

State of New Hampshire



PERSONNEL APPEALS BOARD
25 Capitol Street
Concord, New Hampshire 03301
Telephone (603) 271-3261

Appeal of Gregory Goucher

Docket #2012-T-12

Personnel Appeals Board's Decision on
New Hampshire Department of Administrative Services'
Motion for Reconsideration and Rehearing
and
Appellant's Objection to Motion for Rehearing

Dated: November 12, 2013

1. On July 29, 2013, the New Hampshire Personnel Appeals Board (Bonafide, Johnson and Casey) issued its decision in the Appeal of Gregory Goucher, ordering the Department of Administrative Services to reinstate the Appellant following a sixteen month suspension without pay for Appellant's persistent refusal to follow the legitimate directives of a supervisor.
2. On August 28, 2013, the Board received the Department of Administrative Services' Motion for Reconsideration or Rehearing in which the State asked the Board to reconsider its decision and affirm the agency's decision to dismiss the Appellant. In that motion, without waiving the agency's right to appeal the Board's modification of the agency's termination decision, the Department proposed an alternative, to adjust the Board's Order by ordering the Appellant's demotion to a position of Project Manager I following the suspension without pay.
3. On August 29, 2013, the Board approved the Appellant's assented-to request for an extension of time to file his objection to the State's Motion. The Board agreed to extend the time as requested, and received the Appellant's Objection on September 16, 2013, agreed to by the parties.
4. On September 23, 2013, before issuing a decision on the pending Motion and Objection, the Board received the State's Assented to Motion for Stay. In that Motion, the State's

representatives argued that the parties were engaged in settlement discussions and had reached a tentative agreement, but that they would need thirty additional days in which to finalize the details. The parties indicated that they would provide the Board with a status update no later than October 21, 2013 with regard to the settlement and/or the need for a ruling on the Motion for Reconsideration. The Board agreed to hold its decision in abeyance until October 21, 2013, advising the parties to notify the Board of the settlement on or before October 21, 2013, and to include as a term of that settlement that the State's motion would be withdrawn as moot.

5. On November 6, 2013, the Board's staff received an email message from one of the Department's representatives asking the Board to act on the State's motion, as the parties had been unable to reach an agreement.

Having carefully considered the Motion and Objection in light of the Board's decision in this matter, the Board found as follows:

- A. While the Department of Administrative Services asserts in its Motion that the Appellant's employment was terminated "because of his deception and failure to provide requested information at a critical juncture" [Motion page 1], the stated basis for dismissal cited in the written notice of termination was "willful abuse, misuse or destruction of State property." [Objection page 2]
- B. Prior to dismissal, the Appellant was afforded all rights outlined in rules adopted by the Director of Personnel. The Appellant retained his compensation throughout the period of investigation; he was presented with all of the evidence that the State relied upon in deciding to terminate his employment; and he was offered the opportunity prior to dismissal to refute that evidence. As such, the Board found that the State's decision to dismiss was not unlawful, nor did it constitute a violation of the Rules.
- C. Contrary to the State's assertion, the Appellant did argue that the discipline was too severe, suggesting in his initial notice of appeal and in arguments before the Board that the offense in question warranted nothing more than a written warning or a suspension of up to twenty days. The Appellant also argued that his twenty-two years of service without any formal discipline were mitigating factors that should have been considered by the State in determining what discipline, if any, was appropriate.

Although the Appellant was unable during the hearing on the merits of his appeal to persuade the Board that his dismissal was unlawful or that it violated the Rules of the Division of Personnel, the Appellant did persuade the Board that his dismissal was unjust in light of the facts in evidence. The Board exercised its authority under RSA 21-I:58 to amend and modify the decision of the appointing authority by converting the Appellant's dismissal to a sixteen-month suspension without pay.

The State failed to persuade the Board through the arguments set forth in its Motion for Reconsideration or Rehearing that the Board's decision was unlawful or unreasonable. Accordingly, the Board voted unanimously to deny the State's request for rehearing and to affirm its decision reinstating the Appellant following a sixteen-month suspension without pay.

THE NEW HAMPSHIRE PERSONNEL APPEALS BOARD

/s/ Philip Bonafide

Philip Bonafide, Acting Chair

/s/ Robert Johnson

Robert Johnson, Commissioner

/s/ Joseph Casey

Joseph Casey, Commissioner

cc: Karen Hutchins, Director of Personnel
Attorney Benjamin King
Senior Assistant Attorney General Mary Ann Dempsey
Assistant Attorney General Lisa English
Carol Jerry, Human Resources Administrator, Administrative Services

State of New Hampshire



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Docket #2012-T-12

Department of Administrative Services

July 29, 2013

The New Hampshire Personnel Appeals Board (Bonafide, Johnson and Casey) met in public session on Wednesday, December 12, 2012 and Wednesday, March 27, 2013¹ under the authority of RSA 21-I:58 and Chapters Per-A 100-200 of the NH Code of Administrative Rules, to hear the appeal of Gregory Goucher, a former employee of the Department of Administrative Services. The Appellant, who was represented at the hearing by Attorney Benjamin King, was appealing his May 4, 2012, termination of employment as a Public Works Project Manager for the Bureau of Public Works, Design and Construction in the Division of Plant and Property Management, Department of Administrative Services. Senior Assistant Attorney General Mary Ann Dempsey and Assistant Attorney General Lisa English appeared on behalf of the Department of Administrative Services. Neither party objected to the members of the Board convened to hear and decide the appeal.

The record of the hearing in this matter consists of pleadings submitted by the parties prior to the hearing, notices and orders issued by the Board, the digital audio recording of the hearing on the merits of the appeal and documents admitted into evidence as follows:

¹ The Board was scheduled to conclude the hearing on January 16, 2013, but had to continue the hearing when one of the three Board members was called away unexpectedly, and the parties were unwilling to complete the hearing before a quorum of the Board. The remainder of the hearing was then rescheduled to February 6, 2013, but continued again when Mr. King informed the Board that he had been unable to resolve a scheduling conflict and would not be available. The next available date for all parties involved in the hearing before the original three-member panel was March 27, 2013.

