

School Construction Auth. v. Ray

OATH Index No. 2188/11 (Sept. 16, 2011)

Petitioner established that a construction management project officer directed contractor to purchase unauthorized computer and other equipment, some of which was for his personal benefit. ALJ recommended 60 days' suspension.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of

SCHOOL CONSTRUCTION AUTHORITY

Petitioner

- against -

TRACY RAY

Respondent

REPORT AND RECOMMENDATION

TYNIA D. RICHARD, *Administrative Law Judge*

This disciplinary proceeding was referred by the School Construction Authority ("SCA") pursuant to section 75 of the Civil Service Law. Petitioner charges Tracy Ray, a construction management project officer, with directing a city contractor to purchase various items for his personal benefit. Respondent denies the allegations.

The hearing was conducted before me on June 22, 2011. Petitioner presented three agency witnesses, Mr. Jaffess, Mr. Spano, and Investigator Baldassarri. Respondent testified on his own behalf and presented the testimony of Ms. Egan. At petitioner's request, the record was held open until July 20, 2011, for the submission of a post-trial brief. Respondent declined to submit one.

For the reasons set forth below, I find that petitioner established misconduct and recommend a 60-day suspension.

ANALYSIS

Respondent is charged with directing a city contractor to purchase certain unauthorized equipment for his use (Pet. ¶ 4). In so doing, respondent is also charged with misuse of the agency procurement process to pay for items to be used for his personal benefit (Pet. ¶ 5).

Finally, he is charged with obtaining an item, an Ultima easel pad, not customarily used to equip agency construction management trailers (Pet. ¶ 6).¹

Respondent is a Project Officer with SCA's Construction Management Department. His responsibilities include managing construction projects to assure the work is done in accordance with plans and specifications, responding to questions from the general contractor, ensuring the contractor adheres to the construction schedule and contractual requirements, checking change order requests for validity, and reviewing and approving payment requisitions (Tr. 33).

The charges involve respondent's work as Project Officer on a \$4.8 million capital improvement project at Intermediate School 144 in the Bronx ("IS 144"), an exterior renovation for which Minelli Construction Company, Inc. ("Minelli") is the general contractor (Tr. 35). Petitioner alleges that, even though SCA supplied him with a laptop computer, a desktop computer, and an all-in-one-printer, respondent directed Minelli to purchase certain unauthorized equipment for his personal use, including a Toshiba notebook computer, a Hewlett-Packard all-in-one color printer ("HP color printer") and ink cartridges, an internet radio, a Livescribe Notebook and Smart Pen with leather case and Smart Pen charger, an external DVD read/write multi-recorder, a Passport 500 gigabyte external hard drive, an Ultima electronic easel pad, a wireless keyboard, a Keurig coffee maker and carousel, a Bamboo Pen and Touch Tablet, and five cases of bottled water.²

On January 18, 2011, Senior Project Officer Matt Jaffess, respondent's immediate supervisor, received an e-mail from respondent that indicated Minelli had purchased a laptop computer for him through the office supply allowance (Pet. Ex. 3). This prompted Mr. Jaffess to contact the inspector general's office (Pet. Ex. 3). The IG assigned Christopher Baldassarri to investigate. Investigator Baldassarri made two unscheduled visits to respondent's work trailer, the first on February 8, 2011, and the second on April 7, 2011 (Tr. 140, Pet. Ex. 12). The items listed above were all confiscated from respondent's work trailer. Baldassarri wrote a memo on April 8, 2011, itemizing the items he confiscated including the Toshiba notebook computer, an HP color printer and ink cartridges, an internet radio, an external DVD read/write multi-recorder, a Passport 500 gigabyte external hard drive, and a Bamboo Pen and Touch Tablet (Pet. Ex. 12).

¹ Petitioner amended paragraph 6 of the charges to delete references to all items except the Ultima easel pad (Tr. 283).

² This list contains items added by amendment to paragraph 4 of the Petition, submitted by petitioner by e-mail dated May 11, 2011.

Additional items were picked up some time later (Tr. 50-52). Minelli provided Jaffess with a letter of transmittal that listed all the items Minelli purchased at respondent's request and contained all the items alleged by petitioner, except the wireless keyboard (Pet. Exs. 1A, 14A-K; Tr. 54-56, 58, 181-82). In Mr. Jaffess's opinion, there was no need for respondent to purchase these items (Tr. 52-53).

Respondent contends these items were all purchased for business purposes. He testified, without contradiction, that these items were never taken home with him (Tr. 285). Indeed, Investigator Baldassarri testified that he found the Toshiba notebook and other items in the work trailer in plain sight both times he visited (Tr. 171-72). There appeared to have been no effort to conceal them.

According to Mr. Jaffess, computer equipment may only be purchased if authorized in the standard contract specifications for Temporary Facilities and Controls, which was offered as Petitioner's Exhibit 2 ("Section 1500") (Tr. 37). Section 1500 requires the contractor provide the Project Officer with a temporary field office, in this case a trailer, and details the field office equipment to outfit the trailer, setting forth the specific size and number of plan tables, bookcases, conference tables, filing cabinets, etc. (Pet. Ex. 2 at 7, 9-10). Authorized computer equipment includes a desktop computer, printer, scanner, Ethernet switch, and router, all of which are described in detail including brand and model number (Pet. Ex. 2 at 11-12; Tr. 38). Petitioner contends the items respondent had Minelli purchase for him were not authorized in accordance with specifications.

Section 1500 contains an "Appendix A" that lists permissible office supplies that may be purchased through a \$3,000 allowance (Pet. Ex. 2 at 10). Allowance amounts not expended by the contractor are to be credited back to the SCA (Pet. Ex. 2 at 11). Appendix A includes in the list of office supplies items such as batteries, paper clips, diskettes, envelopes, pads of paper, pencils and pens, staplers, scissors, etc. (Pet. Ex. 2 at 18-19). Appendix A does not contain computer equipment. All of the items set forth below were purchased by Minelli, pursuant to respondent's request, and were charged to the \$3,000 office supplies allowance by Minelli. Petitioner contends this was improper and suggests it was the fault of respondent. Respondent contends he is not at fault because he was not aware they were being charged to the office supplies allowance.

