



**DEPARTMENT OF DEFENSE  
DEFENSE OFFICE OF HEARINGS AND APPEALS**



In the matter of: )  
 )  
 --- ) ADP Case No. 17-03894  
 )  
 Applicant for Public Trust Position )

**Appearances**

For Government: Bryan Olmos, Esquire, Department Counsel  
For Applicant: *Pro se*

12/21/2018

**Decision**

GALES, Robert Robinson, Administrative Judge:

Applicant failed to mitigate the trustworthiness concerns regarding financial considerations. Eligibility to occupy a public trust position is denied.

**Statement of the Case**

On February 3, 2017, Applicant applied for a public trust position and submitted an Electronic Questionnaire for Investigations Processing (e-QIP). On November 29, 2017, the Department of Defense (DOD) Consolidated Adjudications Facility (CAF) issued a Statement of Reasons (SOR) to him, under Executive Order (Exec. Or.) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended and modified; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended and modified (Directive); and Directive 4 of the Security Executive Agent (SEAD 4), *National Security Adjudicative Guidelines* (December 10, 2016) (AG), for all covered individuals who require initial or continued eligibility for access to classified information or eligibility to hold a sensitive position, effective June 8, 2017.

The SOR alleged trustworthiness concerns under Guideline F (Financial Considerations), and detailed reasons why the DOD CAF was unable to make an affirmative finding under the Directive that it is clearly consistent with the national interest to grant Applicant's eligibility for occupying a public trust position to support a contract with the DOD. The SOR recommended referral to an administrative judge to determine whether such eligibility should be granted, continued, denied, or revoked.

Applicant received the SOR on December 18, 2017. In a sworn statement, dated January 31, 2018, Applicant responded to the SOR and requested a hearing before an administrative judge. Department Counsel indicated the Government was prepared to proceed on March 5, 2018. The case was assigned to me on March 20, 2018. A Notice of Hearing was issued on June 29, 2018, scheduling the hearing for July 24, 2018. I convened the hearing as scheduled.

During the hearing, Government exhibits (GE) 1 through GE 3 and Administrative exhibit I were admitted into evidence without objection. Applicant did not offer any Applicant exhibits (AE). Applicant testified. Based on information presented during the hearing, Department Counsel moved to amend the SOR by adding the following language: "You failed to timely file your annual federal income tax returns for tax years 2012 through 2015." There was no objection to the motion, and the motion was granted, thereby amending the SOR by adding SOR ¶ 1.b.<sup>1</sup> The transcript (Tr.) was received on August 2, 2018. I kept the record open to enable Applicant to supplement it. He took advantage of that opportunity and timely submitted documents, which were marked and admitted into evidence as AE A through AE M without objection. The record closed on August 20, 2018.

### **Findings of Fact**

In his Answer to the SOR, Applicant admitted the factual allegations in the initial SOR (SOR ¶ 1.a.). Applicant did not admit or deny SOR ¶ 1.b., but merely acknowledged and conceded the concerns, so a denial was registered as to that allegation. Applicant's admissions and comments are incorporated herein as findings of fact. After a complete and thorough review of the evidence in the record, and upon due consideration of same, I make the following additional findings of fact:

Applicant is a 49-year-old employee of a defense contractor. He has been serving as a systems analyst with his current employer since December 2016. He is a 1988 high school graduate, and received an associate's degree in 1992. In 1995-1996, he was an ordained minister. Applicant has never served with the U.S. military. He has never held a position of public trust. Applicant was married in 1996, separated in 2014, and divorced in 2017. He remarried in April 2018. He has two children, born in 1999 and 2001.

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<sup>1</sup> Tr. at 76-78; Administrative exhibit I (Text of Proposed SOR Amendment).

