

DATE: June 17, 1997

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 96-0525

APPEAL BOARD DECISION AND REVERSAL ORDER

Appearances

FOR GOVERNMENT

Terera A. Kolb, Esq.

Department Counsel

FOR APPLICANT

Jeffrey K. Rath, Esq.

Administrative Judge Robert R. Gales issued a decision, dated December 19, 1996, in which he concluded it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. Department Counsel appealed. For the reasons set forth below, the Board reverses the Administrative Judge's decision.

This Board has jurisdiction on appeal under Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, as amended.

Department Counsel's appeal presents the following issues: (1) whether the Administrative Judge's finding that Applicant did not sexually abuse his granddaughter was arbitrary, capricious, or contrary to law in light of Applicant's criminal conviction for sexual abuse; (2) whether it was arbitrary, capricious or contrary to law for the Administrative Judge to find that even if Applicant sexually abused his granddaughter, such conduct was mitigated, given the Judge's other findings and his findings on the falsification allegations; and (3) whether it was arbitrary, capricious or contrary to law for the Administrative Judge to find Applicant did not falsify material facts.

Procedural History

The Defense Office of Hearings and Appeals issued to Applicant a Statement of Reasons (SOR) dated August 15, 1996. The SOR was based on Criterion D (Sexual Behavior), Criterion J (Criminal Conduct), and Criterion E (Personal Conduct).

A hearing was held on October 22, 1996. The Administrative Judge subsequently issued a written decision in which he concluded it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. The case is before the Board on Department Counsel's appeal from that favorable decision.

Appeal Issues

1. Whether the Administrative Judge's finding that Applicant did not sexually abuse his granddaughter was arbitrary, capricious, or contrary to law in light of Applicant's criminal conviction for sexual abuse. The Administrative Judge found Applicant "did not knowingly engage in sexual abuse of his granddaughter, as alleged." Department Counsel contends the Judge's finding is arbitrary, capricious and contrary to law. In support of this contention, Department Counsel argues: (a) the Judge erred by treating Applicant's *Alford* plea as the same as a *nolo contendere* plea for collateral estoppel purposes; and (b) Applicant's conviction for first degree sexual abuse collaterally estopped him from denying his guilt for sexually abusing his granddaughter. For the reasons that follow, the Board concludes the Judge erred.

(a) The Administrative Judge noted Applicant entered an *Alford* plea to the criminal charge against him and stated "it is unclear if [an *Alford* plea] can be used against a defendant as an admission in a subsequent criminal or civil case. *See, e.g., Fed. R. Evid. 410; Fed. R. Crim. P. 11.*" The Judge later ruled that "[w]hile the *Alford* plea may offer some evidence that Applicant had participated in the conduct alleged, it is by no means conclusive proof of such conduct." Department Counsel contends the Judge erred because: (1) although Federal Rule of Evidence 410 excludes the use of *nolo contendere* pleas in a subsequent proceeding, no Federal Rule of Evidence excludes the use of *Alford* pleas in subsequent proceedings; and (2) even a criminal conviction based on an *Alford* plea has collateral estoppel effect.

In one case,⁽¹⁾ the Board was faced with an appeal claim that an Administrative Judge improperly considered an applicant's *Alford* plea to a criminal charge. However, the majority decision in that case did not squarely address the issue of whether an *Alford* plea or a conviction based on an *Alford* plea has collateral estoppel effect in DOHA proceedings.⁽²⁾ This appeal requires the Board to squarely address that issue.

As a preliminary matter, the Board notes that the Federal Rules of Evidence serve only as a guide in these proceedings. *See Directive, Additional Procedural Guidance, Item 19.* Furthermore, nothing in the Directive indicates or suggests that the Federal Rules of Criminal Procedure shall be applied in these proceedings, even as a guide. However, the legislative history of Federal Rule of Evidence 410 indicates that Congress amended it in 1975 to conform with Federal Rule of Criminal Procedure 11. Accordingly, the Board need only address Federal Rule of Evidence 410 in order to resolve this appeal.

The Administrative Judge's discussion about the collateral estoppel effect of a *nolo contendere* plea is legally irrelevant to the issue of the collateral estoppel effect, if any, of Applicant's *Alford* plea.⁽³⁾ Federal Rule of Evidence 410 is silent as to the use of an *Alford* plea in a subsequent proceeding. Nothing in Rule 410 or any other Federal Rule of Evidence precludes the use of an *Alford* plea or a conviction based on such a plea in a subsequent proceeding. Indeed, a conviction based on an *Alford* plea has the same collateral estoppel effect as a conviction based on a guilty plea. *Blohm v. Commissioner of Internal Revenue*, 994 F.2d 1542, 1553-55 (11th Cir. 1993).

