DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
---	)	ISCR Case No. 18-00037
	)	
Applicant for Security Clearance	)	

Appearances

For Government: Ross Hyams, Esquire, Department Counsel
For Applicant: *Pro se*

11/15/2018

Decision

GALES, Robert Robinson, Administrative Judge:

Applicant mitigated the security concerns regarding personal conduct. Eligibility for a security clearance is granted.

Statement of the Case

On October 27, 2016, Applicant applied for a security clearance and submitted an Electronic Questionnaire for Investigations Processing (e-QIP) version of a Security Clearance Application. On an unspecified date, the Defense Office of Hearings and Appeals (DOHA) furnished Applicant a set of interrogatories. Applicant responded to those interrogatories on February 26, 2018. On March 28, 2018, the Department of Defense (DOD) Consolidated Adjudications Facility (CAF) issued a Statement of Reasons (SOR) to her, 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), (December 10, 2016), *National Security Adjudicative Guidelines* (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 security concerns under Guideline E (Personal Conduct), and detailed reasons why the DOD adjudicators were unable to find that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. The SOR recommended referral to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked.

Applicant received the SOR on April 4, 2018. In a notarized statement, dated April 20, 2018, Applicant responded to the SOR and requested a hearing before an administrative judge. Department Counsel indicated the Government was prepared to proceed on June 20, 2018. The case was assigned to me on July 20, 2018. A Notice of Hearing was issued on August 29, 2018. I convened the hearing as scheduled on September 25, 2018.

During the hearing, Government exhibits (GE) 1 through GE 3, Applicant exhibits (AE) A through AE D, and Administrative exhibit I were admitted into evidence without objection. Applicant testified. The transcript (Tr.) was received on October 4, 2018. I kept the record open to enable Applicant to supplement it. She took advantage of that opportunity and timely submitted several documents which were marked and admitted as AE E and AE F without objection. The record closed on October 30, 2018.

Findings of Fact

In her Answer to the SOR, Applicant denied with comments all of the factual allegations in the SOR (SOR ¶¶ 1.a. through 1.c.). Applicant's 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 45-year-old senior systems operator of a defense contractor. She has been with her current employer since 2016. She is a 1991 high school graduate. Applicant has never served with the U.S. military. She was granted a secret clearance in June 2005. Applicant was married in 1992, and divorced in 2015. She has two children, born in 1998 and 2002.

Personal Conduct

From June 2005 until November 2012, Applicant was employed by a defense contractor as a proprietary systems specialist. Upon receiving an offer at a higher salary from another defense contractor (contractor B), she joined her new employer as a lead functional analyst in November 2012, and remained there until January 2015. The contract on which she was working was transferred to another defense contractor (contractor C), and Applicant remained in the same location as a project management support specialist and functional analyst working for contractor C.

During Applicant's employment with contractor C, her supervisor – the off-site manager – verbally approved a system calling for off-the-record time management. Under that system, because working overtime could not be officially permitted, when an employee worked over an eight-hour day, those extra hours would be considered "comp time" and not included in the official timecard, but annotated in a personal record on a continuing basis. When "official" leave was not expected to be taken because of an absence from the workplace, an employee could dip into their reservoir of accumulated "comp time" hours in the personal record. Under that unofficial system of record management, the "official" timecard would register a 40-hour work-week unless the employee actually took approved annual or sick leave. The only requirements for off-the-record time management were (1) informal supervisor approval, and (2) a continuing annotation of the employee personal record. Applicant maintained her personal record by recording extra hours worked and hours taken on pink post-it sticky notes by her desk. Once off-the-record hours were used, the particular post-it sticky note was discarded. Applicant contends that if she ever took time off that her overtime hours – the ones in her personal record of accumulated hours did not cover – she would use official leave time.[1]

On August 16, 2016, a financial management analyst – the contracting officer's representative (COR) on a particular task order – sent an e-mail to Applicant's supervisor questioning Applicant's excessive absence from work. The e-mail noted that Applicant was frequently absent from work, and that she periodically advised her colleagues at the last moment of her absences, causing government resources to be removed from other tasks to cover for Applicant. The COR requested a meeting with the supervisor.[2] A meeting was held and an investigation conducted. The investigation revealed that Applicant frequently informed three different staff members, including the supervisor, of anticipated absences. Based on the investigation, rather than speaking up on Applicant's behalf, Applicant's supervisor recommended her termination.[3] It does not appear that Applicant's supervisor was ever questioned about the off-the-record time management system that Applicant claimed was approved by him.

