KEYWORD: Sexual Behavior; Personal Conduct; Criminal Conduct

DIGEST: Applicant is a civilian employee of a defense contractor and has worked as a steam engineer for a boiler plant on a military installation for over 26 years. In August 2001, local authorities charged Applicant with child molestation in the first degree, a felony that carried a possible life sentence. In January 2002, pursuant to a plea agreement, Applicant pled guilty through an Alford plea to the misdemeanor offense of Communication with a Minor for Immoral Purposes. The court found him guilty and sentenced him. In later sworn statements to defense investigators, Applicant admitted the conviction but denied committing the actual offense. Applicant failed to mitigate the security concerns arising from his conviction for unlawful sexual behavior and the allegations of falsification. Clearance is denied.

CASENO: 04-00963.h1

DATE: 09/30/2005

DATE: September 30, 2005

In re:

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

Applicant for Security Clearance

ISCR Case No. 04-00963

DECISION OF ADMINISTRATIVE JUDGE

MICHAEL J. BRESLIN

APPEARANCES

FOR GOVERNMENT

Melvin A. Howry, Esq., Department Counsel

FOR APPLICANT

David I. West, Esq.

SYNOPSIS

Applicant is a civilian employee of a defense contractor and has worked as a steam engineer for a boiler plant on a military installation for over 26 years. In August 2001, local authorities charged Applicant with child molestation in the first degree, a felony that carried a possible life sentence. In January 2002, pursuant to a plea agreement, Applicant pled guilty through an *Alford* plea to the misdemeanor offense of Communication with a Minor for Immoral Purposes. The court found him guilty and sentenced him. In later sworn statements to defense investigators, Applicant admitted the conviction but denied committing the actual offense. Applicant failed to mitigate the security concerns arising from his conviction for unlawful sexual behavior and the allegations of falsification. Clearance is denied.

STATEMENT OF THE CASE

The Defense Office of Hearings and Appeals (DOHA) declined to grant or continue a security clearance for Applicant under Executive Order 10865, *Safeguarding Classified Information Within Industry* (Feb. 20, 1960), as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Jan. 2, 1992), as amended and modified (the "Directive"). On March 1, 2005, DOHA issued a Statement of Reasons (SOR) detailing the basis for its decision. The SOR alleges security concerns raised under the Directive, specifically Guideline D, Sexual Behavior, Guideline E, Personal Conduct, and Guideline J, Criminal Conduct.

Applicant answered the SOR in writing on March 18, 2005. He elected to have a hearing before an administrative judge.

The case was assigned to me on May 16, 2005. With the concurrence of Applicant and Department Counsel, I convened the hearing on June 28, 2005. The government introduced Exhibits 1 through 4. Applicant's counsel offered Exhibits A through K and the testimony of two witnesses. Applicant testified on his own behalf. DOHA received the final transcript of the hearing (Tr.) on July 14, 2005.

FINDINGS OF FACT

Applicant denied the allegations in ¶¶ 2.a, 2.b, and 3.b of the SOR. Applicant's Answer to SOR, dated March 18, 2005; Tr. at 14. He admitted the allegations in ¶¶ 1.a, 1.b, and 3.a of the SOR. Applicant's Answer to SOR, dated March 18, 2005; Tr. at 14. After a complete and thorough review of the evidence in the record, I make the following additional findings of fact.

Applicant has worked for a defense contractor as an engineer for a steam plant on a military installation for more than 26 years. Ex. 1 at 2; Tr. at 55. The position requires a security clearance in order to obtain access to locations on the installation.

Applicant was born in July 1949. Ex. 1 at 2. He has 13 brothers, sisters, and half-sisters. *Id.* at 3-5. He completed high school and some college classes, and obtained a certificate from a trade school to qualify for a chief operating engineer license. Tr. at 56-57.

He was married in November 1971. Ex. 1 at 2. Applicant's wife has a daughter from a prior relationship, who took Applicant's name when she was about 13 years old and considers Applicant to be her father. Tr. at 30. Applicant's daughter has two daughters, "N" and "F." Tr. at 32. He and his wife have also sponsored 13 foster children over the years. *Id.*

In 1991, Applicant and his wife noticed that their granddaughter "N," then about three years old, was engaging in sexually suggestive conduct inappropriate for her age. Tr. at 33, 60. They recommended that their daughter contact the local authorities to have the matter investigated. Tr. at 34. The local sheriff's office investigated. Tr. at 34; Ex. 2 at 2. Applicant was interviewed as a witness, as were other family members. *Id.*; Tr. at 35. The investigators concluded that the boyfriend of Applicant's daughter molested the child, along with three other children. Ex. 2 at 2. The offender was convicted and sentenced to seven years confinement. *Id.*