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

A review of the decision shows that, for all practical purposes, the Administrative Judge engaged in a *de novo* review of the issue of Applicant's guilt or innocence of the criminal charge for which he was convicted by a state court. Furthermore, the Judge's analysis was not performed in accordance with any of the recognized exceptions to the collateral estoppel doctrine. The Judge's dissatisfaction with and disapproval of the conduct of the state authorities in handling Applicant's criminal case is legally irrelevant.⁽⁵⁾ Moreover, the Judge's desire for more or better evidence concerning the issue of Applicant's guilt or innocence (with respect to the criminal charge Applicant pleaded to) is also

legally irrelevant.⁽⁶⁾ Except for the qualification explained in the next paragraph, the Judge's analysis was in derogation of the collateral estoppel doctrine, and therefore, it was arbitrary, capricious, and contrary to law.

One aspect of Department Counsel's collateral estoppel argument lacks merit. Specifically, Department Counsel's argument ignores the critical point that the doctrine of collateral estoppel *did not* preclude Applicant from contesting SOR allegations that are not covered by his criminal conviction. SOR ¶1.a. alleged Applicant engaged in sexual abuse of his granddaughter from October 1990 to September 1993. The substitute information to which Applicant entered his *Alford* plea (Applicant Exhibit C) alleged Applicant engaged in such sexual abuse between March 1993 and May 1993. Accordingly, Applicant's conviction *did not* collaterally estop Applicant from contesting the SOR allegation to the extent that he denied sexually abusing his granddaughter on occasions other than during the period March 1993 to May 1993. Therefore, the Judge did not act in derogation of the doctrine of collateral estoppel to the extent his analysis addressed the issue of whether Applicant sexually abused his granddaughter during the periods October 1990 to February 1993 and June 1993 to September 1993, which were not covered by Applicant's criminal conviction.

2. Whether it was arbitrary, capricious or contrary to law for the Administrative Judge to find that even if Applicant sexually abused his granddaughter, such conduct was mitigated, given the Judge's other findings and his findings on the falsification allegations. The Administrative Judge found, in the alternative, that even if Applicant sexually abused his granddaughter, such conduct was mitigated. Department Counsel contends the Judge's alternative finding was arbitrary, capricious, and contrary to law in light of Applicant's other findings and his favorable findings on the falsification allegations. For the reasons that follow, the Board concludes there is merit in Department Counsel's contention.

The Administrative Judge's alternative finding on sexual abuse cannot be reconciled, factually or logically, with his findings that Applicant did not engage in falsification as alleged in the SOR because his denials of sexual abuse were truthful. The inconsistency between the Judge's alternative finding on sexual abuse and his findings on falsification is patent and irreconcilable. Such an inconsistency indicates an arbitrary and capricious analysis that cannot be sustained.

3. Whether it was arbitrary, capricious or contrary to law for the Administrative Judge to find Applicant did not falsify material facts. The Administrative Judge found that Applicant did not falsify material facts when he denied (in written statements given on April 15, 1994 and September 15, 1994) that he never molested his granddaughter. The Judge also found that Applicant's May 29, 1996 written statement (Government Exhibit 3) to be of questionable reliability because "the language and syntax [are] so different from that which Applicant normally uses [and] the content so aberrant from the consistent story previously and subsequently furnished by Applicant, that it immediately brings to mind the *voluntary* 'confessions' of prisoners of war before propaganda cameras" (emphasis in original). Department Counsel makes several arguments in challenging these findings: (a) the Judge acted in an arbitrary and capricious manner by ignoring the Applicant's admissions in Government Exhibit 3 because there is no evidence that the statement was coerced; (b) the Judge erred by refusing to consider Government Exhibit 3 because of the manner in which it was prepared; (c) the language used by the Judge in describing Government Exhibit 3 indicate a bias against the Defense Investigative Service (DIS);⁽⁷⁾ and (d) the totality of the record evidence demonstrates that Applicant did falsify material facts as alleged in the SOR.

At the hearing, Applicant's attorney did not object to the admissibility of Government Exhibit 3. Nor did Applicant's attorney contend that Government Exhibit 3 was an involuntary or coerced statement. Despite the absence of objection or argument by Applicant's attorney, the Administrative Judge proceeded to analyze the voluntariness of Government Exhibit 3. The Judge's discussion, particularly in light of the Judge's reference to confessions made by prisoners of war before propaganda cameras, leads the Board to conclude the Judge found Government Exhibit 3 to be coerced and involuntary in nature. That finding is not sustainable on the record evidence in this case. Directive, Additional Procedural Guidance, Item 32.a.⁽⁸⁾

The Administrative Judge's disagreement with the manner in which the DIS investigators obtained Government Exhibit 3 from Applicant is legally and factually irrelevant. The mere fact that the investigators prepared the statement for Applicant (a former police officer with 12 years of experience, including the rank of captain) does not render it coerced or involuntary. Moreover, nothing in the record evidence concerning the facts and circumstances surrounding the preparation and signature of Government Exhibit 3 comes remotely close to approaching the stark picture of torture, intimidation, psychological manipulation, or "brainwashing" associated with the involuntary, staged confessions of

prisoners of war alluded to by the Judge. The Judge's hyperbolic characterization of Government Exhibit 3 is simply unsupported by the record evidence in this case.

