

pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raised the following issues on appeal: whether Applicant was denied due process and whether the Judge's adverse decision was arbitrary, capricious, or contrary to law. Consistent with the following, we remand the case to the Judge.

The Judge's Findings of Fact

A retired career military officer, Applicant experienced underemployment from October 2014 to March 2016, when he began his current job as a Defense contractor. As a consequence, Applicant has experienced financial problems. He also stated that his difficulties were affected by commuting expenses, additional living expenses necessitated by a job relocation, increased utilities expenses, the costs of his child's extracurricular activities, and trips for family health concerns. The SOR listed a number of delinquent debts, most of which the Judge resolved in Applicant's favor. However, two debts—past-due taxes to the IRS and a wage garnishment—resulted in the adverse decision that Applicant is appealing.

Applicant did not disclose his tax delinquencies on his security clearance application, although he did so during his subsequent clearance interview. While he stated that he was on a payment plan with the IRS to pay \$12,000 in taxes for 2008, additional evidence showed that in fact he owed over \$20,000 for 2009 through 2015. He also owes about \$1,800 to his state tax authorities. Applicant is currently paying the IRS through a garnishment from his wife's wages. If the payment is increased to a certain amount, then the IRS will consider establishing an installment plan agreement.

Applicant and his wife earned a fairly high income during this period. Their current net monthly income is nearly \$11,000 and their positive net remainder after expenses is nearly \$900. Applicant now has more funds available to him because he is no longer budgeting for his child's college expenses.

The Judge's Analysis

The Judge noted that Applicant's payments to the IRS have "not been purely voluntary," insofar as they have been accomplished through garnishment. The Judge stated that Applicant's circumstances suggest that he has a problem complying with governmental rules and regulations. The Judge cited to evidence of Applicant's underemployment but also concluded that, on the whole, he had the means to pay his tax debt, given his and his wife's combined incomes. He concluded that Applicant's tax problems create doubt about his trustworthiness and good judgment.

Discussion

Applicant notes that the Decision was issued one day before the effective date of the new Adjudicative Guidelines promulgated by the Federal Government. He states that the Judge should have considered these updated Guidelines in analyzing his case for mitigation, specifically, Directive, Encl. 2, App. A ¶ 20(g) ("[T]he individual has made arrangements with the appropriate tax authority to . . . pay the amount owed and is in compliance with those arrangements." He

contends that payments to the IRS through garnishment of his wife's wages are sufficient to raise the applicability of this mitigating condition. We note Applicant's testimony that he is seeking an installment plan with the IRS but so far has not been able to reach an agreement as to the amount. In the meantime, the garnishment action remains in effect. The Judge found that, were the garnished amount to be increased from its current level to \$241 per pay period, the IRS would then consider entering into an installment plan. Decision at 5. Under the facts of this case, a similarly situated applicant might have raised the applicability of 20(g) at the hearing as part of his or her case in mitigation.

Given that mitigating condition 20(g) was not in force at the time the Judge completed his Decision, his failure to have addressed it is not surprising and cannot plausibly be attributed to error on his part. However, through no fault of the Judge's own, the Decision as it stands does not adhere to the procedures currently mandated by the Directive. *See* Directive ¶ E3.1.32.2. *See also* ISCR Case No. 00-0489 at 8 (App. Bd. Jan. 10, 2002) (Security clearance decisions must be based on current, not past, DoD policies and standards). Accordingly, we remand the case to the Judge for him to give the parties an opportunity to address the potential applicability of this mitigating condition and issue a new Decision in accordance with the Directive. Other issues raised by Applicant are not ripe for consideration.

Order

The Decision is **REMANDED**.

Signed: Michael Y. Ra'anan

Michael Y. Ra'anan
Administrative Judge
Chairperson, Appeal Board

Signed: James E. Moody

James E. Moody
Administrative Judge
Member, Appeal Board

Signed: James F. Duffy

James F. Duffy
Administrative Judge
Member, Appeal Board