty plea (TR. 30-32). The Judge suggested that the testimony might be appropriate on rebuttal, and deferred his ruling. Department Counsel offered affidavits into evidence, including a detailed affidavit from S indicating Applicant had sexually abused her over a five year period. The Judge asked Applicant whether he objected to consideration of the Affidavit. Applicant replied that the Judge previously determined his exhibits were not relevant, and he did not understand because it seemed that the government's exhibits were retrying the case, and he seemed to be precluded from responding to the allegations in regard to the 2003 offense

(TR. 33). Without explaining why Department Counsel's exhibits were relevant, or indicating he was admitting them for some limited purpose, the Judge reiterated that he was not going to permit Applicant to retry the case. The Judge then admitted the affidavits, concluding "what the government has presented are the usual things that we see in a Guideline J case" (TR. 35).

Department Counsel called Applicant's wife as a witness, but on cross-examination, Applicant was not permitted to ask questions about the financial issues pertaining to his pending divorce or the note that she wrote Applicant because they were beyond the scope of her direct examination (TR. 57-58). Department Counsel called S as a witness, but the Judge refused to permit her testimony without Applicant being offered an opportunity to state his position on whether she should testify stating:

. . . Because I can see where it's going, her stepfather is going to interrogate her about all this behavior that we just heard a little bit about. And I don't think it's in [S's] best interest to be subjected to that, Mr. Blank. I don't know how much more - - again, we're talking about our issue in the beginning, and you weren't present, of retrying this case. And in effect, that's what you're doing, especially if [S] is the one that's going to be testifying about things that you did, and you trying to cross-examine her to say that you didn't do that to convey the impression that you're "not guilty" of the offense. That's not going to happen. So at this point, unless something comes up later, I's not sure [S's] presence is going to be meaningful.

TR. 60.

Applicant subsequently offered the following exhibits and testimony:[(9)] (1) an affidavit from Applicant's attorney concerning why Applicant pleaded guilty to assault and battery; (2) testimony or a DVD related to the sexual abuse of S by a person other than the Applicant;[(10)] and (3) testimony of various witnesses concerning the acrimonious relationship between Applicant and his spouse (TR. 61-66). Applicant's exhibits were marked from A to CC (TR. 66). Ultimately only exhibits B (a court record showing Applicant's shoplifting/trespassing charge was expunged) and C (a letter from Applicant's employer) were admitted.[(11)]

B. Discussion regarding whether the issues of admissibility of evidence and collateral estoppel are waived. "Although *pro se* applicants cannot be expected to act like a lawyer, they are expected to take timely, reasonable steps to protect their rights under the Directive." ISCR Case No. 04-08218 at 2 (Appeal Bd. July 3, 2006) (citing ISCR Case No. 00-0593 at 4 (App. Bd. May 14, 2001)). When a *pro se* applicant fails to take timely, reasonable steps to protect their rights, any objection is waived. *Id*. (citing ISCR Case No. 02-19896 at 6 (App. Bd. Dec. 29, 2003)). The Judge's preemptive comments at the start of the hearing concerning how he was considering the misdemeanor conviction, and would not permit evidence contradicting the sexual abuse of S, as well as Applicant's repeated requests to present evidence to impeach his conviction were cumulatively sufficient to preserve the issue of whether the Judge erroneously precluded Applicant from challenging the factual basis of his conviction, as well as the aggravating facts associated with that conviction.

C. *Res judicata* and collateral estoppel defined. *Res judicata* encompasses both claim preclusion (also known as "true *res judicata*") and issue preclusion (also known as "collateral estoppel").[(12)] "Unlike claim preclusion, issue preclusion does not prohibit litigation of matters that have never been argued or decided." Brownlee, *supra* note 8 (citing Charles Allen Wright et al., Federal Practice and Procedure § 4402 at 136 (1981)).