State's Exhibits

1. May 4, 2012, Notice of Dismissal with Attachments (binder pages 1 – 96)
2. Appellant's Supplemental Job Description and Correspondence Related to the RTI/Barracks Project (binder pages 97 – 509)

Appellant's Exhibits

- A. Appellant's Personnel File
- B. ACI Standard Recommended Practice for Evaluation of Strength Test Results of Concrete (ACA 214-77)
- C. Concrete Bridge Q&A from Portland Cement

The parties jointly offered a stipulation in lieu of live testimony by Sally Gallerani, Director of Technical Support Services for the Department of Information Technology.

The State objected to the admission of Appellant's Exhibit B, noting that the hearing as originally scheduled had been postponed several months at the Appellant's request in order to allow the Appellant to arrange for expert testimony, and to allow the State to review whatever testimony any proposed expert might offer. SAAG Dempsey argued that Appellant's Exhibit B was not disclosed in a timely fashion and was being offered in lieu of expert testimony, effectively denying the State an opportunity to respond and object if necessary. She argued that because the Appellant had decided not to have experts testify, he should not be permitted to submit a treatise on concrete as an "end-around." Mr. King argued that ACA standards are incorporated into the construction contract at issue in the appeal, and that it would be premature for the Board to rule on the admissibility of the exhibit until the Appellant had an opportunity to explore issues concerning the contract and the relationship between TLT Construction, the State of New Hampshire, and Oak Point Associates, the architectural and engineering consultant for the project. The Board took the State's objection under advisement and marked Appellant's Exhibit B for identification only. State's Exhibits 1 and 2, and Appellant's Exhibit A and C were entered into the record without objection. Appellant's Exhibit B was later admitted over the State's objection.

The following persons gave sworn testimony:

Mark Nogueira, Administrator of the Bureau of Public Works, Design and Construction
Michael Connor, Director of the Division of Plant and Property Management
Linda Hodgdon, Commissioner of the Department of Administrative Services
Gregory Goucher, Appellant (former Public Works Project Manager)

Having carefully considered all of the evidence and argument offered by the parties, the Board made the following Findings of Fact and Rulings of Law:

Findings of Fact

1. At the time of his dismissal, the Appellant was working as a Public Works Project Manager III for the Bureau of Public Works Design and Construction in the Department of Administrative Services, Division of Plant and Property Management. In that capacity, the Appellant was responsible for acting as the Project Manager and Contract Administrator for various construction projects including the federally funded Regional Training Institute and Barracks project for the National Guard in Pembroke, New Hampshire. (State's Exhibit 1 and testimony of Gregory Goucher)
2. Military construction projects such as the RTI/Barracks Project involve numerous steps, beginning with a Congressional appropriation and approval by the President of the United States, as well as approval by the National Guard Bureau for design and construction. (Testimony of Mark Nogueira)
3. Under the provisions of RSA 21-I:80, because the anticipated project costs of the RTI/Barracks project would exceed \$25,000, the Department of Administrative Services was required to put the project out to bid and to select the lowest bid from among the qualified bidders. In accordance with RSA 21-I:80, the State also was required to accept bids and award a contract to the lowest bidder for architectural and engineering design services. After selecting contractors and obtaining approval from the Governor and Executive Council, the Department of Administrative Services assumed responsibility for executing the contract with an appropriation to the capital budget. The State then was required to administer the contract and pay the contractors before seeking reimbursement from the federal government. (Testimony of Mark Nogueira and Linda Hodgdon)

4. Vendors are not permitted to bid on public works projects until they have been pre-qualified by the Bureau of Public Works. TLT Construction, one of the pre-qualified bidders for work as the General Contractor on the RTI/Barracks Project, submitted the lowest bid. Oak Point Associates was awarded the bid for design and engineering. Gregory Goucher was assigned by the Department of Administrative Services to act as the State's Project Manager and Contract Administrator. (Testimony of Mark Nogueira)
5. The bid submitted by TLT Construction was approximately \$3 million lower than that of the nearest bidder. Linda Hodgdon, Commissioner of the Department of Administrative Services; Michael Connor, Director of the Division of Plant and Property Management; and Mark Nogueira, Administrator of the Bureau of Public Works were familiar with concerns about TLT's performance on an earlier project, and they were apprehensive about TLT's bid because it was so much lower than bids submitted by its competitors. Despite TLT's assurances they could complete the project on time and on budget, Mr. Nogueira was concerned that TLT would try to make up for any budgetary shortfalls in their original proposal by submitting a series of change orders for approval by the architect that would allow them to charge more money for various components and services than the original bid allowed. (Testimony of Linda Hodgdon and Mark Nogueira)
6. The contract with TLT was approved in September 2011 by New Hampshire's Governor and Executive Council, with construction expected to commence in October 2011. The Executive Councilors cautioned that the work should be carefully scrutinized to ensure that the contractor performed in strict conformance with the terms of the contract that had been approved, and to ensure that any sub-contractors on the project received timely payment from TLT. (Testimony of Linda Hodgdon)
7. Shortly after the award of the bid, Mr. Nogueira met with Mr. Goucher and representatives of the engineering consultant, Oak Point Associates, telling them that they should hold the contractor strictly to the terms of the contract exactly as it had been bid and awarded. (Testimony of Mark Nogueira and Gregory Goucher)
8. TLT sub-contracted with Aggregate Industries to supply concrete for the project. In order to improve the building's "green" certification, the original bid documents called for replacing up to 40% of the Portland cement used in the concrete mix with other cementitious material, provided that fly ash made up no more than 15% of the replacement. (Testimony of Mark Nogueira)