## Financial Considerations<sup>2</sup>

Applicant attributed his financial problems to several different factors: he had personal family life issues involving a wife who lost her teaching position; she mismanaged their money and “self-medicated” by spending money on clothing and eating out; she totaled her vehicle; estate tax issues arose involving an estate inherited by his wife; more tax issues arose in 2011 over capital gains when he cashed in a pension plan to generate funds to enable him to resolve some of his growing financial debt; their house was foreclosed in 2013; he was unemployed from May 2014 until August 2014; his federal income tax refund for the tax year 2016 was withheld by the Internal Revenue Service (IRS) and applied to his outstanding tax debt; and Applicant and his wife were separated for three years before finally divorcing. In addition, although they shared custody of the children, Applicant kept physical custody of their children and did not receive any financial support from his wife.<sup>3</sup>

When Applicant completed his e-QIP in February 2017, he reported that he had failed to timely file his federal and state income tax returns for the tax years 2012 through 2015, and that he had failed to pay his federal and state taxes for the same period.<sup>4</sup> However, during his interview with an investigator from the U.S. Office of Personnel Management (OPM) in August 2017, Applicant changed the narrative and contended he had timely filed his income tax returns for that period, and was sent refunds, claiming his e-QIP entries were in error.<sup>5</sup> In his Answer to the SOR and during the hearing, Applicant acknowledged that the filings had not yet taken place.<sup>6</sup> Although he claimed that he had, at one point, entered into an Installment Agreement with the IRS, he acknowledged that he had failed to make any payments under it for fear that his checks might bounce. He also denied that he has been in contact, in writing or by telephone, with the IRS for approximately five years for anything associated with those tax years.<sup>7</sup> During his hearing, Applicant said that he was now in a position to start paying his delinquent taxes and some retail credit debt about which he was not aware.<sup>8</sup>

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<sup>2</sup> General source information pertaining to the financial issues discussed below can be found in the following exhibits: GE 1 (e-QIP, dated February 3, 2017); GE 2 (Personal Subject Interview, dated August 9, 2017); GE 3 (Combined Experian, TransUnion, and Equifax Credit Report, dated May 26, 2017); and Applicant’s Answer to the SOR, dated January 31, 2018.

<sup>3</sup> Tr. at 21-22, 24-32, 35-37; GE 2, *supra* note 2, at 7-8.

<sup>4</sup> GE 1, *supra* note 2, at 36-39.

<sup>5</sup> GE 2, *supra* note 2, at 5-7.

<sup>6</sup> Tr. at 37.

<sup>7</sup> Tr. at 41-42.

<sup>8</sup> Tr. at 44. It should be noted that the Appeal Board has indicated that promises to pay off delinquent debts in the future are not a substitute for a track record of paying debts in a timely manner and otherwise acting in a financially responsible manner. ISCR Case No. 07-13041 at 4 (App. Bd. Sep. 19, 2008) (citing ISCR Case No. 99-0012 at 3 (App. Bd. Dec. 1, 1999)).

In August 2018, Applicant asserted that he had finally filed his federal income tax returns for the tax years 2010 through 2016.<sup>9</sup> The U.S. Individual Income Tax Return (Form 1040) for 2010, reflecting an adjusted gross income of \$82,032, was dated August 1, 2018;<sup>10</sup> the Forms 1040 for 2011, reflecting an adjusted gross income of \$76,945,<sup>11</sup> and 2012, reflecting an adjusted gross income of \$76,969,<sup>12</sup> were dated August 2, 2018; the Form 1040 for 2013, reflecting an adjusted gross income of \$46,229, was dated August 3, 2018;<sup>13</sup> the Form 1040 for 2014, reflecting an adjusted gross income of \$58,427, was dated August 5, 2018;<sup>14</sup> and the Forms 1040 for 2015, reflecting an adjusted gross income of \$72,246,<sup>15</sup> and 2016, reflecting an adjusted gross income of \$72,515,<sup>16</sup> were dated August 6, 2018 – all clearly beyond the required initial or extended dates of filing.<sup>17</sup>

On August 10, 2018, Applicant submitted an Installment Agreement Request (Form 9465) to the IRS, stating that he owed the IRS \$12,506 in unpaid taxes, interest, and penalties, and offered to pay the IRS a monthly \$340 under the requested

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<sup>9</sup> AE A (E-mail to Department Counsel, dated August 17, 2018); AE B (Letter, dated August 16, 2018).