On August 19, 2016, as directed, Applicant went directly to the main office. She was not questioned about her purported excessive absence from work. Instead, contractor C terminated Applicant from employment for her failure to perform duties appropriately on a specific task order, to wit: (1) persistent falsification of timecard records, (2) failure to post time records in a timely manner, and (3) failure to notify her supervisor appropriately and on a timely basis when not coming into work. That letter was signed by Applicant's supervisor, the same individual who purportedly authorized and approved of the off-the-record time-management system.[4] A second letter, referred to as the Agreement, signed by the vice president of human resources, claimed that company

[1] Applicant's Answer to the SOR, dated April 20, 2018; Tr. at 18, 34-36.

[2] GE 3 (Memorandum for Record, dated August 17, 2016).

[3] GE 3, *supra* note 2, at 2-3.

[4] GE 3 (Termination Letter, dated August 19, 2016).

C discovered 110 hours that Applicant billed but did not work, for which company C will be responsible to reimburse the client. In exchange for not filing any claims against Applicant, she was required to release contractor C for any claims Applicant might have against the company, and would prevent her from filing any charge or complaint with, or participating in an investigation or proceeding conducted by, the Equal Employment Opportunity Commission (EEOC), National Labor Relations Board (NLRB), the Securities and Exchange Commission (SEC), or any other federal, state or local agency charged with the enforcement of any laws. The Agreement asserted that Applicant had had at least 21 days to consider the terms of the Agreement – an assertion that was patently false.[5] At the time of the termination, Applicant had no advanced notice of the intended action, and she was never given any opportunity to explain the situation. Furthermore, although she begged for the opportunity to return to her work area to retrieve her post-it sticky notes to support her position, that opportunity was denied.[6] Those post-it sticky notes – Applicant's only documented evidence of the off-the-record time management system – were never returned to her, and it appears that an unidentified representative of contractor C destroyed them.

Applicant reached out to several of her former colleagues at contractor C, seeking confirmation of the existence of the off-the-record time-management system. One of those colleagues – a member of the team that investigated Applicant's actions at contractor C – recalled being told that she should register her comp time on her calendar, which she remembered being up to an hour per week to use for a medical appointment. Otherwise, she would have to take leave or leave without pay.[7] Another former colleague, while not addressing the specific issue of off-the-record time management, did confirm that Applicant "worked late when the mission required her to do so . . . to make sure the work mission went smoothly and all required tasks were accomplished."[8] Neither of the former colleagues would admit any further knowledge of the off-the-record time-management system at contractor C because they did not wish to jeopardize their respective jobs or security clearances.[9]

The Fair Labor Standards Act (FLSA) requires employers to pay their employees at least one and a half times their regular wage for every hour worked in excess of forty per week.[10] The U.S. Supreme Court wrote that the "the prime purpose" of the FLSA is "to aid the unprotected, unorganized and lowest paid of the nation's working population; that is, those employees who lacked sufficient bargaining power to secure for themselves

[5] GE 3 (Letter identified as Agreement, dated August 19, 2016).

[6] Tr. at 23, 38.

[7] AE E (Facebook Postings, dated September 25, 2018).

[8] AE A (Character Reference, dated June 25, 2018). Applicant stated: I'm not going to stop right in the middle of something, oh, I'll do that tomorrow. That's not how I work. I'll finish the project I'm on or what I'm doing and then I leave." Tr. at 37.

[9] AE F (Statement, dated October 1, 2018).

[10] 29 U.S.C. §207(a)(1).

a minimum subsistence wage."[11] The Court explained that the law was passed because of the unequal bargaining power between employer and employee, and certain segments of the population required federal compulsory legislation to prevent private contracts on their part which endangered national health and efficiency and as a result the free movement of goods in interstate commerce.[12]

Subsequent Circuit Court rulings have held that "if an employer knew or had reason to know that its employee underreported his hours, it cannot escape FLSA liability by asserting equitable defenses based on that underreporting. To hold otherwise would allow an employer to wield its superior bargaining power to pressure or even compel its employees to underreport their work hours, thus neutering the FLSA's purposeful reallocation of that power."[13]

If an employee, such as Applicant, has worked overtime without pay, he or she may bring a private FLSA action for damages. An unpaid-overtime claim has two elements: (1) an employee worked unpaid overtime, and (2) the employer knew or should have known of the overtime work. Knowledge may be imputed to the employer when its supervisors or management "encourage artificially low reporting."[14]

Applicant has shown both required elements. She worked overtime without pay, and her employer, or at least her supervisor, knew or should have known she worked overtime, because Applicant's supervisor both encouraged artificially low reporting and squelched truthful timekeeping. He did the former by explicitly instructing Applicant to underreport her time by working off the clock, and he did the latter by advising Applicant to maintain an official time card reflecting no overtime to reflect zero overtime hours, to show fewer hours worked. The somewhat cryptic acknowledgement by one of Applicant's former colleagues attests to some degree that the off-the-record time management system existed at contractor C.

