DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

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

Appearances

For Government: Tara R. Karoian, Esq., Department Counsel
For Applicant: Brittney Forrester, Esq.

10/04/2022

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Decision

____

LOUGHRAN, Edward W., Administrative Judge:

Applicant mitigated the personal conduct and financial considerations security concerns. Eligibility for access to classified information is granted.

Statement of the Case

On January 6, 2021, the Department of Defense (DOD) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guidelines E (personal conduct) and F (financial considerations). Applicant responded to the SOR on January 22, 2021, and requested a hearing before an administrative judge. The case was assigned to me on April 1, 2022.

The hearing was convened as scheduled on May 12, 2022. Government Exhibits (GE) 1 through 3 were admitted in evidence without objection. Applicant testified, called a witness, and submitted Applicant's Exhibits (AE) A through N, which were admitted without objection.

On June 10, 2022, I issued a decision granting Applicant's eligibility for a security clearance. The Government appealed. On September 8, 2022, the Appeal Board

remanded the case back to me "to address the identified matters in [my] Guideline F and E analysis."

Findings of Fact

Applicant is a 58-year-old engineer working for a defense contractor. He has worked for his current employer since 1998. He served in the U.S. military or the military reserve from 1984 to 1997. He served about eight years on active duty. All periods of service ended with an honorable discharge. He seeks to retain a security clearance, which he has held since his time in the military. He has a bachelor's degree that he earned in 1993. He has never married, and he has no children. (Tr. at 9-11, 30; Applicant's response to SOR; GE 1, 3; AE F, K)

Applicant did not file his federal and state income tax returns when they were due for tax years 1996 through 2006 and 2009 through 2018. He filed his federal and state income tax returns for 2007 and 2008 on time. He received federal refunds of $2,724 for 2007, which included a $600 stimulus payment, and $2,573 for 2008. He testified that he filed the 2007 returns on time to qualify for a federal program in which stimulus payments were issued in 2008. He felt the stimulus payments were issued for a political motive. He filed to receive the stimulus payment, and he then did not vote for the candidates or party that supported the stimulus program. (Tr. at 12, 20-21, 24-27; Applicant's response to SOR; GE 2, 3)

Applicant never went into a tax year thinking that he would not file tax returns. Tax season up through April 15th does not have any holidays, and Applicant would use that time to concentrate on work. The filing date then slipped by. (Tr. at 26) He testified:

> When I failed to file I didn't intend not to file, I just missed the day, and the IRS didn't follow-up with me and I knew they owed me money. And it wasn't until they thought that I didn't owe them money that they contacted me to tell me to file, at which point I did and they sent me a return, a refund. So that was the nature of that relationship with the IRS as I perceived it. (Tr. at 22-23)

Applicant credibly testified that he did not realize that he had to file tax returns if he was due refunds. Since he had more than enough withheld from his paychecks to pay his taxes, he incorrectly believed he was not required to file the returns. He planned to file the returns and receive the refunds, but he just never got around to it. (Tr. at 12-13, 22-26, 36; Applicant's response to SOR; GE 2, 3)

Applicant served on active duty in the military in a combat regiment as a first lieutenant from 1994 to 1997. During that period, he served in Operation Uphold Democracy in Haiti in about 1994 to 1995. He was also involved in counter-drug operations. He was involved in training exercises and a conference. As some point, likely in about 1996, his regiment asked him to assist other service members to file their tax returns, which Applicant stated took away from his ability to file his own returns. There is no evidence as to what, if any, training Applicant received in order to help his

troops. He apparently did not learn too much from the experience because he stated he never used any tax-filing software and did his own returns with pen and paper. (Tr. at 21; GE 1)

IRS tax transcripts indicate that in some years the IRS filed returns for Applicant, and in at least one year actually issued a refund based on the IRS-prepared returns. For tax year 2002, the IRS showed an inquiry for non-filing of tax return on February 23, 2004. The IRS prepared a substitute tax return on July 12, 2004, and refunded $600 to Applicant on September 3, 2004. (GE 2)