Section 1500 requires the contractor purchase only new computer equipment for the temporary field office, or trailer, and that it be purchased through SCA's equipment vendor and shipped directly from the vendor to SCA's IT department (Pet. Ex. 2 at 11-12). It is not disputed that this procedure was not followed here. Similarly, SCA's "Procedure No. IT-1: Computer Usage and Support" ("IT-1") requires that computer equipment for field offices be shipped directly from the vendor to the IT department at SCA for inventory check, configuration, and installation by the operations group (Pet. Ex. 6). During this process, games and other non-work related programs are removed (Tr. 62). According to Mr. Jaffess, IT-1 was distributed to all project officers in hard copy in 2004 and again approximately four years ago and it is located on SCA's website (Tr. 61, 90). Respondent said he did not recall receiving it (Tr. 319), but employees are on notice of rules and regulations made widely available. *See Dep't of Sanitation v. DeSantis*, OATH Index No. 1494/05 at 5 (Oct. 31, 2005) (employee is chargeable with notice of agency rules if they are "made known to him or made generally accessible in a manner reasonable calculated to give notice"). In addition, Section 1500 consists of contract specifications that respondent, as Project Officer, is responsible for knowing and implementing.

Toshiba notebook computer

It was not contested that, pursuant to respondent's request, Minelli purchased for him a Toshiba notebook computer. A photograph of the Toshiba, which was recovered by Investigator Baldassarri from SCA's Director of Human Resources, is Petitioner's Exhibit 14A (Tr. 147; Pet. Ex. 12). Mr. Spano, Project Manager for Minelli, purchased the item from Best Buy at a cost of \$412.83 including applicable sales tax (Pet. Ex. 1B) and delivered it to respondent himself (Tr. 110).

Mr. Spano testified that the purchase was precipitated by a conversation he had with respondent in which respondent told him that his notebook computer was ruined when he dropped in a water puddle (Tr. 106-07). He denied familiarity with the contract requirement that computer purchases go through the contract vendor and said the office administrator, Ms. Egan, handled such matters (Tr. 128). He had thought it was reasonable to purchase the Toshiba to replace the one that was ruined, though he said respondent did not tell him the damaged notebook had been his personal computer (Tr. 129-30). Ms. Egan testified that, although a notebook computer was not provided for in the specs, it was something respondent needed to sustain the project (Tr. 219).

Respondent testified that he had been using his personal notebook computer for work because it was lightweight and convenient to carry (Tr. 238). He decided to order a new notebook computer through Minelli because his personal notebook was ruined when dropped in a water puddle at the job site. He said that he mentioned this to a Minelli employee – not Mr. Spano – who suggested he purchase a new notebook because the cost could be offset by savings resulting from the fact that he was purchasing so few furniture items to set up his trailer (Tr. 233-36, 343). The specs allow contractors to decide not to purchase items designated to set up the project officer's work trailer, in which case a credit will be taken by the contractor for the items not purchased (Tr. 79, 81). Respondent said he believed there would be no problem applying those credits to offset purchase of the notebook since he was not purchasing all the furniture allowed in the contract specs (Tr. 344). He admitted he was fully familiar with the Section 1500 specs, that laptops are not authorized in the specs, and that purchasing the notebook would result in SCA paying for it (Tr. 39-40, 345-47).

Respondent said he intended to use a flash drive to transfer work materials from the desktop computer set up in his trailer to the notebook to facilitate his work. But when he brought the notebook to SCA's IT department for configuration, they could not connect it to SCA's network (Tr. 366). Thus, he admitted the Expedition software program used by SCA to store documents, reports, and requisitions was unavailable to him on the notebook (Tr. 367). He also admitted he had not used the Toshiba very often (Tr. 241).

It was not disputed that SCA provides all of its Project Officers with a Dell laptop computer which they are expected to use in the field, but respondent kept his laptop in his office at headquarters and does not use it in his construction trailer (Tr. 237). He complained it was heavy and bulky to carry and had been stolen several times from his vehicle when he left it on the back seat (Tr. 239-40, 349). Respondent, who is approximately six feet two inches tall and 220 pounds, had to concede that a laptop computer was not too large for him to carry (Tr. 348).

Mr. Jaffess disputed there was any need for the notebook since respondent had both a desktop and laptop issued to him for use in the field (Tr. 57).

Respondent failed to establish a business purpose for the purchase of the Toshiba, which also was not authorized in the specs. While the Toshiba might have been used to facilitate his work, there was no reasonable basis for purchasing equipment that was incompatible with the SCA network. Second, he should not have replaced his personal notebook with one purchased

by SCA, even assuming he had used his personal notebook primarily for work. He had no authority to do so. Third, he had no need for a notebook computer because he had been issued functioning desktop and laptop computers by SCA. Respondent's "inconvenience" argument was neither convincing nor proper as a basis for his actions. Fourth, because of the personal content found on the notebook's hard drive, respondent did not establish that the notebook was primarily used for a business purpose.

A forensic expert extracted the files found on the Toshiba confiscated from respondent and downloaded them to a CD (Tr. 150; Pet. Ex. 10). The Toshiba had five folders that contained 40 personal photographs, a video of a college basketball game, and two work-related items, a memorandum and an invoice (Tr. 151-52). On the CD produced at the hearing, I found approximately 25 photos, a video, and about 25 word processing files which included one work-related memo and one invoice (Pet. Ex. 10). Although he did not recall there being a video on the Toshiba, respondent admitted the personal items found on the notebook's memory were his and that some were his son's that were downloaded inadvertently (Tr. 249-51, 352). City rules allow for some personal use of computer equipment (*see* City of New York, Policy on Limited Personal Use of City Office and Technology Resources), but only two of approximately 52 files found on the notebook were found to be work-related.

