

BEFORE THE STATE PERSONNEL BOARD OF THE STATE OF CALIFORNIA

In the Matter of the Appeal by) SPB Case No. 31025
)
 RONALD J. HOLTE) **BOARD DECISION**
) (Precedential)
 From dismissal from the position)
 of Senior Management Auditor with) **NO. 94-03**
 the California Department of)
 Transportation at Sacramento) January 6, 1994

Appearances: Loren McMaster, Attorney, representing appellant, Ronald T. Holte; Pamela Babich and (by substitution) Patricia Cruz, Staff Counsel, representing respondent, Department of Transportation.

Before Carpenter, President; Stoner, Vice President; Ward, and Villalobos, Members.

DECISION

This case is before the State Personnel Board (SPB or Board) for determination after the Board rejected the Proposed Decision of the Administrative Law Judge (ALJ) in the appeal of Ronald J. Holte (appellant or Holte). Appellant was dismissed from his position as a Senior Management Auditor with the California Department of Transportation at Sacramento (Department or Caltrans) and appealed his dismissal.

Appellant was charged with violations of Government Code section 19572, subdivisions (c) inefficiency, (d) inexcusable neglect of duty, (f) dishonesty, (o) willful disobedience, and (t) other failure of good behavior. The charges were based on fourteen (14) allegations relating primarily to appellant's performance as the Contract Administrator of contract 77G639.

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The ALJ who heard the appeal sustained the dismissal and found Skelly violations based upon the Department's failure to provide certain documents to the appellant. The Board rejected the Proposed Decision, deciding to hear the case itself. After a review of the entire record, including the transcript, the exhibits, and the written and oral arguments presented by the parties, the Board dismisses some of the charges but sustains others and reduces the penalty to a one (1) year suspension.¹

FACTUAL SUMMARY

Appellant has been employed with Caltrans since 1970. At the time of his dismissal on February 11, 1992, he was a Senior Management Auditor. Appellant has no prior adverse actions.

As Senior Management Auditor, appellant's duties required him to plan, direct, review and coordinate the internal audit activity of the Department. Among such duties, appellant was a Contract Administrator which required him to represent Caltrans "in its dealings with [a] contractor. The primary responsibility of [a] contract administrator is to monitor the progress of work to ensure that services are performed according to the quality, quantity and manner specified in the contract." It is

¹At the close of the Department's case in chief, the ALJ dismissed 3 of the charges on the grounds that the Department had failed to establish its prima facie case. The Board has reviewed the evidence presented in the Department's case in chief and approves of the ALJ's decision to dismiss these charges. See Government Code § 19582 (a).

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appellant's performance of this latter function which is at issue in this case. Appellant is charged with not adequately overseeing an audit contract with outside auditors, a joint venture consisting of the accountant firms of Price Waterhouse, Miranda Strabala and Associates (Miranda), and Vargas Cruz and Patel (Vargas). The latter two firms are minority owned businesses and it was they who were to perform the bulk of the auditing functions. The department entered into the contract because it was unable to perform all the audit work it had.

Whistleblower Defense

Appellant originally claimed that the Department's decision to investigate his performance on contract 77G639 and take adverse action against him was in retaliation for appellant being a whistleblower. Appellant testified that after he performed an audit of a federal right of way contract in February of 1991, he recommended an audit exception. According to appellant, he was asked through his superior, Norma Jacobs to change his audit findings, but he refused. Appellant also reported his findings to the Inspector General.

Department witnesses testified that contract 77G639 was investigated because the contract was amended from six hundred thousand dollars (\$600,000) to over two (2) million dollars (\$2,000,000).

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The ALJ noted that appellant apparently abandoned this defense, since he did not address it in his Post-Hearing Brief. Likewise, appellant did not address this defense in his written argument before the Board. In any event, appellant failed to prove a prima facie case that there was a causal connection between his complaint to the Inspector General and the Department's action against him.

Pre-award Audits

In paragraph A of the notice of adverse action, appellant was charged with improperly waiving the performance of a pre-award audit of the proposed contract between the Department and the joint venture. Ms. Diane Eidams, the assistant director for audits and security and the department's principal witness against appellant, testified that the "purpose of a pre-award audit is to determine whether the contractor's accounting system is adequate to meet the needs of the contract" and to "determine that the cost proposal is reasonable." It is undisputed that it was the Department's policy to conduct pre-award audits on all contracts over \$250,000. The proposed contract with the joint venture in this case was \$600,000.

Although the Department takes the position that it unequivocally requires pre-award audits for every contract over \$250,000, its own policy memorandum on the subject is obviously written in order to track the Federal standards for pre-awards

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set out in 23 CFR 172.² Under these federal standards, pre-awards may be waived when, "sufficient audited consultant data is available to permit reasonable comparisons with the cost proposal."