For tax year 2003, the IRS showed an inquiry for non-filing of tax return on April 18, 2004. The IRS prepared a substitute tax return on September 29, 2008. Based on the IRS-prepared return, Applicant would have been due a refund of $1,742. I note that it appears that at least one page is missing from the transcript (transcripts typically have "This Product Contains Sensitive Taxpayer Data" at the bottom (e.g. see transcripts for 2002, 2004, 2005)). However, it was already beyond the three-year window to receive a refund. (GE 2)

The IRS established that no tax returns was filed for tax years 2004, 2005, and 2006 and issued notices for all three years on June 2, 2008. (GE 2)

Applicant submitted a Questionnaire for National Security Positions (SF 86) in January 2018. He did not report his failure to file federal and state tax returns under the question that asked: "**In the last seven (7) years** have you failed to file or pay Federal, state, or other taxes when required by law or ordinance?" (GE 1)

For tax year 2017, the IRS issued an inquiry for non-filing of tax return on November 26, 2018, and a notice was issued on December 17, 2018. Applicant filed his federal and state income tax returns for 2017 in January 2019. The federal return was received by the IRS in January 15, 2019. The IRS issued a refund of $3,024 on March 1, 2019. (GE 2)

Applicant was interviewed for his background investigation on January 31, 2019, after the 2017 return had been filed. A signed statement was not taken, but the interview was summarized in a report of investigation. He initially answered that he satisfies all legal requirements. He was asked if he had any questions or concerns, at which time, he volunteered that he had not filed federal and state tax returns since 1997, and he was not sure if he was legally required to do so if he did not owe money. He filed the returns for 2005 and 2006 (exact year unknown (actually 2007 and 2008)). GE 3)

Applicant told the investigator that he missed the April 15th deadline each year, and he believed the IRS and his state were happy since he always had the maximum amount deducted from his paycheck; he owned a home; and he would be due a refund of at least $3,000 from the IRS and an unsure amount from his state. He stated that he received a letter from the IRS in 2018 (presumably the notice for tax year 2017) telling him to file his 2017 returns. He stated that he was not aware he was legally obligated to

file tax returns if money was due to him. He indicated that he would go through his documents to file all the returns from 1997. (GE 3)

When asked at his hearing about his 2018 tax returns following his January 2019 clearance interview, Applicant replied, "I, once again, was intending to get the pencil and the forms out and do it by hand and the due date slipped because I wasn't using a tax service. So yeah, for that year I once again slipped" (Tr. at 32)

The DOD sent Applicant interrogatories. The dates they were sent to Applicant and when he received them are not in the record, but it was apparently no later than January 2020, because that period is mentioned in Applicant's response to the interrogatories. (GE 2)

Applicant used to file his own returns by hand. He finally realized it was easier to use a professional, and he retained the services of a tax professional to prepare the returns. As indicated above, he filed his federal and state income tax returns for 2017 in January 2019. He requested IRS wage and income transcripts (W-2 information) for the years that he did not have W-2 forms. He filed the 2009 through 2018 returns in January and February 2020. The IRS received his 2006 return in September 2020. He was due federal refunds each year, in amounts ranging from $1,242 to $3,673. Because the IRS does not pay refunds from returns more three years old, Applicant forfeited almost $18,000 in federal refunds for tax years 2006 and 2009 through 2015. He stated that he forfeited at least $10,000 in refunds from his state during the same period. The IRS would not provide wage and income transcripts from before 2010, and Applicant no longer had information for tax years before 2006. (Tr. at 15-19, 32-34; Applicant's response to SOR; GE 2; AE C, D, J)

With the assistance of the tax professional, Applicant filed his federal and state income tax returns for 2019, 2020, and 2021 on time. He received refunds each year. His state certified that he is in good standing. (Tr. at 33-34; GE 2; AE C, D, H-J)

Applicant accepted responsibility for his tax failures and poor judgment. He has a good job with a stable income. He completed a financial counseling course. His finances are currently in good shape, and he is aware that neglecting his tax obligations in the future could jeopardize his security clearance and his job. He found the process of using a tax professional easy, and he is no longer forfeiting thousands of dollars in refunds. He credibly stated that he has learned a valuable and costly lesson, and all future tax returns will be filed on time. (Tr. at 17-19, 32-35; Applicant's response to SOR; GE 3, 4; AE G)

Applicant credibly denied intentionally providing false information about his taxes on his 2018 SF 86. As addressed above, he did not realize that he was required to file tax returns if he was due refunds, and he did not owe any taxes. Therefore, he thought he provided the correct answer. He discussed his tax situation during his background interview in January 2019. (Tr. at 17-18, 28, 31-32, 36; Applicant's response to SOR; GE 1, 3) After considering all of the evidence, including Applicant's age, education,

experience, character evidence, and credible testimony, I find he did not intentionally falsify the SF 86. Additional comments with be provided in the Analysis section.