In 1998, one of Applicant's sisters began living with Applicant's family, along with her three children: a boy and two girls. Tr. at 36. She subsequently moved out and lived at various addresses over the next few years. *Id*. at 64-65. In about 2001, Applicant's sister returned to the area with her (then) boyfriend, RN, and asked Applicant for $2,000.00 to catch up on car payments. Applicant refused. *Id*. at 65. Applicant's sister then asked if she, her three children, her boyfriend, and his son could live at Applicant's house. Applicant agreed to take in his sister and her children, but not her boyfriend and his son. *Id.* A few days later, in July 2001, Applicant's sister informed authorities that Applicant had molested her two daughters. *Id.*

Local authorities interviewed the alleged victims in July 2001 and contacted Applicant in August 2001. Ex. 4 at 4. Applicant denied touching the children in an inappropriate manner, but admitted he may have touched them inadvertently or accidentally while they were playing. On August 23, 2001, investigators questioned Applicant at the

sheriff's office. During a lengthy interview, Appellant repeatedly denied touching the children inappropriately. After a confrontational interrogation, the investigator reported that Appellant admitted touching one child in the area of her thighs on one occasion with sexual motivation. Ex. 4 at 5. Applicant denied ever touching the other child inappropriately. *Id.*

On August 24, 2005, state authorities charged Applicant with Child Molestation in the First Degree, a felony carrying a maximum penalty that included life imprisonment. Ex. 4 at 1-2. Applicant was arraigned on the charge and entered a Not Guilty plea. Ex. 4 at 9.

The state's attorney and Applicant's counsel negotiated a plea agreement. In January 2002 the state dropped the felony charge and instead charged Applicant with Communication with a Minor for Immoral Purposes, a gross misdemeanor punishable by up to one year confinement or a $5,000.00 fine, or both. Ex. 2 at 1-2; Ex. 4 at 20; Ex. G; Tr. at 83. The offense also qualifies for registration as a sexual offender under state law. Ex. I. On January 8, 2002, Applicant pled guilty to the misdemeanor offense. Ex. 4 at 18. He did so through an *Alford* plea, by which he did not specifically admit guilt, but admitted the evidence was sufficient to find him guilty. *Id.;* Tr. at 74. *See North Carolina v. Alford*, 400 U.S. 25 (1970). The court sentenced Applicant to 365 days' confinement, with 305 days suspended and the confinement to be served through electronic home monitoring, 24 months of community supervision, a $5,000.00 fine, and court fees. Ex. 4 at 19; Tr. at 69. The court did not require Applicant to register as a sexual offender. Ex. 4 at 28.

Appellant reported the charge and conviction to his employer. Tr. at 70. His employer advised him that his job and security clearance would not be affected if the offense was only a misdemeanor. Tr. at 70-71. Applicant asserted he took the plea bargain relying on the representation that it would not affect his ability to work. Tr. at 72.

In June and July 2002, security investigators interviewed Applicant about the charges. Exs. 2 and 3. Appellant admitted pleading guilty through an *Alford* plea to the misdemeanor offense but denied actually committing the crime. Ex. 3 at 2. He indicated he did not remember the questioning but thought he might have admitted touching his niece "only once with sexual motivations." Ex. 3 at 1. Applicant then denied ever touching either girl in that way, except by accident. Ex. 3 at 2. Applicant signed sworn statements to this effect on June 19, 2002 and July 31, 2002. Exs. 2 and 3.

In November 2002, local authorities charged RN, the boyfriend of Applicant's sister, with Child Molestation in the First Degree, of the same two girls in Applicant's case. Ex. J. RN pled guilty and was sentenced to 89 months confinement (with all but 6 months suspended). Ex. K at 2.

At the hearing in this case, Applicant testified about his interrogation by local investigators. Tr. at 66-68. He recalled arriving at 8:00 in the morning, submitting to numerous polygraph examinations, and being interrogated until about 11:00 or 11:30 a.m. Tr. at 67. According to Applicant, the investigator yelled at him and repeatedly accused him of molesting the children. Tr. at 66-67. He testified that his wife was present and was also yelling at him not to say anything and to request a lawyer. Tr. at 77. Applicant claimed that he only admitted to touching one child inappropriately by accident. Tr. at 75-76. He asked for a lawyer at the end of the questioning, after he was placed under arrest. Tr. at 78.