Absent a sustainable finding that Government Exhibit 3 was coerced and involuntary in nature, the Administrative Judge had no rational basis to dismiss it in the manner that he did, particularly in light of the absence of any objection by Applicant's counsel to Government Exhibit 3. The Judge's dismissal of Government Exhibit 3 was arbitrary and capricious in nature and cannot be sustained on appeal.

The Board need not decide whether the admissions contained in Government Exhibit 3, standing alone, would support a finding that Applicant engaged in sexual misconduct with his granddaughter as alleged in SOR ¶1.a. Those admissions, taken together with the Applicant's conviction for sexual abuse of his granddaughter during the period March 1993 to May 1993, constitute record evidence that clearly undercuts the Administrative Judge's finding that no sexual abuse occurred. *See* Directive, Additional Procedural Guidance, Item 32.a. *See, e.g.*, ISCR Case No. 94-1109 (January 31, 1996) at p. 4. Logically, if Applicant engaged in sexual abuse (even if only for a lesser period than alleged by SOR ¶1.a.), then Applicant's denials of engaging in any such conduct were false. Considering the record as a whole, the Board cannot sustain the Judge's finding that Applicant's denials of engaging in sexual abuse of his granddaughter were truthful.

Conclusion

Department Counsel has met its burden of demonstrating error that warrants reversal. Pursuant to Item 33.c. of the Additional Procedural Guidance, the Board reverses the Administrative Judge's favorable decision.

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board

Signed: Michael Y. Ra'anan

Michael Y. Ra'anan

Administrative Judge

Member, Appeal Board

Signed: Jeffrey D. Billett

Jeffrey D. Billett

Administrative Judge

Member, Appeal Board

1. DOHA Case No. 94-0966 (July 21, 1995).

2. Indeed, that case can be distinguished from the current case. Federal courts do not give collateral estoppel effect to convictions for misdemeanor offenses. *See, e.g.*, ISCR Case No. 94-1213 (June 7, 1996) at p. 3 (citing federal case). Since DOHA Case No. 94-0966 involved a misdemeanor conviction, it was irrelevant (for purposes of collateral estoppel) whether the applicant's conviction in that case was based on a guilty plea or an *Alford* plea. Therefore, the majority's discussion of *Alford* pleas was unnecessary for the disposition of that appeal.

3. In the past, the Board has held that a conviction based on a *nolo contendere* plea does not collaterally estop an applicant from contending he or she is really innocent of the conduct for which he or she was convicted. *See, e.g.*, ISCR

Case No. 94-1213 (June 7, 1996) at p. 3. While researching the collateral estoppel issue for this appeal, the Board found a court decision that squarely holds that neither Federal Rule of Evidence 410 nor Federal Rule of Criminal Procedure 11(e)(6) preclude the use of a *nolo contendere* plea and conviction in a subsequent administrative agency proceeding. *See Myers v. Secretary of Health & Human Services*, 893 F.2d 840, 843 (6th Cir. 1990). The Board need not decide at this time whether that court decision warrants a change in the Board's position with respect to the collateral estoppel effect of a conviction based on a *nolo contendere* plea.

4. Federal and state criminal proceedings are undertaken under procedural and evidentiary requirements that exceed those applicable to industrial security clearance cases. Moreover, they must satisfy Federal or state constitutional requirements (or both) of due process of law, with special attention to the rights of criminal defendants. Accordingly, the results of such proceedings clearly qualify as due process adjudications entitled to be given full recognition and respect under the doctrine of collateral estoppel.

5. If Applicant had any complaints about the manner in which his state prosecution was handled, Applicant was free to raise those concerns with the state court judge at the trial level, or appeal his criminal conviction to a state appellate court.

6. The Administrative Judge's discussion of what kinds of sexual misconduct were not proven by Department Counsel was totally irrelevant. Just because Department Counsel did not prove that Applicant engaged in certain forms of sexual misconduct enumerated by the Judge, the Judge was not free to infer or conclude that Department Counsel failed to prove Applicant engaged in *any* sexual misconduct with his granddaughter.

7. Department Counsel uses the word bias (or variants) in its brief several times from page 16 on. At the same time Department Counsel's brief tries to insulate the word by asserting that Department Counsel "is not raising bias as a separate appellate issue." The Board takes Department Counsel at its word and declines to address the issue.

8. Whether there is sufficient evidence to support an Administrative Judge's findings is a question of law, not one of fact. *See, e.g.*, DOHA Case No. 95-0904 (November 15, 1996) at p. 3.