Applicant called a witness, and he submitted documents and letters attesting to his moral character and excellent job performance. He is praised for his honesty, trustworthiness, judgment, dedication, work ethic, and diligent handling of classified information. His supervisor who has known Applicant since 2012 testified that Applicant "is very honest. He will tell you like it is and tell you the truth, whether it's good truth or bad truth." (Tr. at 36-43; GE 2; AE A, E, L)

Policies

This case is adjudicated under Executive Order (EO) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG), which became effective on June 8, 2017.

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are to be used in evaluating an applicant's eligibility for access to classified information.

These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, administrative judges apply the guidelines in conjunction with the factors listed in the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶ 2(c), the entire process is a conscientious scrutiny of a number of variables known as the "whole-person concept." The administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that "[a]ny doubt concerning personnel being considered for national security eligibility will be resolved in favor of the national security."

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, the applicant is responsible for presenting "witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven by Department Counsel." The applicant has the ultimate burden of persuasion to obtain a favorable security decision.

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours. The Government reposes a high degree of trust and confidence in individuals to whom it

grants access to classified information. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation of potential, rather than actual, risk of compromise of classified information.

Section 7 of EO 10865 provides that adverse decisions shall be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." *See also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

Applicant's credibility is key to the personal conduct allegations and the financial considerations allegations. The Appeal Board noted:

> 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.

I agree with the Appeal Board that this case hinges on whether Applicant knew he had to file income tax returns as that is the key to the falsification allegation under Guideline E as well as his failure to file the returns, which was cross-alleged under both Guidelines E and F. Since Applicant's veracity, or lack thereof, is key to both guidelines, I will address why I found Applicant credible under the falsification allegation, and incorporate that discussion by reference under the personal conduct and financial considerations analysis for the failure to file federal and state income tax returns.

Guideline E, Personal Conduct (Falsification of SF 86)

The security concern for personal conduct is set out in AG ¶ 15, as follows:

> Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.

AG ¶ 16 describes conditions that could raise a security concern and may be disqualifying. The following disqualifying condition is potentially applicable to the allegation that Applicant intentionally falsified his SF 86:

> (a) deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment

qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities.

Applicant denied the falsification allegation, and the mere omission of information does not prove a falsification. *See, e.g.,* ISCR Case No. 17-00709 at 3 (App. Bd. Jun. 28, 2018). It is the Government's obligation to prove controverted matters by substantial evidence, i.e., "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. *See, e.g.,* ISCR Case No. 16-04094 at 2 (App. Bd. Apr. 20, 2018). An administrative judge must consider the record evidence as a whole to determine an applicant's state of mind at the time of the omission. *See* ISCR Case No. 03-09483 at 4 (App. Bd. Nov. 17, 2004). An applicant's experience and level of education are relevant to determining whether a failure to disclose relevant information on a security clearance application was deliberate. ISCR Case No. 08-05637 (App. Bd. Sep. 9, 2010).

As indicated in the Findings of Fact and in my original decision, Applicant did not intentionally provide false information about his taxes on his 2018 SF 86, and the Government did not meet their burden of proof that he did. AG ¶ 16(a) is not applicable. SOR ¶ 2.a is concluded for Applicant.

The Appeal Board directed me to address certain "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."