When Applicant completed her e-QIP on October 27, 2016, in response to a question about employment activities, Applicant reported that contractor C had fired her for being "out sick and out with sick kids," a characterization interpreted by the DOD CAF that she deliberately failed to disclose that she was fired for persistently falsifying her timecards. Applicant denied that allegation and explained that despite what was written in the termination documents, her supervisor told her that she was actually fired for being

[11] *Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 707 n. 18, (1945).

[12] *O'Neil,* at 706–07.

[13] *Bailey v. Titlemax of Georgia, Inc.*, 776 F.3d 797, 802-803 (11th Cir. 2015).

[14] *Allen v. Bd. Of Pub. Educ. For Bibb Cnty.*, 495 F.3d 1306, 1314-15, 1319 (11th Cir. 2007); *Brennan v. Gen. Motors Acceptance Corp.,* 482 F.2d 825, 828 (5th Cir.1973) ("The company cannot disclaim knowledge when certain segments of its management squelched truthful responses."). Cf. *Reich v. Dep t of Conservation & Natural Res., State of Ala*., 28 F.3d 1076, 1082 (11th Cir.1994) ("The cases must be rare where prohibited work can be done and knowledge or the consequences of knowledge avoided." (alteration adopted) (quoting Gulf King Shrimp Co. v. Wirtz, 407 F.2d 508, 512 (5th Cir.1969))).

absent too often, and in her heart she knew she did not falsify her work hours.[15] The next time she completes an e-QIP, although she still does not believe the basis for the termination, Applicant will say she was terminated for falsifying time cards, because "if that's what they want to say then that's what I have to accept," along with the fact that she still disputes the basis.[16]

Based on her experience with contractor C, now that she is in a position with another defense contractor, she has vowed to avoid the circumstances that led to her termination by contractor C. She stated "I don't dare put any time on my time card that I don't work, period. If I ever work over, I just don't get paid for it.[17] Her current deputy program manager advised her that she does not have to log into the time management system to account for every minute, but she says she has to because she cannot go through "this" again.[18]

Character References

One of Applicant's former colleagues, although reluctant to discuss the off-the-record time management system at contractor C, was effusive in describing Applicant's character and reputation. Applicant is a "very hardworking, honest and devoted parent and employee," and "she has been a person of morals and integrity over the time we have known each other." Applicant "has worked late when the mission required her to do so. . . ."[19]

The deputy program manager/senior quality assurance manager at Applicant's current employer has worked very closely with Applicant for the past two years. She is very well respected as a coveted source of knowledge and by the management staff as a dependable employee. Applicant often volunteered to work late, come in early, or come in during off-shifts to ensure the warfighter mission succeeded. Applicant's work ethic has translated well to management to "always ensure operations come first and our mission succeeds." He added "Considering what I've experienced working with [Applicant], I cannot imagine any scenario where her character should ever be questioned. Please look favorably in anything regarding work ethic and trustworthiness."[20]

The chief of plans and policy for the section where Applicant currently works, characterized Applicant as a person with integrity and morals, who is also reliable,

[15] Tr. at 32; GE 2 (Personal Subject Interview, dated September 19, 2017), at 4.

[16] Tr. at 34.

[17] Tr. at 33.

[18] Tr. at 33-34.

[19] AE A, *supra* note 8.

[20] AE B (Character Reference, undated).

personable, and honest.[21] Applicant's ex-husband noted that she is "loyal to a fault at times, trustworthy without doubt and respectful of others at all times.[22]

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."[23] 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. The President has authorized the Secretary of Defense or his designee to grant an applicant eligibility for access to classified information "only upon a finding that it is clearly consistent with the national interest to do so."[24]

When evaluating an applicant's suitability for a security clearance, 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 access to classified information.

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 commonsense 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."[25] 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

[21] AE D (Character Reference, dated June 25, 2018).

[22] AE C (Character Reference, dated June 25, 2018).

[23] *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).

[24] Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended and modified.

[25] "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 (4th Cir. 1994).

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.[26]

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 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 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 as to potential, rather than actual, risk of compromise of classified information. Furthermore, "security clearance determinations should err, if they must, on the side of denials."[27]

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."[28] 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 as to Applicant's allegiance, loyalty, or patriotism. It is merely an indication the Applicant has or has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance. 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.