9. On November 4, 2011, Richard Fredette of Aggregate Industries sent an email message to Rex Radloff of TLT Construction saying, "Attached please find information regarding the use of high percentages of fly-ash in concrete. Forty percent replacement mixes will achieve the same favorable mix characteristics as a mix with 15% ash, 25% slag and 60% cement. Aggregate Industries has successfully delivered and placed hundreds of thousands of yards of high (30-50%) ash content mixes. Aggregate industries does not have the ability to deliver mixes with low alkali cement or three cementitious components." That email was forwarded to the Appellant by John Galasso of TLT Construction, with a request to discuss the issue. (State's Exhibit 1, pages 95-96)
10. Later that day, November 4, 2011, the Appellant sent an email message to Scott Hughes, Oak Point's Architect and Mark Gianniny, Oak Point's Project Manager, concerning "low bid contracting issue 2." The Appellant wrote, "There is currently a discussion between Aggregate Industries and TLT on the 15% max fly ash content. Economics 101 – use as much material as possible that doesn't cost you anything. I just want to know what Aggregate supplied their bid price on, given the specification. John [Galasso, TLT Project Manager] is now looking for wiggle room." (Testimony of Mark Nogueira and State's Exhibit 1, page 94)
11. In response to Mr. Goucher's November 4, 2011 email titled "fly ash," Scott Hughes of Oak Point Associates wrote, "We have to be careful on how much fly-ash is included. We included a higher percentage at the Readiness Ctr (per LEED) and nothing would stick to the floor. Microscopically it seems to create a 'dusting' effect that the 'green' glues do not adhere to. Wiggle room is not a good idea in my opinion. Did John [Galasso of TLT] get you the info on what Aggregate Ind. included? It is always funny when a submittal comes through, doesn't meet the spec so it is rejected, then other avenues are researched, because to do what we asked costs too much. Hmmmmm." (State's Exhibit 1, page 94)
12. Three days later, on November 7, 2011, the Appellant sent an email message to John Galasso of TLT stating, "I have reviewed the issue with OPA [Oak Point Associates] for any 'wiggle room,' as we discussed on Friday. Given the specific design mix in the specifications, this comes down to an after-the-bid substitution. Prior to bidding, OPA was directed by this Bureau that review of submittals was to strictly adhere to Div 01 requirements. As no requests were submitted during the bid period for alternate mix designs, I am in agreement that this would constitute a substitution and the product does need to be resubmitted in accordance with the specification. If there is something I am

missing, please let me know.” Mr. Galasso responded approximately an hour later writing, “Greg, this is more an issue with availability of a product. The concrete plants the [sic] can supply this project do not carry the ingredients to produce the mix design spec’d.” (State’s Exhibit 1, Page 108)

13. Although TLT asserted in November, 2011, that Aggregate Industries would be unable to supply the concrete mix specified in the bid documents because the components were not available, in April 2012, Aggregate Industries was able to deliver the concrete mix specified in the original bid documents. (Testimony of Mark Nogueira)
14. On November 22, 2011, Mark Gianniny, Oak Point’s Project Manager, copied the Appellant on an email sent to John Galasso and Rex Radloff at TLT Construction in which Mr. Gianniny advised that he would be issuing an ASI (Architect’s Supplemental Instruction) later that day. That ASI modified specification section 033000, Cast-in-Place Concrete, paragraph 2.14.8, authorizing an increase the amount of fly ash permitted in the “cementitious materials other than Portland cement” in the concrete mix design. The email did not include an explanation of how or why the decision to issue the supplemental instruction was made, nor did it explain why that supplemental instruction did not constitute a change to the specifications in the bid, which originally limited the amount of the fly ash in the cementitious material to 15%. The ASI issued by Mr. Gianniny allowed one design mix to include 40% fly ash instead. (State’s Exhibit 2, page 468)
15. Despite his administrator’s explicit instructions to hold the contractor strictly to the terms of the contract, when the Appellant received notification from Oak Point Associates that an ASI had been issued allowing for 40% fly ash instead of 15% fly ash, he made no objection and did not notify Mr. Nogueira or Mr. Connor of the change. (Testimony of Gregory Goucher, Mark Nogueira and Michael Connor)
16. In order to test the strength of the concrete to ensure that it met the specifications in the contract, the contractor was required to establish a “break schedule” when samples of the concrete would be tested for compressive strength. The contract called for the concrete to have reached a compressive strength of 3000 psi (pounds per square inch) at 28 days. The approved break schedule for test cylinders was set at intervals of 7 days, 14 days and 28 days. (Testimony of Mark Nogueira)
17. On December 8, 2011, the Appellant sent an email to Bill Godin and Mark Gianniny at Oak Point Associates, asking Mr. Gianniny to issue an ASI amending the testing schedule for the concrete being poured with “breaks” to be scheduled at 7 days, 28 days and 56 days

instead of 7 days, 14 days and 28 days as originally specified. (State's Exhibit 2, page 267). That same day, Mr. Gianniny issued ASI 004, revising paragraph 3.17.C.7 in specification section 033000 – Cast-in-Place Concrete regarding compressive strength tests being conducted at 7 days, 28 days and 56 days. The Appellant did not inform Mr. Nogueira that he had requested a change in the testing schedule and the issuance of an ASI. (State's Exhibit 2, page 471 and testimony of Gregory Goucher)