I will address some of the factors that went into my credibility determination, some of which individually are relatively minor, but when considered as a whole led to my conclusion. Judging credibility is a complicated process, with both the explainable and the inexplicable. The Honorable John L. Kane, Senior District Judge, Federal District of Colorado, described it as follows:

> A few brave souls have attempted to parse the elements of credibility, but this essential function is left largely to the mysteries of intuition. Although demeanor evidence can mislead, it is considered a reliable basis for finding credibility. Does the witness hesitate or stammer or show fear in answering questions? Reliance on demeanor vests wide discretion in the fact-finder. As Judge Jerome Frank, no slouch when it came to pushing the judicial envelope, observed, the methods of evaluating oral testimony "do not lend themselves to formulations in terms of rules and are thus, inescapably, 'unruly.'"[1]

There is a reason why judges and juries are usually given deference in their credibility determinations. For DOHA proceedings, when evaluating the administrative

[1] *Judging Credibility*, by the Honorable John L. Kane, Senior District Judge, Federal District of Colorado, Litigation Magazine, Spring 2007, available at: extension://efaidnbmnnnibpcajpcglclefindmkaj/http://www.cod.uscourts.gov/Portals/0/Documents/Judges/JLK/JLK_Judging_Credibility.pdf.

judge's factual findings, the Appeal Board is required to give deference to the judge's credibility determinations. Directive ¶ E3.1.32.1. 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). That deference of course is not absolute, which is what resulted in the remand decision. 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, is inherently improbable or discredited by undisputed fact, is contradicted by other evidence, or is so internally inconsistent or implausible that a reasonable fact finder would not credit it. *See* ISCR Case No. 97-0184 at 5 (App. Bd. Dec. 8. 1998) (internal citations omitted); 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 or she 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).

Assessing credibility is not being a human lie-detector. It is an examination of all of the evidence in the case, and assessing whether that evidence is consistent with and support's the witness's testimony, or is inconsistent and contradicts the testimony. The objective part of a credibility determination can be explained. The subjective part can be inexplicable, particularly to someone who did not observe the witness's testimony.

That is why it is somewhat surprising that Applicant's veracity became the crux of Department Counsel's appeal, when Department Counsel observed Applicant's testimony, and his veracity was barely mentioned in her closing argument. Department Counsel did not argue that the concerns were with Applicant's veracity; she argued that the concerns were primarily related to Applicant's failure to file his tax returns and to comprehend the significance of his tax issues: "There's a failure here, the Government's position is there's a failure here for the Applicant to realize the gravity of his actions." (Tr. at 45-46) Department Counsel specifically argued:

> He lives in his, for lack of a better way to put it, he lives in his own bubble. I know I don't owe the Government money. I know that I have withheld more than enough. Heck, I'm giving them extra money at the end of the year, I'm not applying for my refund, I should be golden. (Tr. at 46)

That argument is subject to interpretation, but when taken with the rest of her argument, it appears that the Government did not dispute Applicant's version of events, just questioned whether, even if true, Applicant should have a security clearance. I do not believe the following argument by Department Counsel is subject to interpretation:

> So, I mean, you've been doing this long enough, Judge, we submit to your discretion as to how much you'd like to credit Applicant's testimony in that regard and the decision you want to make there. (Tr. at 48)

Department Counsel essentially stated that she left it to my discretion as to whether I should believe Applicant. It appears what she really meant was that she left it to my discretion, unless I came down on the side of believing Applicant. Nonetheless, Department Counsel's argument is not evidence; and the Government, an administrative judge, and the Appeal Board are not limited by Department Counsel's argument. My findings were and are based on the evidence, not Department Counsel's arguments.

Applicant clearly never took any actions, or failed to take any actions, designed to avoid paying taxes. Quite the opposite. He never owed any additional taxes, and he forfeited about $28,000 by not filing the returns within the required three-year window to receive a refund.

Applicant served in the U.S. military or the military reserve from 1984 to 1997. He served about eight years on active duty. He was an officer when he was honorably discharged. He has held a security clearance for decades, apparently without incident. I also considered his favorable character evidence, and that he was warned as are all witnesses that it is a criminal offense to knowingly and willfully make any materially false, fictitious, or fraudulent statement or representation in any matter within the executive branch of the Government of the United States. 18 U.S.C. § 1001. Security clearances are within the jurisdiction of the executive branch of the Government of the United States.[2] A violation of 18 U.S.C. § 1001 is a serious offense as it may be punished by imprisonment for up to five years and a $10,000 fine.

Does that mean that individuals who served honorably as military officers, with favorable character evidence, would not knowingly commit a federal crime and lie during these proceedings? Of course not, as we see that frequently. However, those individuals with good records are less likely to lie. We at DOHA are frequently involved with allegations of lying and criminal conduct, and we can become jaded in that regard, because we only see those individuals whose backgrounds have raised security concerns. We do not see those who go through the process without issues.