At the outset, I note I had ample opportunity to evaluate the demeanor of Applicant, observe her manner and deportment, appraise the way in which she responded to questions, assess her candor or evasiveness, read her statements, and listen to her testimony. It is my impression that her explanations regarding her personal conduct issues are consistent and have the solid resonance of truth.

Upon consideration of all the facts in evidence, including Applicant's testimony, as well as an assessment of Applicant's demeanor and credibility, and after application of all appropriate legal precepts and factors, I conclude the following with respect to the allegations set forth in the SOR:

Analysis

Guideline E, Personal Conduct

The security concern relating to the guideline for Personal Conduct is set out in AG ¶ 15:

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[26] *See* ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

[27] *Egan*, 484 U.S. at 531.

[28] *See* Exec. Or. 10865 § 7.

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 or sensitive information. Of special interest is any failure to cooperate or provide truthful and candid answers during national security investigative or adjudicative processes. The following will normally result in an unfavorable national security eligibility determination, security clearance action, or cancellation of further processing for national security eligibility:

> (a) refusal, or failure without reasonable cause, to undergo or cooperate with security processing, including but not limited to meeting with a security investigator for subject interview, completing security forms or releases, cooperation with medical or psychological evaluation, or polygraph examination, if authorized and required; and
>
> (b) refusal to provide full, frank, and truthful answers to lawful questions of investigators, security officials, or other official representatives in connection with a personnel security or trustworthiness determination.

The guideline notes several conditions that could raise security concerns under AG ¶ 16:

(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 national security eligibility or trustworthiness, or award fiduciary responsibilities;

(b) deliberately providing false or misleading information; or concealing or omitting information, concerning relevant facts to an employer, investigator, security official, competent medical or mental health professional involved in making a recommendation relevant to a national security eligibility determination, or other official government representative; and

(d) credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information, 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. This includes, but is not limited to, consideration of:

> (1) untrustworthy or unreliable behavior to include breach of client confidentiality, release of proprietary information,

> unauthorized release of sensitive corporate or government protected information;
>
> (2) any disruptive, violent, or other inappropriate behavior;
>
> (3) a pattern of dishonesty or rule violations; and
>
> (4) evidence of significant misuse of Government or other employer's time or resources.

As noted above, during Applicant's employment with contractor C, because of an official working-overtime prohibition, Applicant utilized an unofficial, unauthorized, off-the-record time-management system, to record her official time in the official time card and a personal record to keep track of her "comp time" for later use, if needed. Her participation in that off-the-record time management system was contrary to the official company policy and, in fact, was a falsification of the official record. In addition, in light of the notices of termination of employment submitted to Applicant on the day of her termination, and without considering Applicant's explanations, there is evidence of a pattern of dishonesty or rule violations, as well as evidence of significant misuse of government or her employer's time or resources.

When completing her e-QIP on October 27, 2016, Applicant reported that she had been fired for being "out sick and out with sick kids." She later explained that despite what was written in the termination documents, her supervisor told her that she was actually fired for being absent too often, but in her heart she knew she did not falsify her work hours. The DOD CAF interpreted her e-QIP entry as a deliberate failure to disclose that she was fired for persistently falsifying her timecards.

Applicant's comments provide sufficient evidence to examine if her submission was a deliberate falsification, as alleged in the SOR, or merely an inaccurate answer that was the result of oversight or misunderstanding of the true facts on her part. Proof of incorrect answers, standing alone, does not establish or prove an applicant's intent or state of mind when the falsification or omission occurred. As an administrative judge, I must consider the record evidence as a whole to determine whether there is a direct or circumstantial evidence concerning Applicant's intent or state of mind at the time the alleged falsification or omission occurred. I have considered the entire record, including Applicant's initial and subsequent comments.[29]

[29] The Appeal Board has cogently explained the process for analyzing falsification cases, stating:

> (a) when a falsification allegation is controverted, Department Counsel has the burden of proving falsification; (b) proof of an omission, standing alone, does not establish or prove an applicant's intent or state of mind when the omission occurred; and (c) a Judge must consider the record evidence as a whole to determine whether there is direct or circumstantial evidence concerning the applicant's intent or state of mind at the time the omission occurred. [Moreover], it was legally permissible for the Judge to conclude Department Counsel had established a prima facie case under Guideline E and the burden of persuasion had shifted to the applicant to present evidence to explain the omission.