18. The Appellant did not advise his bureau administrator, division director or commissioner that the contractor wanted to use materials or testing schedules in the project that did not conform to the original bid specifications or contract documents, nor did the Appellant advise his administrator, division director or commissioner that he had asked Oak Point Associates to issue supplemental instructions regarding either the concrete mix design, cure or break schedule. (Testimony of Mark Nogueira, Michael Connor and Linda Hodgdon)
19. Because the RTI/Barracks project was a federally funded military construction project, the National Guard Bureau retained the authority to accept or reject any changes in design to the original bid and construction specifications. Absent such approval, the State would be ineligible for reimbursement of costs associated with any unauthorized changes. The Appellant neither sought nor received approval from the National Guard Bureau for the change to the concrete design mixture, curing time, or break schedule to test for compressive strength. (Testimony of Linda Hodgdon, Michael Connor and Mark Nogueira)
20. The contractor began pouring concrete at the construction site in December 2011, and in early January 2012, engineers from Oak Point Associates began to express concerns about the low compressive strength of concrete that had been poured. David Martin, Oak Point Associate's Senior Structural Engineer summarized his observations and concerns in a letter to the Appellant dated January 19, 2012, relating information about discussions with TLT at a project meeting on January 12, 2012, and providing his observations about the status of the concrete. He wrote, in part, "The 14-day and concrete core compressive strength results are less than 60% of the specified design strength. Again, these are not the 28-day compressive strength results and any final conclusions on the status of the in-place concrete will be evaluated at that time." Mr. Martin also discussed problems he observed during the January 12, 2012 site walk with the existing cold weather curing plan. He advised the Appellant, "Since we have not received the 28-day test results or the concrete core results as of the date of this letter, Oak Point Associates cannot make a final recommendation on the status of the in-place concrete. The Contractor should be cautioned

to limit any work around these areas pending a final determination. At this time we would recommend that the Contractor submit a modified cold weather curing plan to the Contract Administrator for review and approval before placing additional concrete.” That letter was copied to Deputy Administrator Thomas Carleton, Clerk of the Works Scott LeBrun, and National Guard’s LTC Larry Rea. (State’s Exhibit 1, pp. 14-16) The Appellant did not inform any of the recipients that a month earlier, he had asked Mark Gianniny to issue an ASI for compressive strength testing at 56 days.

21. In an email dated January 19, 2012 addressed to Scott LeBrun and copied to Gregory Goucher, Mark Nogueira and Michelle Juliano, Thomas Carleton addressed the major points in the January 19th letter from OPA, asking if there were any “...thoughts or concerns regarding these items or any of the other statements” in the OPA letter, noting that the agency would be preparing a memo to send to TLT. Mr. Carleton concluded saying, “The memo will address the structural engineer’s recommendations,” which included whether or not to remove concrete that failed to reach the specified compressive strength at 28 days. There was no evidence of a response from the Appellant to inform Mr. Carleton that an ASI had been issued at the Appellant’s request on December 8, 2011, extending the testing schedule to 56 days.
22. By letter dated January 20, 2012, Thomas Carleton, Acting Deputy Administrator for the Bureau of Public Works notified TLT Construction that the firm would be required to remove and replace concrete that did not meet the requirements set forth in the contract documents. Mr. Goucher was not copied on that letter. (State’s Exhibit 1, pp. 12-13)
23. Between January 20 and January 27, 2012, the Appellant exchanged emails with John Galasso, Rex Radloff, Scott Hughes, and Scott LeBrun about the concrete issues, including compressive strength testing and cold weather protection. None of those emails were copied to Mr. Nogueira, Mr. Carleton or Mr. Connor. (State’s Exhibit 2, pp. 35, 177, 121, 122, 124 and 129) In email dated January 26, 2012, addressed to Mr. Galasso, the Appellant wrote, “And given the latest breaks with the RTI footings (allowing the Barracks schedule to “float”), waiting out for specified strengths may not be an option for the RTI schedule. Mark will need to see this addressed by tomorrow.” In email the following day to Mr. Galasso, the Appellant discussed in-place low strength material, again saying, “Mark [Gianniny] will need to see this addressed by tomorrow.” Copies were not forwarded to Mr. Nogueira, Mr. Carleton or Mr. Connor.

24. In an email dated February 6, 2012, Commissioner Hodgdon asked Director Connor if there was an update on the cement issue. Mr. Connor responded by email that same day saying, in part, "There is a 28 day cure test for the concrete cylinders that took place on Friday. The cylinders broke under the required 3,000 lb. requirement. As a result, we have ordered TLT to take core samples of the actual wall. The core samples are due to be tested today. If they break under the 3,000 lbs TLT will be required to remove the defective wall areas and re-pour the defective wall sections." That email was sent to Commissioner Hodgdon with a copy to Mark Nogueira. Mr. Nogueira forwarded those messages to Gregory Goucher and Thomas Carleton, and Mr. Goucher forwarded the messages to Scott LeBrun, the Clerk of the Works. Mr. LeBrun then sent a message dated February 7, 2012, at 1:17 p.m. to Mr. Goucher asking, "Does it matter that Mr. Connor's statements are incorrect? There still seems to be a miss understanding [sic] regarding the 56 days scenario." (DAS Exhibit 2, page 142)
25. Although the Appellant was fully cognizant of changes to both the concrete mix design and the break schedule to test for compressive strength, the Appellant did not reply directly to Mr. LeBrun's question, nor did he communicate with Mr. Nogueira or Mr. Connor concerning the substance of the email. Instead, the Appellant engaged in an email exchange on February 9, 2012, with staff from Oak Point Associates concerning issues discussed at the February 8, 2012 project meeting when Scott LeBrun, the Clerk of the Works, mentioned the 56-day break schedule. Scott Hughes of Oak Point Associates wrote that Thomas Carleton of BPW had asked for a letter addressing several areas of concern, including a request to "Clarify the 28-day versus 56-day mix discussion" and "Clarify the ACI 318 requirements and how that coordinates with the specifications (so there is less ambiguity)." Mr. Goucher replied by email saying that "there was a wealth of knowledge offered up for tweaking the placement process for the Fly Ash mix." He indicated that there had been an explanation about how fly ash mixes cure differently from concrete and "why the 56 day target is more relevant to this project for field conditions..." He did not provide a copy of that email to anyone in his own department. The Appellant concluded his email message saying, "While it is difficult to summarize issues that actually didn't occur at the meeting, I do want to make it known that proactive actions continue to be taken to identify the problems and solutions. I will suggest that a call to Scott as an 'after-meeting' conversation occur, just to put all knowns on the table, as the facts seem to be getting lost in the translations." He did not address the issue of the concrete mix design, cure rate, or 28-day versus a 56-day break

schedule for the concrete, nor did he inform the consultant or his own department that Mr. Connor's email contained inaccurate information. (State's Exhibit 2, pages 144-145)

