Date: September 8, 2022

In the matter of:	)	
	)	
-----	)	ISCR Case No. 19-03577
	)	
Applicant for Security Clearance	)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT
Tara R. Karoian, Esq., Department Counsel

FOR APPLICANT
Brittany D. Forrester, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On January 6, 2021, DoD issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline F (Financial Considerations) and Guideline E (Personal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On June 10, 2022, after the hearing, Administrative Judge Edward W. Loughran granted Applicant's request for a security clearance. Department Counsel appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Department Counsel raised the following issues on appeal: whether the Judge's decision is arbitrary and capricious, and contrary to law and the record evidence. Consistent with the following, we remand the Judge's decision.

Under Guideline F, the SOR alleged that Applicant failed to file, as required, his Federal and state income tax returns for 1995–2006 and 2008–2018. Under Guideline E, it cross-alleged the Guideline F allegations and also alleged that Applicant deliberately failed to disclose his tax filing deficiencies on his 2018 security clearance application (SCA). In responding to the SOR, Applicant admitted the allegations with clarifications. Applicant is in his fifties, has never been married, and has no children. He served in the military from 1984 to 1997 and worked for a defense contractor since 1998. The Judge concluded that Applicant erroneously believed he was not required to file a return for the years in question because his withholdings from his salary were more than sufficient to pay the tax that he owed and he was due refunds for each year. Although he intended to file returns in order to receive refunds, Applicant did not do so and forfeited almost $18,000 in Federal refunds and an estimated $10,000 in state refunds. Regarding the falsification allegation, the Judge concluded Applicant "credibly denied intentionally providing false information," as he did not realize that he was required to file tax returns if he was due refunds. Decision at 3.

We concur with the Judge that a key issue in this case is whether or not Applicant knew he was required to file the alleged Federal and state income tax returns. In her appeal brief, Department Counsel persuasively argues the Judge did not address important aspects of the case regarding this issue. We note the following evidence drawn from the record:

1. While serving in the military, Applicant served as a tax assistant for members of his unit. Tr. at 21. During cross-examination, Applicant agreed with Department Counsel's characterization of his circumstances regarding tax filing.

> Q: So, you helped other people file their taxes but you didn't take the time to file your own?
>
> A: That's a correct statement. [*Id.*]

2. Applicant testified that at least some of his delayed filings were due to having "just missed the day, and the IRS didn't follow up . . . ." *Id*. at 22. When asked about his filings of 2018 tax returns following his clearance interview, he replied, "I, once again, was intending to . . . do it by hand and the due date slipped because I wasn't using a tax service." *Id*. at 32.

3. Applicant's background interview reflects the following exchange: "'[D]o you satisfy all legal financial obligations?' 'Yes.' . . . "[Applicant] was asked if he had any questions or concerns. At that point, [Applicant] volunteered that he has not filed Federal or State taxes since 1997 . . . and is not sure if he is legally required to do so if he does not owe money." GE 3 at 2.

4. Applicant's tax transcripts appear to indicate the IRS sent him notices over the years regarding his tax filing deficiencies. They also indicated tax returns were secured after the IRS prepared substitute returns. Pertinent entries follow:

a. 2002 Tax Transcript (GE 2 at 45)
   - Inquiry for non-filing of tax return: 02-23-2004
   - Substitute tax return prepared by IRS: 07-12-2004
   - Tax return secured: 07-27-2004

b. 2003 Tax Transcript (GE 2 at 43)
   - Inquiry for non-filing of tax return: 04-18-2005
   - Established non-filing of tax return: 05-22-2008
   - Substitute tax return prepared by IRS: 09-29-2008
   - Tax return secured: 10-23-2008

c. 2004 Tax Transcript (GE 2 at 41)
   - No tax return filed
   - Established non-filing of tax return: 05-22-2008
   - Notice issued: 06-02-2008

d. 2005 Tax Transcript (GE 2 at 39)
   - No tax return filed
   - Established non-filing of tax return 05-22-2008
   - Notice issued: 06-02-2008

e. 2006 Tax Transcript (GE 2 at 37)
   - No tax return filed
   - Established non-filing of tax return 05-22-2008
   - Notice issued: 06-02-2008

e. 2007 Tax Transcript (GE 2 at 35)
   - Return received 04-15-2008

   (Applicant testified that he filed this year's tax return on time to qualify for a Federal Government program in which stimulus checks were issued. Tr. at 24-25.)