See 23 CFR 172.5(c)(3).

Appellant presented departmental audit logs which indicated that waivers had been granted for a number of other Caltrans contracts. Although there was also evidence that these other contracts were not specifically comparable, the fact that waivers had occurred in the past indicates that waiver was, in fact, a possibility under Department policy. Thus, the burden shifts to the Department to prove that waiver was not appropriate for the contract in question.

Although the Request for Proposal (RFP) asked for competing firms to submit bids which would be reimbursed on an actual cost plus profit basis, the contract that was actually negotiated and approved was an hourly rate contract in which a fixed rate was paid for every hour of auditing provided by the joint venturers. A Department witness testified that a pre-award audit would have looked beneath the hourly billing rates proposed in the contract to determine whether, based upon the actual costs to the

²The policy memorandum upon which the department relies explicitly aims at conforming department policy to "recent changes in FHWA regulations in accordance with 23 CFR 172...."

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joint venturers, the proposed rates were reasonable.³ Appellant maintains that he had sufficient information to evaluate the contract and the only pre-award evaluation necessary was a "price comparison" between the proposed rates in the contract and the general market rates for similar services. Appellant also notes that he had extensive knowledge of the timekeeping and accounting practices of the proposed contractor because he had been the contract administrator for an earlier contract between Price Waterhouse and the Department.

The Department failed to prove by a preponderance of evidence that appellant did not have enough information about the joint venture to justify waiver of the pre-award audit. The Department argued at the hearing and in its brief before this Board that the earlier Price Waterhouse contract relied upon by appellant was inappropriate for comparison because that contract was for "fixing a computer system" and not auditing services. However, a review of the earlier contract, 16D862, indicates that although there may have been a different focus to the work the contract auditors were doing, both contracts were for audit consultant services. Appellant testified without contradiction that many of the same personnel from the earlier contract would again be assigned under the new contract.

³The department's specific charge that a pre-award audit would have uncovered an unnecessary charge of \$5.00 an hour is discussed and rejected below.

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The Department also argued that reliance on the earlier Price Waterhouse contract was inappropriate because the earlier contract provided only information about Price Waterhouse. However, the earlier contract included all the joint venture participants involved -- Price Waterhouse, Miranda and Vargas -- although the Vargas firm at that time included an additional named partner.

Finally, appellant's supervisor, Norma Woods, testified that she had been informed of and had agreed with appellant's decision to "waive" the pre-award audit in this case.

Hindsight is twenty-twenty. Although the Department proved that a pre-award audit is perhaps the better practice, the Department did not prove that the failure to perform a pre-award audit on contract 77G639 was actionable. At the time the contract was originally contemplated it involved a relatively small amount of money --\$600,000; it involved mainly the same parties as an earlier contract appellant administered; the type of personnel to be provided were nearly identical to the earlier contract; and the structure of the fiscal arrangement was the same. As noted above, appellant's supervisor was informed of, and agreed to, the waiver. Thus, it can not be said that appellant's decision to waive the pre-award audit was inexcusable neglect of duty.

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This contract was amended three times resulting in a final contract dollar amount of 2.4 million dollars. Although appellant is also charged with waiving the pre-award audits on the three amendments, no evidence was presented which proved that waiver of these pre-award audits was not justified.

This allegation is dismissed.

\$5.00 Per Hour Overpayment

In paragraph B of the notice of adverse action, the Department charged that appellant's failure to perform a pre-award audit led to the Department's paying Price Waterhouse \$5.00 per hour more than necessary for services performed by the Vargas and Miranda staff. Having found that the Department did not prove that appellant erred in failing to perform a pre-award audit, this charge must also fail. However, even if the Department had proven a pre-award audit was required, this charge could not be sustained.

Under the terms of the contract, Price Waterhouse was to coordinate the billing for the joint venture. What this meant in practice was that 1) the other members of the joint venture, Miranda and Vargas, were supposed to send their billings to Price Waterhouse; 2) Price Waterhouse was supposed to invoice the Department; 3) the Department would then write a check to Price Waterhouse for eventual disbursement to the other members of the joint venture.

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Both Diane Eidams and Carl Brust, a Senior Management Auditor assigned to supervise the Department's audit of contract 77G639, testified that Price Waterhouse was remitting \$5.00 per hour less to the joint venturers than it was receiving from the Department. The Department argues that had a pre-award audit been done, a \$5.00 per hour discrepancy between the proposed rates in the contract and the actual costs of providing services would have been discovered.