26. Over the course of the following week, communications between the Bureau of Public Works, Oak Point Associates and TLT Construction continued, and on February 14, 2012, David Martin, Oak Point's Senior Structural Engineer wrote to the Appellant explaining the status of the compressive strength tests and the project as a whole, telling the Appellant, "Oak Point Associates recommends that the concrete identified above be removed and replaced with concrete that meets the specifications." Oak Point's recommendations to remove the concrete were based on the 28-day tests that had been submitted. Mr. Martin wrote, in part, "There was a discussion as to the status of the concrete mix design being a 28-day or 56-day mix design. Oak Point Associates noted that the approved mix design was submitted as a 28-day mix based upon the submitted ACI 214 Strength Test Evaluations. Subsequent to this meeting, Oak Point Associates re-verified that the submittals were based upon a 28-day mix design." (State's Exhibit 2, page 173-175)
27. On February 14, 2012, Mark Nogueira sent an email to the Appellant telling him to "be prepared to discuss the status of the RTI concrete issues and proposed actions at our 2:30 meeting." Following his receipt of that message, the Appellant opened and viewed the following documents from the project file on the Bureau's computer system, but did not prepare copies of the documents, information about the documents, or instructions how to access the documents for Mr. Carleton or Mr. Nogueira at their meeting. (State's Exhibit 2, pp. 217-282):
- a. December 9, 2011 Submittal Review for Cast-In-Place Concrete
 - b. January 29, 2012 letter from TLT regarding Cold Weather Procedures
 - c. January 25, 2012 email from Oak Point Associates regarding "additional areas with low concrete test results
 - d. January 19, 2012 letter from Oak Point Associates regarding "Barracks Building concrete test results
 - e. January 23, 2012 emails from Oak Point Associates regarding RTI Concrete
 - f. January 6, 2012 emails from Oak Point Associates regarding RTI Concrete
 - g. January 6, 2012 emails from TLT regarding RTI Concrete
 - h. January 9, 2012 email and reports from Geotechnical Services Inc.
 - i. January 9, 2012 emails from Scott LeBrun and TLT regarding RTI/conc mix

- j. December 20, 2011 email from Oak Point Associates regarding Form Releasing Agent Submittal
- k. December 6, 2011 emails regarding supplemental instructions for 56-day mix
- l. January 24, 2011 email from Oak Point Associates regarding cold weather protection
- m. January 25, 2011 letter from TLT regarding cold weather protection
- n. January 20, 2012 letter from Thomas Carleton to TLT regarding "Concrete strength problems and related actions required"
- o. February 15, 2012 email from Oak Point Associates regarding Cold Weather Concrete Plan – Amended

28. After having reviewed letters, email correspondence and contract submittals associated with the concrete mix design and testing schedule, the Appellant met with Mark Nogueira and Thomas Carleton. Notes from that meeting prepared by Mark Nogueira and Thomas Carleton both refer to the issue of an approved concrete mix design and 56-day break schedule reportedly approved by OPA in December 2011. The Appellant was directed to provide copies of any submittals approved by OPA for the concrete mix, curing and testing schedule to resolve the issue of 28 days versus 56 days. (State's Exhibit 2, pp. 187 – 191) After the meeting, the Appellant responded by forwarding several email messages dated December 5 and December 6, 2011. He did not provide copies of any submittals approved by OPA as he had been directed, nor did he provide specific information about the approved break schedule. (State's Exhibit 2, pp 165-166)

29. Thomas Carleton replied by email message dated February 15, 2012, stating, "Greg, Although this background correspondence is interesting, the question is still unanswered for how this 28 day mix design requirement got changed. A copy of the submittal that you described to Mark, where OPA approved a revised 56-day mix design, is needed to illustrate how this occurred." The Appellant replied, saying that, "...the 'change' was focused on the e-mail, which questioned the need to revise the original 8 cylinders, 28-day break schedule to reflect the new mix design properties. This correspondence occurred during the review by OPA of the revised concrete mix design." The Appellant again failed to provide copies of the submittals as requested despite the fact that he had opened those documents from the project file. Mr. Carleton answered that message with email saying, "Based upon your input below, my understanding is that there hasn't been a change to the terms of the contract for 3000 psi concrete at 28 days. Please let me know if there's any additional documentation that we need to consider on the subject." The Appellant replied, "the submittal review did

not change the design parameters.” He did not provide copies of submittals or ASIs detailing the change in mix design or testing schedules. (State’s Exhibit 2, pp 164-166)