The evidence failed to show a primarily business purpose for purchase of the Toshiba notebook; thus, I find it was purchased for respondent's personal benefit. The purchase also violated IT-1 procedures for the purchase of computer equipment (Pet. Ex. 6 at 6).

HP Officejet 6500 Wireless All-in-One Printer and ink cartridges

It was not contested that, pursuant to respondent's request, Minelli purchased for him an HP color printer and ink cartridges. Photographs of these items recovered from respondent's work trailer are marked as Petitioner's Exhibits 14C and 14D (Pet. Ex. 12). Mr. Spano purchased the items from CompubizUSA at a cost of \$172.88 (Pet. Ex. 1C).

The Section 1500 specifications authorize purchase of a Hewlett Packard 4250N desktop printer for respondent's work trailer (Pet. Ex. 2 at 12). Respondent testified that the wrong printer had been ordered by Minelli and delivered to the trailer and, because it did not comply with specs, SCA's IT department would not install it (Tr. 245-46). A delay ensued while Minelli attempted to get the proper approvals for installation. In the meantime, he decided he needed a "backup" printer because IT had warned him not to use the unauthorized printer (Tr. 248). In

addition to regular printing, copying, and faxing, he said he used the HP color printer to print color photographs of the work site (Tr. 262). He also said he downloaded work documents to his notebook and printed wirelessly on the HP color printer.

Ms. Egan testified that one of the first things she did to set up the project was to order a printer/copier/fax machine; she did not recall the brand name she ordered (Tr. 197-99). She obtained the machine from another SCA construction job that was ending. Although it was not the one listed in the specs, prior to ordering it, she was told by SCA's IT department that it was okay to use because it was equivalent to the machine in the specs (Tr. 205). But when it arrived, the machine was found incompatible with the network (Tr. 200). She said that respondent asked her to order the HP color printer as a "backup" at the start of the project (Tr. 199).

Mr. Jaffess maintained that respondent had no need for the HP color printer because a three-in-one machine was purchased for his trailer (Tr. 57). If the printer authorized in the specs was not functioning properly, the IT department should have been alerted to service it. It is not permissible to purchase alternate equipment.

Although a work-related purpose existed for the purchase, there was no reasonable basis for purchasing an additional all-in-one printer when one was authorized and purchased for him in accordance with Section 1500 specifications. If it was not working, he should have had it serviced. There was no authorization for a "backup" printer and no proof of a need for it. Respondent did not show that attempts to have the authorized printer serviced were exhausted or that he had such an urgent need for printing, copying, or faxing that he could not wait out the usual inconvenience of a service visit. Respondent's purchase of the HP color printer, while not for personal use, was unauthorized and unnecessary.

Passport 500 gigabyte external hard drive

It was not contested that, pursuant to respondent's request, Minelli purchased a 500 gigabyte external hard drive for him at a cost of \$79.99 before taxes (Pet. Ex. 7 at 1). A photograph of the external hard drive recovered from respondent's work trailer is Petitioner's Exhibit 14B (Tr. 149; Pet. Ex. 12). Forensic analysis uncovered 700 music files on the hard drive and nothing else (Tr. 152-53; Pet. Ex. 11). It was not known whether the songs were downloaded all at once or on more than one occasion (Tr. 175). Respondent testified that he initially did not know how the music files got on the hard drive. He later recalled that, around the date the files were downloaded, he had intended to download photographs of a construction

project from a flash drive and he may have confused that flash drive with a personal flash drive that had music files on it (Tr. 256-57).

Respondent testified that he requested the external hard drive to increase his capacity to store videotapes of construction jobs, because the Toshiba notebook had less memory than a laptop (Tr. 254-55). The videos could be used to show the progress of the construction, to improve his presentations, and to develop tapes for training purposes, which he has done in the past. There were neither photographs nor videotapes of construction jobs found on the hard drive.

Respondent's work-related justification for purchasing the external hard drive was plausible. But, even assuming it is true, there was no need to purchase additional hard drive capacity on which to store photos and video, because he had a laptop and desktop that could have stored such files. Thus, his perceived "need" for this item was created by his failure to use the computers already assigned to him. I found purchase of the external hard drive not only unauthorized in the specifications but also lacking a reasonable basis.

External DVD read/write multi-recorder

It was not contested that, pursuant to respondent's request, Minelli purchased an external DVD drive for him at a cost of \$69.99 before taxes (Pet. Ex. 7 at 4). A photograph of the DVD drive recovered from respondent's work trailer is Petitioner's Exhibit 14F (Pet. Ex. 12).

Respondent did not offer a work-related use for this item (Tr. 265). He said he ordered it because notebooks are smaller and do not have all the features of a laptop; thus, the Toshiba did not have an internal CD reader (Tr. 264). Not only was there no authorization to purchase this item, but respondent offered no work-related use for it. I therefore find it was purchased for his personal benefit.

Grace internet radio

It was not contested that, pursuant to respondent's request, Minelli purchased an internet radio for him at a cost of \$129.99 before taxes (Pet. Ex. 7 at 2). A photograph of the wireless internet radio recovered by Investigator Baldassarri from SCA's Director of Human Resources is Petitioner's Exhibit 14E (Tr. 147; Pet. Ex. 12).

Investigator Baldassarri testified that, during his interview, respondent told him he needed the internet radio because there was poor frequency in the trailer (Tr. 186). The investigator noted that a regular radio was playing loudly when he first arrived at respondent's

work trailer and it seemed to be working fine. Respondent testified there was poor reception and he wanted a better connection; he also needed the radio for weather and traffic conditions because of the time he spent on the road (Tr. 252-53).

Respondent offered an insufficient work-related basis for purchasing this item; I therefore find it was purchased for his personal benefit. Moreover, the item was unauthorized and I found no reasonable basis for purchasing it.