Eidams' testified that she saw a payroll cost sheet for Miranda which indicated that the actual costs to Miranda of providing "heavy" staff services was lower than the contractual rates. Since the testimony failed to establish who prepared such a "cost-sheet", or its purpose, and, moreover, since the "cost sheet" was never introduced as evidence, Eidams' testimony alone can not support a finding that the minority contractor's costs were overstated by \$5.00 per hour.

Both Eidams and appellant testified that Rudy Vargas, one of the named partners of Vargas, complained to them that Price Waterhouse was "keeping" \$5.00 per hour for every service hour. The Department contends the Vargas' statement means that it was paying a \$5.00 per hour premium to Price Waterhouse above the actual cost of Vargas and of Miranda providing services to it. Preliminarily, we note that the testimony as to Vargas' statement is uncorroborated hearsay. Furthermore, it does not follow from

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the fact that Price Waterhouse was "keeping" \$5.00 per hour that the actual cost of either minority joint venturer was inflated by \$5.00. For all the record shows, the \$5.00 per hour difference might have been attributable to Price Waterhouse paying the minority members of the joint venture less than they were entitled to rather than Caltrans being overcharged.

In addition, the contract required that Price Waterhouse provide coordination and management services, review timekeeping, submit invoices, and receive and disburse payments to the other joint venturers. No evidence was presented to indicate what the Department considered to be a reasonable charge for the role Price Waterhouse was expected to play under the terms of the contract. Under the Department's theory that the Department was overcharged by \$5.00 per hour, Price Waterhouse would have to perform all the coordination and management functions in exchange for no compensation at all. Although there may well be an overcharge here, the department has failed to prove that the department was overcharged \$5.00 per hour.

In light of this discussion and considering the dismissal of the charges in paragraph A, the charge that appellant's failure to do a pre-award audit led to the Department's overpaying \$5.00 per hour under the contract is dismissed as unproven.

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Appellant Failed to Enforce the Contractual Provisions

Two separate grounds for adverse action relate to the Department's contention that appellant failed to require Price Waterhouse to fulfill its role as contractor. The first is that appellant specifically authorized one of the members of the joint venture to submit its bills "directly" to the Department on Price Waterhouse letterhead, and the second is that appellant permitted Miranda and Vargas to bill the Department for coordination and for supervision which, the Department contends, were outside the scope of the contract.

A. Price Waterhouse Did Not Review Invoices Before Submission

Appellant is charged with allowing one of the members of the joint venture, Vargas, to violate the contract provisions and submit its bills directly to the Department on Price Waterhouse letterhead. The contract specifically required all invoices to be approved by the project manager, a representative of Price Waterhouse. It is undisputed that at some point Rudy Vargas sent his invoices directly to the Department on Price Waterhouse letterhead.

The ALJ who heard the evidence found Diane Eidams credible when she testified that appellant admitted to her that he told Rudy Vargas to use Price Waterhouse letterhead in this way. In any event, appellant does not deny that he was aware of the arrangement. Appellant maintains, however, that it makes no

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difference that Vargas was sending its bills directly to the Department since, at the same time, it was also sending them to Price Waterhouse which could have alerted the Department to any difficulties it saw.

Even if Vargas was sending the same invoices to Price Waterhouse, by sending his invoices to the Department under Price Waterhouse letterhead, Vargas effectively misrepresented to the Department that the particular work covered by the invoice had already been approved by Price Waterhouse when in fact it had not been previously reviewed. Under the terms of the contract, the Department bargained for Price Waterhouse to fulfill the project manager role and it was appellant's responsibility to obtain the benefit of the Department's bargain. This allegation is sustained.

B. Coordination and Supervision

Appellant is charged with failing to enforce the provisions of the contract by allowing Miranda and Vargas to provide and bill for coordination and supervision functions which the Department contends were outside the scope of the contract.

1. Coordination

The contract incorporated by reference the joint venture's response to the RFP. In its response, the joint venture represented that Price Waterhouse "would have the responsibility of assigning the professional staff needed to fulfill [Caltrans']

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requests for audit consultants through the coordination of the participants in the joint venture" and, further, that "all requests for audit assistance" would go through Price Waterhouse. In other words, under the contract, specific audit requests were to be routed through Price Waterhouse.

The RFP specifically states that "[t]he contractor will not be reimbursed for direct supervision and management." (emphasis added). The joint venture's response to the RFP describes "Management" as including "the responsibility of assigning your [Caltrans] requests for audit consultants through the coordination of the participants in the joint venture." For purposes of this Decision, this assignment function is considered "coordination". Reading the RFP in light of the Proposal, it appears that "coordination" is a "management" function outside the scope of reimbursement.

