



DEPARTMENT OF DEFENSE  
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of: )  
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----- ) ISCR Case No. 11-11572  
 )  
Applicant for Security Clearance )

**Appearances**

For Government: Robert J. Kilmartin, Esq., Department Counsel  
For Applicant: *Pro se*

04/23/2013

**Decision**

Harvey, Mark, Administrative Judge:

Applicant’s statement of reasons (SOR) alleges four delinquent debts, totaling \$34,112. Applicant’s spouse had medical expenses, and he and his spouse had lengthy periods of unemployment. Due to circumstances beyond his control, he had insufficient financial resources to pay his debts. All of his SOR debts are in an established Chapter 13 bankruptcy payment plan, and he currently has no delinquent debts. Financial considerations are mitigated. Eligibility for access to classified information is granted.

**Statement of the Case**

On March 30, 2011, Applicant submitted an Electronic Questionnaires for Investigations Processing (e-QIP) or security clearance application (SF 86) (GE 1). On November 13, 2012, the Department of Defense (DOD) issued an SOR to Applicant, pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended; and the adjudicative guidelines (AG) promulgated by the President on December 29, 2005.

The SOR alleged security concerns under Guideline F (financial considerations). (Hearing Exhibit (HE) 2) The SOR detailed reasons why DOHA was unable to find that it

is clearly consistent with the national interest to continue a security clearance for Applicant, and it recommended that his case be submitted to an administrative judge for a determination whether his clearance should be continued or revoked. (HE 2)

On December 14, 2012, Applicant responded to the SOR. (HE 3) On February 14, 2013, Department Counsel was ready to proceed on Applicant's case. On March 18, 2013, DOHA assigned Applicant's case to me. On April 2, 2013, the Defense Office of Hearings and Appeals (DOHA) issued a hearing notice, setting the hearing for April 8, 2013. (HE 1) Applicant waived his right to 15 days of notice of the date, time, and location of his hearing. (Tr. 16) Applicant's hearing was held as scheduled on April 8, 2013. At the hearing, Department Counsel offered four exhibits, and Applicant offered two exhibits. (Tr. 21-22; GE 1-4; AE A-B) There were no objections, and I admitted GEs 1-4 and AEs A-B. (Tr. 21-22) The record was not held open after the hearing for additional evidence. On April 14, 2013, DOHA received the transcript of the hearing.

### **Findings of Fact<sup>1</sup>**

In his Answer to the SOR, Applicant accepted responsibility for the debts listed in the SOR. He also explained what he had done and was doing to resolve his delinquent debts. (HE 3) His admissions are accepted as findings of fact.

Applicant is a 57-year-old test development technician for a defense contractor. (Tr. 6; GE 1) He has worked continuously for the same defense contractor since 2005. (Tr. 30) He graduated from high school in 1973, and he was awarded an associate's degree in robotics and electronics in 1989. (Tr. 8) He has never served in the military. (GE 1)

Applicant married in 1975, and he has three children, who are 31, 32, and 34. (Tr. 7) His 32- and 34-year-old children live with Applicant and his spouse because they are unemployed. (Tr. 7, 50) His spouse was unemployed from 2007 to 2008, and from 2009 until the fall of 2010. (GE 1) His spouse was not employed full time outside their home until last year because she has medical problems. (Tr. 19, 36) In 2012, she began new, full-time employment, and her monthly income is now about \$1,100. (Tr. 35)

### **Financial Considerations**

Applicant was unemployed from July 2001 to August 2001, July 2002 to August 2002, and October 2003 and August 2004. (Tr. 27) His spouse had medical problems and lost her employment. (Tr. 28) Applicant borrowed from his 401(k) account because of the unemployment, and he was unable to pay his income taxes. (Tr. 28) In October 2004, the Internal Revenue Service (IRS) filed a tax lien against Applicant for about \$10,000. (Tr. 31-32; GE 4) Applicant negotiated a payment plan with the IRS, and he paid his tax lien. (Tr. 32) His mortgage is current. (Tr. 37-39)

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<sup>1</sup>Some details have been excluded in order to protect Applicant's right to privacy. Specific information is available in the cited exhibits.