Livescribe Notebook and Smart Pen with leather case and Smart Pen charger

It was not contested that, pursuant to respondent's request, Minelli purchased the Livescribe Pulse 2G Smart Pen, charger, notebook, and leather case for him. The cost of these items was \$234.95 before taxes (Pet. Ex. 7 at 2-3).

Mr. Jaffess testified that this is an "electronic pad" (Tr. 58). Aside from that, none of the witnesses testified about the function or purpose of this item, including respondent, who did not indicate what business purpose, if any, it had. The item was not authorized in the specs. However, it is petitioner's burden to establish the item was purchased for personal use, as alleged, and petitioner failed to meet its burden.

Ultima electronic easel pad

It was not contested that, pursuant to respondent's request, Minelli purchased an Ultima easel pad for him at a cost of \$169.99 before taxes (Pet. Ex. 7 at 1). Mr. Jaffess testified that this item was found in respondent's trailer; he remarked that the easel pad was electronic (Tr. 51-52). Respondent admitted ordering this item, but denied it was electronic (Tr. 284-85). He said he wanted a free standing easel pad, like a dry marker board, for writing notes during progress meetings and said an architect could use it to make demonstrative drawings for the group (Tr. 253-54, 284). A photograph of the easel pad was presented as Petitioner's Exhibit 5; it appears to be a free standing marker board and does not appear to have an electronic apparatus. Although the specs provide for a "dry marker board" with erasable markers (Pet. Ex. 2 at 9), respondent testified that he needed a larger board than the one in the specs (Tr. 376).

Petitioner's witnesses did not dispute that this free standing easel pad performed a valid work function. It was not explained why this item was not confiscated in the search conducted by Investigator Baldassarri; it may be that the investigator assumed it had a business purpose. Respondent offered a work-related basis for purchasing this item, which I credit. However, the item was unauthorized and I found no reasonable basis for purchasing it through the allowance

for office supplies when a dry marker board was provided in the specs. There was no showing that a larger board was necessary.

A separate allegation of misconduct set forth in paragraph 6 of the Petition, where petitioner claims that the Ultima pad was not “customarily” used to equip an SCA work trailer; aside from a cursory statement by Mr. Jaffess, there was no evidence regarding customary use of such items. Moreover, the fact that an item was not customarily used, alone, does not establish misconduct. Thus, the allegation of misconduct alleged in paragraph 6 of the Petition should be dismissed.

Bamboo Pen and Touch Tablet

It was not contested that, pursuant to respondent’s request, Minelli purchased a Bamboo pen and touch tablet for him at a cost of \$99.99 before taxes (Pet. Ex. 7 at 4). A photograph of the Bamboo set recovered by Investigator Baldassarri from respondent’s work trailer is Petitioner’s Exhibit 14J (Pet. Ex. 12).

Respondent testified that this bevel pad is used to insert his signature in form letters, in a script font, giving it a more professional look, and to send such letters electronically (Tr. 274-76). He appeared not to consider this an essential piece of equipment and said he had not seen anyone else use one. Rather, he considered it a “bell and whistle type” of item that would make his work product look more professional.

Although respondent offered a work-related basis for purchasing this item, I did not credit it. I therefore find it was purchased for his personal benefit. Also, the item was not authorized in the specs as field office equipment or office supplies, and I found the purchase of this item unreasonable given its limited purpose and high cost.

Keurig coffee maker and carousel

It was not contested that, pursuant to respondent’s request, Minelli purchased a Keurig coffee maker and coffee carousel for him at a cost of \$169.97 before taxes (Pet. Ex. 7 at 2).

Respondent testified that he thought it was protocol to charge the cost of a coffee maker to trailer set up, and he was unaware that project officers purchased their own coffee makers (Tr. 354). He said this particular coffee maker was the “newest thing” and he had seen it at four or five SCA work sites he had visited recently (“a lot of people are getting that now”) (Tr. 373). He also said he did not know it was so costly when he ordered it (Tr. 357).

Respondent did not offer a work-related reason for purchasing it; I find it was purchased for his personal benefit. The coffee maker was not authorized and, given its cost, I found it unreasonable.

Bottled water

The evidence shows that, pursuant to respondent's request, Minelli purchased five cases of bottled water for respondent at a cost of \$29.95, which was charged to the office supplies allowance (Pet. Ex. 7 at 4).

Respondent said he had no problem ordering bottled water previously (Tr. 364). According to the specifications, a water cooler is to be provided for the work trailer as well as "fresh bottled water," which should be provided "as needed" (Pet. Ex. 2 at 10). Thus, bottled water was authorized. Since it is listed in the specs under field office equipment, it should not have been charged to the office supplies allowance, however. But this could easily be attributed as inadvertence by Minelli who charged it to the allowance. This item was not purchased for respondent's personal benefit.

Wireless keyboard

None of petitioner's witnesses offered testimony about a wireless keyboard. Respondent was not questioned about one. This item was not included in the list of items that Investigator Baldassarri recovered from respondent's work trailer (Pet. Ex. 12), nor was it among the items Investigator Baldassarri photographed and offered testimony about (Tr. 181-82; Pet. Ex. 14A-K). Though there are "wireless" items among those Ms. Egan purchased and charged to the office supplies allowance, it is unclear whether any of them is a keyboard (Pet. Exs. 1A, 7, 9).

In the absence of any testimony about this item, there is insufficient basis to make a finding that a wireless keyboard was purchased for respondent's benefit.

Unauthorized purchase and personal use

Petitioner alleges that respondent had unauthorized items purchased for his use in subversion of the procurement process (Pet. ¶ 4). The evidence establishes that Minelli purchased for respondent's use a Toshiba notebook computer, an HP color printer and ink cartridges, an internet radio, a Livescribe Notebook and Smart Pen with leather case and Smart Pen charger, an external DVD read/write multi-recorder, a Passport 500 gigabyte external hard drive, an Ultima electronic easel pad, a Keurig coffee maker and carousel, and a Bamboo Pen and Touch Tablet without proper authorization. While it was protocol for the project officer to

place an order for supplies with the contractor who then purchased them, here the items purchased were not authorized as field office equipment or office supplies pursuant to contract specifications (Pet. Ex. 2). Petitioner did not establish that the bottled water was unauthorized and the proof was insufficient to make any finding with respect to the wireless keyboard. Petitioner's allegation that normal protocols were subverted is addressed, below, in the discussion of the allowance for office supplies.