Applicant's wife testified that she was present during the post-polygraph interview. Tr. at 45. She claimed that the detective shouted at her husband and accused him of molesting the two girls. Tr. at 38-39. Applicant's wife contended that Applicant had just been diagnosed as diabetic, they could not get his blood-sugar under control, and he was not allowed to take his medication or to get something to eat during the interview. Tr. at 37-38. She testified that she advised Applicant to remain silent and to request an attorney, but he did not do so. Applicant's wife asserted that Applicant denied the allegations repeatedly, but then gave in and admitted his guilt. Tr. at 46. She indicated she became more upset at that point. Tr. at 49.

At the time of the hearing, Applicant's granddaughter "N" lives with Applicant and his wife. Tr. at 32. Applicant's granddaughter "F" lives with her mother, but visits Applicant's home on weekends and for weeks during the summer. *Id.*

Applicant is active in his church and serves as an elder. Tr. at 59. His former bishop praises his character and honesty. Ex. A. Applicant's former supervisor, co-workers, and friends consider him to be truthful, reliable, and trustworthy. Tr. at 108-09; Exs. B, C, D, E, and F.

POLICIES

The President has "the authority to . . . control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to occupy a position … that will give that person access to such information." *Department of the Navy v. Egan*, 484 U.S. 518, 527 (1988). In Executive Order 10865, *Safeguarding Classified Information Within Industry* (Feb. 20, 1960), the President set out guidelines and procedures for safeguarding classified information within the executive branch.

To be eligible for a security clearance, an applicant must meet the security guidelines contained in the Directive. Enclosure 2 of the Directive sets forth personnel security guidelines, as well as the disqualifying conditions and mitigating conditions under each guideline. The adjudicative guidelines at issue in this case are:

Guideline D, Sexual Behavior. Sexual behavior is a security concern if it involves a criminal offense, indicates a personality or emotional disorder, may subject the individual to coercion, exploitation, or duress, or reflects lack of judgment or discretion. Directive ¶ E2.A4.1.1.

Guideline E, Personal Conduct. Conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations could indicate that the applicant may not properly safeguard classified information. Directive, ¶ E2.A5.1.1.

Guideline J, Criminal Conduct. A history or pattern of criminal activity creates doubt about an applicant's judgment, reliability, and trustworthiness. Directive, ¶ E2.A10.1.1.

Conditions that could raise a security concern and may be disqualifying, as well as those which could mitigate security concerns pertaining to these adjudicative guidelines, are set forth and discussed in the conclusions below.

"The adjudicative process is an examination of a sufficient period of a person's life to make an affirmative determination that the person is eligible for a security clearance." Directive, ¶ E2.2.1. An administrative judge must apply the "whole person concept," and consider and carefully weigh the available, reliable information about the person. *Id.* An administrative judge should consider the following factors: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowledgeable participation; (3) the frequency and recency of the conduct; (4) the individual's age and maturity at the time of the conduct; (5) the voluntariness of participation; (6) the presence or absence of rehabilitation and other pertinent behavioral changes; (7) the motivation for the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence. *Id.*

Initially, the Government must present evidence to establish controverted facts in the SOR that disqualify or may disqualify the applicant from being eligible for access to classified information. Directive, ¶ E3.1.14. Thereafter, the applicant is responsible for presenting evidence to rebut, explain, extenuate, or mitigate the facts. Directive, ¶ E3.1.15. An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance." ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). "Any doubt as to whether access to classified information is clearly consistent with national security will be resolved in favor of the national security." Directive, ¶ E2.2.2.

A person granted access to classified information enters into a special relationship with the government. The government must be able to repose a high degree of trust and confidence in those individuals to whom it grants access to classified information. The decision to deny an individual a security clearance is not a determination as to the loyalty of the applicant. Exec. Ord. 10865, § 7. It is merely an indication that the applicant has not met the strict guidelines the President has established for issuing a clearance.

CONCLUSIONS

I considered carefully all the facts in evidence and the legal standards discussed above. I reach the following conclusions regarding the allegations in the SOR.

Most of the allegations in the SOR arise from Applicant's guilty plea to the misdemeanor offense described above. It is helpful to determine at the outset the legal significance of the plea.

As a general rule, an applicant convicted of a criminal offense is precluded from denying his guilt in subsequent civil proceedings. DISCR Case No. 94-1213 at 3 (App. Bd. June 7, 1996). This concept, known as collateral estoppel, is based upon the premise that an individual's right to administrative due process does not give him or her the right to litigate again matters properly adjudicated in an earlier proceeding. *Chisholm v. Defense Logistics Agency*, 656 F.2d 42, 46 (3rd Cir. 1981).