Applicant's explanation for her submission, in my view, is that she essentially recorded what she thought was right, and that she had not: (1) persistently falsified timecard records, (2) failed to post time records in a timely manner, and (3) failed to notify her supervisor appropriately and on a timely basis when not coming into work. In light of this more persuasive evidence of Applicant's actual intent, I conclude that, with respect to her response in the e-QIP, AG ¶ 16(a) has not been established. As to the actual participation in the purported off-the-record time management system, AG ¶¶ 16(b), 16(d)(1), and 16(d)(4) have been established.

The guideline also includes examples of conditions under AG ¶ 17 that could mitigate security concerns arising from personal conduct. They include:

> (a) The individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts;
>
> (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;
>
> (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; and
>
> (e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress;

AG ¶¶ 17(a), 17(c), 17(d), and 17(e) apply. Applicant worked overtime without pay, and her employer knew or should have known of the overtime work. As noted above, knowledge may be imputed to the employer when its supervisors or management "encourage artificially low reporting." In this instance, there is evidence that Applicant's supervisor not only knew that she worked overtime, but also encouraged artificially low reporting and squelched truthful timekeeping. He explicitly instructed Applicant to underreport her time by working off the clock, and he advised her to maintain an official timecard reflecting no overtime to reflect zero-overtime hours, to show fewer hours worked. The supervisor's actions were in direct violation of the FLSA. Because of the zero-overtime policy, it was expedient for the supervisor to encourage the use of the off-the-record time management system, theoretically minimizing expenses while encouraging mission completion. Under the system, both parties were accommodated. The employer could maintain its zero-overtime policy and reduce expenses, and the

ISCR Case No. 03-10380 at 5 (App. Bd. Jan. 6, 2006) (citing ISCR Case No. 02-23133 (App. Bd. June 9, 2004)). *See also* ISCR Case No. 08-05637 at 3 (App. Bd. Sept. 9, 2010) (noting an applicant's level of education and other experiences are part of entirety-of-the-record evaluation as to whether a failure to disclose past-due debts on a security clearance application was deliberate).

employee could maintain leave and attendance flexibility, but with a loss of earned overtime wages.

Once the issue of Applicant's time and attendance was discovered by the COR, the honorable thing to do was for the supervisor to acknowledge the off-the-record time management system, rather than recommending Applicant's immediate termination. There is reasonable suspicion that contractor C management also knew of the entire situation. It had a zero-overtime policy, and faced with a potential FLSA violation, contractor C refused to permit Applicant to obtain her off-the-record time management system annotations (the pink post-it sticky notes), and destroyed them. Applicant was not interviewed about her leave and attendance activities. In addition, Applicant was required to release contractor C for any claims Applicant might have against the company, and would prevent her from filing any charge or complaint with, or participating in an investigation or proceeding conducted by, any federal, state or local agency charged with the enforcement of any laws. This was exactly what the U.S. Supreme Court was concerned about when an employer wields its superior bargaining power to pressure or even compel its employees to underreport their work hours, thus neutering the FLSA's purposeful reallocation of power.

Based on her experience with contractor C, now that she is in a position with another defense contractor, Applicant has vowed to avoid the circumstances that led to her termination by contractor C. She stated "I don't dare put any time on my time card that I don't work, period," because she cannot go through "this" again. Applicant's actions under the circumstances no longer cast doubt on her current reliability, trustworthiness, and good judgment.

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 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 a security clearance 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.[30]

There is some evidence against mitigating Applicant's conduct. Applicant's participation in an off-the-record time management system was contrary to the official company policy and, in fact, was a falsification of the official record. In addition, Applicant was terminated from employment for a pattern of dishonesty or rule violations, as well as significant misuse of government or her employer's time or resources.

The mitigating evidence under the whole-person concept is more substantial. Applicant is a 45-year-old senior systems operator of a defense contractor. She has been with her current employer since 2016. She was granted a secret clearance in June 2005. Applicant's reputation is that she is a very hardworking, honest and devoted parent and employee; a person of morals and integrity; reliable, personable, and honest; and that she worked late when the mission required her to do so. Applicant often volunteered to work late, comes in early, or comes in during off-shifts to ensure the warfighter mission succeeded. That reputation from several sources is clearly at odds with the one contractor C sought to spread.

Overall, the evidence leaves me without substantial questions and doubts as to Applicant's eligibility and suitability for a security clearance. For all of these reasons, I conclude Applicant has mitigated the security concerns arising from her personal conduct 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 E: FOR APPLICANT

Subparagraphs 1.a. through 1.c.: For Applicant

Conclusion

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

_____
ROBERT ROBINSON GALES
Administrative Judge

[30] *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).