Petitioner also alleges that the items were obtained for respondent's personal use (Pet. ¶ 5). The fact that respondent kept the items in his work trailer, and did not take them home, is some indication that they were intended for work use. However, I have found that some of the items were obtained for respondent's personal benefit rather than any work-related use including the Toshiba laptop, the DVD drive, the internet radio, the Bamboo pen and touch tablet, and the Keurig coffee maker and carousel. Many of the purchases, even if work-related, were simply unreasonable for purposes of administering a city contract.

Respondent attempted to explain some of the purchases by noting that the choice of high end office items was not unusual for SCA project officers. He testified that he had observed deviation from the specs such as trailers outfitted with television sets, large refrigerators, and DVD connections (Tr. 371). He said he observed a 32-inch flat screen TV, a large refrigerator, and a fax machine that varies from the specs in Mr. Jaffess's trailer (Tr. 372). He admitted, though, that he did not know whether Mr. Jaffess had charged SCA or the contractor for the items or had paid for them himself (Tr. 377). Petitioner did not recall Mr. Jaffess to the witness stand to clarify the allegation. Mr. Jaffess testified that, as a Senior Project Officer, he is allowed more equipment but then admitted the contract does not state that (Tr. 99).

Office supplies allowance or trailer set up expense

Respondent maintains that he did not intend for these items to be charged to the office supplies allowance; rather he thought they would be charged as a cost of setting up his trailer.³ Petitioner argues that respondent was not permitted to select items that were not specifically set forth in the specs, and the specs do not allow the purchase of computer equipment in exchange for furniture allocated to set up the trailer.

Respondent pointed to a \$20,000 budget item for "field office setup-SCA" in the payment application for the IS 144 project and asserted that he expected the cost of the computer and

³ Ms. Egan, who handled billing for Minelli, was unfamiliar with a trailer "setup allowance" (Tr. 218).

other items to be charged to this line item (Tr. 300, 303; Resp. Ex. C). The furniture items purchased for the trailer were billed to this line item (Tr. 306). He expected Minelli to bill the computer and other items the same way, and said he was remiss in not directing Minelli to bill the items to “field office set up.” He knew there was enough in the budget to cover the purchases, because there were several authorized furniture items that he did not need and had not ordered (Tr. 309). Mr. Jaffess acknowledged this (Tr. 78-81, 84; Pet. Ex. 2 at 9-10). However, Jaffess insisted that project officers and contractors may not deviate from Section 1500 (Tr. 77) and furniture items may not be exchanged for computer items (Tr. 86). If an authorized item is not purchased, the contract permits the contractor to take a credit for the item (Tr. 79, 81). However, Jaffess contradicted his assertion that there could be no deviation by stating that equipment variations would be tolerated if approved by the head of the IT department (Tr. 87-88). He admitted he did not know what provision of the contract did this (Tr. 89).

Respondent testified that he did not direct Minelli to charge the items to the office supplies allowance and did not realize that Ms. Egan had done so until their e-mail exchange on January 18, 2011 (Tr. 308; Pet. Ex. 3). A set of e-mail transmissions between respondent and Minelli beginning on January 17 supports his claim.

In an e-mail exchange that is copied to Mr. Jaffess, Ms. Egan asks respondent for payment on the requisition and respondent replies that he is awaiting information from her (Pet. Ex. 3 at 2). When she asks “what information,” he responds on January 18:

You were to supply me the numbers and break-down so that I have them for records and review. I requested this over a week ago.

(Pet. Ex. 3 at 2). Ms. Egan replies:

As I previously explained the allowance was used in its entirety with your first staples order, laptop and additional printer and therefore [sic] should be paid in full. Do you wish to see receipts for these items?

(Pet. Ex. 3 at 2). Jaffess replies to respondent stating:

Why did you buy a laptop and addition [sic] printer from Staples? The SCA provides you with a laptop, the allowance is for supplies only.

Jaffess said his reference was to the allowance for office supplies (Tr. 46). Respondent replies to Jaffess:

I got that as backup to incase [sic] the printer and fax didn't work which now [sic] my problem. I had my person [sic] laptop and fell in the water at the site so I need another to keep up. It fell under budget. That [sic] why I ask for the break down so this can't come up again.

(Pet. Ex. 3 at 1). It is this e-mail transmission that prompted Mr. Jaffess to report respondent to the inspector general. At the hearing, Mr. Jaffess acknowledged that respondent's final sentence, above, was respondent's attempt to get a list of items that Minelli purchased from Staples and to identify what Minelli was charging to the allowance, and he admitted respondent's statements in the e-mail did not prove that he was trying to have the Toshiba billed to the office supplies allowance (Tr. 45, 77), although he initially thought it did (Tr. 97). Ms. Egan testified that she had no conversation with respondent about whether to charge the allowance, but she assumed it should be used (Tr. 215).

