

DATE: May 1, 2000

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 99-0116

APPEAL BOARD DECISION AND REVERSAL ORDER

APPEARANCES

FOR GOVERNMENT

Carol A. Marchant, Department Counsel

FOR APPLICANT

Pro Se

Administrative Judge Kathryn M. Braeman issued a decision, dated October 21, 1999, in which she 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 erred by accepting Applicant's explanation about the March 1998 incident that led to his arrest and felony conviction for possession of a controlled substance; (2) whether the Administrative Judge erred by finding that Applicant's conduct was mitigated; and (3) whether the Administrative Judge erred by evaluating Applicant's conduct under Criterion H in a piecemeal manner.

Procedural History

The Defense Office of Hearings and Appeals issued to Applicant a Statement of Reasons (SOR) dated February 18, 1999. The SOR was based on Criterion J (Criminal Conduct) and Criterion H (Drug Involvement). A hearing was held on September 1, 1999. The Administrative Judge issued a written decision, dated October 21, 1999, in which she 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 the Judge's favorable decision.

Appeal Issues⁽¹⁾

1. Whether the Administrative Judge's erred by accepting Applicant's explanation about the March 1998 incident that led to his arrest and felony conviction for possession of a controlled substance. The Administrative Judge accepted Applicant's explanation about the March 1998 incident that led to his arrest and felony conviction for possession of cocaine, a controlled substance. Department Counsel contends the Judge erred because acceptance of Applicant's explanation runs contrary to the doctrine of collateral estoppel. Department Counsel's contention has merit.

It is well-settled that, with narrow exceptions not applicable in this case, an applicant is collaterally estopped from

contending that he or she did not engage in the criminal acts for which he or she was convicted. *See, e.g.*, ISCR Case No. 96-0525 (June 17, 1997) at pp. 3-4; ISCR Case No. 96-0587 (March 24, 1997) at p. 2; ISCR Case No. 95-0817 (February 21, 1997) at p. 3. Collateral estoppel applies to a criminal conviction whether the conviction is based on a verdict after trial or based on a guilty plea. ISCR Case No. 94-1213 (June 7, 1996) at p. 3 n. 4. Due process of law does not give an applicant 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.3d 42, 46 (3rd Cir. 1981). Federal and state criminal proceedings are entitled to be given full recognition and respect under the doctrine of collateral estoppel because they are conducted under procedural and evidentiary requirements that exceed those applicable to industrial security clearance cases, and must satisfy Federal and state constitutional requirements of due process that pay special attention to the rights of criminal defendants. *See* ISCR Case No. 96-0525 (June 17, 1997) at p. 4 n.4. Furthermore, DOHA Administrative Judges and this Board lack the jurisdiction and authority to pass judgment on the proceedings and decisions in criminal cases conducted by Federal and state courts.

In this case, Applicant entered a guilty plea to a felony drug charge as part of a plea agreement. Applicant's guilty plea constituted an admission that he committed the acts covered by the criminal charge to which he pleaded guilty. ISCR Case No. 94-1213 (June 7, 1996) at p. 3 (citing Supreme Court decisions). Applicant's motivation for entering the guilty plea is irrelevant to its legal effect.⁽²⁾ Having gained the benefits of a plea bargain, it is inequitable for Applicant to seek to retain the benefits of that plea bargain and then turn around and seek to repudiate his guilty plea and its legal effect in these proceedings. ISCR Case No. 94-1213 (June 7, 1996) at p. 4 n. 6.

The Administrative Judge noted that Applicant was bound by his felony guilty plea in a state criminal proceeding. However, the Judge then accepted Applicant's testimony to find that he really did not engage in the criminal conduct covered by his guilty plea.⁽³⁾ The Judge's action was arbitrary, capricious, and contrary to law because it had the practical effect of ignoring and disregarding the clear applicability of the doctrine of collateral estoppel to Applicant's guilty plea to a felony drug charge.

2. Whether the Administrative Judge erred by finding that Applicant's conduct was mitigated. The Administrative Judge found that Applicant's criminal conduct was mitigated because: (a) Applicant was not really guilty of the felony criminal conduct covered by his guilty plea; (b) Applicant believes he is eligible for early release from his probation because of his good behavior; (c) favorable character evidence was submitted on Applicant's behalf by his supervisor, a co-worker, and his pastor; (d) Applicant's conduct was mitigated by Criminal Conduct Mitigating Conditions 2 and 4; and (e) Applicant reported his March 1998 arrest and his June 1998 guilty plea to his defense contractor in June 1998. The Judge found that Applicant's drug involvement was mitigated because: (f) Applicant's conduct was mitigated by Drug Involvement Mitigating Conditions 1 and 2; (g) the favorable character evidence supports Applicant's denial of drug use; and (h) Applicant's involvement in the March 1998 incident does not outweigh the other favorable record evidence about his character traits and actions.

Department Counsel contends the Administrative Judge erred by finding Applicant's conduct was mitigated. In support of this contention, Department Counsel argues: (i) the Judge erred by accepting Applicant's claim that he did not intentionally or knowingly possess cocaine in connection with the March 1998 incident; (ii) the Judge erred by not giving proper weight to the significance of Applicant's guilty plea to a felony drug charge; (iii) the Judge erred by applying Criminal Conduct Mitigating Condition 4; (iv) the Judge erred by giving little weight to Applicant's five-year probation which is scheduled to last until June 2003; and (v) the Judge erred by applying Drug Involvement Mitigating Conditions 1 and 2. Department Counsel's arguments have mixed merit.