Jody Woods, one of the Department's field supervisors, testified that, at least later in the life of the contract, he used Brian Moshenko of Miranda to arrange for audit staff. Diane Eidams testified that appellant told her that he instructed the minority firms to do their own coordination since Price Waterhouse was not acting quickly enough. Diane De La Montanya of Vargas admitted that she was the person who scheduled audits on behalf of Vargas.

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Appellant argues that the coordination work the minority firms billed was actually the normal work expected of any "lead auditor."

Although coordination of some aspects of individual audits might be appropriate, the contract spells out that audit assignments were to be a Price Waterhouse function. Thus, appellant's first error was to allow Vargas and Miranda to perform the coordination function for themselves. Allowing the minority firms to sidestep Price Waterhouse reduced contract accountability.

Appellant's second and far more serious error was to allow the joint venturers to bill the Department for time spent on these functions when such billing was specifically prohibited by the contract. The charge that appellant improperly approved payment for coordination work by contract auditors is sustained.

2. Supervision

Supervision is not defined in the contract documents. However, paragraph H of the RFP provides "Consultant auditors will be under the direction of Caltrans, and working papers and draft reports will accordingly be solely reviewed and the responsibility of Caltrans audit supervisors and managers. . . The Contractor will not be reimbursed for direct supervision and/or management." This appears to indicate that supervision in this context is supervision of the work product itself.

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Thus, from the Department's point of view, just as performance of coordination by any of the joint venturers except Price Waterhouse interfered with Price Waterhouse's contractual obligation, performing supervision interfered with the Department supervisor's functions. In either circumstance, neither was to be billed to the Department.

To prove this charge, the Department placed into evidence one time sheet from one specific audit where Diane De La Montanya initialed a box designated for a supervisor's approval. Ms. De La Montanya admitted that she would have been supervising if she had reviewed someone else's work; however, she denied that she ever did this. Without the rest of the audit papers, Ms. Montanya testified, she could not explain why her initials appear in the wrong box on one document. One wrongly initialed time sheet does not prove that consultant auditors were supervising other auditors.

The charge that appellant permitted the joint venture participants to be paid for supervision is dismissed.

Overbilling of Contract Audit Staff

The Department charged appellant with a failure to discover that the consultants provided by the joint venture participants did not have government auditing experience that matched civil service specifications for comparable titles. The basis of this charge was that Caltrans auditors reviewing the qualifications of

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the audit consultant staff were unable to verify that the individual consultant auditors who had been billed at the "heavy" rate matched the government experience of an Associate Management Auditor. The Department introduced into evidence the resume of one consultant auditor who was billed at the "heavy" rate but did not appear to have the qualifications the Department claims are appropriate for "heavy" billing.

On its face, the contract calls for three different rates to be billed and paid for audit work: "light staff" is billed at approximately \$35.00/hr; "medium staff" is billed at approximately \$37.00/hr; and, "heavy staff" is billed at approximately \$42.00/hr. The contract does not define what qualifications a consultant would need to be considered "light," "medium" or "heavy" for purposes of billing rates.

However, the joint venture's response to the Department's RFP which is specifically incorporated by reference into the contract compares these various classifications to specific state classifications. "Light staff" is treated as "comparable" to the Staff Management Auditor B class; "medium staff" as "comparable" to the Staff Management Auditor C class; and "heavy staff" as "comparable" to the Associate Management Auditor class. Attachment A to the RFP indicates that the purpose behind including these classifications was to ensure that state wages would not be undercut.

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The Department claims that the requirement that contract auditors not "undercut" the wages of comparable state auditors implies that these classifications be somehow comparable. The Department chooses to define "comparable" as requiring, for example, that a consultant auditor billed at the "heavy" rate meet the specifications for the State's Associate Manager Auditor class.⁴

Appellant contends that the need to determine whether state wages would be undercut by the contract is the only reason the joint venture's RFP response compares State wage classifications to the joint venture's "light", "medium" and "heavy" rates.

The ALJ found that the contract did, in fact, require the experience of the consultant audit staff to match the experience required of the auditors in "comparable" civil service classes. The ALJ reasoned that since Government Code § 19130 (a) (8) specifically provides that no outside contracts may be let unless they include "specific provisions pertaining to the qualifications of the staff who will perform the work . . ." and since the only "qualifications" in the contract are those which might be implied from the designation of comparable civil service classifications, the State classifications must be part of the

⁴The Associate Manager Auditor class requires either one year of state service performing professional auditing or accounting at a level equivalent to an entry level auditor or three years of increasingly responsible professional auditing or accounting.