Under the *Alford* plea, Applicant did not specifically admit that he committed the acts in question. However, his actions before the state court constituted a guilty plea nonetheless. The effect of such a plea was explained by the United States Court of Appeals for the Eleventh Circuit in *Blohm v. C.I.R.*, 994 F.2d 1542, 1554 (11th Cir. 1993).

The collateral consequences of a guilty plea may not be avoided by the simultaneous assertion of innocence. A guilty plea is "more than a confession which admits that the accused did various acts." *Boykin v. Alabama*, 395 U.S. 238, 242, 89 S.Ct. 1709, 1711, 23 L.Ed.2d 274 (1969). It is an "admission that he committed the crime charged against him." *Alford*, 400 U.S. at 32, 91 S.Ct. at 164; *McCarthy v. United States*, 394 U.S. 459, 466, 89 S.Ct. 1166, 1170, 22 L.Ed.2d 418 (1969). A guilty plea is distinct from a plea of *nolo contendere.* A guilty plea is an "admission of all the elements of a formal criminal charge." *McCarthy,* 394 U.S. at 466, 89 S.Ct. at 1170. A *nolo contendere* plea is instead a "consent by the defendant that he may be punished as if he were guilty and a prayer for leniency." *Alford*, 400 U.S. at 35 n. 8, 91 S.Ct. at 166 n. 8. Guilty pleas must be rooted in fact before they may be accepted. Fed.R.Crim.P. 11(f); *Alford,* 400 U.S. at 35 n. 8, 91 S.Ct. at 166 n. 8. No similar requirement exists for pleas of *nolo contendere. Alford,* 400 U.S. at 35 n. 8, 91 S.Ct. at 166 n. 8. Courts may accept them without inquiring into actual guilt. *Id.*

Once accepted by a court, it is the voluntary plea of guilt itself, with its intrinsic admission of each element of the crime, that triggers the collateral consequences attending that plea. Those consequences may not be avoided by an assertion of innocence. As long as the guilty plea represents a voluntary and intelligent choice among alternative courses of action open to the defendant, *see Boykin v. Alabama,* 395 U.S. 238, 242, 89 S.Ct. 1709, 1711, 23 L.Ed.2d 274 (1969), and a sufficient factual basis exists to support the plea of guilt, see Fed.R.Crim.P. 11(f), the collateral consequences flowing from an *Alford* plea are the same as those flowing from an ordinary plea of guilt.

The Appeal Board has held that the doctrine of collateral estoppel applies in industrial security cases. ICSR Case No. 99-0116 at 2 (App. Bd. May 1, 2000); ISCR Case No. 96-0525 at 4 (App. Bd. June 17, 1997); ISCR Case No. 94-1213 at 3 (App. Bd. June 7, 1996). Indeed, the Appeal Board has ruled repeatedly that an administrative judge may not engage in a *de novo* review of an applicant's guilt or innocence of a criminal charge of which he was convicted in a

criminal court. ISCR Case No. 99-0116 at 2 (App. Bd. May 1, 2000); ISCR Case No. 96-0525 at 4 (App. Bd. June 17, 1997).

In ISCR Case No. 94-1213 at 3 (App. Bd. June 7, 1996), the Appeal Board acknowledged, in *dicta*, that the doctrine of collateral estoppel does not apply in certain circumstances. These include where 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 at 4 (App. Bd. January 25, 1989), the conviction was based upon a *nolo contendere* plea, DISCR Case No. 88-2116 at 4-5 (App. Bd. October 13, 1989), or where the conviction was being used regarding a matter not legally determined by the conviction, *Otherson v. U.S. Dept. of Justice,* 711 F.2d 267, 276 (D.C. Cir. 1983), *cert. denied*, 454 U.S. 840 (1981). The Appeal Board also indicated the doctrine does not apply where the conviction involved a guilty plea to a misdemeanor offense. ISCR Case No. 94-1213 at 3 (App. Bd. June 7, 1996). Similarly, in ISCR Case No. 96-0525 at 3, n. 2 (App. Bd. June 17, 1997), the Appeal Board asserted, "Federal courts do not give collateral estoppel effect to convictions for misdemeanors." Significantly, the Appeal Board based its conclusion upon the opinion in *Otherson*, 711 F.2d at 275-77. However, a careful reading of the *Otherson* decision reveals that the federal court ultimately rejected that premise in that case and applied collateral estoppel to a misdemeanor conviction. *Otherson*, 711 F.2d at 277. Contrary to the *dicta* in the Appeal Board's decisions cited above, at times federal courts apply collateral estoppel to matters previously determined by a misdemeanor conviction. *See Gahn v. Fujino*, 39 F.3d 1187 (9th Cir. 1994) (collateral estoppel barred relitigation of state misdemeanor conviction); *Franklin v. Thompson*, 981 F.2d 1168 (10th Cir. 1992) (conviction for disorderly conduct precluded relitigation of lawfulness of arrest); *Arrellano v. Nieves*, 911 F.2d 737 (9th Cir. 1990) (misdemeanor conviction collaterally estopped plaintiff from relitigating the issues decided against him in state court); *Czajkowski v. City of Chicago*, 810 F.Supp. 1428 (N.D. Ill. 1992) (prior misdemeanor conviction for battery given collateral estoppel effect).