30. On February 15, 2012, the Appellant reviewed additional documents on the computer concerning the concrete mix and testing schedule (State’s Exhibit 2, pp. 283-328):
 - a. February 15, 2012 email from Oak Point Associates regarding Cold Weather Concrete Plan – Amended
 - b. February 14, 2012 letter from Oak Point Associates regarding Structural Concrete Issues
 - c. February 14, 2012 letter from Oak Point Associates, in draft form, regarding Concrete Issues and Follow-up
 - d. February 15, 2012 email from Oak Point Associates forwarding “draft” letter for review
 - e. December 5, 2011 email from Oak Point Associates regarding 7-day and 28-day breaks
 - f. December 5, 2011 email from Oak Point Associates regarding concrete testing
 - g. December 5, 2011 email from Oak Point Associates regarding change in mix design being full at 56 days
 - h. February, 14, 2012 email from TLT regarding Cold Weather Plan – Amended
 - i. February 14, 2012 email from TLT regarding concrete requests
31. On February 16, 2012, the Appellant forwarded a series of email messages to Mr. Nogueira and Mr. Carleton from Geotechnical Services, Oak Point Associates and Scott LeBrun, the State’s Clerk of the Works, regarding the 56-day break schedule. In it, Mr. Goucher wrote, “To review our discussion, the ‘change’ was focused on the email, which questioned the need to revise the original 8 cylinders, 28-day break schedule to reflect the new mix design properties. This correspondence occurred during the review by OPA of the revised concrete mix design.” Mr. Carleton replied, writing, “Based on your input below, my understanding is that there hasn’t been a change in the terms of the contract for 3000 psi concrete at 28 days. Please let me know if there’s any additional documentation that we need to consider on the subject.” The Appellant responded, saying “the submittal review did not change the design parameters.” (State’s Exhibit 2, pp 164-166)
32. On February 17, 2012, Mr. Nogueira sent the Appellant email, asking him again to, “1. Please provide a status update today on the three action items you had from our meeting on Tuesday. – Shop drawings/submittal approving a 56-day mix, verification/documentation on

OPA's flawed concrete, Letter to Larry Rae [National Guard] about the critical path of the transformer. 2. Update on the email below and TLT's response to removing the concrete." Attached was a message from Mr. Carleton asking the appellant to respond to a message from John Galasso at TLT, "clarifying for him what is required by the contract and according to the letter provided by Oak Point dated 2/14/2012? It would appear that John is still referring back to prior conversations that weren't in alignment with the contract requirements." (State's Exhibit 2, p 169)

33. Before responding to Mr. Nogueira's request, the Appellant reviewed the following documents (State's Exhibit 2, pp. 337- 444):
- a. December 2, 2011 Submittal Review – Concrete Mix Re-Submitted
 - b. Submittal Transmittal – Concrete Mix Design and LEED Credit MR 4
 - c. Cement Concrete Mix Design Submittal
 - d. Cement Concrete Mix Design Submittal
 - e. November 22, 2011 email from OPA to TLT advising that an ASI would be issued revising the concrete mix to allow 40% fly ash
 - f. December 5, 2011 email from TLT to OPA for review and approval of concrete mix design without rebar
34. The Appellant replied to Mr. Nogueira's email message on February 17, 2012, saying, "Mark, Tom was forwarded the email we discussed regarding the break schedule of the concrete cylinders. As noted to Tom, this email was not part of the Revised Submittal, rather a clarification from BPW regarding the mix design parameters. The design strength period was not changed by or during the submittal process. The documentation of the concrete mixes is reflected in the submittals, noting the materials, locations and corresponding emails." Although Mr. Nogueira had asked specifically for the Appellant to provide him with copies of submittals and shop drawings concerning the concrete mix and break schedule, the Appellant did not provide copies of any documents, nor did he indicate how or where these documents could be accessed. (State's Exhibit 2, pp 169-170)
35. At the end of the day on February 17, 2012, Thomas Carleton emailed a message to John Galasso at TLT, concluding a series of emails concerning removal of defective concrete at the project. Mr. Carleton wrote, "John, Yes I received that email [from Gregory Goucher on 2/15/12] and it didn't provide the additional direction as outlined in Oak Point Associates letter and in my last email below. In short: BPW directs TLT to remove deficient concrete work, as identified and explained in the letter from Oak Point Associates, dated February 14,

2012. Where any previous conversations (or emails, letters, etc.) on this subject may have given an impression contrary to this direction, they shall receive no further consideration. Please refer to my original email for details, sent at 5:46 p.m. this evening.” (State Exhibit 2, p 452)

36. When the Appellant learned of the correspondence from the Bureau of Public Works directing TLT to begin removing defective concrete, he said he was “somewhat shocked and amazed” that he was not involved in discussions beforehand. The Appellant testified that, “It was clear [to him] that Tom [Carleton] and Mark [Nogueira] were handling things the way they wanted them handled, and [his] input was not needed.” (Testimony of Gregory Goucher) The Appellant did nothing to inform his supervisor that the State’s position was incorrect and that changes to the concrete mix design and break schedule had been authorized. (Testimony of Michael Connor)
37. On February 21, 2012, the Appellant opened and reviewed documents related to his department’s order for TLT to remove deficient concrete (State’s exhibit 2, pp. 445-463) including:
 - a. February 17, 2012 email from Thomas Carleton titled “remove deficient structural concrete”
 - b. February 17, 2012 email from John Galasso
 - c. February 17, 2012 email from Thomas Carleton
 - d. February 20, 2012 email from John Galasso
 - e. February 21, 2012 email with attachments from Geotechnical Services
38. TLT replied by letter dated February 22, 2012 stating that TLT would be proceeding with the work necessary to carry out the directive for removal of the concrete, but would perform that work “under protest.” (State’s Exhibit 2, p. 498)
39. On February 23, 2012, the Appellant opened and reviewed additional documents related to the project, but did not provide them to Mr. Nogueira or Mr. Carleton. They included the following: (State’s Exhibit 2 pp. 464- 509)
 - a. Architect’s Supplemental Instruction 003 for 40% fly ash cast-in-place concrete
 - b. November 22, 2011 email from Oak Point Associates concerning ASI 003
 - c. Architect’s Supplemental Instruction 004 for field curing at 56 days
 - d. February 22, 2012 email from John Galasso regarding removal and replacement plan discussed on February 22, 2012
 - e. February 21, 2012 email from John Galasso regarding RTI – Removal Plan

