

**BEFORE THE OFFICE OF STATE ADMINISTRATIVE HEARINGS  
STATE OF GEORGIA**

MICHAEL CRAIG SEWELL,  
Petitioner,

v.

GEORGIA DEPARTMENT OF  
TRANSPORTATION,  
Respondent.

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Docket No.:  
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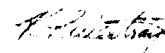


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**INITIAL DECISION**

**I. Introduction**

  
Kevin Westray, Legal Assistant

Petitioner Michael Craig Sewell (“Mr. Sewell”) requested a hearing after he was demoted by Respondent the Georgia Department of Transportation (“GDOT”). A hearing matter was held on January 23, 2015 at the Office of State Administrative Hearings in Atlanta, Georgia. Mr. Sewell represented himself and Kisa Pangburn, Esq., represented GDOT. For the reasons stated below, GDOT’s action is hereby **AFFIRMED**.

**II. Findings of Fact**

1. Mr. Sewell has worked for GDOT for approximately twenty years. Prior to his demotion, Mr. Sewell was employed by the GDOT as an Assistant Area Engineer – Construction, a position in the classified service. Mike Williams, Area Engineer in the Thomaston District, was Mr. Sewell’s direct supervisor. (Testimony of Michael Craig Sewell; Testimony of Mike Williams).

*The Notice of Intent Issue*

2. In an “Interdepartment Correspondence” dated September 24, 2013, Marc Mastronardi, State Construction Engineer, advised District Construction Engineers that the Georgia Department of Natural Resources Environmental Protection Division (hereinafter “EPD”) had issued a new permit, and that GDOT was terminate coverage from the prior version of the permit and request coverage under the new permit by December 23, 2013 in order for construction projects to be allowed to continue. As part of the process to obtain the new permit, GDOT was required to obtain updated and signed Notices of Intent (“NOIs”) from its contractors for every project. Per the Correspondence “the majority of administrative activities needed to execute this requirement [would] be performed by the Area/project staff.” (Respondent Exhibit 3).

3. On September 25, 2013, Kenneth Robinson, District Construction Engineer for the Thomaston District sent an e-mail to Petitioner, Mike Williams and other Area and project staff members. In this e-mail, Mr. Robinson advised the recipients to “[h]ave those projects that require an outdating of the NOI to Dennis Shepard **no later than October 16th**”<sup>1</sup> and to make certain that

<sup>1</sup> Emphasis in original.

they obtained the contractors' signatures on the forms. (Petitioner Exhibit 1, 2; Respondent Exhibit 4).

4. Approximately ten minutes later, Mike Williams e-mailed Petitioner, advising him to provide GDOT's District Contract Administrative Office with "a list . . . of the projects that require a revision in the NOI per the e[-]mail and directives from Marc." Petitioner provided this list in an e-mail on October 23, 2013, whereupon he was advised to obtain a signed NOI for each of the projects listed in the e-mail. (Petitioner Exhibits 3, 4; Respondent Exhibit 5).

5. On October 28, 2013, Petitioner sent the revised NOI forms to his contractors via e-mail. However, Petitioner unintentionally omitted a letter from the e-mail address of one contractor, C.W. Matthews, and, unbeknownst to Petitioner, the NOI form failed to reach its intended recipient. He thereafter reported to his supervisor and to the Contract Administrative Office that he had sent revised NOI forms to the contractors, and that he would forward to the Contract Administrative Office upon obtaining the requisite signatures. (Respondent Exhibits 5, 7; Testimony of Michael Craig Sewell).

6. Mr. Sewell attempted to follow up with CW Matthews on December 2, 2013. However, his follow-up e-mail was also sent to the incorrect e-mail address. (Respondent Exhibit 7; Testimony of Michael Craig Sewell).

7. On May 20, 2014, EPD visited the site of a project in Henry County to investigate a citizen's complaint of an erosion control issue. During this site visit, EPD determined that GDOT's NOI on the project had not been updated and that, as a result, GDOT was in violation of its National Pollution Discharge Elimination System (hereinafter "NPDES") General Permit. Upon further investigation, EPD discovered additional expired NOIs for projects under Mr. Sewell's supervision. Twelve projects were eventually affected by the lapse in the permitting process. (Respondent Exhibit 1; Testimony of Marc Mastronardi).