D. The Board's past application of collateral estoppel with respect to convictions.

"The Board has held that the doctrine of collateral estoppel applies in [industrial security clearance] proceedings and precludes applicants from contending they did not engage in the criminal acts for which they were convicted." ISCR Case No. 95-0817 at 2-3 (App. Bd. Feb. 21, 1997) (citing ISCR Case No. 94-1213 at 4 (App. Bd. June 7, 1996)); DISCR Case No. 88-2271 at 5 (App. Bd. Oct. 16, 1991); DISCR Case No. 88-2903 at 4 (App. Bd. Feb. 13, 1990) (applicant convicted of felony in state court does not have right to relitigate issue of his guilt of that offense in industrial security clearance proceeding). The Appeal Board has also previously held it is error for an Administrative Judge not to apply collateral estoppel to a felony conviction. *See* ISCR Case No. 94-1213 at 4 (App. Bd. June 7, 1996). In 1996, the Appeal Board broadly addressed the issue of collateral estoppel with respect to convictions stating:

As a general rule, a person convicted of a criminal offense is collaterally estopped from denying his guilt of the crime in subsequent civil proceedings. Collateral estoppel applies to a criminal conviction whether it is entered after trial or by guilty plea. DISCR Case No. 88-2116 (October 13, 1989) at p. 4 (citing federal cases). Federal courts have held that collateral estoppel is applicable to preclude relitigation of criminal convictions in subsequent federal administrative hearings. *Otherson v. U.S. Department of Justice*, 711 F.2d 267 (D.C. Cir. 1983); *Chisholm v. Defense Logistics Agency*, 656 F.2d 42 (3d Cir. 1981). The Board has held that [the] general rule applies in security clearance cases. *See, e.g.*, DISC 92-1283 (August 26, 1993) at p.3; DISCR Case No. 88-2271 (October 16, 1991) at pp. 5-6. A person can avoid the collateral estoppel effect of a criminal conviction in some situations:

- The conviction was constitutionally infirm. *United States v. Broce*, 488 U.S. [563, 574-576 (1989)];
- The conviction was reversed on appeal. DISCR Case No. 88-0060 (January 25, 1989) at 4 (citing federal cases).
- The conviction was based on a *nolo contendere* plea. DISCR Case No. 88-2116 (October 13, 1989) at pp. 4-5. *See also* Fed. R. Crim. Proc. 11(e)(6)(B).

- The conviction involved a guilty plea to a misdemeanor offense. *Otherson v. U.S. Department of Justice*, supra, 711 F.2d at 276.

- The conviction is being used to collaterally estop a person concerning a matter not legally determined by the conviction. [*Id.*] at 273.

The next year the Appeal Board questioned the continued vitality of an exception for *nolo contendere* pleas in ISCR 96-0525 at 3 n.3 (App. Bd. June 17, 1997) (citing *Myers v. Secretary of Health & Human Services*, 893 F.2d 840, 843 (6th Cir. 1990)). However, the *Myers* decision held a conviction based on a *nolo* plea was admissible, and met the standard of substantial evidence, but it did not address preclusion or collateral estoppel. The Appeal Board in ISCR Case No. 96-0525 at 3 n. 2 (App. Bd. June 17, 1997) stated, "Federal courts do not give collateral estoppel effect to misdemeanor convictions,"[(13)] and cited ISCR Case No. 94-1213 at 3 (App. Bd. Jun. 7, 1996). The Appeal Board also concluded that state and federal court convictions based on *Alford*-type pleas[(14)] have collateral estoppel effect on industrial security hearings. *Id*. at 3-5. These broad statements about the collateral estoppel effects of different types of convictions conflict with decisions of the Supreme Court and the federal circuits.

E. Collateral estoppel with respect to state and federal convictions.

I agree with the majority's three-part test for application of collateral estoppel involving federal court criminal convictions. Additionally, the Supreme Court has determined that the third requirement (the application of collateral estoppel must not result in unfairness) is always applicable, regardless of the jurisdiction where the criminal trial occurred.[(15)] My disagreement with the majority

is that I believe Supreme Court precedent (which has developed the common law of collateral estoppel) and a federal statute are consistent in their support for application of state collateral estoppel law to determine the preclusion effects of a state court conviction. In Applicant's case, the federal and state collateral estoppel rules with respect to the preclusion effects of convictions are the same.[(16)]

(1) 28 U.S.C. § 1738. 28 U.S.C. does not explicitly or directly apply to administrative hearings. In regard to state court convictions, however, "28 U.S.C. § 1738 generally requires 'federal courts to give preclusive effect to state-court judgments whenever the courts of the State from which the judgments emerged would do so.'" *Haring v. Prosise*, 462 U.S. 306, 313 (1983) (quoting *Allen v. McCurry*, 449 U.S. 90, 96 (1980)). "This statute directs a federal court to refer to the preclusion law of the State in which judgment was rendered." *Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373, 380 (1985).

