KEYWORD: Guideline E

DIGEST: Applicant also contends that the Judge was biased. In doing so, he points out that she questioned his use of military vernacular in a his workplace. There is a rebuttable presumption that a Judge is impartial. A party seeking to rebut that presumption has a heavy burden of persuasion on appeal. The transcript reflects that the Judge also stated she was offended by one of Applicant's alleged statements; she counseled him about "pushing the envelope"; she did not agree with, accept, or believe aspects of his testimony; she stated she would have called the police on him; and she twice counseled him to tell the truth. Based on our review of the record, we conclude a reasonable person might question the Judge's impartiality based on the referenced comments. Adverse decision remanded.

CASENO: 17-03898.a1

DATE: 03/06/2019

DATE: March 6, 2019

In Re:	)	
	)	
----------	)	ISCR Case No. 17-03898
	)	
	)	
Applicant for Security Clearance	)	
	)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT
James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT
Pro se

The Department of Defense (DoD) declined to grant Applicant a security clearance. On December 28, 2017, DoD issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline E (Personal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On October 26, 2018, after the hearing, Administrative Judge Darlene D. Lokey Anderson denied Applicant's request for a security clearance. Applicant appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raised the following issue on appeal: whether the Judge's adverse decision was arbitrary, capricious, or contrary to law. Consistent with the following, we remand.

The Judge's Findings of Fact

Applicant is a 38-year-old employee of a defense contractor. From 2002 to 2015, he served in the military and was medically retired for injuries sustained overseas. He began working for his current employer in late 2016.

In August 2016, Applicant was terminated from a previous defense contractor job for erratic and irregular behavior over the course of several months. In March 2016, Applicant reported two employees for timecard fraud.[1] The following day he was informed those employee were upset with him. Both employees were disciplined. Before reporting the fraud, he was allowed to work a flex schedule, but afterwards he was no longer permitted to do so. He believes the change in his schedule was done in retaliation for being a whistleblower. He also believes those upset with him fabricated a story about his erratic behavior.

In June and August 2016, Applicant also made statements that raised concerns. Those statements involve his email response to a Government contract representative in which he stated he would "comply and adjust fire", advising his program manager his flex schedule only became a problem out of "retaliation", stating to his manager "misquoting me right now is dangerous", and

[1] One of those employees was Applicant's Government supervisor and the other was a coworker. Tr. at 22, 38-39, and 54-55. Applicant testified as follows:

> [Applicant]: [The supervisor] is [the coworker's] supervisor and signs her timecard. So, when I reported [the coworker], who is also friends with [the supervisor] socially, it offended [the supervisor] as well. And [the supervisor] was found to have not been keeping her time accurately as well, which was not in my report. I didn't report [the supervisor] in that capacity.
>
> [Department Counsel]: Understood. But, because [the supervisor] signs off on [the coworker's] timecard, it effectively impacted her as well?
>
> [Applicant]: That's correct. And both of their times were adjusted and both of their schedules were adjusted. [Tr. at 54-55.]

commenting to a coworker "Prepare to go to war in five minutes." Decision at 3. In essence, Applicant contended those statements were taken out of context.[2]

The Judge's Analysis

"Applicant's statements, when viewed as a whole, were unacceptable, scary and dangerous. His on-going threats clearly demonstrate inappropriate and questionable behavior that cannot be tolerated." Decision at 5. "It is noted that Applicant was at one time in the military, and his vernacular of concern in this case is inconsistent with everyday civilian language. Despite this excuse, Applicant's misconduct is still unexplainable. Applicant's behavior has created a hostile work environment." Decision at 6. "From the evidence presented, the culmination of these statements reflect a warped mind-set and demonstrate a serious lapse in judgment that cannot be taken lightly." *Id.*

Discussion

The Appeal Board may remand a case to correct identified error and specify the action to be taken on remand. Directive ¶ E3.1.33.2. At the outset, we note the Judge erred by failing to address SOR ¶ 1.e in her analysis and by failing to make any formal finding regarding that allegation. Directive ¶ E3.1.25 provides that "[t]he Administrative Judge shall make a written clearance decision in a timely manner setting forth pertinent findings of fact, policies, and conclusions as to the allegations in the SOR . . ." This provision does not on its face authorize a Judge to enter findings and conclusions only as to some of the allegations. Rather, by its plain language it requires the Judge to address all of them. *See, e.g.*, ISCR Case No. 08-07803 at 2 (App. Bd. Sep. 21, 2009).