Respondent's claim is also supported by an earlier e-mail exchange with Ms. Egan (Pet. Ex. 9). On November 10, 2010, she notifies respondent that Minelli has purchased from Staples the items he ordered and states they were charged to the "allowance" (Pet. Ex. 9 at 1). Respondent replies asking "is that allowance above the cost for setting up the site?" and mentions other trailer set up items (window shades, exterior trash cans, and catwalk) that have not yet been provided (Pet. Ex. 9 at 1). This suggests to me that respondent viewed these items as trailer set up costs and was confusing, or combining, trailer set up costs with charges to the office supplies allowance. In her reply, Ms. Egan does not resolve the ambiguity when she states that she did not "factor any of the set up into the allowance cost." (Pet. Ex. 9). There is no further reply, which suggests that this apparent confusion was not resolved prior to the January 18 e-mail exchange.⁴

I found respondent's testimony that he intended the costs of the items he requested to be charged to trailer set up to be credible. I also found credible his claim that he believed his decision to substitute furniture for computer and other electronic equipment to be proper. Of course, respondent is motivated to deny knowledge that his actions were wrong, so I was not convinced by his testimony alone. The e-mail exchanges support the view that he was laboring

⁴ Investigator Baldassarri initially testified that respondent told him that he used the allowance to purchase the new notebook computer (Tr. 141), but he later corrected himself saying he did not recall respondent making reference to an "allowance fund" (Tr. 164). Respondent denied telling Baldassarri that he charged the equipment to the allowance (Tr. 329).

under this mistaken belief months before Jaffess discovered it. His claim is also supported by the absence of any attempt to conceal his actions. Respondent did not try to conceal the fact that the items were purchased for him or that he had possession of them; he revealed the existence of the items in an e-mail he sent to his supervisor (Pet. Ex. 3). They were recovered by the investigator in his work trailer, which is consistent with his contention that the items were purchased for work use. *Cf. Dep't of Sanitation v. Blount*, OATH Index No. 1127/02 at 10 (June 11, 2002), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 03-18-SA (Feb. 5, 2003) (respondent's knowledge that he was not entitled to take the WTC relief items established by his use of a ruse to obtain them); *Dep't of Transportation v. Delprete*, OATH Index No. 506/95 at 4 (Feb. 17, 1995) (respondent's "secrecy and evasion" established that he knew that the cobblestones "belonged to someone else" and "had not been abandoned as rubbish").

Petitioner's stated concern that allowing a contractor to make improper purchases for a project officer's personal benefit would make him " beholden" to the contractor (Pet. Br. at 18) is legitimate but was not supported by the record of respondent's relationship with Minelli. The evidence showed some hostility toward respondent by Minelli's project manager that respondent said had required mediation by Mr. Jaffess, for what Minelli considered to be unnecessary delays in reimbursements (Resp. Ex. E). A corrupt project manager would not invite such conflict with a contractor if he was seeking improper favors. The conflict with Minelli's construction managers might also support the theory that respondent was insufficiently experienced in administering this type of contract, though respondent claimed that Minelli was slow getting the project started and needed constant prodding (Tr. 228-29).

Respondent's testimony that deviations from specs were tolerated also was credible. Although coffee makers were not authorized as an office supply or item of field office equipment, refrigerators and microwave ovens were (Pet. Ex. 2 at 10). In an environment where deviations from the rule were permitted, as respondent claimed, and where refrigerators and microwaves were permitted, it would not be a great leap of logic to think that a coffee maker would be an acceptable purchase. Although petitioner's counsel got respondent to admit during his cross examination that other project officers may have been paying personally for their coffee makers, rather than charging them to the contract, petitioner did not offer evidence to refute a custom like that suggested by respondent. Mr. Jaffess's comments that deviations might be tolerated if approved by the head of the IT department supports respondent's testimony, rather

than contradicting it. Mr. Jaffess's claim that Senior Project Officers were allowed more equipment even though the contract does not provide for it (Tr. 99) similarly supports respondent's claim that deviations were tolerated.

Without a doubt, respondent's decision to purchase these unauthorized and overpriced equipment items lacked sound judgment. At the same time, I did not find his actions tainted by corruption, having noted they were not characterized by deception or concealment. Respondent explained his actions in part based on a belief that he had some discretion to allocate trailer set up costs as he saw fit, so long as they were within the budget for trailer set up. I found his testimony credible and his demeanor consistent with contrition for acting so carelessly and without proper attention to the written requirements in the specifications. I also found credible his claims that he had observed other project officers make similar inappropriate purchases; whether the costs were passed on to SCA or the contractor is not on this record, but respondent's superficial understanding of the protocols and his assumptions made from observations of other work trailers combined to dull his judgment.

Notice of agency rules

Employees are charged with knowledge of the rules and regulations of the agencies that employ them (Resp. Br. at 16). However, petitioner did not produce a set of rules that govern respondent's conduct and responsibilities as a project officer. The IT-1 procedure governs computer use but is not comprehensive and does not address non-computer items. The Section 1500 specifications are directed to the contractor, not the project officer, although the project officer is responsible for administering the contract.

Respondent contends that the charges fail to reference a particular rule that was violated by respondent's conduct, as required by this tribunal's rules of practice, 48 RCNY § 1-22 ("The petition shall . . . identify the law, rule, regulation, contract provision, or policy that was allegedly violated"), and as necessary to provide notice to respondent so that he could adequately defend himself. *See also* City Admin. Procedure Act – Charter § 1046(a)(3) (Lexis 2011) ("reasonable notice" of hearing shall include "a short and plain statement of the matters to be adjudicated, including reference to the particular sections of law and rule involved."). In fact, the only rule cited in the charges is Section 75 of the Civil Service Law, which generally states that a covered employee may be disciplined for misconduct or incompetence. *See* Civ. Serv. L. § 75(2) ("A person against whom removal or other disciplinary action is proposed shall have

written notice thereof and of the reasons therefor, shall be furnished a copy of the charges preferred against him and shall be allowed at least eight days for answering the same in writing.”).