Federal courts may review security clearance determinations, including whether an Administrative Judge properly applied collateral estoppel with respect to a previous state court conviction. Because Federal courts, under § 1738, are required to apply state preclusion law, it is illogical for the Board to employ its own rules of *res judicata* and collateral estoppel. A Federal court could not comply with § 1738 and affirm a Board decision, should that Board decision conflict

with state collateral estoppel rules. In *Marrese*, the Supreme Court stated, "[§ 1738] goes beyond common law and commands a federal court to accept the rules chosen by the State from which the judgment is taken." *Id.* (citations omitted). This language refers to the mandatory, statutory application of state collateral estoppel rules, as opposed to the flexibility of federal common law, which is developed through caselaw.[(17)]

In *Haring v. Prosise*, for example, the Supreme Court analyzed Virginia state court decisions and determined that Prosise's guilty plea to manufacturing a controlled substance in state court under "Virginia law would not bar Prosise from litigating the validity of the search conducted by petitioners." 462 U.S. at 317. The Court also rejected petitioner's proposal that the "Court should create a special rule of preclusion" for among other reasons "to preserve important federal interests [consistency] in judicial administration." *Id*. at 317-322.

The Federal Circuit has decided that § 1738 requires a determination of the preclusive effect at a Merit Systems Protection Board hearing of a prior guilty plea in Maryland court under Maryland law. *See Graybill v. U.S. Postal Service*, 782 F.2d 1567, 1571-1572 (Fed. Cir. 1986). In 1999, citing *Graybill*, the Federal Circuit came to the same conclusion about preclusion requirements of § 1738 in an Armed Services Board of Contract Appeals case. *See Caldera v. Northrop Worldwide Aircraft Services, Inc.*, 192 F.3d 962 (Fed. Cir. 1999).

(2) Federal common law and collateral estoppel. Title 28 U.S.C. § 1738 has been in effect essentially unchanged in its present form since 1790. *Allen v. cCurry*, 449 U.S. 90, 96 n.8 (1980). Federal common law mirrors 28 U.S.C. § 1738 by virtue of § 1738's long-standing existence. Federal common law recognizes the virtues of reduction of unnecessary litigation, which fosters reliance on adjudication, and the federal common law's recognition of collateral estoppel promotes "the comity between state and federal courts that has been recognized as a bulwark of the federal system." *Id*. (citing *Younger v. Harris*, 401 U.S. 37, 43-45 (1971)).

Some might argue that the absence of a significant body of caselaw requiring administrative judges to comply with collateral estoppel requirements for a previous state criminal court conviction allows an administrative judge to craft their own collateral estoppel rules. In *University of Tennessee v. Elliott*, 478 U.S. 788, 797 (1986), the Supreme Court determined that the federal common law rules of preclusion required application of state preclusion law in the context of administrative hearings, stating:

We have previously recognized that it is sound policy to apply principles of issue preclusion to fact-finding of administrative bodies acting in a judicial capacity. In a unanimous decision in *United States v. Utah Construction & Mining Co.*, 384 U.S. 394 (1966), we held that the fact-finding of the Advisory Board of Contract Appeals was binding in a subsequent action in the Court of Claims involving a contract dispute between the same parties . . . "Occasionally courts have used language to the effect that *res judicata* principles do not apply to administrative proceedings, but such language is certainly too broad. When an administrative agency is acting in a judicial capacity, and resolves disputed issues of fact properly before it which the parties have an adequate opportunity to litigate, the courts have not hesitated to apply *res judicata* to enforce repose." (citations omitted).

The *Tennessee v. Elliott* Court at 799 continued:

The [Constitution's] Full Faith and Credit Clause is of course not binding on federal courts, but we can certainly look to the policies underlying the Clause in fashioning federal common-law rules of preclusion. "Perhaps the major purpose of the Full Faith and Credit Clause is to act as a nationally unifying force," *id*., at 289 (White, J. concurring in judgment), and this purpose is served by giving preclusive effect to state administrative fact-finding rather than leaving the courts of a second forum, state or federal, free to reach conflicting results. Accordingly, we hold that when a state agency "acting in a judicial capacity . . . resolves disputed issues of fact properly before it which the parties have an adequate opportunity to litigate," *Utah Construction & Mining Co.*, 384 U.S. at 422, federal courts must give the agency's fact-finding the same preclusive effect to which it would be entitled in the State's courts.