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contract. This reasoning appears shaky at best. To imply that "specific provisions" are included because the law requires that they be included is surely putting the cart before the horse.

Having read the contract in light of the proposal, the Board can only conclude that the intent behind treating the contractor's "light", "medium" and "heavy" classifications as comparable to various State classifications would be to require some parallel between the two. However, without having any criteria spelled out, it is not clear what this was supposed to mean to appellant.

The only description of how the process worked was provided by Jody Woods, a Departmental supervisor. Woods testified that he would determine the level of auditing skills he needed and request that skill level. Woods testified that he generally requested entry level personnel. In at least one instance when he had a more complicated audit to perform, Woods requested a higher skill level than usual. Thus, Woods focused on whether the consultant auditor could do the work assigned, not what that individual's qualifications were.⁵

Without specific direction in the contract, it is not unreasonable to use a performance approach to evaluate individual consultants and determine appropriate billing rates. As

⁵The Board makes no finding that the auditors provided at Mr. Woods request were, in fact, entry level or "light." There was no evidence presented from which to make such a finding.

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appellant argues, there is a great difference between private and public employment. Where a civil service system may rely heavily on length of service as a qualification, private industry could as easily use a "skill level" or "performance" approach. Thus, absent specific language in the contract requiring an assessment of each auditor are comparable to the parallel state classifications, it would not be unreasonable for a contract administrator to use performance as a measuring stick instead of experience.

This is not to say that appellant used a performance approach. There is no evidence that he did. However, the basis for this "overbilling" charge is a specific experience requirement the Department would have us read into the contract.

Finally, even if the Department is correct that the state classifications should be read into the contract and the only way to determine the appropriate billing rate is to measure the qualifications by length of experience, the Department's case still fails. The only evidence presented at the hearing that auditors were billed at inappropriate rates was the resume of one individual. Although appellant is charged with the potential loss of approximately \$60,964, this loss was not based on an analysis showing that the individual consultants did not meet the Department's criteria for specific billing rates but rather on the Department's inability to verify that the individual

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consultants did meet the Department's claimed requirements. Without proof that the consultants were underqualified, the evidence simply does not support the allegation that the claimed loss was attributable to overbilling based on a lack of qualifications on the part of the consultant auditors.

This charge is not sustained.

Training

Appellant is charged with authorizing payment for training. The RFP sought consultants with specific knowledge of governmental auditing principles, standards and procedures. The response to the request specifically represents that "[a]ll assigned personnel will have knowledge of governmental auditing principles, standards and procedures and federal cost principles and many will have previous work experience on Caltrans projects." Clearly, the department bargained for auditors trained in governmental accounting. In addition, the joint venture agreement specifically provides that training is to be provided by Price Waterhouse at no additional cost to Caltrans.

For his part, appellant argues that the "training" provided was merely technical instruction on how Caltrans wanted the consultant auditors to maintain their records and how to make sure that the audits complied with federal regulations. Thus, appellant's argument is not that he did not authorize the amount expended on "training," but that the training was appropriate.

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The contract provided for direct audit services at an hourly rate. It did not provide for training. The joint venture agreement specifically provided that training would not be charged to the contract. Consequently, even if training was a good idea, it was beyond the scope of appellant's authority to authorize that contract funds be expended on it. Before authorizing training, appellant should have sought a contract amendment. This charge is sustained.

Installation of Local Area Network

Appellant is charged with improperly authorizing the installation of a local area network (LAN) computer system in violation of both Department rules concerning acquisition of such systems and of the contract.

Norma Jacobs, Assistant Director of Auditing and appellant's superior during the pertinent period, testified that she asked appellant to develop a monitoring system to determine how much time Vargas and Miranda were spending on audit work. Appellant testified that he determined that it would cost the Department several thousand dollars to obtain software to perform this function. When he spoke to Rudy Vargas about the problem, Vargas agreed to install the hardware at no cost and to provide the programming for approximately \$5,000.00.⁶ The Department

⁶Although this amount was initially billed to, and paid by, Caltrans, it is undisputed that Vargas eventually gave the Department credit for the amounts billed.

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charges this as improper for two main reasons: 1) appellant did not follow the State Administrative Manual provisions regarding acquisition of information technology; and 2) it was beyond the scope of the contract.

The State Administrative Manual directs that installation of LANs is to be treated as an "information technology project." As such, "the mechanism for approving information technology projects is the Feasibility Study Report (FSR). All information technology projects must have an approved FSR prior to the . . . expenditure of resources (i.e. staff time) beyond the feasibility stage." It is undisputed that there was no attempt to comply with the State Administrative Manual. This allegation is sustained.