While it is better practice to incorporate specific agency rules alleged to have been violated to comply with this tribunal’s pleading requirement, the failure to do so is not fatal where respondent is on notice of the essence of the charge. *See Health & Hospitals Corp. (Harlem Hosp. Ctr.) v. Case*, OATH Index No. 595/95 at 6-7 (Apr. 6, 1995) (finding respondent was not prejudiced by the agency’s failure to cite to the particular time and leave rules respondent was alleged to have violated where respondent had requested specific rules in discovery but did not move to compel). In general, due process is satisfied so long as an employee to be disciplined is sufficiently apprised of the nature of the charge against him “so as to enable him to adequately prepare and present a defense.” *Fitzgerald v. Libous*, 44 N.Y.2d 660, 661 (1978); *Dep’t of Environmental Protection v. Careccia*, OATH Index No. 270/84 (Apr. 25, 1985). Here, respondent was sufficiently on notice that he was being charged with making unauthorized purchases that were intended to benefit him personally, as is stated in the Petition.⁵

Although the Section 1500 contract specifications prove the purchases were unauthorized, petitioner offered no agency rule forbidding unauthorized purchases by employees or prohibiting “personal use” of such items, as is charged in the Petition. Moreover, although respondent violated IT-1 which requires that computer equipment be received and configured by SCA’s IT department, IT-1 does not put employees on notice that violating it may lead to discipline or termination of employment. Mr. Jaffess could not confirm that respondent was ever told that violation of IT-1 or the Section 1500 specifications could result in his termination (Tr. 91). Respondent contends that this failure to put him on notice that his actions could subject him to discipline including termination makes this due process hearing unfair.

⁵ Petitioner argues that, if respondent was unaware of his responsibilities, then he is guilty of “gross incompetence” (Pet. Br. at 18), an allegation that is not charged in the Petition. Petitioner proposes to amend the charges to assert it (Pet. Br. at 19, n.5). Doing so would be palpably unfair. “In order to satisfy due process, a notice of charges must reasonably apprise the accused of the claim being made so that an adequate defense may be mounted.” *Benson v. Board of Education of Washingtonville Central School District*, 183 A.D.2d 996, 997 (3d Dep’t 1992) (annulling a finding of misconduct where an employee was found guilty of incompetency and intentional misconduct, but the charges could not be construed as charging petitioner with acts of intentional misconduct); *see also Murray v. Murphy*, 24 N.Y.2d 150, 157 (1969) (“no person may lose substantial rights because of wrongdoing shown by the evidence, but not charged.”).

Fundamental fairness in employee disciplinary cases requires that notice be given that a particular action is proscribed before an employee may be disciplined for that action. *See Dep't of Correction v. Baysmore*, OATH Index No. 393/81 at 8-9 (Feb. 9, 1982) (officer may not be held accountable for non-compliance with institutional order of which he never had notice). An employee is chargeable with notice of his employer's rules if made known to him or made generally accessible in a manner reasonably calculated to provide notice. *See Quinn v. Brooklyn Heights RR. Co.*, 91 A.D. 489 (2d Dep't 1904) (book of alleged rules was properly excluded from evidence where it was prepared after the accident and contained rules that were not in the original lost book that was prepared before the accident); *see also Dep't of Sanitation v. Shinnick*, OATH Index No. 1466/07 at 3 (June 29, 2007) (petitioner failed to establish that log book was an official Department form or that supervisors were ever put on notice of its existence); *Admin. for Children's Services v. Bonds*, OATH Index No. 1211/04 at 8-9 (May 28, 2004) (caseworker who dated former client did not commit misconduct where the Department had no rule forbidding such conduct or notifying her that such conduct could subject her to disciplinary charges).

The only exception to this proposition of law involves conduct that is clearly wrong, *i.e.*, well known, commonly accepted standards of reasonable discipline and proper conduct. *Baysmore*, OATH 393/81 at 7 (citing *In re Ross Gear & Tool Co.*, 35 Lab. Arb. Rep. (BNA) 293, 295-96 (1960)); *see Petties v. NYS Dep't of Mental Retardation & Developmental Disabilities*, 93 A.D.2d 960, 961 (3d Dep't 1983) (egregiously vexing activity need not be specifically proscribed by a rule or regulation to be actionable as misconduct); *Dep't of Education v. Halpin*, OATH Index No. 818/07 at 21 (Aug. 9, 2007) (supervisor was on notice that false timekeeping was disciplinable misconduct by the Department's policies and, even in their absence, would be charged with the generally accepted principle that employees must submit truthful time cards and may be paid only for the hours that they actually worked).

Although the contract specifications are directed to the contractor rather than the project officer, they clearly establish what items are authorized for purchase and it would be unreasonable to assert that the project officer is not expected to know and to enforce the specifications. Thus, I find it appropriate to find respondent guilty of misconduct for (i) directing a contractor to replace his personal notebook computer through a city contract; (ii) directing the purchase of other items not authorized by the contract specifications, and (iii)

requesting items that are primarily for a personal benefit. Despite the fact that petitioner has not adopted rules governing such employee conduct, which is a matter that should be corrected, the absence of a rule to prohibit integrity violations such as obtaining personal benefit of agency funds should not benefit an employee in respondent's position of authority and responsibility. Thus, the allegations set forth in paragraphs 4 and 5 of the Petition are sustained, as specifically set forth herein.

FINDING AND CONCLUSION

Project Officer was guilty of directing a city contractor to purchase certain unauthorized equipment, some of which had no work-related purpose and were purchased for his personal benefit.

RECOMMENDATION

Upon making these findings, I obtained and reviewed a portion of respondent's disciplinary history for purposes of recommending an appropriate penalty. Mr. Ray received his appointment to the SCA on September 7, 1999. He has no prior discipline. The ratings on his performance evaluations for 2008, 2009, and 2010 ranged from "good" to "very good" with no overall score provided.

Respondent has been found guilty of directing a city contractor to purchase certain unauthorized equipment, including a notebook computer, for his personal benefit. For this misconduct, petitioner seeks respondent's termination, arguing that a lesser penalty cannot properly repair his working relationship with the Authority, as was explained in *Human Resources Administration v. Williams*, OATH Index No. 226/02 at 30 (Mar. 7, 2002).