f. 2008 Tax Transcript (GE 2 at 33)
   - Extension of time to file tax return 04-15-2009
     ext. date 10-15-2009
   - Return received date 10-19-2009

g. 2017 Tax Transcript (GE 2 at 15)
   - Inquiry for non-filing of tax return 11-26-2018

- Notice issued: 12-17-2018
- Return filed: 01-15-2019

5. In a background interview in January 2019, Applicant stated that he "received a letter from the Federal government in 2018 (exact date unknown) to file his 2017 taxes." GE 3 at 2. As noted above, his 2017 tax transcript indicates "Notice issued" on 12/17/18. GE 2 at 15. Even after submitting his SCA in January 2018, receiving the IRS non-filing notice for 2017 issued in December 2018, and undergoing his background interview in January 2019, Applicant did not file his 2018 Federal income tax return until January 27, 2020. GE 2 at 13 and 15. *See also* Applicant's Exhibit C.

6. Department Counsel also notes the Judge described Applicant's failure to file his tax returns as "foolish" and as exhibiting "poor judgment." Appeal Brief at 7, quoting from Decision at 2 and 5. In his Guideline E analysis, the Judge did not explain why Applicant's late filings, which may have been prompted, in part, by the chance of losing a clearance, were sufficient to mitigate the noted poor judgment security concerns.

The Directive requires a Judge to consider the entire record in evaluating the extent to which an applicant has met his or her burden of persuasion. *See, e.g.*, ISCR Case No. 15-03019 at 3 (App. Bd. Jul. 5, 2017). In analyzing a challenged conclusion or finding, the Appeal Board must consider not only whether there is evidence supporting it, but also whether there is evidence that fairly detracts from it. *See, e.g.*, ISCR Case No. 01-03112 at 2 (App. Bd. Mar. 20, 2002).

In this case, the Judge should have addressed the above identified matters in determining whether Applicant knew of his obligation to file the alleged tax returns and whether Applicant mitigated the foolishness and poor judgment he demonstrated in failing to file those returns as required. Given these circumstances, we conclude that the best resolution of this case is to remand the case to the Judge to address the identified matters in his Guideline F and E analysis. Upon remand, a Judge is required to issue a new decision. Directive ¶ E3.1.35. The Board retains no jurisdiction over a remanded decision. However, the Judge's decision issued after remand may be appealed pursuant to Directive ¶¶ E3.1.28 and E3.130. Other issues in the case are not ripe for consideration at this time.

Order

The Decision is **REMANDED**.

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

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

Separate Opinion of Board Member Moira Modzelewski

I respectfully dissent. I disagree with my colleagues that remand is warranted and would instead affirm the Judge's decision.

There is no presumption of error below, and the appealing party has the burden of raising and demonstrating factual or legal error by the Judge. *See, e.g.*, ISCR Case No. 19-01689 at 3 (App. Bd. Jun. 8, 2020). The application of the adjudicative guidelines is not reducible to a simple formula, but rather requires the exercise of sound judgment within the parameters set by the directive. *See, e.g.*, ISCR Case No. 01-27371 at 4 (App. Bd. Feb. 19, 2003).

Department Counsel contends that the Judge's decision is arbitrary and capricious because it fails to consider an important aspect of the case and runs contrary to the weight of the evidence. At its core, Department Counsel's argument is this—the Judge erred in his credibility determination that Applicant honestly believed he did not have to file income tax returns if he would receive a refund. Applicant's story was implausible in several regards, Department Counsel argues, and the Judge failed to consider its implausibility. It is this argument that my colleagues find persuasive, and they require further explanation from the Judge upon remand:

> We concur with the Judge that a key issue in this case is whether or not Applicant knew he was required to file the alleged Federal and state income tax returns. . . . Department Counsel persuasively argues the Judge did not address important aspects of the case regarding this issue. [Majority Opinion at 2.]