The Department also alleges that installation of the LAN was beyond the scope of the contract because it was not "audit consultant services." Appellant contends that the contract was meant to include a broader view of audit consultant services. The Board rejects this contention. The contract was a fixed rate of compensation for direct audit services. Installation of a computer network is not direct audit services.

Appellant claims no harm no foul noting that the Department eventually received a credit from Vargas for the amounts expended for the programming costs. Nonetheless, payment for this kind of service was beyond the scope of the contract. Since appellant

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had an obligation as Contract Administrator to enforce the contract as written, his initial authorization of the LAN was improper.

Installation of LAN billed to Federal Earthquake Funds

It is undisputed that appellant initially authorized the billing of the programming costs to Federal Earthquake funds. The Department claims that this authorization was inappropriate.

The ALJ dismissed this charge because no evidence was introduced concerning the conditions under which the federal monies were granted. The Board agrees with this analysis and dismisses this charge.

"P" Numbers

When the contract was first let, it was paid entirely by State funds. However, after the Loma Prieta earthquake, federal money became available for rebuilding. The Department let a great number of contracts in connection with this "rebuilding" process. One of the assignments of the joint venture was to audit a number of these "earthquake" contracts. In order to obtain federal reimbursement for the auditing of the earthquake contracts, it was necessary to be able to trace the audit work being done by the joint venture auditors on these projects.

A number of Department witnesses testified the Department has developed so called "P" numbers to identify specific audit assignments. Although the "P" numbers may play various roles in

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tracking information for the Department, in the context of this adverse action, the important function of the "P" numbers is to allow the Department to support its decision to seek 100% reimbursement from the federal government. It is undisputed that appellant did not initially require the joint venture to use the "P" number system in identifying audit assignments. However, this did not become a problem until the 100% reimbursable federal activities were added.

Piecing together the evidence submitted at the hearing, it appears that contract auditors would be assigned to audit specific contracts or to audit simultaneously a number of contracts with the same contractor. The audits of only some of these contracts were federally reimbursable. Each week, time sheets were prepared setting out the hours of each auditor. These time sheets were grouped together and submitted for payment with a summary and an invoice. Appellant prepared a breakdown on the invoice segregating the amount that was to be paid by the state from the amount that was federally reimbursable.⁷ A copy of the time sheets was circulated to the Department supervisors who would check that the time sheets accurately reflected the time put in by each auditor, but there was no designation on the time sheets that identified the particular contract that the

⁷The basis of appellant's ability to breakdown the amount that was 100% reimbursable is not clear.

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individual auditors worked on. Consequently, although appellant designated a certain amount of the billing as federally reimbursable, there was no means of tracking back the auditor hours to the particular contract audited.

Appellant claims that Expenditure Authorization (EA) numbers which designated the contract being audited as 100% federally reimbursable was all that was required. However, appellant could not explain how an auditor following an audit trail backwards from accounting could identify the particular federally reimbursable project from the EA number.

Appellant also argued that if he had been given more time before he was dismissed, he could have identified the federal contracts. Even if appellant is correct, this response begs the question. The fact that some necessary records could be reconstituted is no defense to inefficiency.

Appellant argues that he did not require "P" numbers because the contract did not require them. The evidence established that it was Department policy to use "P" numbers in its own audits for the purpose of creating an audit trail. The Board concludes that, given his years of experience and position at Caltrans, appellant should have known of the Department's policy. The requirement that an auditor have a system to allocate work to specific audit assignments appears to be reasonable, especially where audits are to be charged to different accounts. Therefore,

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appellant, as Contract Administrator, was negligent not to have anticipated the need for the joint venturers to either use the Department's system for, or at least to have in place some alternative method of, directly tying audit work to specific contracts for the purpose of creating an audit trail to justify federal reimbursement. The allegation that appellant improperly failed to require the joint venturers to record audit assignment numbers is sustained.

The actual loss to the Department in federal reimbursement as a result of the non-use of "P" numbers has not been quantified. In its brief before the Board, the Department asserts that Eidams and Legate testified that the lack of "P" numbers caused the Department not to seek \$250,000 of federal reimbursement. A review of the transcripts, however, indicates that when Legate testified that the loss was approximately \$250,000, she was mixing up the amount at issue in the audit exception report with the amount of the state would lose in federal reimbursement.⁸

After Legate's confused testimony, Eidams took the stand to affirm that the \$250,000 figure testified to by Legate was not

⁸The audit exception report quantifies the amount the state refused to pay the joint venturers. This amount is conceptually different from whatever amount the state properly paid the joint venturers but, because of a lack of documentation, cannot be reimbursed by the federal government.