- f. February 21, 2012 email from John Galasso regarding outside engineering
 - g. February 22, 2012 letter from John Galasso regarding Removal and Replacement Deficient Structural Concrete
 - h. February 23, 2012 email from John Galasso regarding RTI – Removal Letter
 - i. February 23, 2012 email from Thomas Carleton to Oak point, with requesting review and response to assertions made by TLT in their letter regarding removal of deficient concrete
40. On February 28, 2012, the Appellant was notified in writing that he was being suspended with pay pending the outcome of an internal investigation into allegations that he, “..may have modified the concrete strength requirement in the RTI and Barracks contract without proper authority to do so and when requested by the Administrator for relevant documentation [he] failed to produce documents which were later discovered to exist.” (State’s Exhibit 2, pp 69-70)
41. On April 4, 2012, the Appellant participated in an investigative interview with Mark Nogueira and Michael Connor (State’s Exhibit 1, pp. 72 – 80), answering a series of questions about his responsibilities and authority as a Public Works Project Manager, and his role in the events surrounding the RTI and Barracks Project. When asked repeatedly if he had directed Oak Point Associates to issue an ASI concerning the cure time or break schedule for the concrete, he would only say, “Discussions were had and clarifications were needed.” (Testimony of Mark Nogueira and Michael Connor)
42. The State’s consultant estimated that the cost to the Department resulting from removal of deficient concrete, and the required disassembly of steel already placed on the faulty foundations, would be approximately \$290,000, and those costs would not be reimbursed to the State because the State had allowed changes to the contract without approval by the National Guard Bureau. (Testimony of Mark Nogueira and Linda Hodgdon)
43. On April 18, 2012, the Appellant was provided with copies of evidence supporting his possible dismissal from employment, and on April 23, 2012, he was given an opportunity to refute that evidence. By letter dated May 4, 2012, the Appellant was notified that he was being dismissed from his position as a Public Works Project Manager III for “willful abuse, misuse or destruction of state property or the property of any employee or individual served by the agency which, in the opinion of the appointing authority, represents a substantial cost for repair or replacement.” (State’s Exhibit 1, pp. 1-7)

Rulings of Law

- A. In order to determine the appropriate form of discipline as required by Per 1002.03 of the NH Code of Administrative Rules, Commissioner Hodgdon considered the Appellant's past record of performance as well as the nature and severity of the Appellant's offense in relation to the Appellant's duties and responsibilities and the functions of the agency before deciding to dismiss him for violation of Per 1002.08(b)(6).
- B. Willful abuse, misuse or destruction of State property or the property of another employee or individual served by the agency, as described in Per 1002.08(b)(6), would not include deception and failure to provide critical information, even if that conduct contributed to a significant financial liability to the State. That conduct, however, would qualify as refusal to follow the legitimate directives of a supervisor.
- C. While appointing authorities in most instances may not suspend an employee for more than 20 work days, Per 1002.06 (c) permits an appointing authority to suspend an employee for more than 20 work days, "when the employee's job function in relation to the offense warrants a suspension of more than 20 work days."
- D. The Appellant's refusal to provide truthful, accurate responses to questions from his administrator, and to produce documents requested by his administrator relating to the 56-day break schedule constituted repeated refusal to follow the legitimate directives of a supervisor could subject the employee to a suspension without pay, as described in Per 1002.06(a)(3)a., or to dismissal without prior warning as described in Per 1002.08(b)(13) for persistent refusal to follow the legitimate directives of a supervisor.
- E. RSA 21-I:58, I, provides, in pertinent part, that, "In all cases, the personnel appeals board may reinstate an employee or otherwise change or modify any order of the appointing authority, or make such other order as it may deem just."

Position of the Parties

Mr. King argued that the State was holding the Appellant responsible for activities and decisions that were beyond the Appellant's authority and control. In particular, Mr. King noted that there was a contract between TLT Construction and the State for construction of the RTI/Barracks project, as well as a contract with Oak Point Associates to act as architect and consultant on the project. He argued that the Appellant had no input into which supplier TLT used for the

concrete, and that it was outside the Appellant's control if Aggregate Industries was unable to supply the particular mix of concrete that the State had described in its bid documents. Mr. King argued that the concrete Aggregate Industries could supply with 40% fly ash was more environmentally friendly, supporting the National Guard's specification that this be a "green" project with LEED certification. He argued that when Aggregate Industries informed TLT what the concrete mix would contain, Oak Point Associates recognized that the mix would take longer than 28 days to reach the appropriate compressive strength, and therefore it was an appropriate decision to change the break schedule from 28 to 56 days. He argued that the Appellant could not reject Oak Point's supplemental instruction, and even if he did, it would have been impossible to cure the concrete in that period of time.

Mr. King argued that the Appellant did not withhold information, as alleged, as all the information concerning the project was accessible to Bureau staff in the project file. Mr. King argued that when Mr. Nogueira asked the Appellant for information about the 28 day versus 56 day schedule, the Appellant did not believe he was being asked for submittals or shop drawings, and instead tried to supply correspondence that would address questions he had been asked. Finally, Mr. King argued that the Appellant never engaged in willful abuse, misuse or destruction of state property or the property of any employee or individual served by the agency. He argued that the State's claim amounted to nothing more than an allegation that the Appellant refused to follow the directives of a supervisor when he did not produce the documents that Mr. Nogueira had requested. Mr. King argued that, at most, such an offense, if proven, would only support a suspension without pay, and that such suspension could not exceed 20 days.