It is illogical to conclude that courts are required to follow collateral estoppel rules for previous administrative hearings, but conversely administrative judges are not required to comply with such rules for previous state court convictions.

(3) The majority opinion. The majority, citing four circuit-level cases, reasons that state law should not be considered

because uniformity in administrative hearings is a better policy choice than that made by Congress in 28 U.S.C. § 1738, and the Supreme Court in federal common law. The majority concludes that the Supremacy Clause authorizes the Board to choose the scheme for application of collateral estoppel in industrial security cases. I distinguish the four cases cited by the majority-all involve injunctive relief ordered by state courts that affect the core functions of federal agencies, all involve situations where neither the federal government nor the federal agency was a party to the prior litigation, none involve procedural or evidentiary rules for administrative hearings, and none involve collateral estoppel effects of a prior state court conviction.

(1) *Taylor v. Sawyer*, 284 F.3d 1143 (9th Cir. 2002). The Ninth Circuit succinctly explained why § 1738 did not require the Federal government to comply with a state court order that Taylor's state and federal sentences were to run concurrently (the state sentence was already completed):

However, it has been held that the Act does not apply to federal executive branch agencies and to courts reviewing cases in which the relief sought is an order for an action by a federal executive agency. *See NLRB v. Yellow Freight Sys., Inc.*, 930 F.2d 316, 330 (3d Cir. 1991). Further, as the Supreme Court has explained recently, although the full faith and credit doctrine applies to the recognition of civil judgments, it does not apply to either enforcement measures arising from civil judgments or the operation of state statutes. *Baker* [*v. Gen. Motors Corp.*, 522 U.S. 222 (1998)] (holding that a federal court in Missouri was not obligated to give full faith and credit to a consent judgment entered by a Michigan state court). In resolving *Baker*, the Supreme Court concluded that one state's judgment cannot be used to control litigation in other courts absent both parties having been before the court in both litigations. *Id*. at 239.

Id. at 1152-53.

(2) *Arapahoe County Airport Authority v. Federal Aviation Administration*, 242 F.3d 1213 (10th Cir. 2001). The Tenth Circuit reached the same result as in *Taylor*, for the same reasons, deferring to the FAA's decisions about the safe operation of an airport and the civil aviation needs of the public over the state court's injunctive order. The Arapahoe Court noted:

We agree with the FAA and the Fifth Circuit that the preclusive effect, if any of the Colorado Supreme Court decision derives from the common law doctrines of *res judicata* and issue preclusion (collateral estoppel), not § 1738. We further agree these common law doctrines extending full faith and credit to state court determinations are trumped by the Supremacy Clause if the effect of the state court judgment or decree is to restrain the exercise of the United States' sovereign power by imposing requirements that are contrary to important and established federal policy. Balancing, de novo, the common law justification for the full faith and credit with the competing policy supporting the Supremacy Clause, we conclude the FAA is not required to give preclusive effect to the Colorado Supreme Court's decision.

Id. at 1219. In the *Arapahoe* balancing test, the 10th Circuit reasoned that the Colorado proceeding lacked the "depth and breadth of analysis" of the FAA hearing, the Colorado Supreme Court was "seriously divided," and the FAA was not a party to or in privity with a party to the state court proceedings. *Id*. at 1219-1220. Because the FAA was not a party in the earlier proceeding, a key requirement for issue preclusion under state and federal law was not met. In regard to balancing the supremacy principles, the court recognized "in the arena of aviation regulation 'federal concerns are preeminent,'" and Congress has provided a "comprehensive scheme of combined regulation, subsidization, and operational participation" in the aviation field, tilting the balance towards federal interests trumping state interests. *Id*. at 1221.