The majority then identifies six issues from the record that the Judge purportedly failed to explore or explain prior to arriving at his determination that Applicant was credible.

There is a rebuttable presumption that an Administrative Judge considered all the record evidence unless the Judge specifically states otherwise. *See, e.g.,* ISCR Case No. 99-9020 at 2 (June 4, 2001). On appeal, we review a Judge's challenged findings of fact to determine whether they are supported by substantial evidence, that is, "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the same record." Directive ¶ E3.1.32.1. "This is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620 (1966).

The Judge found that Applicant honestly believed that he did not have to file tax returns as he overpaid taxes each year through withholding and was always due a refund. In evaluating the Judge's factual findings, the Board is required to give deference to the Judge's credibility determinations. Directive ¶ E3.1.32.1. Appeal Board precedent on this issue is both long-standing and clear—the party challenging a Judge's credibility determination has a heavy burden on appeal. *See, e.g.*, ISCR Case No. 02-12199 at 3 (App. Bd. Aug. 8, 2005).

The Board's deference to an Administrative Judge's credibility determination is, of course, not absolute. For instance, a credibility determination may be set aside or reversed if it is unreasonable, contradicts other findings, is based on an inadequate reason, is patently without basis in the record, or is inherently improbable or discredited by undisputed fact. *See* ISCR Case No. 97-0184 at 5 (App. Bd. Dec. 8. 1998) (internal citations omitted). "When a witness's story is contradicted by other evidence or is so internally inconsistent or implausible that a reasonable fact finder would not credit it, we can find error despite the deference owed a Judge's credibility determination." ISCR Case No. 10-03886 at 3 (App. Bd. Apr 26, 2012), citing *Anderson v. Bessemer City*, 470 U.S. 564 at 575 (1985). When the record contains a basis to question an applicant's credibility (*e.g.,* prior inconsistent statements, prior admissions, or contrary record evidence), the Judge should address that aspect of the record explicitly, explaining why he finds an applicant's version of events to be worthy of belief. *See, e.g.,* ISCR Case No. 14-05476 at 5 (App. Bd. Mar. 25, 2016).

The majority identifies six facts in the record that "the Judge should have addressed . . . in determining whether Applicant knew of his obligation to file the alleged tax returns" and specifically requires the Judge upon remand to address these matters. Majority Opinion at 4. The matters identified by the majority opinion are not inconsistent statements, prior admissions, or contradictory evidence. In one example, the majority requires the Judge to explain how he weighed the fact that—while on active duty in 1996—Applicant was tasked with helping members of his combat unit file their 1995 tax returns. The fact that the Judge neglected to include this stray piece of information in his decision does not rebut the presumption that he considered all the evidence and does not undermine his credibility determination. In another example, the majority

requires the Judge to address Applicant's testimony that he intended to file his 2018 return, but failed to do so. However, that testimony—quoted above in the majority opinion—is not overlooked by the Judge or inconsistent with the Judge's findings. Instead, it is consistent with Applicant's testimony and the Judge's finding that Applicant "planned to file the returns and receive the refunds, but he just never got around to it." Decision at 2. Said differently, I see no significant evidence in the record that undercuts the Judge's credibility determination and permits us to challenge that determination, rather than to defer to it.

Based upon my review of the record, the Judge's material findings are supported by substantial evidence–such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the record. Directive ¶ E3.1.32.1. In my view, Department Counsel in this case has failed to rebut the presumption that the Judge considered all the evidence in the case and failed to carry the heavy burden required for the Board to challenge the Judge's credibility determination. *Cf.* ISCR Case No. 10-03886 (App. Bd. Apr. 26, 2012) (in which the Judge chose to believe Applicant's testimony regarding alleged time card fraud rather than the employer's findings) and ISCR Case No. 19-02304 (App. Bd. Feb. 23, 2022) (in which the Judge accepted Applicant's in-hearing denials regarding receipt of child pornography and disregarded Applicant's prior admissions).

Accordingly, I dissent from the Majority Opinion that remand is necessary or appropriate in this case.

Signed: Moira Modzelewski
Moira Modzelewski
Administrative Judge
Member, Appeal Board