Applicant's SOR alleges four delinquent debts, totaling \$34,112. Those four delinquent debts are described and discussed in his SF 86, July 12, 2011 Office of Personnel Management (OPM) personal subject interview (PSI), responses to DOHA interrogatories, SOR response, and at his hearing. All the documentation consistently and credibly discusses his finances. (GE 1-4) His Chapter 13 bankruptcy and four SOR debts are described as follows:

SOR ¶ 1.a alleges that Applicant filed for protection under Chapter 13 of the Bankruptcy Code in October 2011. Initially his plan required him to pay \$300 monthly for 36 months. (GE 4) Applicant provided copies of money orders for October 2012, November 2012, December 2012, March 2013, and April 2013, showing that he made his \$340 or \$380 monthly payments as required under his Chapter 13 bankruptcy plan. (Tr. 24; AE A; SOR response) He provided his 2012 trustee's report showing all 12 payments were made in 2012. (GE 4) The four debts in the SOR are included in the Chapter 13 bankruptcy plan. (Tr. 25, 46-47) His Chapter 13 bankruptcy also addresses his spouse's non-SOR medical debts. (Tr. 43) His Chapter 13 bankruptcy will be completed in 2014, and Applicant believes he will successfully complete the bankruptcy plan. (Tr. 38) When his debts are discharged under Chapter 13, his only debt will be his mortgage, and it is current. (Tr. 48) His automobiles are paid off. (Tr. 48) Applicant understands that if he does not make his payments under his Chapter 13 plan, his bankruptcy may be dismissed, and all of his debts will be reinstated. (Tr. 54-55)

SOR ¶ 1.b alleges a 2010 judgment owed to a bank for \$25,148. (Tr. 25) This debt was generated when Applicant borrowed money to consolidate his debts, missed some payments, and the interest rate accelerated. (Tr. 25) In 2011, the creditor garnished 25% of Applicant's pay. (Tr. 32-33) It is much less expensive for Applicant to make payments under his Chapter 13 payment plan than for Applicant to have 25% of his pay garnished by this creditor.

SOR ¶ 1.c alleges a judgment adjudged in July 2004, in which \$438 is owed to a company. (Tr. 25) Applicant paid this debt in November 2010. (Tr. 34-35; AE A at 6)

SOR ¶ 1.d alleges a delinquent debt owed to a store for \$1,978. (Tr. 25) Applicant purchased appliances and charged the purchases on a store credit card. (Tr. 41-42) He was unable to make payments, and the debt became delinquent. (Tr. 41-42)

SOR ¶ 1.e alleges a debt owed to a bank for \$6,648. (Tr. 44) Applicant borrowed money to pay for automobile repairs and for other family debts. (Tr. 44) He could not afford to keep the payments in current status.

Applicant received credit counseling as part of his bankruptcy, and he provided a personal financial statement (PFS). (Tr. 36, 45-46; GE 4 at 3) Applicant and his spouse's current gross monthly income is \$5,516; his monthly expenses are \$2,930; his debt payments are \$880 (includes his \$380 monthly payment to his bankruptcy trustee); and his monthly net remainder is \$1,706. (GE 4 at 3)

A friend for 12 years described Applicant as honest and dedicated. (AE B) He said Applicant is a diligent and responsible worker with excellent integrity. (AE B)

## 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 security clearance.” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). 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.” *Id.* at 527. The President has authorized the Secretary of Defense or his designee to grant applicant’s eligibility for access to classified information “only upon a finding that it is clearly consistent with the national interest to do so.” Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended.

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the adjudicative guidelines. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with an evaluation of the whole person. An administrative judge’s overarching adjudicative goal is a fair, impartial, and commonsense decision. An administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable.

The Government reposes a high degree of trust and confidence in persons with access to classified information. This relationship transcends normal duty hours and endures throughout off-duty hours. 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 about potential, rather than actual, risk of compromise of classified information. Clearance decisions must be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See Exec. Or. 10865 § 7. See also Executive Order 12968 (Aug. 2, 1995), § 3.1. Thus, nothing in this Decision should be construed to suggest that I have based this decision, in whole or in part, on any express or implied determination about applicant’s allegiance, loyalty, or patriotism. It is merely an indication the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that may disqualify the applicant from being eligible for access to classified information. The Government has the burden of establishing controverted facts alleged in the SOR. See *Egan*, 484 U.S. at 531. “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). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant’s security suitability. See ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant “has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue her security clearance.” ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). The burden of disproving a mitigating condition never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005). “[S]ecurity clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531; see AG ¶ 2(b).

## **Analysis**

### **Financial Considerations**

AG ¶ 18 articulates the security concern relating to financial problems:

Failure or inability 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 information. An individual who is financially overextended is at risk of having to engage in illegal acts to generate funds.

AG ¶ 19 provides two disqualifying conditions that could raise a security concern and may be disqualifying in this case: “(a) inability or unwillingness to satisfy debts;” and “(c) a history of not meeting financial obligations.” In ISCR Case No. 08-12184 at 7 (App. Bd. Jan. 7, 2010), the Appeal Board explained:

It is well-settled that adverse information from a credit report can normally meet the substantial evidence standard and the government’s obligations under [Directive] ¶ E3.1.14 for pertinent allegations. At that point, the burden shifts to applicant to establish either that [he or] she is not responsible for the debt or that matters in mitigation apply.

(internal citation omitted). Applicant’s history of delinquent debt is documented in his SF 86, credit reports, OPM interview, SOR response, and statement at his hearing.