(3) *N.L.R.B. v. Yellow Freight Systems, Inc.*, 930 F.2d 316, 320 (3rd Cir. 1991). The Third Circuit commented about the inapplicability of § 1738 to N.L.R.B. decisions because, in part, federal courts are not required to give collateral estoppel effect to an unappealed arbitration award. *Yellow Freight* balanced the policy in favor of arbitration against the "federal policy to remedy unfair labor practices" and concluded the arbitrator's findings of fact need not be given preclusive effect by the N.L.R.B. *Id*. at 32-321. *Yellow Freight* stated, "when a state agency 'acting in a judicial capacity . . . resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate' . . . federal courts must give the agency's fact finding the same preclusive effect to which it is entitled in the State's courts." *Id*. at 321 (quoting *University of Tennessee v. Elliott*, 478 U.S. 788, 799 (1986)), and decided that the arbitrators decision was not binding because "the arbitrator was not presented with evidence essential to the Board's resolution of

the same factual issue in disposing of an unfair labor practice charge." *Yellow Freight,* 930 F.2d at 322.

(4) *American Airlines, Inc., et al. v. Department of Transportation*, 202 F.3d 788, 799 (5th Cir. 2000). The Fifth Circuit made a broad statement about § 1738 being applicable to courts, but not agencies, and then distinguished two cases that held otherwise. The court indicated "the rationale underlying § 1738 extends to agencies through common law preclusion doctrines. This rule is consistent with Supreme Court precedent and the plain text of § 1738. *Id*. at 800. *American Airlines* emphasized that the federal agency involved was not in privity with any party in the state court action. *Id*. The court then balanced the importance of federalism and repose against supremacy of federal concerns in aviation, and inconsistent results, ultimately deciding that the state's judgment did not preclude the agency from making its own decision about airline service at a particular airport. *Id*. at 800-801

(5) Conclusion. A similar balancing analysis favors application of state preclusion rules versus the majority's desire for uniformity in procedural application of preclusion rules. Initially, it should be noted that the Supremacy Clause and the authority of the federal executive trumps a state court decision to order that someone receive a federal security clearance.(18) This is not the issue before the Board. The issue is whether a federal Administrative Judge should give a different preclusion effect to a state court conviction than that same state's courts would give to the conviction.

F. Application of collateral estoppel to Applicant's misdemeanor conviction.

(1) Facts about Applicant's conviction and trial. Applicant's indictment, plea agreement, and conviction. Applicant was charged with Lewd Act Upon a Child, in violation of § 16-15-140 of the South Carolina Code of Laws, (1976 as amended).(19) The specified conduct alleged in the indictment was that Applicant:

on or between January 1, 1997 and January 31, 2002, being over the age of fourteen years (14), did willfully and lewdly commit or attempt to commit a lewd and lascivious act upon or with the body of [S], a child being under the age of sixteen years with the intent of arousing, appealing to and gratifying the lust, passions, and sexual desires of himself or the child.

In Applicant's statement to the Defense Security Service, Government Exhibit 2, on November 14, 2003, he stated, "The [prosecutor] has offered me a plea bargain such that if I pled guilty to simple assault, the charge of lewd act on a minor would be dropped and my conviction would be expunged after two years. I am considering this offer because I am not certain I want to take my chances with a jury trial." The court record, Government Exhibit 6, simply states, "before Judge [] on 1-7-04 by bench [trial] DISPOSITION: plead guilty to SA & B, sentence: $225.00." The SOR indicates Applicant "pleaded guilty to the amended charge of Simple Assault and Battery and [] was fined $225.00."(20)

We have no other information to help us determine what facts supported the elements of the offense of assault and battery. The court's record is devoid of information about the providence inquiry, the existence of stipulations, whether the battery involved a sexual contact, the name of the victim, or even the date or location of the assault and battery. We don't know whether Applicant's guilty plea was actually a plea of no contest or an *Alford*-type guilty plea.

(2) South Carolina law on collateral estoppel. South Carolina has "adopted the general rule of collateral estoppel as set forth in the Restatement (Second) of Judgments § 27 (1982)." *State v. Bacote*, 331 S.C. 328, 330, 503 S.E.2d 161, 162 (1998) (citation omitted). Section 27 states, "When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim." *Id*.(21) The party asserting collateral estoppel has the burden of establishing it's application. *Schmidt v. Cannon*, 347 S.C. 75, 80, 552 S.E.2d 767, 772 (2001). Additionally South Carolina recognizes that collateral estoppel is grounded upon concepts of fairness, and "should not be rigidly or mechanically applied." *State v. Bacote*, 331 S.C. 328, 330, 503 S.E.2d 161, 162 (1998) (citations omitted). South Carolina also adopted the exceptions in Section 28 of Restatement (Second) of Judgments (1982), which lists exceptions for the requirement to apply collateral estoppel.

