KEYWORD: Guideline E

DIGEST: The manner in which the Judge questioned Applicant and her citation to matters outside the record could cause a reasonable person to question the Judge's impartiality. Board recommends case be assigned to a different Judge. Adverse decision remanded for new hearing.

CASENO: 07-18525.a1

DATE: 02/18/2009

DATE: February 18, 2009

In Re:	)	
	)	
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	)	
Applicant for Security Clearance	)	

APPEAL BOARD DECISION

APPEARANCES

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

FOR APPLICANT
B. Daniel Lynch, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On July 24, 2008, DOHA 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 November 25, 2008, after the hearing, Administrative Judge Darlene D. Lokey Anderson denied Applicant's request for a security clearance. Applicant filed a timely appeal pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Applicant appeal raises the following issues: whether Department Counsel met his burden of production; whether the Judge's questioning of Applicant at the hearing was appropriate; whether the Judge's findings of fact are supported by the record evidence; and whether the Judge's adverse conclusions are sustainable in light of the record as a whole. Finding harmful error the Board remands the case to the Hearing Office for a new hearing.

Whether the record supports the Administrative Judge's Factual Findings

The Judge made the following pertinent findings of fact:

Applicant became a naturalized citizen of the U.S. in 2000. He was employed as a linguist at a U.S. high security installation. During this period, his employer gave him warnings three times. The first was for attempting to sponsor an unauthorized person into the installation. The second was for accessing inappropriate web sites on his government computer and for over-reporting the hours that he worked. The third was for losing two security badges. Applicant's job performance is above average, as attested by performance appraisals, certificates of appreciation, and letters of recommendation. In the Analysis section of her decision, the Judge concluded that Applicant's case raised security concerns under Guideline E and that Applicant had failed to meet his burden of persuasion as to mitigation. She stated that Applicant's testimony concerning inappropriate web sites was neither candid nor forthcoming. She further stated that Applicant's conduct, as reflected in the record, impugned his trustworthiness, judgement and reliability.

Discussion

As a threshold issue, Applicant notes the vigor and length with which the Administrative Judge questioned him, as well as her citation in the course of that questioning to matters outside the record. A careful review of the transcript has the led the Board to conclude that it could cause a reasonable person to question the Judge's impartiality. In light of that conclusion, we remand the case to the Hearing Office to conduct a new hearing. We recommend that the case be assigned to a different Judge. As a matter of judicial economy, we instruct the new Judge to treat all SOR allegations as controverted. In light of the remand, it is premature to address any other issue at this time.

Order

The Judge's adverse security clearance decision is REMANDED.

Signed: Michael Y. Ra'anan
Michael Y. Ra'anan
Administrative Judge
Chairman, Appeal Board

See Separate Opinion
Jeffrey D. Billett
Administrative Judge
Member, Appeal Board

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

Separate Opinion of Administrative Judge Jeffrey D. Billett, Dissenting, In Part

I concur with my colleagues' assessment of the manner of the Administrative Judge's questioning of Applicant and her citation to matters outside the record. I also concur with their decision to remand the case for a new hearing in front of a different administrative Judge. However, I differ with the majority in terms of delineating the scope of the hearing upon remand. On appeal, Applicant squarely raised the issue of the sufficiency of the evidence against Applicant regarding the three allegations brought against him under Guideline E.[1] Applicant essentially argues that the government produced no evidence and failed to prove its case with respect to each of the three SOR allegations. With the exception of evidence relating to the viewing of pornographic materials alleged under subparagraph 1.b., I find Applicant's arguments persuasive.

[1]The SOR allegations under Guideline E are set forth as follows:

a. You received a written warning on about [date] from your employer for attempting to sponsor unauthorized persons into [facility].

b. You received a verbal warning on about [date] from your employer for accessing inappropriate pornographic web sites on your government computer, and over reporting the hours you purportedly worked.

c. You received a written warning in about [date] from your employer for losing two security badges.

It should be emphasized at the outset that there is an absolute dearth of evidence produced by the government in this case. Other than Applicant's hearing testimony, we have nothing, other than Applicant's answer to the SOR and his answers to a set of interrogatories, constituting the record in this case. While Applicant admits to certain historical facts, those admissions fall short of establishing, on behalf of the government, a *prima facie* case of questionable judgment, lack of candor, dishonesty, unwillingness to comply with rules and regulations, unreliability, and untrustworthiness under Guideline E–again, with the exception of evidence pertaining to Applicant's viewing of pornography on his government computer. The government's case is weakened by the fact that, notwithstanding the recitation of Applicant's receipt of written and verbal warnings or counselings in the SOR, the government failed to produce evidence of either a documentary or a testimonial nature regarding the content of those warnings or counselings, or the circumstances under which they were promulgated. Absent such evidence, we are left solely with Applicant's version of events from which we must determine (a) whether or not Applicant has admitted anything of security significance, and (b) if not, is his version of events plausible and thus worthy of belief.

I agree with my colleagues' assessment that all the SOR allegations are controverted in this case. Therefore, the government was in no way relieved of its obligation to come forward with evidence. Under our Directive, the government bears the burden of producing evidence sufficient to prove controverted allegations. Directive, ¶ E3.1.14. That burden has two components. First, the government must establish by substantial evidence that the facts and events alleged in the SOR indeed took place. Second, the government must establish a nexus between the existence of the established facts and events and a legitimate security concern. *See*, *e.g.*, *Gayer v. Schlesinger*, 490 F.2d 740, 750 (D.C. Cir. 1973); *McKeand v. Laird*, 490 F.2d 1262, 1263-64 (9th Cir. 1974)(holding that there must be a nexus or rational connection between a person's conduct or situation and a decision to deny or revoke access to classified information).