Applicant’s debts became delinquent in 2005 and some of them continue to be delinquent. Applicant’s SOR alleges four delinquent debts, totaling \$34,112. The Government established the disqualifying conditions in AG ¶¶ 19(a) and 19(c), requiring additional inquiry about the possible applicability of mitigating conditions.

Five mitigating conditions under AG ¶ 20 are potentially applicable:

(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;

(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, or a death, divorce or separation), and the individual acted responsibly under the circumstances;

(c) the person has received or is receiving counseling for the problem and/or there are clear indications that the problem is being resolved or is under control;

(d) the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts; and

(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.

Applicant's conduct in resolving his debts warrants full application of AG ¶¶ 20(a) and 20(b). Unexpected medical bills, unemployment, and insufficient income to support his family were circumstances largely beyond his control that caused Applicant to have debts he could not afford to pay. He made at least 15 payments on his Chapter 13 payment plan, and his plan will be completed in 2014. His only debt not included in his Chapter 13 payment plan is his mortgage, and his mortgage is now current.<sup>2</sup>

Two recent Appeal Board decisions illustrate the analysis for applying AG ¶¶ 20(a) and 20(b). In ISCR Case No. 09-08533, the applicant had \$41,000 in delinquent credit card debt and defaulted on a home loan generating a \$162,000 delinquent debt. *Id.* at 2. That applicant filed for bankruptcy the same month the Administrative Judge issued her decision. *Id.* at 1-2. The applicant in ISCR Case No. 09-08533 was recently divorced, had been unemployed for 10 months, and had childcare responsibilities. Her former husband was inconsistent in his payment of child support to her. The Appeal Board determined that AG ¶ 20(a) was "clearly applicable (debt occurred under such circumstances that it is unlikely to recur and [the debt] does not cast doubt on the individual's current reliability, trustworthiness, or good judgment)" even though that applicant's debts were unresolved at the time the Administrative Judge's decision was issued. The Appeal Board also decided that the record evidence raised the applicability

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<sup>2</sup> 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. Sept. 19, 2008) (citing ISCR Case No. 99-0012 at 3 (App. Bd. Dec. 1, 1999)).

of AG ¶ 20(b) because of the absence of evidence<sup>3</sup> of irresponsible behavior, poor judgment, unreliability, or lack of trustworthiness. *Id.* at 4.

Similarly, in ISCR Case No. 08-06567 at 3 (App. Bd. Oct. 29, 2009) the Appeal Board addressed a situation where an applicant was sporadically unemployed and lacked the ability to pay her creditors. The Appeal Board noted “it will be a long time at best before she has paid” all of her creditors. The applicant was living on unemployment compensation at the time of her hearing. The Appeal Board explained that such a circumstance was not necessarily a bar to having access to classified information stating:

However, the Board has previously noted that an applicant is not required to be debt-free nor to develop a plan for paying off all debts immediately or simultaneously. All that is required is that an applicant act responsibly given his [or her] circumstances and develop a reasonable plan for repayment, accompanied by “concomitant conduct,” that is, actions which evidence a serious intent to effectuate the plan. See ISCR Case No. 07-06482 at 3 (App. Bd. May 21, 2008).

ISCR Case No. 08-06567 at 3 (App. Bd. Oct. 29, 2009). The applicant in ISCR Case No. 08-06567 used his limited resources to (1) resolve some of his debts; (2) had a repayment plan for the remaining debts; and (3) took “reasonable actions to effectuate that plan.” *Id.* The Appeal Board remanded the Administrative Judge’s decision because it did not “articulate a satisfactory explanation for his conclusions,” emphasizing the Administrative Judge did “not explain[] what he believes that applicant could or should have done under the circumstances that he has not already done to rectify his poor financial condition, or why the approach taken by applicant was not ‘responsible’ in light of his limited circumstances.” *Id.*

Application of AG ¶ 20(c) is warranted. Applicant received financial counseling, and he generated a PFS and budget. His financial situation was damaged by unemployment and medical expenses. Although there is limited evidence of record that he established and maintained contact with his creditors,<sup>4</sup> his financial problem is being resolved or is under control. Under Chapter 13 of the Bankruptcy Code, the judge reviewed his finances and debts and determined a fair payment plan. Applicant agreed

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<sup>3</sup> Applicant has the burden of proving the applicability of any mitigating conditions, and the burden to disprove a mitigating condition never shifts to the Government.