<sup>10</sup> AE D (Form 1040, dated August 1, 2018).

<sup>11</sup> AE E (Form 1040, dated August 2, 2018).

<sup>12</sup> AE F (Form 1040, dated August 2, 2018).

<sup>13</sup> AE G (Form 1040, dated August 3, 2018).

<sup>14</sup> AE H (Form 1040, dated August 5, 2018).

<sup>15</sup> AE I (Form 1040, dated August 6, 2018).

<sup>16</sup> AE J (Form 1040, dated August 6, 2018).

<sup>17</sup> The legal requirement to file a federal income tax return is based upon an individual's gross income and other enumerated conditions. Once it is determined that there is an obligation to so file, the following applies:

Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return, keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than \$25,000 (\$100,000 in the case of a corporation), or imprisoned not more than 1 year, or both, together with the costs of prosecution. In the case of any person with respect to whom there is a failure to pay any estimated tax, this section shall not apply to such person with respect to such failure if there is no addition to tax under section 6654 or 6655 with respect to such failure. In the case of a willful violation of any provision of section 6050I, the first sentence of this section shall be applied by substituting "felony" for "misdemeanor" and "5 years" for "1 year."

26 U.S.C. § 7203, *Willful failure to file return, supply information, or pay tax.*

agreement.<sup>18</sup> He sent a check to the IRS for \$300 that same day.<sup>19</sup> Applicant offered no documentation from the IRS to indicate that his Installment Agreement Request had been approved. In addition, he offered no explanation for paying the IRS less than he had promised to pay under the Installment Agreement Request, or if he had continued making subsequent payments in compliance with the proposed Request.

In addition to his difficulties with respect to his federal income tax returns and the taxes he still owes the IRS, Applicant also had two delinquent debts that were not alleged in the SOR.<sup>20</sup> Although one account became delinquent in 2011 and the other account became delinquent in 2017, and at least one of them was discussed during his OPM interview in August 2017, Applicant did not attempt to resolve one debt until he made a payment of \$295.94 on July 31, 2018, thereby paying it off.<sup>21</sup> During the hearing, he discussed the other, earlier debt, and stated that he intended to get it resolved as well, but he offered no evidence to indicate that any further efforts to do so had been made.

In August 2018, Applicant submitted a Personal Financial Statement to indicate monthly income, monthly expenses, and debts. He reported \$7,609 in combined net monthly income; and \$5,410 in monthly expenses, including \$320 in federal taxes. Among his debts are monthly payments of \$430 on his Lexus vehicle. He reported a monthly remainder of \$419 available for discretionary spending or savings.<sup>22</sup>

There is no evidence that Applicant has ever received financial counseling. While there is evidence of two recent, post-hearing payments on both SOR and non-SOR delinquent debts, nearly a year after the SOR was issued, and there is evidence of a modest monthly remainder, there is little meaningful evidence to indicate that Applicant's financial situation is now under control.

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<sup>18</sup> AE K (Form 9465, dated August 10, 2018).

<sup>19</sup> AE L (Check, dated August 10, 2018).

<sup>20</sup> Unalleged conduct can be considered for certain purposes, as discussed by the DOHA Appeal Board. (Conduct not alleged in an SOR may be considered: (a) to assess an applicant's credibility; (b) to evaluate an applicant's evidence of extenuation, mitigation, or changed circumstances; (c) to consider whether an applicant has demonstrated successful rehabilitation; (d) to decide whether a particular provision of the Adjudicative Guidelines is applicable; or (e) to provide evidence for whole-person analysis under Directive § 6.3.). See ISCR Case No. 03-20327 at 4 (App. Bd. Oct. 26, 2006); (citing ISCR Case No. 02-07218 at 3 (App. Bd. Mar. 15, 2004); ISCR Case No. 00-0633 at 3 (App. Bd. Oct. 24, 2003)). See *also* ISCR Case No. 12-09719 at 3 (App. Bd. April 6, 2016) (citing ISCR Case No. 14-00151 at 3, n. 1 (App. Bd. Sept. 12, 2014); ISCR Case No. 03-20327 at 4 (App. Bd. Oct. 26, 2006)). Applicant's unlisted and unalleged delinquent accounts will be considered only for the five purposes listed above.