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." *Allen v. McCurry*, 449 U.S. 90, 96 (1980). *See also Haring v. Prosise*, 462 U.S. 306, 313 (1983). A review of Supreme Court and federal case law suggests a three-part test to determine the appropriateness of applying collateral estoppel.

First, 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; *Allen v. McCurry*, 449 U.S. at 95; *Montana v. United States*, 440 U.S. 147, 153 (1979); *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313, 328-329 (1971); *Blohm,* 994 F.2d at 1553; *In re Raiford*, 695 F.2d 521, 523 (11th Cir.1983).

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. 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"); *Restatement (Second) of Judgments* § 27 ("essential to the judgment"); *accord Association of Bituminous Contractors, Inc. v. Andrus,* 581 F.2d 853, 859-60 (D.C. Cir. 1978). "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).

Third, the application of collateral estoppel in the second hearing must not result in unfairness. 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. at 317-318, *citing Montana v. U.S.*, 440 U.S. at 164, n. 11 (1979). *See also Parklane Hosiery Co.,* 439 U.S. at 330 (detailing circumstances where allowing the use of collateral estoppel would result in unfairness); *Montana v. U.S.*, 440 U.S. at 155 (court should consider whether other special circumstances warrant an exception to the normal rules of preclusion); *Haring v. Prosise*, 462 U.S. at 313-14 ("additional exceptions to collateral estoppel may be warranted in § 1983 actions in light of the understanding that the federal courts could step in where the state courts were unable or unwilling to protect federal rights. [*Allen v. McCurry,* 449 U.S.] at 101"). Many federal courts decline to apply collateral estoppel where the circumstances indicate a lack of incentive to litigate the original matter; *see U.S. v. Berman,* 884 F.2d 916, 922-23 (6th Cir. 1989); *Tutt v. Doby*, 459 F.2d 1195, 1200 (D.C. Cir. 1972); *Red Lake Band v. United States*, 607 F.2d 930, 934-35, 221 Ct. Cl. 325 (Ct. Cl. 1979); *BCCI Holding, S.A. v. Clifford*, 964 F.Supp. 468, 477 (D.D.C. 1997). The *Otherson* court, upon which the Appeal Board relied, noted, "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. The arguments for excluding 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; *Raiford*, 695 F.2d at 524.

Guideline D, Sexual Behavior

Considering these concepts of law, we turn to the allegations in the SOR. Under ¶ E2.A4.1.2.1 of the Directive, "[s]exual behavior of a criminal nature" may be disqualifying. Paragraph 1.a of the SOR alleges that Applicant was questioned about the sexual molestation of his three-year-old granddaughter in 1991. The available evidence indicates Applicant was instrumental in urging that the matter be reported to authorities, that he was questioned as a witness in the case along with others, and that another person was determined to be responsible for the sexual abuse. The available evidence does not establish that Applicant engaged in any improper sexual behavior towards his granddaughter.

Paragraph 1.b of the SOR alleges that Applicant pled guilty to and was sentenced for the misdemeanor offense of Communication with a Minor for Immoral Purposes. As discussed above, Applicant pled guilty to the offense, a gross misdemeanor under the state law, by entering an *Alford* plea. Ex. 4 at 18; Ex. G at 1. Under the *Alford* plea, Applicant did not admit guilt, but admitted the evidence was sufficient to find him guilty and authorized the court to treat him as if he were guilty. The court found Applicant guilty and sentenced him. However, at the hearing in this case Applicant denied that he committed the offense. Tr. at 72.

It is necessary to determine whether application of the collateral estoppel rule is appropriate in this case. The first element of the test is whether Applicant had a full and fair opportunity to litigate this issue in the case below. Applicant was properly charged with the felony offense, had time to prepare a defense, and was represented by counsel. All the evidence indicates his decision to plead guilty was a knowing and voluntary waiver of his right to litigate this case, which would necessarily have included the ultimate issue of whether he committed the acts in question. I find the first part of this test is satisfied.