As discussed in our resolution of the first appeal issue, it was arbitrary, capricious, and contrary to law for the Administrative Judge to allow Applicant to attack the validity of his guilty plea to a felony drug charge and accept his testimony to find that he really did not engage in the criminal conduct covered by his guilty plea. Under the doctrine of collateral estoppel, the Judge was required to give full weight to Applicant's guilty plea and reject Applicant's attempt to attack the validity of his guilty plea. It was arbitrary, capricious, and contrary to law for the Judge to find Applicant's conduct was mitigated based on her finding that Applicant did not really engage in the criminal conduct covered by his guilty plea. The Judge's error on this point also fatally infected her application of the second portion of Criminal Conduct Mitigating Condition 4.⁽⁴⁾

The Administrative Judge also erred in her evaluation of the significance of Applicant's probationary status, which is scheduled to last until June 2003. As Department Counsel correctly notes, there is **no** record evidence that Applicant's probation will end in six months. It was arbitrary and capricious for the Judge to give any weight to Applicant's expressed hope that his probation might be ended early. Applicant's hope that his probation might be ended early is merely a personal opinion that has no evidentiary value as to whether he will in fact have his probation ended early. Applicant's hopes about ending his probation do not constitute evidence of reform and rehabilitation that the Judge could rely on in making her favorable determination as to Applicant's security eligibility.

The Administrative Judge's application of Drug Involvement Mitigating Condition 1 ⁽⁵⁾ to Applicant's marijuana use was based on the Judge's conclusion that Applicant was not really guilty of possession of crack cocaine in connection with the March 1998 incident. As discussed earlier in this decision, the Judge's conclusions about the March 1998 incident were based on reasoning that is arbitrary, capricious, and contrary to law. Accordingly, the Judge's application of Drug Involvement Mitigating Condition 1 was fatally infected by her errors concerning the March 1998 incident.

The Administrative Judge's application of Drug Involvement Mitigating Condition 2 ⁽⁶⁾ with respect to the March 1998 incident was not arbitrary, capricious, or contrary to law. The Judge's application of Drug Involvement Mitigating Condition 2 with respect to the March 1998 incident fell within the bounds of her discretion given the particular facts and circumstances of this case.

3. Whether the Administrative Judge erred by evaluating Applicant's conduct under Criterion H in a piecemeal manner. Department Counsel contends the Administrative Judge erred by evaluating Applicant's conduct under Criterion H in a piecemeal manner. In support of this contention, Department Counsel argues: (a) the Judge erred by considering Applicant's marijuana use in 1971-1972 separately from Applicant's March 1998 drug incident; and (b) the Judge erred by analyzing Applicant's conduct under Criterion H based on her finding that Applicant did not intentionally or knowingly possess cocaine during the March 1998 incident. Department Counsel's arguments have mixed merit.

Department Counsel correctly notes that an Administrative Judge must consider the evidence as a whole and avoid a piecemeal analysis of an applicant's history of conduct. However, it was not arbitrary or capricious for the Judge to conclude that the 26 to 27-year gap between Applicant's marijuana use (in 1971-1972) and the March 1998 drug incident was sufficiently large as to render the two unrelated and not part of a meaningful pattern of conduct.

Department Counsel persuasively argues that the Administrative Judge's analysis of Applicant's conduct under Criterion H was influenced by her flawed analysis of that conduct under Criterion J. Given the applicability of the doctrine of collateral estoppel in this case, the Judge's analysis of Applicant's conduct under Criterion H was flawed to the extent it was influenced by the Judge's erroneous acceptance of Applicant's explanation that he was really innocent of drug-related criminal conduct covered by the felony charge to which he pleaded guilty.

Conclusion

Department Counsel has met its burden on appeal of demonstrating harmful error by the Administrative Judge. Considering the record as a whole, the totality of the Judge's errors warrants reversal. Accordingly, pursuant to Item 33.c. of the Directive's Additional Procedural Guidance, the Board reverses the Judge's October 21, 1999 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. Applicant's reply brief contains some statements that constitute new evidence because they seek to add information that goes beyond the record below. The Board cannot consider new evidence on appeal. Directive, Additional Procedural Guidance, Item 29.
2. Accordingly, Department Counsel is correct in arguing the Administrative Judge erred by relying on Applicant's motivation for entering into a plea agreement in her analysis.
3. By failing to raise the issue of collateral estoppel until closing argument, Department Counsel waived any objection to: (a) the admissibility of Applicant's statements and testimony that sought to contest the validity of his 1998 drug conviction; and (b) the Judge's questions of Applicant that elicited such testimony. However, Department Counsel's failure to object earlier in the hearing did not constitute a waiver of its right to raise the doctrine of collateral estoppel before the Administrative Judge.
4. ". . . or the factors leading to the violation are not likely to recur."
5. "[T]he drug involvement was not recent."
6. "[T]he drug involvement was an isolated or infrequent event."