<sup>21</sup> AE A, *supra* note 9; AE B, *supra* note 9; AE M (Account Activity, dated July 31, 2018).

<sup>22</sup> AE C (Personal Financial Statement, dated August 2, 2018).

## Policies

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security emphasizing, “no one has a ‘right’ to a [position of public trust].”<sup>23</sup> As Commander in Chief, the President has the authority to control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to have access to such information. DOD contractor personnel are afforded the right to the procedures contained in the Directive before any final unfavorable access determination may be made.<sup>24</sup>

When evaluating an applicant’s suitability for a public trust position, the administrative judge must consider the guidelines in SEAD 4. In addition to brief introductory explanations for each guideline, the guidelines list potentially disqualifying conditions and mitigating conditions, which are used in evaluating an applicant’s eligibility for a public trust position.

An administrative judge need not view the guidelines as inflexible, ironclad rules of law. Instead, acknowledging the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The administrative judge’s overarching adjudicative goal is a fair, impartial, and common sense decision. 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 meaningful decision.

In the decision-making process, facts must be established by “substantial evidence.”<sup>25</sup> The Government initially has the burden of producing evidence to establish a potentially disqualifying condition under the Directive, and has the burden of establishing controverted facts alleged in the SOR. Once the Government has produced substantial evidence of a disqualifying condition, under Directive ¶ E3.1.15, the applicant has the burden of persuasion to present evidence in refutation, explanation, extenuation or mitigation, sufficient to overcome the doubts raised by the Government’s case. The burden of disproving a mitigating condition never shifts to the Government.<sup>26</sup>

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<sup>23</sup> *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).

<sup>24</sup> It should be noted that a memorandum from the Deputy Under Secretary of Defense for Counterintelligence and Security, Adjudication of Trustworthiness Cases, dated November 19, 2004, covers the handling of trustworthiness cases under the Directive. The memorandum directed the Defense Office of Hearings and Appeals (DOHA) to continue to utilize the Directive in ADP contractor cases for trustworthiness determinations.

<sup>25</sup> “Substantial evidence [is] such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all contrary evidence in the record.” ISCR Case No. 04-11463 at 2 (App. Bd. Aug. 4, 2006) (citing Directive ¶ E3.1.32.1). “Substantial evidence” is “more than a scintilla but less than a preponderance.” See *v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4<sup>th</sup> Cir. 1994).

<sup>26</sup> See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

A person who seeks access to sensitive 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 as well. It is because of this special relationship that the Government must be able to repose a high degree of trust and confidence in those individuals to whom it grants access to sensitive information. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to safeguard sensitive information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of sensitive information. Furthermore, security clearance determinations, and by inference, public trust determinations, should err, if they must, on the side of denials.<sup>27</sup> In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

## **Analysis**

### **Guideline F, Financial Considerations**

The trustworthiness concern relating to the guideline 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. Affluence that cannot be explained by known sources of income is also a security concern insofar as it may result from criminal activity, including espionage.

The guideline notes several conditions that could raise trustworthiness concerns under AG ¶19:

- (a) inability to satisfy debts;
- (b) unwillingness to satisfy debts regardless of the ability to do so;
- (c) a history of not meeting financial obligations; and

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<sup>27</sup> *Egan*, 484 U.S. at 531.