Ms. English argued that, the Appellant was dismissed for his performance managing the RTI/Barracks project contract as "a result of his deception and failure to provide requested information at a critical juncture, putting the state at significant financial risk." According to Ms. English, "Mr. Goucher was terminated because he was asked multiple times to provide information related to the concrete mix design and design strength period. He never provided the information, despite multiple requests." Ms. English argued that the documentary evidence, including documents authored by the Appellant, contradicted the Appellant's testimony at hearing and demonstrated the Appellant's "pattern of misdirection and misinformation throughout the inquiry into the concrete mix design [which] not only put the State at tremendous

financial risk, it also caused his supervisors and colleagues to irrevocably lose trust in Mr. Goucher's ability to faithfully and honestly execute his duties as a project manager."

Decision and Order

When TLT Construction was awarded the bid for the RTI/Barracks project, the Appellant expressed concerns about the \$3 million difference between TLT and the next lowest bid, and he worried that the low bidder would try to maximize profits by billing for higher costs through the change order process. The Appellant highlighted some additional concerns when communicating with staff from Oak Point Associates, discussing the contractor looking for "wiggle room" on the content of the materials and trying to use materials that did not cost them anything as opposed to those materials specified in the bid. He indicated that if TLT were to use materials not specified in the bid documents, it would constitute an after-the-bid substitution and a change to the contract. The Appellant also was fully aware of concerns that had been raised by his own managers and the members of the Governor's Executive Council about the work to be performed by TLT Construction. The Appellant received clear instructions at the outset of the project to not allow TLT to deviate from the specifications against which the bid had been awarded, and he knew that representatives of Oak Point Associates had received the same instructions. As the State's Project Manager, it was the Appellant's responsibility ultimately to ensure that the architect, engineer and general contractor were held to the terms of the contract and approved bid documents.

As the project progressed, and as problems with the concrete became more apparent, the Appellant was asked repeatedly whether or not the State "owned 3000 pounds and 28 days." Certainly Mr. Nogueira and/or Mr. Carleton could have begun searching the project files themselves for evidence of discrepancies between their understanding of TLT's responsibility and what TLT believed it was permitted to do. That, however, was the Appellant's responsibility, and Mr. Nogueira, Mr. Carleton and Mr. Connor should have been able to rely on the Appellant to provide timely, accurate information, and ensure that the contractor was in compliance with the terms of the contract as specified. Instead, the Appellant repeatedly avoided answering direct questions about the concrete mix. When asked by the Clerk of the Works if the Appellant should correct Mr. Connor's erroneous statements about 3000 pounds at 28 days, the Appellant offered no response. When those subjects were discussed in meetings

that the Appellant attended, the Appellant chose to remain silent rather than providing accurate information upon which his department could make decisions about the status and direction of the project. When asked specifically for documents concerning the 56-day mix, the Appellant searched through project files and located precisely what Mr. Nogueira had requested, but failed to produce any of those documents for him or mention ASIs that had been issued months earlier at the Appellant's direction. Instead of answering the question with a simple yes or no, producing copies of supplemental instructions changing the fly ash content or break schedules, or complying with his supervisor's request for copies of relevant submittals and shop drawings, the Appellant found ways to obfuscate and avoid explaining what had been done.

In evaluating whether or not the Appellant committed offenses warranting his dismissal without prior warning, the Board considered the specific circumstances surrounding the award and administration of this particular contract. The Board gave little weight to the Appellant's assertion that, in the past, he had not been expected to apprise his supervisors of contract changes or the issuance of ASIs. As soon as the Appellant realized that his department might be acting on mistaken information about the concrete mix, cure rate or break schedule, he had an affirmative obligation to provide timely, accurate information upon which the agency could base its decisions regarding the project. In this case, the evidence reflects that the Appellant withheld critical information that his administrator had requested repeatedly. The Appellant's argument that all the information was available in the project files if the administrator wanted to go and look for it is without any merit

The Board agrees with the Appellant, that his conduct was not accurately described as willful abuse or misuse of State property or the property of another. That, however, does not diminish the seriousness of his offense. The Board found that the Appellant was deceptive, engaging in misdirection and repeated refusal to provide accurate information as requested by his administrator. While one might argue that the agency itself bears some responsibility for moving forward with its order for removal of defective materials before finally resolving the 28-day versus 56-day concrete issue, it should have been able to rely on the Appellant's repeated representation that nothing in the contract had changed. The fact remains that the Appellant's misconduct contributed to significant financial liability to the State.

For all the reasons set forth above, the Board voted to exercise its authority, as provided in RSA 21-I:58, I, and modify the decision of the appointing authority by ordering the Appellant reinstated following a suspension without pay for refusal to follow the legitimate directives of a supervisor. As such, the appeal of Gregory Goucher is GRANTED IN PART. As noted above, while appointing authorities usually may not suspend an employee for more than 20 work days, in this instance, the seriousness of the offense in relation to the Appellant's duties and responsibilities, the willfulness of his refusal to provide information sought by his supervisor, and the substantial consequences of the Appellant's misconduct warrant an equally significant penalty. Therefore, in accordance with the provisions of Per 1002.06 (c), the Appellant's May 4, 2012, termination of employment shall be converted to suspension without pay from May 4, 2012 through September 4, 2013, during which the Appellant shall not be deemed eligible for any compensation, benefits, accrual of leave, or credit toward retirement eligibility. Any award of back-pay to which the Appellant would be entitled after September 4, 2013, shall be reduced by interim earnings as set forth in the provisions of RSA 21-I:58, I.

THE NEW HAMPSHIRE PERSONNEL APPEALS BOARD

/s/ Philip Bonafide

Philip Bonafide, Acting Chair

/s/ Robert Johnson

Robert Johnson, Commissioner

/s/ Joseph Casey

Joseph Casey, Commissioner

cc: Karen Hutchins, Director of Personnel
Attorney Benjamin King
Senior Assistant Attorney General Mary Ann Dempsey
Assistant Attorney General Lisa English
Carol Jerry, Human Resources Administrator, Administrative Services