<sup>4</sup>“Even if Applicant’s financial difficulties initially arose, in whole or in part, due to circumstances outside his [or her] control, the Judge could still consider whether Applicant has since acted in a reasonable manner when dealing with those financial difficulties.” ISCR Case No. 05-11366 at 4 n.9 (App. Bd. Jan. 12, 2007) (citing ISCR Case No. 99-0462 at 4 (App. Bd. May 25, 2000); ISCR Case No. 99-0012 at 4 (App. Bd. Dec. 1, 1999); ISCR Case No. 03-13096 at 4 (App. Bd. Nov. 29, 2005)). A component is whether he or she maintained contact with creditors and attempted to negotiate partial payments to keep debts current.

to the Chapter 13 payment plan, and he has made at least 15 payments. His Chapter 13 bankruptcy plan is on track to discharge all remaining unsecured debts in 2014.

AG ¶ 20(d) is partially applicable. Applicant paid one SOR debt, and he admitted responsibility for and took reasonable and responsible actions to resolve his other three SOR debts, establishing some good faith.<sup>5</sup> AG ¶ 20(e) is not applicable. Applicant did not dispute any of his delinquent SOR debts.

In sum, Applicant fell behind on his debts primarily because of insufficient income and to a lesser extent because of medical debts. He made at least 15 payments under his Chapter 13 payment plan. Applicant has a sufficient monthly remainder as shown by his PFS and budget to maintain his financial responsibility. It is unlikely that financial problems will recur. His efforts are sufficient to fully mitigate financial considerations security concerns. Assuming, financial considerations concerns are not mitigated under AG ¶ 20, security concerns are mitigated under the whole-person concept, *infra*.

### **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 the circumstances. The administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(a):

- (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.

The ultimate determination of whether to grant eligibility for a security clearance must be an overall commonsense judgment based upon careful consideration of the

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<sup>5</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) 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)).



guidelines and the whole-person concept. AG ¶ 2(c). I have incorporated my comments under Guideline F in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under Guideline F, but some warrant additional comment.

Applicant is a 57-year-old test development technician, who has worked continuously for a defense contractor since 2005. He graduated from high school in 1973, and he was awarded an associate's degree in robotics and electronics in 1989. He married in 1975, and he has three children, who are 31, 32, and 34. Two of his adult children are unemployed and live with Applicant. He is sufficiently mature to understand and comply with his security responsibilities. He deserves substantial credit for supporting the U.S. Government as an employee of a contractor. There is every indication that he is loyal to the United States and his employer. There is no evidence that he abuses alcohol or uses illegal drugs. Medical expenses and unemployment contributed to his financial woes. I give Applicant substantial credit for admitting responsibility for his delinquent debts in his SF 86, OPM PSI, responses to DOHA interrogatories, SOR response, and at his hearing. He received a favorable endorsement from a friend. His spouse is currently employed, and he now has additional financial resources to ensure he can pay his debts.

Applicant lacked financial resources because of his and his spouse's unemployment and his spouse's medical problems. Applicant made a reasonable decision to seek protection under Chapter 13 of the Bankruptcy Code. He made at least 15 payments under his Chapter 13 bankruptcy plan. He promised to continue to make payments until his plan is completed in 2014. The Appeal Board has addressed a key element in the whole-person analysis in financial cases stating:

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 has paid off each and every debt listed in the SOR. All that is required is that an applicant demonstrate that he has . . . established a plan to resolve his 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 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.

ISCR Case No. 07-06482 at 2-3 (App. Bd. May 21, 2008) (internal citations and quotation marks omitted).

Applicant is an intelligent person, and he understands how to budget and what he needs to do to establish and maintain his financial responsibility. There is simply no reason not to trust him. Moreover, he established a “meaningful track record” of debt repayment. I am confident he will maintain his financial responsibility.<sup>6</sup>

I have carefully applied the law, as set forth in *Department of Navy v. Egan*, 484 U.S. 518 (1988), Exec. Or. 10865, the Directive, and the AGs, to the facts and circumstances in the context of the whole person. I conclude financial considerations concerns are mitigated, and eligibility for access to classified information is granted.

### **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 to 1.e:               For Applicant

### **Conclusion**

In light of all the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant Applicant’s eligibility for a security clearance. Eligibility for a security clearance is granted.

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Mark Harvey  
Administrative Judge

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<sup>6</sup>Of course, the government can re-validate Applicant’s financial status at any time through credit reports, investigation, and additional interrogatories. Approval of a clearance now does not bar the government from subsequently revoking it, if warranted. Violation of a promise made in a security context to pay legitimate debts also raises judgment concerns under Guideline E, and may support future revocation of a security clearance. An administrative judge does not have authority to grant a conditional clearance. ISCR Case No. 99-0901, 2000 WL 288429 at \*3 (App. Bd. Mar. 1, 2000). See *also* ISCR Case No. 04-03907 at 2 (stating, “The Board has no authority to grant [a]pplicant a conditional or probationary security clearance to allow her the opportunity to have a security clearance while she works on her financial problems.” and citing ISCR Case No. 03-07418 at 3 (App. Bd. Oct. 13, 2004)). This footnote does not imply that this Applicant’s clearance is conditional.