(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 failed to timely file his federal income tax returns for the tax years 2012 through 2015 until August 2018, well after the SOR was issued; failed to pay annual federal individual income taxes as required; and, as of August 2018, according to Applicant, he still owed the IRS \$12,506 in unpaid taxes, interest, and penalties. Applicant contended that his failure to timely file those federal income tax returns was because he did not have sufficient funds to pay his taxes. The requirement to file is separate from the requirement to pay. The failure to timely file income tax returns has security and trustworthiness implications because:<sup>28</sup>

Failure to file tax returns suggests that an applicant has a problem with complying with well-established governmental rules and systems. Voluntary compliance with such rules and systems is essential for protecting classified information. ISCR Case No. 01-05340 at 3 (App. Bd. Dec. 20, 2002). As we have noted in the past, a clearance adjudication is not directed at collecting debts. See, e.g., ISCR Case No. 07-08049 at 5 (App. Bd. Jul. 22, 2008). By the same token, neither is it directed toward *inducing an applicant to file tax returns*. Rather, it is a proceeding aimed at evaluating an applicant's judgment and reliability. *Id.* A person who fails repeatedly to fulfill his or her legal obligations does not demonstrate the high degree of good judgment and reliability required of those granted access to classified information. See, e.g., ISCR Case No. 14-01894 at 5 (App. Bd. Aug. 18, 2015). See *Cafeteria & Restaurant Workers Union Local 473 v. McElroy*, 284 F.2d 173, 183 (D.C. Cir. 1960), *aff'd*, 367 U.S. 886 (1961).

The Appeal Board clarified that even in instances where an applicant has purportedly corrected his or her federal tax problem, and the fact that an applicant is now motivated to prevent such problems in the future, does not preclude careful consideration of an applicant's security worthiness, or by inference trustworthiness, in light of his or her longstanding prior behavior evidencing irresponsibility including a failure to timely file federal income tax returns.<sup>29</sup> In this instance, while Applicant may now be properly motivated, and he has finally taken the appropriate actions to actually file his federal income tax returns for the tax years 2012 through 2015, there is still insufficient evidence to demonstrate that he is paying his back taxes. AG ¶¶ 19(a), 19(c), and 19(f) have been established, and AG ¶ 19(b) has been partially established.

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<sup>28</sup> ISCR Case No. 14-04437 at 3 (App. Bd. Apr. 15, 2016) (emphasis in original). See ISCR Case No. 14-05476 at 5 (App. Bd. Mar. 25, 2016) (citing ISCR Case No. 01-05340 at 3 (App. Bd. Dec. 20, 2002)); ISCR Case No. 14-01894 at 4-5 (App. Bd. Aug. 18, 2015).

<sup>29</sup> See ISCR Case No. 15-01031 at 3 and note 3 (App. Bd. June 15, 2016) (characterizing "no harm, no foul" approach to an Applicant's course of conduct and employing an "all's well that ends well" analysis as inadequate to support approval of access to classified information with focus on timing of filing of tax returns after receipt of the SOR).



The guideline also includes examples of conditions that could mitigate trustworthiness concerns arising from financial difficulties under AG ¶ 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;<sup>30</sup>

(b) the conditions that resulted in the financial problem were largely beyond the person's control (e.g., loss of employment, a business downturn, unexpected medical emergency, a death, divorce or separation, clear victimization by predatory lending practices, or identity theft), and the individual acted responsibly under the circumstances;

(c) the individual has received or is receiving financial counseling for the problem from a legitimate and credible source, such as a non-profit credit counseling service, and there are clear indications that the problem is being resolved or is under control;

(d) the individual initiated and is adhering to a good-faith effort to repay overdue creditors or otherwise resolve debts;<sup>31</sup>

(e) the individual has a reasonable basis to dispute the legitimacy of the past-due debt which is the cause of the problem and provides documented proof to substantiate the basis of the dispute or provides evidence of actions to resolve the issue; and

(g) the individual has made arrangements with the appropriate tax authority to file or pay the amount owed and is compliance with those arrangements.

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<sup>30</sup> A debt that became delinquent several years ago is still considered recent because "an applicant's ongoing, unpaid debts evidence a continuing course of conduct and, therefore, can be viewed as recent for purposes of the Guideline F mitigating conditions." ISCR Case No. 15-06532 at 3 (App. Bd. Feb. 16, 2017) (citing ISCR Case No. 15-01690 at 2 (App. Bd. Sept. 13, 2016)).