As an imperfect example because of the differing standards of proof, in a court-martial, if there is character evidence presented, the members (jury) are instructed by the military judge something to the effect:

> Evidence of the accused's character for [pertinent character trait] may be sufficient to cause a reasonable doubt as to his or her guilt. On the other hand, evidence of the accused's good character for [pertinent character trait] and (good military record) may be outweighed by other evidence tending to show the accused's guilt. See Electronic Benchbook available at: https://www.jagcnet.army.mil/EBB/.

I considered the nature of Applicant's statement that he believed that he did not have to file returns if he was due a refund. It is relatively easy to discard that statement

[2] *See Department of the Navy v. Egan*, 484 U.S. 518, 527 (1988).

as nonsensical, but it is not that uncommon, and not all of those people are lying. The IRS reported in March 2022 that it had an estimated $1.5 billion in refunds for an estimated 1.5 million taxpayers who did not file tax returns in tax year 2018. The three-year window to collect those refunds closed in April 2022.[3] It is impossible to know how many of that 1.5 million shared Applicant's beliefs that he was not required to file a tax return because he was due a refund. It is equally impossible to know how many additional people shared Applicant's beliefs, but they filed their returns in order to get their refund. I also note that nowhere in the IRS article does it state that taxpayers who meet the income threshold are required to file returns even if they are due refunds. That information is available elsewhere on the IRS website.

The following matters identified by the Appeal Board are addressed individually:

Identified Matter 1

At some point, likely in about 1996, Applicant's regiment asked him to assist other service members to file their tax returns. One might think that means he has tax expertise, but there is no evidence as to what, if any, training Applicant received in order to help his troops. Junior officers are assigned many duties, particularly when deployed, some of which they do without training, and they are ill prepared for the task. They do the best they can because the troops they are assisting know even less. "In the land of the blind, the one-eyed man is king." (Desiderius Eramus) I did not find that detracted significantly from Applicant's credibility.

Identified Matter 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.

I saw nothing in the above that is inconsistent with Applicant's testimony that he never went into a tax year thinking that he would not file tax returns. He just missed the day and then let things slide because he did not owe any money. The aspect of this identified matter relating to the delay in filing the 2018 returns after the interview will be addressed under the analysis related to Applicant's judgment under personal conduct and financial considerations.

Identified Matter 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

[3] *See* IRS news release of March 25, 2022, at: https://www.irs.gov/newsroom/irs-has-1-point-5-billion-in-refunds-for-people-who-have-not-filed-a-2018-federal-income-tax-return-april-deadline-approaches.

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.

I did not find that the above exchange detracted from or was inconsistent with Applicant's testimony. The chronology is important for this matter. Applicant submitted the SF 86 in January 2018. The IRS issued a notice for tax year 2017 on December 17, 2018, after the SF 86 was submitted. Applicant received the notice in December 2018 because he discussed it with the investigator on January 31, 2019. He volunteered the information because he was not completely sure that he was correct. It is possible that the notice may have shaken his beliefs, but it does not detract from whether he believed it when he submitted the SF 86.

Identified Matter 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.

I considered the actions by the IRS, including their notices. The IRS's actions should have made the lightbulb go off in Applicant's head, but they may have actually contributed to Applicant's misinformation. In general, except for forfeiture of older refunds, the IRS does not punish individuals who do not file returns, but would be due refunds if they did. There are penalties and interest imposed on those who file late and owe taxes, but no penalties for those who just file late. It is not difficult to understand why many (including Applicant) believe the IRS is happy when taxpayers who are due a refund do not file returns. It is actually a revenue saver for the IRS, as shown in Applicant's case, where he forfeited almost $18,000, and by the estimated $1.5 billion in refunds for an estimated 1.5 million taxpayers who did not file their 2018 tax returns.

Additionally, Applicant might have received mixed signals from the IRS. Tax transcripts indicate that in some years the IRS filed returns for him and in at least one year, the IRS actually issued a refund based on the IRS-prepared returns. For tax year 2002, the IRS showed an inquiry for non-filing of tax return on February 23, 2004. The IRS prepared a substitute tax return on July 12, 2004, and refunded $600 to Applicant on September 3, 2004.