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the amount of unreimbursed federal charges. However, Eidams did not testify as to how much the state lost in reimbursement.

Paragraph J of the adverse action states that 18.8% of the audit sample included time sheets which did not provide enough information to establish an audit trail sufficient for federal reimbursement. Paragraph J then applied this 18.8% failure to an amount over 2 million dollars (ostensibly the contract amount) to project a range of up to \$417,170 in losses to the state in federal reimbursement.

Paragraph J grossly overstates the potential loss. Of the \$2.4 million dollars in the contract as amended, only \$600,000 was to be completely reimbursable by the federal government. In addition, as discussed above, "P" numbers were not required in the early part of the contract because the \$600,000 of reimbursable funds were not added until the Loma Prieta earthquake. However, there was no information that the audit sample excluded the early days of the contract. Thus, the Department's charge that 18.8% of the time sheets lacked "tracking" information provides little information with which to evaluate the loss to the state. Consequently, while we find there was some loss to the state, the record contains insufficient evidence to evaluate the amount of the loss.

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Destruction of Time sheets

Appellant was charged with arranging for the destruction of all bills and time sheets received from the joint venture prior to March, 1991 despite the State's contractual responsibility to retain these records for three years from the last day of the contract.⁹. Appellant testified that three copies of all invoices with appropriate bills and time sheets were sent to him by the joint venturers and he, in turn, sent all these copies to accounting. According to appellant, the contractor sent him a fourth copy which he circulated to his supervisors for review and generally used for his own review. He kept these copies (the fourth copy) in boxes in the Caltrans audit office. Appellant's supervisor ordered the destruction of all unnecessary documents because of space considerations. Appellant destroyed the boxes of documents in the Caltrans audit office.

The ALJ found that Department witnesses testified credibly and without contradiction that it is the practice of the accounting department to keep copies of whatever is sent to them.

These same witnesses testified that they caused the accounting files to be searched and, although the invoice cover sheets were

⁹Article XII of the contract provides that "The Contractor, subcontractors and the State shall maintain all books document, papers, accounting records and other evidence pertaining to the performance of the contract, but not limited to the costs of administering the contract." The contract specifically requires record retention for 3 years.

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present and had been paid, invoices and time sheets were not present in a great number of cases for invoices paid between December 1990 and March 1991. The ALJ who heard the testimony of the witnesses specifically discredited appellant's testimony that the records he sent to accounting were complete. The ALJ found that appellant did not send to accounting the invoices and time sheets as claimed. Since appellant himself contends that the materials he destroyed contained the sort of documentation which was missing from the materials lodged in accounting, we find that he knowingly caused the destruction of files which he should have kept.

Computer Purchase

Appellant is charged with inappropriately authorizing the expenditure of Federal Earthquake funds to buy computer equipment. Appellant testified that he was asked by his superiors, Norma Jacobs and Joe Fouret, if there was any justification for using federal earthquake monies to purchase computers. Appellant testified that he believed that, as long as the monies were used for auditing federally reimbursable contracts, that it was appropriate. Since no evidence is presented as to the conditions of the federal grants, the ALJ appropriately dismissed this charge.

ISSUES

This case presents the following issues for our determination:

a) Were each of the charges established by a preponderance of the evidence;

b) Assuming the charges are supported by the evidence, applying the factors set forth in Skelly, what is the appropriate penalty under all the circumstances; and,

c) Did the Department violate appellant's Skelly rights by its failure to turn over documents requested?

DISCUSSION

Appellant was charged with violations of Government Code section 19572, subdivisions (c) inefficiency, (d) inexcusable neglect of duty, (f) dishonesty, (o) willful disobedience, and (t) other failure of good behavior. The Board sustained several of the allegations in the Notice of Adverse Action.

The Department established by a preponderance of the evidence that appellant instructed one of the joint venturer participants to submit invoices directly to the Department for payment, a system which bypassed a contractually mandated review process. The Department also established that, in violation of the terms of the contract, appellant allowed the minority participants to perform their own coordination functions and bill this activity to the contract. The Department proved that

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appellant authorized the installation of a computer system without following appropriate channels for approval, and authorized programming and installation charges that were not allowable under the terms of the contract. In addition, the Department established that appellant destroyed copies of bills and time sheets in his possession with knowledge that copies of these bills and time sheets had not been forwarded to accounting where they would be maintained

As a Senior Management Auditor and Contract Administrator of contract 77G639, appellant had a duty to enforce the terms of the contract and abide by the Department's policies. The above findings demonstrate that appellant failed to enforce the terms of contract 77G639 or follow department policies. This failure constitutes inexcusable neglect of duty under Government Code § 19572, subdivision (d).