The second part of the test considers whether the criminal conviction covered the same facts the government sought to establish in this proceeding. The SOR alleged as a security concern Applicant's conviction for the misdemeanor offense of Communication with a Minor for Immoral Purposes. There can be no question that the facts established by the conviction (Applicant's sexual behavior with the minor child) were the same facts the government sought to establish in this action.

The third part of the test is of greater concern-whether application of collateral estoppel in this case would result in unfairness. Unlike the first part of the test, the focus here is not on the voluntariness of his choice to plead guilty or the opportunity for litigation available to an applicant. Instead, the question is whether a second court can determine that the outcome of the first proceeding was a reliable indicator of a fact of consequence. The evidence reveals Applicant had a strong incentive not to litigate this issue at the first trial. The state charged him with a felony offense that carried a potential life sentence, then offered a pretrial agreement that allowed Applicant to plead guilty to a misdemeanor with no jail time and a minimal fine. Indeed, the state agreed that Applicant would not be reported as a sexual offender, even though it is authorized for the misdemeanor offense. As Applicant's counsel ably argued, the pretrial agreement offered by the state was a powerful disincentive to litigate this case. Additionally, Applicant's employer advised him that a misdemeanor conviction would not affect his security clearance, so he would be allowed to continue to work to support his family. Considering all the circumstances, I conclude this case does not meet the criteria established by the Supreme Court for the application of collateral estoppel.

The determination that it is not appropriate to apply collateral estoppel in this case does not end the inquiry, however. It is necessary to review the substantive evidence to determine whether the government's evidence raises security concerns, and whether Applicant met his burden of persuasion that it is in the best interests of the United States that he be granted a security clearance.

The sheriff's report indicates that two children alleged Applicant sexually abused them over several years by touching them indecently through their clothing. The report also states that, after lengthy interrogation, Applicant admitted a single instance of improper touching of one child. Ex. 4 at 5. In his sworn statement to a security investigator several months later, Applicant claimed he did not remember the questioning, but that "I might have said that I touched my niece only once with sexual motivation." Ex. 3 at 1. Applicant testified his recollection of the interview was uncertain because of his medical problems and the stress of the interrogation, but he may have admitted that he touched a child. Tr. at 90. Nonetheless, he was aware of his right to terminate the questioning at any time-indeed, his wife repeatedly reminded him of his right to remain silent and to request an attorney, a right he later exercised.

I find the government's evidence is sufficient to raise security concerns regarding "sexual behavior of a criminal nature" by Applicant under the Directive, ¶ E2.A4.1.2.1. Applicant's evidence in refutation is vague and ultimately unpersuasive.

The Directive, ¶ E2.A4.1.2.3, also provides that "[s]exual behavior that causes an individual to be vulnerable to coercion, exploitation, or duress" may be disqualifying. In this case, the conviction is a matter of public record. Applicant informed most, although not all, of his family members and co-workers of his conduct. I find that Applicant's vulnerability to coercion, exploitation, or duress is so minimal that it is not a significant factor in this case.

The Directive also presents potentially mitigating conditions. Paragraph E2.A4.1.3.2 applies where "[t]he behavior was not recent and there is no evidence of subsequent conduct of a similar nature." The incident in question was alleged to have occurred between April 1998 and July 2001-more than five years ago. Ex. 4 at 20. The available evidence indicates Applicant has not committed any conduct of a similar nature since that time. This potentially mitigating condition applies.

Under the Directive, ¶ E2.A4.1.3.3, it may be mitigating where "[t]here is no other evidence of questionable judgment, irresponsibility, or emotional instability." The available evidence indicates Applicant is a stable, reliable, and responsible individual. This potentially mitigating condition applies.

Finally, under ¶ E2.A4.1.3.4 of the Directive, it may be mitigating where "[t]he behavior no longer serves as a basis for coercion, exploitation, or duress." Applicant's conviction and the passage of time effectively bars any later prosecution for the conduct that formed the basis of this guideline under the SOR. The conviction is a matter of public record, and Applicant has informed his employer, his closest friends, and some of his fellow church members of the circumstances. I find this potentially mitigating condition applies.

I balanced the potentially disqualifying and mitigating conditions in light of the "whole person" concept, and all the circumstances in this case. If this were a criminal case, I would not be convinced of Applicant's guilt beyond a reasonable doubt based upon the available evidence. However, different standards apply here. Applicant has not met his burden of persuasion that he has mitigated the security concerns arising from his conviction for sexual misconduct. Under the controlling Directive, any doubt about whether a security clearance should be granted must be resolved in favor of the national security.