(3) Application of South Carolina law on collateral estoppel to Applicant's case. Applicant's misdemeanor conviction does not reveal the name, age or gender of the victim of the battery. Nor is the nature of circumstances of the

battery disclosed in the final judgment. Therefore, these determinations are not conclusive, and Applicant can challenge or contest whether he touched S in a sexual manner.

Whether Applicant can now challenge the allegation that he committed an assault and battery at all is a more difficult issue. The parties at the hearing did not litigate, and we have insufficient record information for us to conclude whether Applicant had an adequate incentive to obtain a full and fair adjudication in the initial action.

Federal courts have declined to apply collateral estoppel where the circumstances indicate a lack of incentive to litigate the original matter. *See, Otherson*, 711 F.2d at 275-276*; United States v. Berman*, 884 F.2d 916, 922-23 (6th Cir. 1989); *Tutt v. Doby*, 459 F.2d 1195, 1200 (D.C. Cir. 1972). "Preclusion is sometimes unfair if the party to be bound lacked an incentive to litigate in the first trial, especially in comparison to the stakes of the second trial." *Otherson*, 711 F.2d at 273. Applicant may have lacked the incentive to fully litigate the misdemeanor offense because at most he faced a fine and 30 days in jail. A plea bargain may have further reduced the stakes creating more of a disincentive to litigate the issues. *See Otherson*, 711 F.2d at 276; *Raiford*, 695 F.2d at 524. Because the parties did not fully address the issue of preclusion at the hearing, we cannot determine whether or not collateral estoppel should be applied in Applicant's case.

G. Harmless error analysis

Our conclusion that the Judge made a legal error does not end our analysis. Next we must determine whether under all the facts and circumstances of this case, the error is harmless. The Judge thoroughly discussed Applicant's sexual offenses involving S in his findings and conclusions. If he had determined that Applicant had not committed any offense involving S, or if he had determined that the offense was a simple assault and battery without being aggravated by its sexual aspects, there is a better case for granting Applicant's security clearance. Therefore, we conclude that the legal error may have influenced the Judge's decision. Accordingly, we conclude that this error was not harmless.

H. Remedy

Having determined that harmful or prejudicial error occurred, we must determine an appropriate remedy. Remand, rather than reversal, is appropriate for those legal errors that can be corrected on remand. Reversal implicitly requires the Board to determine that a "Judge's clearance decision is not sustainable and the identified errors cannot be remedied on remand." *See* ISCR Case No. 03-22861 at 3 (App. Bd. June 2, 2006); ISCR Case No. 03-09053 at 5 (App. Bd. Mar. 29, 2006).

This is not a case where approval or disapproval of a clearance would be arbitrary and capricious regardless of the factual determinations and analysis. A sustainable decision largely depends on whether or not the Judge finds that Applicant committed the alleged sexual misconduct. As such remand is clearly the appropriate remedy.

Signed: Mark W. Harvey

Mark W. Harvey

Administrative Judge

Member, Appeal Board

1. In his answer to the SOR allegation dealing with the improper sexual conduct, Applicant admitted that the legal events (i.e., the initial charge of Lewd Act on a Minor, a felony, followed by his guilty plea to the amended charge of Simple Assault and Battery and the assessment of a $225.00 fine) but denied the factual basis for the original charge.

2. The problems of Applicant's cross-examination of his wife, and the Administrative Judge's handling of that cross-examination were significantly compounded by the fact that Applicant is a lay person without legal training, and lacked an understanding of how to form questions and how to conduct effective cross-examination. In addition to the problems with the Judge's restriction of the scope of Applicant's cross-examination, the hearing transcript reveals that the Judge, generally, gave Applicant little, if any, leeway in his cross-examination of his wife, notwithstanding Applicant's pro se status.

3. A 1996 shoplifting charge was the subject of a separate SOR allegation against Applicant. The Administrative Judge found in favor of Applicant on this SOR allegation and the Judge's treatment of it is therefore not an issue on appeal.

4. 28 U.S.C. § 1738 provides: "The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto. The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form. Such Acts, records, and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken."