8. Mr. Sewell eventually realized that he had sent the NOI forms to the wrong e-mail address, and obtained an updated NOI from CW Matthews on or about June 18, 2014, which he immediately forwarded to the Contract Administrative Office. (Respondent Exhibits 7, 8; Testimony of Sewell).

#### *The Undercutting Issue*

9. While GDOT was assessing the severity of the EPD violations, it discovered significant cost overruns for a project involving the widening of State Route 3 in Griffin, Georgia, a project under Mr. Sewell's supervision. Specifically, C.W. Matthews, the contractor assigned to the project, reported that the SR 3 project was "basically out of money." Upon further investigation, GDOT discovered that a significant portion of the cost overrun was attributable to Petitioner's unilateral decision to allow the contractor to undercut substantial areas and fill them with graded aggregate base ("GAB"). GDOT determined that Mr. Sewell's decision to pay for the use of GAB cost GDOT \$201,151.20. (Respondent Exhibits 1, 8; Testimony of Thomas Howell).

10. GDOT further determined that Mr. Sewell's undercutting decision contravened its Standard

Specifications for the Construction of Transportation Systems (hereinafter “the Specifications”), which allow for payments for undercutting areas at a rate of \$7.50 per cubic yard for quantities up to 750 cubic yards, after which the undercutting becomes “Extra Work” which must be authorized by a Supplemental Agreement approved by the District Construction Engineer. (Respondent Exhibit 9; Testimony of Ken Robinson, District Construction Engineer, GDOT).

11. Upon discovering the cost overruns, Ken Robinson, District Construction Engineer, met with Mr. Sewell and Mike Williams to discuss the undercutting issue. Mr. Sewell explained that he had made the decision to undercut using GAB because he and David Coleman, a former Area Engineer with GDOT then working as a consultant, had determined that it would be more cost-effective than alternative methods of undercutting. (Testimony of Sewell; Testimony of Ken Robinson).

### *Disciplinary Action and Appeal*

12. Mr. Robinson was dissatisfied with Mr. Sewell’s explanation for his conduct and discussed possible disciplinary action with Mr. Williams, Thomas Howell, District Engineer over the Thomaston District, and Louis Walker, District Administrative Officer for Thomaston District. They determined that Mr. Sewell’s conduct—with regard to both (1) the NOI Issue and (2) the undercutting issue—amounted to negligence and inefficiency in the performance of his assigned duties and was sufficiently egregious to warrant disciplinary action. (Testimony of Thomas Howell; Testimony of Ken Robinson; Testimony of Louis Walker).

13. According to GDOT’s Policies and Procedures, an employee’s “[f]ailure to meet the acceptable level of performance will be considered inefficiency and/or negligence in performing assigned duties resulting in disciplinary action up to and including separation from employment.” GDOT’s Employee Handbook provides that some performance issues “are serious enough to justify dismissal without going through a progressive disciplinary process.” (Respondent Exhibit 11).

14. On or about October 22, 2014, Howell, Robinson, Williams, and Walker presented Mr. Sewell with a letter informing him that, based on the NOI and undercutting issues, he would be demoted from Assistant Area Engineer – Construction, pay grade 16, to the position of Construction Project Engineer, pay grade 14,<sup>2</sup> effective November 16, 2014. This letter further advised Mr. Sewell of his right to appeal the disciplinary action within ten calendar days. (Respondent Exhibit 1).

15. After Mr. Sewell appealed his demotion, the matter was assigned to Mr. Bayne Smith, Director of Field Services with GDOT, for an internal review. After conducting this review, which included an interview with Mr. Sewell, Mr. Smith concluded that Mr. Sewell’s conduct in allowing NOIs for projects under his supervision to expire and failing to follow the Specifications for undercutting indicated that he had been negligent in performing his duties and that he was “not performing at a level expected of an Assistant Area Engineer – Construction.” Accordingly, Mr. Smith upheld Mr. Sewell’s demotion to Construction Project Engineer. In a letter dated November 6, 2014, Mr. Sewell was informed of the results of the internal review and

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<sup>2</sup> No position in pay grade 15 was available at the time of Mr. Sewell’s demotion. (Testimony of Louis Walker).

advised of his right to appeal the determination with the Office of State Administrative Hearings pursuant to the rules of the State Personnel Board. (Testimony of Bayne Smith; Respondent Exhibit 2).