Guideline E, Personal Conduct

The Directive sets out various factors relevant to an applicant's personal conduct that may be potentially disqualifying. Under ¶ E2.A5.1.2.3 of the Directive, "[d]eliberately providing false or misleading information concerning relevant and material matters to an investigator . . . in connection with a personnel security . . . determination" may be disqualifying. Paragraphs 2.a and 2.b of the SOR allege Applicant falsely denied touching his niece in a sexual way in the signed, sworn statements he gave investigators on June 19, 2002, and July 31, 2002, respectively. Exs. 2 and 3. The government relies upon the fact of Applicant's guilty plea to the misdemeanor offense compared to his denials in the respective statements to establish the falsifications that are alleged security concerns.

The Appeal Board seems to have applied collateral estoppel in cases where an applicant denies committing an offense of which he was previously convicted. ISCR Case No. 96-0525 at 6 (App. Bd. June 17, 1997). Thus, it is important to first determine whether collateral estoppel should be applied to the allegations under Guideline E under the test set out above.

As noted earlier, Applicant had a full and fair opportunity to litigate this matter at the first trial. Thus, the first part of the test is satisfied.

The second part of the test is whether the factual matters sought to be established in the second case are the same as those resolved in the first case. Applicant's misdemeanor conviction was for Communication with a Minor for Immoral Purposes. Under the law of the jurisdiction involved, the word "communication" as used in the statute includes either language or conduct. *State v. Falco*, 59 Wn.App. 354, 358, 796 P.2d 796 (1990). *See also State v. Schimmelpfennig*, 92 Wn.2d 95, 101-04, 594 P.2d 442 (1979) ("communication with a minor for immoral purposes" means "any spoken word or course of conduct with a minor for purpose of sexual misconduct is prohibited;" upholding conviction of a man who had merely attempted to entice young girls into the back of his van for sexual purposes); *State v. McNallie*, 120 Wn.2d 925, 933, 846 P.2d 1358 (1993). The available evidence does not indicate whether Applicant's misdemeanor conviction under this statute was based upon language or conduct. Therefore, the misdemeanor conviction does not establish the facts relevant to the allegations in ¶¶ 2.a and 2.b of the SOR-i.e., that Applicant touched his underage niece with sexual motivation. As the Appeal Board previously noted, a conviction may not be used to collaterally estop a person concerning a matter not legally determined by the conviction. ISCR Case No. 94-1213 at 4 (App. Bd. June 7, 1996). The second part of the test does not apply.

The third part of the test-whether application of collateral estoppel would result in unfairness-is also satisfied. For the reasons discussed above, Applicant had a strong disincentive to litigate this case at the first trial, therefore the resulting conviction may not be reliable.

The application of collateral estoppel in this case would also result in unfairness under the unique facts of this case. In a similar case, the Appeal Board ruled, "Logically, if Applicant engaged in sexual abuse . . ., then Applicant's denials of engaging in any such conduct were false." ISCR Case No. 96-0525 at 6 (App. Bd. June 17, 1997). However, a closer examination of the facts reveals the problem with that reasoning. For illustration, assume the following scenario:

X pleads guilty to an offense through a *Alford* plea, and tells the judge, "I didn't do it, but I agree the evidence is sufficient to prove my guilt." The judge accepts the guilty plea and imposes a sentence. Under the law, the conviction establishes X's guilt. Later, X makes an official statement and says the exact same thing he told the judge.

If one followed the Appeal Board's reasoning in ISCR Case No. 96-0525 at 6, the first statement would be true and would establish X's guilt, and the second (identical) statement would be criminally false. This result is obviously contradictory. The reason is also obvious-an *Alford* plea is an acceptance of a finding of guilt but not an admission of guilt. A person may plead guilty even if they are not guilty. *Alford*, 400 U.S. at 35-36. The distinction is unimportant if one is attempting to establish the fact of the conviction, but it is very important if one attempts to use the *Alford* plea as a basis for proving a later denial is criminally false.

For all these reasons, I find it would not be appropriate to apply collateral estoppel to the allegations under Guideline E. However, that does not end the necessary review.

Considering the substantive evidence, the government has presented matters sufficient to establish a security concern under ¶ E2.A5.1.2.3 of the Directive, specifically: Applicant's statement to the interrogator admitting an offense and his statements to the security investigator denying any offense. As discussed above, his conviction for Communication with a Minor for Immoral Purposes does not establish that his denial of touching any child was false. Similarly, Applicant's statement to the security investigator that he "might" have touched his niece with sexual motivation on one occasion does not establish that his later denials were false. It was Applicant's burden to mitigate these security concerns. Applicant's evidence was insufficient to convince me that his statements were not false.