The Judge found against Applicant on SOR ¶ 1.b, which states: "You made a statement regarding 'retaliation' after finishing your discussion with your Program [M]anager on approximately August 17, 2016." The evidence reflects that Applicant's program manger issued Applicant a "Disciplinary Notice" on August 16, 2016. In the "Employee comments" section of that document, Applicant responded by writing in part, "I have an entirely different perspective that brings to light the motivation behind these events. The **retaliation** and level of harassment **endured by me** is being documented and substantiated with support from . . . leaders in the organization I support." [Emphasis added.] Government Exhibit (GE)5 and AE B. Based on the Judge's findings of fact as well as our reading of the record, SOR ¶ 1.b appears to be based on Applicant's written

[2] For example, Applicant contends that, when he stated in an email, "I will comply and adjust fire," he meant that he would "adjust [his] course of action." SOR reponse; Applicant's Exhibit (AE) A; Tr. at 37-38, 44. The individual to whom Applicant sent the email responded shortly thereafter by stating: "Not an issue [Applicant]. Please continue to communicate clearly and continuously as u did in our conversation and with different elements of your surroundings and all will stay peachey." AE A. This response does not reflect that the recipient of Applicant's email felt threatened or was offended by the words in question.

response to the Disciplinary Notice.[3] In those comments, Applicant did not state that he was going to retaliate against anyone, but instead claimed he was the victim of retaliation. The Judge erred by failing to explain how Applicant's claim of being a victim of retaliation could serve as a legitimate basis for the allegation against him in SOR ¶ 1.b.[4]

In his appeal brief, Applicant contends that the Judge erred by failing to address his claim of being the victim of whistleblower retaliation. We agree. The Judge made findings of fact that Applicant reported timecard fraud; that disciplinary action was taken against two employees, including his supervisor, because of his report; and that Applicant claimed he was retaliated against due to his report. Applicant claim of retaliation was the key point in his attempt to refute the SOR allegations. The Judge, however, failed to discuss that claim in her analysis.[5] We do not know whether the Judge concluded there was any merit in his claim of retaliation and, if so, how any retaliation was factored into her analysis.

Applicant also contends that the Judge was biased. In doing so, he points out that she questioned his use of military vernacular in a his workplace. There is a rebuttable presumption that a Judge is impartial. A party seeking to rebut that presumption has a heavy burden of persuasion on appeal. *See, e.g.*, ISCR Case No. 08-06795 at 4 (App. Bd. May 25, 2012). The transcript reflects that the Judge also stated she was offended by one of Applicant's alleged statements (Tr. at 45); she counseled him about "pushing the envelope" (Tr. at 56); she did not agree with, accept, or believe aspects of his testimony (Tr. at 57, 58, and 59); she stated she would have called the

---

[3] GE 2, an Incident History from the Joint Personnel Adjudication System (JPAS), reflects in part:

> Another statement was made on August 17, 2016 to the Program Manager (PM) in person at the Program Office after he finished his discussion regarding statement of "retaliation" for reporting his civil service customer. The PM previously relayed to me that he received information from [Applicant] that [Applicant] was seeking legal counsel for "retaliation." During the interview, HR questioned if [Applicant] had in fact sought legal counsel. He informed HR he had not yet done so.

The apparent misinterpretation or misunderstanding of Applicant's statement regarding "retaliation" gives some credence to his claim that his other alleged statements were taken out of context. Yet, the Judge failed to analyze that issue in her analysis.

[4] Defense contractors are provided protection from reprisal for disclosure of certain information. *See*, 10 U.S.C. § 2409. We have long stated that the Directive presumes there is a nexus or rational connection between proven conduct under any of the guidelines and an applicant's security clearance eligibility. *See, e.g.*, ISCR Case No. 10-09511 at 3 (App. Bd. Nov. 17, 2011). However, based on the facts of this case, the presumption of nexus is rebutted. Absent proof of some form of wrongful intent in claiming retaliation or in filing such a complaint, the mere making of such a claim does not raise security concerns under the Directive. Prudence dictates that caution must be exercised in this regard to avoid infringing upon a defense contractor's whistleblower rights.

[5] *Compare*, Paragraph 7.3.c of DoD Manual 5200.02, *Procedures for the DoD Personnel Security Program (PSP)*, dated April 3, 2017, which states:

> c. All personal security adjudicators, DOHA administrative judges (AJs), and Personnel Security Appeals Boards (PSABs) will, as part of their adjudication of an individual's eligibility, consider and resolve any claims of reprisal for whistleblowing.

police on him (Tr. at 58); and she twice counseled him to tell the truth (Tr. at 59). Based on our review of the record, we conclude a reasonable person might question the Judge's impartiality based on the referenced comments.

Given these errors, we conclude that the best resolution is to remand this case. Because the Judge has expressed an unequivocal opinion about Applicant's alleged conduct and made comments during the hearing that could cause a reasonable person to question her impartiality, the case should be remanded to a different judge for a new hearing. Applicant raises other issues on appeal that are not ripe for consideration.

Order

The Decision is **REMANDED**.

Signed: Michael Ra'anan
Michael Ra'anan
Administrative Judge
Chairperson, Appeal Board

Signed: James E. Moody
James E. Moody
Administrative Judge
Member, Appeal Board

Signed: James F. Duffy
James F. Duffy
Administrative Judge
Member, Appeal Board