5. The separate opinion states that it is illogical for the Board to employ its own rules of *res judicata* and collateral estoppel. The Board is not attempting to employ its own rules of res judicata and collateral estoppel. We are merely adopting a standard that employs well established precepts of federal common law to resolve collateral estoppel issues in DOHA cases involving state misdemeanor convictions.

6. The decision of whether or not to apply the collateral estoppel doctrine is a procedural one, but it has significant substantive overtones in that it determines the parameters of the record, and thus the scope and depth of a DOHA Judge's inquiry into the particular facts of a case.

7. Partially as a counter to the majority opinion's expressed interest in treating DOHA applicants in a uniform manner, the separate opinion emphasizes the importance of the concepts of comity and supporting federalism. These are strong concerns when dealing with federal courts, who hear and decide cases in a manner very similar to state courts and who apply very similar rules of procedure and evidence. The considerations change, however, when dealing with federal executive agencies like DOHA, who have been assigned quasi-judicial powers to resolve matters in specific, narrowly defined areas, who bring a unique degree of expertise to their specialized area, and who resolve the issues brought before them without use of formal rules of evidence or detailed procedures. The separate opinion cites *University of Tennessee v. Elliott* for the proposition that federal common law rules of preclusion require application of state preclusion law in the context of administrative hearings. It should be pointed out that *Tennessee v. Elliott* involved a federal court review of a state agency decision, which is a posture significantly different from the one in the case before us. Given *Egan* and this difference in posture, we are not persuaded that *Tennessee v. Elliott* is on point.

8. In the Judge's decision, he began his Findings of Fact with the sentence, "Applicant's admissions to the allegations in the SOR are incorporated herein by reference." The Judge did not subsequently refer to Applicant's response to the SOR in his decision pertaining to the 2003 charge. The Judge did not explain why he considered the admissions in his statement, but not all of the evidence in his statement that he offered contesting the sexual abuse of his stepdaughter. *See* Fed. R. Evid. 106; *Beach Aircraft Corp. v. Rainey*, 488 U.S. 153, 171-172 (1988) (discussing rule of completeness).

9. In lieu of several exhibits and some testimony that were not admitted, the Judge accepted proffers of testimony that Applicant had always been an excellent father and family man, and appeared to have an altogether proper relationship with his two step-daughters whenever they were all together at family gatherings and other times, as well as that he had numerous video recordings to present showing the wholesome relationship he says he had with his step-daughters over a period of years, and particularly with S. Applicant's appellate complaints about the failure to admit the testimony and exhibits described by these proffers are without merit because Applicant does not explain how the proffers were not a fair description of the excluded evidence.

10. Because Applicant failed to articulate how the sexual abuse of S by another person was relevant, the Judge correctly determined that this information was inadmissible.

11. The exhibits that were marked and presented to the Judge, but not admitted into evidence were not included in the record. Such documents should be clearly marked as not admitted and attached to the record. Because of the absence of the documents, the Appeal Board was unable to assess the degree to which they supported Applicant's claims.

12. Monica R. Brownlee, "Rethinking the Restatement View (AGAIN!): Multiple Independent Holdings and the Doctrine of Issue Preclusion," 37 Val. U.L.Rev. 879, 882-883 (2003) (supporting citations omitted); *see Cromwell v. Sac,* 94 U.S. 351, 352-353 (1876) (illustrating differences between claim preclusion and issue preclusion).

13. However, *Otherson* held that the federal misdemeanor conviction at issue in that case collaterally estopped the defendant from denying the underlying conduct. *Id*. at 278. *See also Galin v. Fujino*, 39 F.3d 1187 at *4 -*5 (9th Cir. 1994) (unpublished opinion); *Franklin v. Thompson*, 981 F.2d 1168, 1170-71 (10th Cir. 1992).

14. *See North Carolina v. Alford*, 400 U.S. 25, 37-38 (1970)(stating "an individual accused of [a] crime may voluntarily, knowingly, and understandingly consent to the imposition of a prison sentence even if he is unwilling or unable to admit his participation in the acts constituting the crime"); *Ballard v. Burton*, 444 F.3d 391, 397 n.3 (5th Cir. 2006) (stating, "A guilty plea under the *Alford* doctrine is the functional equivalent to an unconditional plea of *nolo contendere* which itself has the same legal effect as a plea of guilty on all further proceedings within the indictment. The only practical difference is that the plea of *nolo contendere* may not be used against the defendant as an admission in a subsequent criminal or civil case." (citations omitted)).