Williams involved a theft. Proven allegations of theft, even of small sums, typically result in termination of employment. See, e.g., *Schaubman v. Blum*, 49 N.Y.2d 375 (1980) (upholding dismissal of a pharmacist from the Medicaid program who defrauded the government of \$3.39); *Dep't of Sanitation v. Blount*, OATH Index No. 1127/02 at 10-12 (June 11, 2002), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 03-18-SA (Feb. 5, 2003) (sanitation worker terminated for theft of several bags of clothing and towels from World Trade Center emergency relief center while making the false claim that he was taking them to his co-workers); *Health & Hospitals Corp. (Kings County Hospital Ctr.) v. Brown*, OATH Index No. 802/00 at 9-10 (Feb. 28, 2000) (termination recommended despite 15 years on the job and no prior discipline, where

respondent stole checks from the home of a deceased man he was charged with bringing to the mortuary); *Health & Hospitals Corp. (Kings County Hospital Ctr.) v. Colter*, OATH Index No. 196/98 at 9 (Oct. 20, 1997) (theft of a turkey and attempted theft of dish soap by a hospital employee warranted termination); *Dep't of Transportation v. Mascia*, OATH Index No. 403/85 at 24-26 (May 30, 1986) (13-year employee without any prior disciplinary history was terminated for stealing \$28.50 in tokens from his supervisor's desk).

Williams was a clerical worker who was caught on surveillance video stealing agency property (a spiral notebook and answering machine) from a co-worker's desk. The tribunal rejected respondent's claim that her actions were a "prank" and found that they constituted theft under the Penal Law. *Williams*, OATH 226/02 at 26-28. Specifically, the tribunal found that Williams took the items surreptitiously, after normal working hours and when no one else was around; that she failed to corroborate her claim of innocent intent, or prank; and that her credibility was impeached by inconsistent statements made at trial and during her investigatory interview in which she stated that she had never removed the items from the workplace, that she had removed them and taken them home, that she had returned them the next day, and that they were stolen from her. OATH 226/02 at 28. The items were never recovered. This case is not *Williams*.

This case does not involve a theft. Here, respondent did not try to conceal the fact that the items were purchased for him or that he had possession of them, and it was respondent's own e-mail which he copied to his supervisor that revealed the fact that he had replaced a personal notebook computer with a new one purchased through a city contract. Moreover, respondent did not take the items home or remove them from agency premises.

Cases involving unauthorized personal use of agency property invoke lesser penalties, because they typically involve lesser culpability than active theft. *See Office of the Comptroller v. Lattanzio*, OATH Index No. 1029/04 (Oct. 13, 2004), *adopted*, Comm'r Dec. (Jan. 29, 2004) (30-day suspension for claims specialist guilty of violating rules against personal use of office equipment by using her office computer to view and print documents that she was not authorized to access, including a summary prepared by the City's attorneys that evaluated her personal injury claim against the City); *Dep't of Sanitation v. Singer*, OATH Index No. 2033/00 (Mar. 15, 2001), *modified on penalty*, Comm'r Dec. (Mar. 29, 2001) (ALJ recommended 30-day suspension for supervisor found guilty of sorting through trash and retrieving several items for personal use); *Dep't of Parks & Recreation v. Guerin*, OATH Index No. 1265/97 at 7, 10, 11, 15

(June 20, 1997) (60-day suspension for employee guilty of misappropriating an agency parking permit where, though he was entitled to it and needed it for work, he took it without the proper authorization; penalty encompassed other charges including insubordination); *Transit Auth. v. Davis*, OATH Index No. 717/95 (Mar. 27, 1995) (44-day suspension for officer who misappropriated gasoline for personal use and made false memo book entries; ALJ recommended less than termination due to officer's dire financial circumstances and outstanding work record). Such cases may result in termination where the misappropriation or mismanagement is severe or persistent. *See, e.g., Dep't of Education v. Honan*, OATH Index No. 2231/07 (Mar. 14, 2008) (custodian engineer terminated for persistent mismanagement of school custodial account by paying himself \$8,493.12 more than he was due in salary, commingling personal funds in the account, failing to properly record payments, making late payments and poor recordkeeping).

Here, respondent misappropriated agency funds by obtaining purchase of a new notebook computer, admittedly, to replace his personal notebook computer that was damaged. I have found that the Toshiba notebook purchased for respondent was unauthorized, unnecessary and primarily for his personal benefit. Although respondent said he intended to use it for work, he had two SCA-authorized computers issued to him for work purposes and the notebook was unable to access SCA's network, a significant hindrance to his stated goal. For the unauthorized purchase of the other items, many of which amounted to high end electronic toys with "bells and whistles" that might create interesting presentations but were a waste of resources, a lesser penalty would suffice. However, the replacement of a personal computer with one paid for by the agency is a serious offense that demands a severe penalty. That these acts were committed by an employee whose position requires him to oversee the financial integrity of others is, reasonably, a great concern for the Authority.

Despite the apparent tolerance of "high end" deviations from the specs, the fact that respondent replaced his personal notebook computer with a new one purchased through a city contract demonstrates a serious lack of judgment and a questionable understanding of his responsibility for the integrity of the public contracts he supervises, even if his actions do not evidence *malum in se* conduct. *Cf. Human Resources Admin. v. Brown*, OATH Index No. 236/90 at 4 (Oct. 25, 1989) (employee's submission of false medical notes to receive sick leave payments for 13 work days when she was absent but not actually sick was *malum in se* and constituted fraudulent misrepresentation). Respondent's failure of judgment may have created "a

fundamental breach of the necessary trust that must exist . . . between an employer and employee, to ensure an effective working relationship.” *Williams*, OATH 226/02 at 30.

I hesitate to recommend the ultimate penalty in this case, however, because of the absence of any written rules of conduct that should govern the conduct of project officers who are imbued with so much fiscal responsibility. Because of the sincere contrition expressed by respondent, I concluded that had he been aware that strict rules were in place and that their violation would lead to discipline and possibly termination, he would not have put himself in this situation.

For this reason, I recommend a penalty of 60 days’ suspension for the misconduct that occurred here, a substantial penalty but one that gives respondent the opportunity to correct his behavior.

Tynia D. Richard
Administrative Law Judge

September 16, 2011

SUBMITTED TO:

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