Whether there is sufficient record evidence to support the Judge's factual findings is a question of law, not one of fact. *See*, *e.g.*, ISCR Case No. 97-0356 at p. 4 n.7 (App. Bd. Apr. 21, 1998). When a challenge to an administrative judge's rulings or conclusion raises a question of law, the Board's scope of review is plenary. *See* ISCR Case No. 87-2107 at 4-5 (App. Bd. Sep. 29, 1992). The Judge stated, in general terms, that Applicant's engaged in incidents of misconduct that demonstrate a pattern of poor judgment. She found that he did not follow the rules and regulations of his company. With the exception of the viewing pornography allegation, there is no record evidence to support these findings.

The first SOR allegation (1.a) alleges that Applicant received a written warning from his employer for attempting to sponsor unauthorized persons into the facility. Whether or not the language of the warning actually alleged an "attempt" cannot be known, since the document was not introduced by the government. Regardless of the content of the written warning, a more pertinent inquiry is whether Applicant, in fact, engaged in the underlying conduct supposedly alleged in the warning. Again, the only record evidence available are the statements and testimony of Applicant. According to the record evidence, Applicant had an idea about sponsoring someone to visit the facility as a favor to a friend who worked for another contractor at the same facility. From all appearances, the person to be sponsored met the qualifications for sponsorship. Applicant merely

made a proposal to his supervisor about the sponsorship. The company objected, not for any articulated reasons relating to security but apparently because the sponsorship would have ultimately benefitted an employee of a rival company. Applicant states he took no further action as a result of his company's rebuff and there is no evidence to refute him. Applicant testified at the hearing that he was mystified as to why the company issued a warning to him, stating, "they held me accountable for asking the question." There is no evidence of any company rule violations or disregard of any company policy on the part of Applicant.

As Applicant argues persuasively on appeal, there is evidence of an inquiry about sponsoring but no evidence of any *attempt* to sponsor any other person. One can only speculate as to why the company issued a warning under these circumstances, but in the absence of additional evidence, it is absolutely improper to assume misconduct or security significant conduct on the part of Applicant on the strength of an unseen, undefined allegation. It cannot seriously be argued that the mere making of an inquiry about sponsorship under the circumstances described by Applicant represents conduct indicative of lack of judgment or untrustworthiness, or constitutes misconduct. I would rule that the government has not established its case under SOR allegation 1.a.

Part of the allegation under SOR subparagraph 1.b. involved Applicant's purported over reporting hours that he supposedly worked. Applicant has categorically denied this allegation and there is nothing in the record beyond his denials. The Judge makes little mention of this specific allegation in her decision, other than to note that he received a verbal warning and counseling for it as stated in the SOR. There is no record evidence that even begins to address this allegation. I would rule that the government has not established its case under this portion of SOR allegation 1.b..

The last SOR allegation (1.c.) States that Applicant received a written warning for losing two security badges on one occasion. Applicant admitted that he lost the badges. However, there is no evidence that the mere losing of badges is a violation of his company's policies. Indeed, it is hard to imagine how it could be. Such items are often lost under the best of circumstances. It is also hard to imagine how the Judge could characterize this as misconduct or a failure to follow rules. There is no evidence of negligence on the part of Applicant, and the evidence that does exist indicates that Applicant acted prudently and responsibly in reporting the loss and getting the badges back. If there was evidence of negligent or repeated conduct on the part of Applicant related to losing badges, the case might well be different, but neither of these factors are established by the record. In their absence, no reasonable argument can be made in support of the proposition there is a nexus between Applicant's losing the badges and legitimate government security concerns. I would rule that the government has not established its case under SOR allegation 1.c.

After a careful assessment of the evidence in this case, one is left to ponder why Applicant's company took the actions that it did for Applicant's behavior other than the possible viewing of pornography. There is certainly no evidence to explain the propriety of the company issuing warnings or counselings, given Applicant's explanations. Those explanations are not inherently unbelievable. There is also Applicant's uncontradicted assertion that the company's actions may have been the product of a supervisor who was going after Applicant for personal reasons. Again, Applicant's theory is not inherently implausible. Such unfortunate scenarios do happen. In a

controverted case, the government cannot satisfy its burden of production merely by establishing that the government issued the warnings or counselings without producing some evidence of the contents of those items, or the circumstances that led to their issuance. In the context of this case, I do not accept as adequate the bare proposition that Applicant must have done *something* of security significance, otherwise the company would not have taken the actions it did.

My colleagues have ordered that this case be reheard before a different administrative judge. This essentially takes us back to square one. The government has already had its opportunity to present evidence regarding the sponsorship, the over-reporting of hours and the lost badges. I am not inclined to grant it another. Even when the evidence of these matters is viewed in the aggregate and even when it is viewed in conjunction with the evidence involving the possible viewing of pornography, the government has failed produce evidence of security significant conduct other than the viewing of pornography. Because there is some record evidence of Applicant misconduct regarding the viewing of pornographic materials, I am not advocating that the Judge's decision be reversed.

I would remand the case to a different administrative judge with instructions to limit the scope of the rehearing to matters alleged in subparagraph 1.b. relating to the accessing of pornographic materials on Applicant's government computer.

Signed: Jeffrey D. Billett
Jeffrey D. Billett
Administrative Judge
Member, Appeal Board