15. The Supreme Court has observed, "As a general matter, even when issues have been raised, argued, and decided in a prior proceeding, and are therefore preclusive under state law, '[r]edetermination of the issues [may nevertheless be] warranted if there is reason to doubt the quality, extensiveness, or fairness of procedures followed in prior litigation.'" *Haring v. Prosise*, 462 U.S. 306, 317-318 (1983) (*citing Montana v. United States*, 440 U.S. 147, 164, n. 11 (1979)). The party against whom the earlier decision is asserted must have had a "full and fair opportunity" to litigate that issue in the earlier case. *Haring v. Prosise*, 462 U.S. at 313 (citing *Allen v. McCurry*, 449 U.S. 90, 101 (1980)); *Montana v. United States*, 440 U.S. at 153; Restatement (Second) of Judgments § 27 (1982) (concepts of full and fair opportunity addressed in Illustrations 11 and 14); Brownlee, *supra* note 5, at 883-884. *See also Parklane Hosiery Co. v. Shore,* 439 U.S. 322, 330 (1979) (detailing circumstances where allowing the use of collateral estoppel would result in unfairness). Other special circumstances may also warrant an exception to the normal rules of preclusion. *See Montana v. United States*, 440 U.S. at 155.

16. In regard to resolving the three tests, federal courts often look to the Restatement (Second) of Judgments §§ 27-29 for guidance. *See Otherson*, 711 F.2d at 272-275. The state law to be applied in this case mirrors the federal law because the source for both is the Restatement (Second) of Judgments §§ 27-29. *See* Section F of this decision, *infra*.

17. "'Faith' and 'credit' were evidentiary terms used at common law to describe the effect given to judgments from a foreign jurisdiction. The recognition for such judgments was a matter of comity, a respect for courts of another sovereign." Smith, "Full Faith and Credit and Section 1983: A Reappraisal," 63 N.C.L.Rev. 59, 83 (Nov. 1984).

18. In *Department of the Navy v. Egan*, 484 U.S. 518, 527 (1988) the Court recognized that the Executive had primacy in the realm of industrial security clearances stating, "the grant of [a] security clearance to a particular employee, a sensitive and inherently discretionary judgment call, is committed by law to the appropriate agency of the Executive Branch."

19. South Carolina Ann. § 16-15-140 (2005) provides, "It is unlawful for a person over the age of fourteen years to wilfully and lewdly commit or attempt a lewd or lascivious act upon or with the body, or its parts, of a child under the age of sixteen years, with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of the person or of the child." Violation of this section is a Class D felony, "and, upon conviction, [a defendant] must be fined in the discretion of the court or imprisoned not more than fifteen years, or both."

20. Under South Carolina law, "[a] 'simple assault and battery' is an unlawful act of violent injury to another, unaccompanied by any circumstances of aggravation." *State v. Sprouse*, 325 S.C. 275, 285-86, 478 S.E.2d 871, 877 (1996) (citing *State v. Cunningham*, 253 S.C. 388, 171 S.E.2d 159 (1969)). In regard to the term, "violent injury", South Carolina courts have stated, "the adjective 'violent' may be somewhat misleading . . . For example, assault and battery has also been defined as "any touching of the person of an individual in a rude or angry manner, without justification." *State v. LaCoste*, 347 S.C. 153, 166, 553 S.E.2d 464, 473 (2001) (citations omitted). The maximum punishment for simple assault and battery under South Carolina Ann. § 22-3-560 (2005) is a fine not exceeding five hundred dollars or

imprisonment for a term not exceeding thirty days, or both.

21. *See also Montana v. United States,* 440 U.S. at 155; *Emich Motors Corp. v. General Motors Corp.*, 340 U.S. 558, 568 (1951); 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). *See also Parklane Hosiery Co. v. Shore,* 439 U.S. 322, 326 n. 5 (1979) (must be "necessary to the outcome of the first action")."In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, the inquiry must always be as to the point or question actually litigated and determined in the original action, not what might have been thus litigated and determined." *Cromwell v. County of Sac*, 94 U.S. 351, 353 (1877).