The Appeal Board also identified that "Applicant testified that he filed [2007's] tax return on time to qualify for a Federal Government program in which stimulus checks were issued." Applicant readily admitted that he felt the stimulus payments were being issued for a political motive. He filed to receive the stimulus payment, and he then did not vote for the candidates or party that supported the stimulus program. That is not inconsistent with his overall testimony.

In addition to all of the above reasons, I found nothing that detracted significantly from Applicant's testimony. I just found him credible.

Identified Matters 5 and 6

The credibility aspect of Identified Matter 5 was addressed above under Identified Matter 3. Identified Matter 6 is about Applicant's "poor judgment" under personal conduct. The judgment aspects of Identified Matters 5 and 6 will be discussed below.

Guideline F, Financial Considerations (failure to file), as cross-alleged under Guideline E, Personal Conduct

Applicant's failure to file federal and state income tax returns was alleged under Guideline F and cross-alleged under Guideline E. They will be discussed together. The security concern for financial considerations is set out in AG ¶ 18:

> Failure to live within one's means, satisfy debts, and meet financial obligations may indicate poor self-control, lack of judgment, or unwillingness to abide by rules and regulations, all of which can raise questions about an individual's reliability, trustworthiness, and ability to protect classified or sensitive information. Financial distress can also be caused or exacerbated by, and thus can be a possible indicator of, other issues of personnel security concern such as excessive gambling, mental health conditions, substance misuse, or alcohol abuse or dependence. An individual who is financially overextended is at greater risk of having to engage in illegal or otherwise questionable acts to generate funds.

Guideline E notes several conditions that could raise security concerns under AG ¶ 16. Guideline F notes conditions that could raise security concerns under AG ¶ 19. The following are potentially applicable in this case:

> 16(c) credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the individual may not properly safeguard classified or sensitive information;
>
> 16(e) personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress by a foreign intelligence entity or other individual or group. Such conduct includes:
>
> > (1) engaging in activities which, if known, could affect the person's personal, professional, or community standing; and
>
> 19(f) failure to file or fraudulently filing annual Federal, state, or local income tax returns or failure to pay annual Federal, state, or local income tax as required.

Applicant did not file his federal and state income tax returns for multiple tax years when they were due. AG ¶ 19(f) is applicable. That conduct reflects questionable judgment and an unwillingness to comply with rules and regulations. It also created vulnerability to exploitation, manipulation, and duress. AG ¶¶ 16(c) and 16(e) are also applicable.

Conditions that could mitigate the personal conduct and financial considerations security concerns are provided under AG ¶¶ 17 and 20. The following are potentially applicable:

> 17(c) the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment;
>
> 17(d) the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that contributed to untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur;
>
> 17(e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress;
>
> 20(a) the behavior happened so long ago, was so infrequent, or occurred under such circumstances that it is unlikely to recur and does not cast doubt on the individual's current reliability, trustworthiness, or good judgment; and
>
> 20(g) the individual has made arrangements with the appropriate tax authority to file or pay the amount owed and is in compliance with those arrangements.

Applicant foolishly but honestly believed he did not have to file income tax returns if he would receive a refund. The IRS and his state benefitted from his ignorance as he forfeited almost $18,000 in federal refunds for tax years 2006 and 2009 through 2015 and at least $10,000 in refunds from his state during the same period. All of the returns since 2006 have now been filed, with the returns for the last three years filed on time. Returns from 2005 and earlier no longer have any security significance.

Applicant accepted responsibility for his tax failures and poor judgment. He now utilizes a tax professional, which he finds easier and saves him thousands in refunds. AG ¶ 20(g) is applicable, but that does not end the discussion. Applicant's failure to file his tax returns when required raises questions about his judgment and willingness to abide by rules and regulations. I found Applicant to be honest and truthful, but lax about his legal requirement to file his tax returns in a timely manner. I am convinced that he has learned a valuable and costly lesson, and that all future returns will be filed on time.

The Appeal Board correctly noted that I described Applicant's belief that he did not have to file income tax returns if he would receive a refund as honest, but "foolish," and that he exhibited "poor judgment." The Appeal Board indicated that in my Guideline E analysis, I "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 Appeal Board directed me to address the matter under Guideline E, but it applies to both Guidelines, so I will address them together.