Finally, the Department proved by a preponderance of the evidence that appellant failed to require the joint venturers to include "P" numbers on their time sheets in violation of his duty to see that an adequate audit trail existed to ensure federal reimbursement. This failure constitutes both inexcusable neglect of duty and inefficiency, violations of Government Code § 19572, subdivisions (d) and (c).

Notably, the charges involving billing for coordination functions and the installation of the computer ultimately were

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resolved so as to cause no loss to the state. However, appellant originally approved these payments and the joint venturers relied on appellant's approval. The later reversal of those charges cost the joint venturers a significant amount of money. Thus, appellant's original approval of these charges constitutes a violation of Government Code § 19572, subdivision (t), other failure of good behavior which causes discredit to the Department or to a person's employment. The allegations of dishonesty and willful disobedience are dismissed. There remains the question of the appropriate discipline.

Penalty

The Board considers a number of factors it deems relevant in assessing the propriety of the imposed discipline. Among the factors the Board considers are those specifically identified by the Court in Skelly v. State Personnel Board (1975) 15 Cal.3d 194 as follows:

...[W]e note that the overriding consideration in these cases is the extent to which the employee's conduct resulted in, or if repeated is likely to result in [h]arm to the public service. (Citations.) Other relevant factors include the circumstances surrounding the misconduct and the likelihood of its recurrence. (Id. at 218)

In this case, the appellant violated his duty to enforce the terms of the contract and abide by Department auditing policy. The expenditure of public monies is a public trust. Although the amount of loss to the state has not been quantified, the harm to

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the public service resulting from appellant's neglect of duty is obvious. When a high level auditor bends or ignores basic rules of accountability and contract administration by approving contract expenditures that result in significant audit exceptions, the reputation of the Department is seriously harmed.

Even when the improper approvals do not result in the loss of

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state money, the relationship between the Department and its contractors is compromised. Finally, when an auditor fails to recognize the significance of an audit trail to support federal reimbursement, the Department's reputation is seriously jeopardized and its ability to recover that reimbursement is greatly hampered.

On the other hand, appellant is a 27 year veteran of Caltrans who has never been subjected to adverse action. It is clear from the record that he was afforded little supervision. In fact, in her testimony, appellant's supervisor ratified many of appellant's actions. The in-depth review of appellant's performance as administrator of this contract should result in better control on the part of the Department which would guard against any recurrence of the problems uncovered during this action.

For the reasons set forth above, the Board has determined that although appellant's behavior warrants a serious penalty, dismissal is not warranted. Appellant is suspended for one year

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from the date of his dismissal.

The Skelly Violation

In Skelly v. State Personnel Board (1975) 15 Cal 3d 194, 215, the California Supreme Court determined that minimal standards of due process required only that, prior to imposition of discipline, a public employee must be afforded certain procedural safeguards including: (1) notice of the action proposed, (2) the grounds for discipline, (3) a copy of the charges and materials upon which the action is based, and (4) the opportunity to respond in opposition to the proposed action. Id. at 215. Based on Skelly, appellant contends that the Department should have provided him with certain materials necessary to prepare his defense which he requested in his letter of February 4, 1992 and certain other materials which he contends necessarily underlie the adverse action.

We need not reach the question of whether a Skelly violation has occurred because we have determined to return appellant to his position. The remedy for a Skelly violation (backpay) would be applicable only if the Board sustained appellant's dismissal.

Since there is no remedy, the Board declines to reach the Skelly question.

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CONCLUSION

For all of the reasons set forth above, appellant is found guilty of inefficiency, inexcusable neglect of duty and other failure of good behavior. Appellant is suspended for one year.

ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in this case, it is hereby ORDERED that:

1. The above-referenced action of the Department of Transportation in dismissing appellant is modified to a one year suspension;

2. The Department of Transportation shall reinstate Ronald J. Holte to the position of Senior Management Auditor and pay to him all back pay and benefits that would have accrued to him had he been suspended for one year rather than dismissed.

3. This matter is hereby referred to the Administrative Law Judge and shall be set for hearing on written request of either party in the event the parties are unable to agree as to the salary and benefits due appellant.

4. This opinion is certified for publication as a Precedential Decision (Government Code § 19582.5).

THE STATE PERSONNEL BOARD*

Richard Carpenter, President
Alice Stoner, Vice-President
Lorrie Ward, Member
Alfred R. Villalobos, Member

*Member Floss Bos did not participate in this decision.

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* * * * *

I hereby certify that the State Personnel Board made and adopted the foregoing Decision and Order at its meeting on January 6, 1994.

GLORIA HARMON

Gloria Harmon, Executive Officer
State Personnel Board