<sup>31</sup> The Appeal Board has previously explained what constitutes a good-faith effort to repay overdue creditors or otherwise resolve debts:

In order to qualify for application of [the "good-faith" mitigating condition], an applicant must present evidence showing either a good-faith effort to repay overdue creditors or some other good-faith action aimed at resolving the applicant's debts. The Directive does not define the term "good-faith." However, the Board has indicated that the concept of good-faith "requires a showing that a person acts in a way that shows reasonableness, prudence, honesty, and adherence to duty or obligation." Accordingly, an applicant must do more than merely show that he or she relied on a legally available option (such as bankruptcy [or statute of limitations]) in order to claim the benefit of [the "good-faith" mitigating condition].

(internal citation and footnote omitted) ISCR Case No. 02-30304 at 3 (App. Bd. Apr. 20, 2004) (quoting ISCR Case No. 99-9020 at 5-6 (App. Bd. June 4, 2001)).

AG ¶ 20(b) partially applies, but none of the remaining mitigating conditions apply. The nature, frequency, and recency of Applicant's continuing financial difficulties make it difficult to conclude that it occurred "so long ago" or "was so infrequent," or that it is "unlikely to recur." Applicant generally attributed his financial difficulties to an ex-wife's various issues; his own problems in 2011 over capital gains taxes when he cashed in a pension plan to generate funds to enable him to resolve some of his growing financial debt; their house was foreclosed in 2013; he was unemployed from May 2014 until August 2014; his federal income tax refund for the tax year 2016 was withheld by the IRS and applied to his outstanding tax debt; and Applicant and his wife were separated for three years before finally divorcing. While those are factors, without more details as how they impacted Applicant's finances, it is difficult to determine to what degree they were largely beyond his control, or how he dealt with them.

However, they separated in 2014, and with the exception of the tax years 2013 and 2014, Applicant's annual adjusted gross income improved and was generally in excess of \$72,000. While his federal income tax returns were finally filed in August 2018, there is limited evidence that he made any reasonable efforts to file his income tax returns or voluntarily pay his back taxes until well after the SOR was issued as well as after the hearing was conducted. There is no evidence of a budget. There is no evidence of any financial counseling. There is no evidence of disputes. Applicant offered some evidence to indicate that his financial situation is now under better control. Applicant's actions under the circumstances cast doubt on his current reliability, trustworthiness, and good judgment.<sup>32</sup>

Trustworthiness decisions are aimed at evaluating an applicant's judgment, reliability, and trustworthiness. They are not a debt-collection procedure. The guidelines do not require an applicant to establish resolution of every debt or issue alleged in the SOR. An applicant needs only to establish a plan to resolve financial problems and take significant actions to implement the plan. There is no requirement that an applicant immediately resolve issues or make payments on all delinquent debts simultaneously, nor is there a requirement that the debts or issues alleged in an SOR be resolved first. Rather, a reasonable plan and concomitant conduct may provide for the payment of such debts, or resolution of such issues, one at a time. Mere promises to pay debts in the future, especially after a multi-year delay in taking any action, without further confirmed action, are insufficient.

An applicant who begins to resolve his financial problems only after being placed on notice that his or her eligibility for a public trust position is in jeopardy may be lacking in 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.<sup>33</sup> In this instance, to date, there is minimal meaningful evidence that corrective actions have been taken by Applicant. While Applicant claimed to have insufficient funds to pay his federal or state income tax over

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<sup>32</sup> See ISCR Case No. 09-08533 at 3-4 (App. Bd. Oct. 6, 2010).

<sup>33</sup> See, e.g., ISCR Case No. 17-01213 at 5 (App. Bd. Jun. 29, 2018); ISCR Case No. 17-00569 at 3-4 (App. Bd. Sept. 18, 2018).

several years, or to timely file his federal income tax returns for the tax years 2012 through 2015, the evidence regarding his adjusted gross income over a substantial period reveals that his adjusted gross income appears to be more than sufficient to make at least some modest payments well before the SOR was issued. Purchasing a Lexus seems to indicate there were some funds available to make those modest tax payments. Applicant's actions, or inaction, under the circumstances cast doubt on his current reliability, trustworthiness, and good judgment.<sup>34</sup>