I note that previous versions of the Adjudicative Guidelines did not have the equivalent of AG ¶ 20(g). By including AG ¶ 20(g) in the current Adjudicative Guidelines, I believe the Security Executive Agent directed me to give it full consideration. As discussed above, AG ¶ 20(g) is clearly applicable. The applicability of a mitigating condition does not end the discussion. In ISCR Case No. 17-01807 at 3-4 (App. Bd. Mar. 7, 2018), the Appeal Board held:

> [t]he mere filing of delinquent tax returns or the existence of a payment arrangement with an appropriate tax authority does not compel a Judge to issue a favorable decision. As with the application of any mitigating condition, the Judge must examine the record evidence and decide whether the favorable evidence outweighs the unfavorable evidence, or *vice versa*. The timing of corrective action is an appropriate factor for the Judge to consider in the application of [pertinent mitigating conditions].

Before a finding that the security concerns are not mitigated, there should be a discussion as to why the concerns are not mitigated despite the applicability of one or more mitigating conditions. The Appeal Board has provided guidance on that matter in financial cases. An applicant who begins to resolve his or her financial problems, including filing tax returns, only after being placed on notice that his or her clearance is in jeopardy may lack the judgment and self-discipline to follow rules and regulations over time or when there is no immediate threat to his or her own interests. *See, e.g.,* ISCR Case No. 16-03187 at 4 (App. Bd. Aug. 1, 2018).

This case can be distinguished from many others because Applicant was not aware that he had to file the returns if he was due refunds, which means that he did not intentionally shirk his tax-filing responsibilities. I believe he was placed on notice that he was required to file the returns and that his clearance was in jeopardy during the interview for his background investigation on January 31, 2019.

Applicant's returns, including for tax year 2018, were not filed until early in 2020, almost a year after the interview. However, older returns require more work. W-2 forms, or the equivalent information in the form of an IRS wage and income transcript, have to be obtained, and then the returns have to be completed and filed. The returns for 2018 were filed about nine months after the standard due date of April 15, 2019, and about three months after the automatic extension had Applicant applied for one.

The delay is less than ideal, but it is acceptable in light of Applicant's responsibility in filing his 2019, 2020, and 2021 returns on time. To establish a meaningful track record of reform, an applicant is required to demonstrate that he has established a plan to resolve his financial problems and taken significant actions to implement that plan. *See, e.g.,* ISCR Case No. 19-01624 at 34 (App. Bd. Aug. 29, 2022). I find he has done so.

As indicated throughout this decision, Applicant was never driven by money. If Applicant was truthful, which I believe he was, his failure to file his tax returns was not done out of malice, ill intent, or with intention to avoid paying taxes. It was foolish because he forfeited about $28,000 in refunds. He exercised poor judgment in not being aware of his legal obligations, and then in taking time to rectify those issues. But he did rectify the problems, and his three years' worth of timely returns indicate that he has learned his lesson. I find the conduct is unlikely to recur, and it no longer casts doubt on Applicant's reliability, trustworthiness, or good judgment. AG ¶¶ 17(c), 17(d), 17(e), and 20(a) are applicable. Personal conduct and financial considerations security concerns are mitigated.

Whole-Person Concept

Under the whole-person concept, the administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of the applicant's conduct and all relevant circumstances. The administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(d):

> (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 extent to which participation is voluntary; (6) the presence or absence of rehabilitation and other permanent 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.

Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept. I have incorporated my comments under Guidelines E and F in my whole-person analysis. I also considered Applicant's honorable military service and favorable character evidence.

Overall, the record evidence leaves me without questions or doubts about Applicant's eligibility and suitability for a security clearance. I conclude Applicant mitigated the personal conduct and financial considerations security concerns.

Formal Findings

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline F:	For Applicant
Subparagraphs 1.a-1.b:	For Applicant
Paragraph 2, Guideline E:	For Applicant
Subparagraphs 2.a-2.b:	For Applicant

Conclusion

It is clearly consistent with the national interest to continue Applicant's eligibility for a security clearance. Eligibility for access to classified information is granted.

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Edward W. Loughran
Administrative Judge