16. At the hearing on this matter, Mr. Sewell explained that his initial failure to obtain NOIs was due to his misinterpretation of Mike Williams' September 25, 2013 e-mail. Specifically, Mr. Sewell testified that he construed the e-mail to mean that he should compile a list of projects for which GDOT still needed an updated NOI. Mr. Sewell acknowledged that he did not follow up with C.W. Matthews to ensure that they had received his e-mail concerning NOIs at any time prior to December 2, 2013. (Testimony of Michael Craig Sewell).

17. With regard to the undercutting issue, Mr. Sewell testified that he made the decision to undercut using GAB without obtaining a supplemental agreement because, after consulting with David Coleman and obtaining a price estimate from the contractor, he had determined that using GAB would be more cost-effective. Mr. Sewell further testified that his conduct was consistent with GDOT Specifications as well as the standard practices of Area Engineers. (Testimony of Michael Craig Sewell; Petitioner Exhibits 9, 10, 11, 12, 13, 17, 18, 19).

18. David Coleman testified that he and Mr. Sewell had obtained a price for undercutting from the contractor, and that he and Mr. Sewell had determined undercutting with GAB to be the most economical option. He acknowledged that GDOT Specifications required obtaining a Supplemental Agreement before allowing extensive undercutting by the contractor. (Testimony of David Coleman).

19. Mr. Sewell further testified that the NOI and undercutting issues were the first instances of purported misconduct in his more than twenty years with GDOT. He contended that GDOT was obligated to institute progressive disciplinary action, rather than immediately demote him. (Testimony of Michael Craig Sewell).

### **III. Conclusions of Law**

1. Under Georgia law, “[c]lassified employees . . . may be dismissed from employment or otherwise adversely affected as to compensation or employment status only if such action is taken in accordance with the rules and regulations of the State Personnel Board governing adverse actions and appeals for classified employees.” O.C.G.A. § 45-20-8(a) (2014). The procedure for adverse action against a classified employee’s employment must include, at a minimum, providing the classified employee with reasons for the adverse action and “an opportunity to file an appeal and request a hearing which may be held before either the [State Personnel Board] or an administrative law judge.” O.C.G.A. § 45-20-8(b) (2014).

2. State Personnel Board (SPB) Rule 26 defines “adverse action” as “a disciplinary action taken by an [employer] which results in the suspension without pay, demotion, reduction in salary, or dismissal of a permanent employee.” Ga. Comp. R. & Regs. 478-1-.26(1). Pursuant to SPB Rule 26, employers may demote a classified employee for “negligence or inefficiency in performing assigned duties.” Ga. Comp. R. & Regs. 478-1-.26(3)(a).<sup>3</sup>

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<sup>3</sup> “The employee retains classified status in the lower job upon demotion as a result of adverse action.” Ga. Comp.


3. An employee against whom adverse action is proposed must be provided with written notice at least fifteen (15) days prior to the effective date of the adverse action and an opportunity to respond to the charges before a responsible official of the employer, who shall issue a notice of determination of final action in writing to the employee. Ga. Comp. R. & Regs. 478-1-.26(5), (6). The notice of proposed action and the written determination must include the information prescribed in SPB Rule 26. Ga. Comp. R. & Regs. 478-1-.26(5), (7).

4. GDOT demotion of Mr. Sewell to a lower pay grade was done in compliance with SPB Rules. Mr. Sewell failed to obtain signed NOIs for projects under his supervision, despite an express directive from his supervisors. Although Mr. Sewell's initial misinterpretation of the directive from Mike Williams is plausible, his attempt to comply with that directive came seven days after the deadline set by Ken Robinson. Moreover, Mr. Sewell offered an unsatisfactory explanation for his failure to follow up with C.W. Matthews until more than one month after he received no response to his initial e-mail, despite a looming deadline. His failure to obtain updated NOIs subjected GDOT to regulatory action and potential penalties. With regard to the undercutting issue, premitting whether Mr. Sewell's conduct was more cost-effective in outcome, it was nonetheless done unilaterally and in contravention of the Specifications. GDOT was justified in demoting Mr. Sewell inasmuch as his conduct demonstrated negligence and inefficiency in performing assigned duties. Further, GDOT's adverse action comported with the procedural requirements expressed in SPB Rule 26.

#### IV. Decision

In accordance with the foregoing Findings of Fact and Conclusions of Law, GDOT's action is **AFFIRMED**.

**SO ORDERED**, this 20th day of February 2015.

  
Steven W. Teate  
Administrative Law Judge