### **Whole-Person Concept**

Under the whole-person concept, the administrative judge must evaluate an applicant's eligibility for a position of public trust by considering the totality of the applicant's conduct and all the circumstances. The administrative judge should consider the nine adjudicative process factors listed at SEAD 4, App. A, ¶ 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 SEAD 4, App. A, ¶ 2(c), the ultimate determination of whether to grant eligibility for a position of public trust must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept. Moreover, I have evaluated the various aspects of this case in light of the totality of the record evidence and have not merely performed a piecemeal analysis.<sup>35</sup>

There is some evidence mitigating Applicant's conduct. Applicant is a 49-year-old employee of a defense contractor. He has been serving as a systems analyst with his current employer since December 2016. Although he failed to timely file his federal income tax returns for the tax years 2012 through 2015, he finally filed them in August 2018. He also reached out to the IRS and requested an Installment Agreement. Applicant made one modest tax payment to the IRS. He also paid off one non-SOR debt. He has \$419 available each month for discretionary spending or savings.

The disqualifying evidence under the whole-person concept is more substantial. Applicant failed to timely file his federal income tax returns for the tax years 2010 through 2015 until August 2018, well after the SOR was issued; failed to pay annual federal individual income taxes as required; and, as of August 2018, he still owed the IRS \$12,506

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<sup>34</sup> See ISCR Case No. 09-08533 at 3-4 (App. Bd. Oct. 6, 2010).

<sup>35</sup> See *U.S. v. Bottone*, 365 F.2d 389, 392 (2d Cir. 1966); See also ISCR Case No. 03-22861 at 2-3 (App. Bd. Jun. 2, 2006).

in unpaid taxes, interest, and penalties. He did not engage the IRS over his unfiled income tax returns for five years, and did not request an Installment Agreement until after the hearing was held. He made one modest payment to the IRS and another modest payment to resolve a non-SOR debt after the hearing. Considering all of the above, I am unable to reach a positive conclusion pertaining to Applicant's eligibility for a position of public trust.

The Appeal Board has addressed a key element in the whole-person analysis in financial cases stating:<sup>36</sup>

In evaluating Guideline F cases, the Board has previously noted that the concept of "meaningful track record" necessarily includes evidence of actual debt reduction through payment of debts. However, an applicant is not required, as a matter of law, to establish that he [or she] has paid off each and every debt listed in the SOR. All that is required is that an applicant demonstrate that he [or she] has ". . . established a plan to resolve his [or her] financial problems and taken significant actions to implement that plan." The Judge can reasonably consider the entirety of an applicant's financial situation and his [or her] actions in evaluating the extent to which that applicant's plan for the reduction of his outstanding indebtedness is credible and realistic. See Directive ¶ E2.2(a) ("Available, reliable information about the person, past and present, favorable and unfavorable, should be considered in reaching a determination.") There is no requirement that a plan provide for payments on all outstanding debts simultaneously. Rather, a reasonable plan (and concomitant conduct) may provide for the payment of such debts one at a time. Likewise, there is no requirement that the first debts actually paid in furtherance of a reasonable debt plan be the ones listed in the SOR.

Applicant has demonstrated an extremely poor track record of debt reduction and elimination efforts, seemingly avoiding the filing of his federal income tax returns for several years as well as failing to make income tax payments, until well after the SOR was issued. Overall, the evidence leaves me with substantial questions and doubts as to Applicant's eligibility and suitability for a position of public trust. For all of these reasons, I conclude Applicant has failed to mitigate the trustworthiness concerns arising from his financial considerations. See SEAD 4, App. A, ¶¶ 2(d)(1) through AG 2(d)(9).

### **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:	AGAINST APPLICANT
Subparagraphs 1.a. and 1.b.:	Against Applicant

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<sup>36</sup> ISCR Case No. 07-06482 at 2-3 (App. Bd. May 21, 2008) (internal citations omitted).

## **Conclusion**

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 Applicant eligibility for a position of public trust to support a contract with the DOD. Eligibility is denied.

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ROBERT ROBINSON GALES  
Administrative Judge