Under the Directive, an applicant may mitigate the security concerns arising from questionable personal conduct under certain circumstances. Directive, ¶ E2.A5.1.3. Under ¶ E2.A5.1.3.1, it may be mitigating where "[t]he information was unsubstantiated or not pertinent to a determination of judgment, trustworthiness, or reliability." Applicant's allegedly false statements were substantiated by the interrogator's report and his written statements to security investigators. Clearly, false statements about potentially criminal conduct during a security clearance investigation are pertinent to a determination of his judgment, trustworthiness, and reliability. I find this mitigating factor does not apply.

Paragraph E2.A5.1.3.2 of the Directive arises where "the falsification was an isolated incident, was not recent, and the individual subsequently provided correct information voluntarily." The statements in question were executed on June 19, 2002, and July 31, 2002, respectively; therefore, they were recent. I conclude this potentially mitigating condition does not apply.

Under the Directive, it may be mitigating where, "[t]he individual made prompt, good-faith efforts to correct the falsification before being confronted with the facts." Applicant has not met his burden of proving that he made good-faith efforts to correct any falsification in his sworn statements; to the contrary, Applicant insists his statements were not false. I find this potentially mitigating condition does not apply. I also considered carefully the other potentially mitigating conditions and conclude they do not apply.

I considered carefully the disqualifying and mitigating conditions in light of all the facts and circumstances in this case and the "whole person" concept. The most significant security concern is the underlying conduct alleged under Guideline D, above. Under the unique facts of this case, Applicant's denial of guilt adds little to the analysis of his security worthiness. I note he denied the offenses when first confronted, before making the admission reported by the interrogator. I also note that his statement to the security investigators mirrors what he told the court when he pled guilty through the *Alford* plea. Nonetheless, candor during security clearance investigations is extremely important. Considering all the available evidence, I conclude Applicant has not met his burden of mitigating the security concerns relating to the alleged falsifications.

Guideline J, Criminal Conduct

Under the Directive, ¶ E2.A10.1.2.2, "a single serious crime" may be disqualifying. Applicant was convicted of a gross misdemeanor, carrying a potential sentence of up to one year in confinement. Additionally, the available information raises the concern that Applicant made false official statements to security investigators on two occasions, in violation of 18 U.S.C. § 1001. I conclude the available evidence raises this potentially disqualifying condition.

The security concerns arising from criminal conduct may be mitigated in certain circumstances. Under ¶ E2.A10.1.3.1 of the Directive, it may be mitigating when "the criminal behavior was not recent." Applicant's criminal conduct resulting in the conviction occurred over five years ago; therefore, it was not recent. I find this potentially mitigating condition applies to that conduct. However, the two sworn statements in question were executed in June and July 2002. This potentially mitigating condition does not apply to that conduct.

The Directive, ¶ E2.A10.1.3.2, also provides that it may be mitigating where "the crime was an isolated incident." Applicant was convicted of a single incident of Communication with a Minor for Immoral Purposes. The available evidence indicates no other similar conduct or criminal offense. If that were the only security concern relating to criminal conduct, I would find it was an isolated incident. However, Applicant was unable to persuade me that his sworn statements to investigators were not false. I conclude this mitigating condition does not apply.

Under ¶ E2.A10.1.3.6 of the Directive, it may be mitigating where "there is clear evidence of successful rehabilitation." Applicant did not participate in any rehabilitation or counseling program after the conviction, no doubt because he stridently denies that the offense ever occurred. Under the circumstances, I find there is no evidence of successful rehabilitation; therefore, this potentially mitigating condition does not apply.

I carefully considered the disqualifying and mitigating conditions in this case, in light of the "whole person"concept. Applicant is a mature adult with a lengthy record of reliable service to the government. That record is marred by the allegations of child molestation, his guilty plea to the misdemeanor offense, and the dispute about the veracity of his sworn statements. Balancing the disqualifying and mitigating factors in light of the "whole person"concept, I conclude

Applicant has not mitigated the security concerns arising from his criminal conduct.

FORMAL FINDINGS

My conclusions as to each allegation in the SOR are:

Paragraph 1, Guideline D: AGAINST APPLICANT

Subparagraph 1.a: For Applicant

Subparagraph 1.b: Against Applicant

Paragraph 2, Guideline E: AGAINST APPLICANT

Subparagraph 2.a: Against Applicant

Subparagraph 2.b: Against Applicant

Paragraph 3, Guideline J: AGAINST APPLICANT

Subparagraph 3.a: Against Applicant

Subparagraph 3.b: Against Applicant

DECISION

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant. Clearance is denied.

Michael J. Breslin

Administrative Judge