

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, S.C.

SUPERIOR COURT

(FILED: JUNE 6, 2012)

JAMES R. CAROSELLI

v.

STATE OF RHODE ISLAND
DEPARTMENT OF ADMINISTRATION :
PERSONNEL APPEAL BOARD :
by and through its MEMBERS, et al. :

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C.A. No. PC 10-4104

DECISION

TAFT-CARTER, J. Before this Court is an appeal by Appellant James R. Caroselli (“Caroselli”) from a decision of the Rhode Island Personnel Appeal Board (“Board”), affirming the termination of Caroselli from his position with the Rhode Island Department of Transportation (“RIDOT”). Jurisdiction is pursuant to G.L. 1956 § 42-35-15. For the reasons set forth in this Decision, the Court affirms the Final Decision of the Personnel Appeal Board.

I

Facts and Travel

Caroselli was employed as Chief Civil Engineer for the RIDOT Construction Management Section and Maintenance Division and had worked with the RIDOT for twenty-three years. (Board Final Decision at 5.) As Chief Civil Engineer, Caroselli oversaw multi-million dollar projects, including the I-Way Project and the Washington Bridge Project, which were some of the largest projects undertaken by the RIDOT. *Id.* at 5. Caroselli’s responsibilities included supervising the work performed by RIDOT employees and private contractors, as well as supervising many other aspects of his assigned projects, including the materials used,

compliance to plans and specifications, and the budget. (Termination Letter, Dec. 19, 2008, at 1).

In 2008, there were allegations lodged against the RIDOT by the Federal Highway Administration concerning improper testing of concrete for the I-Way Project. An investigation into the allegations ensued. As a result of the investigation, Caroselli was reassigned to the RIDOT Highway and Bridge Maintenance Division to ensure that investigation would be conducted without interference. (Board Final Decision at 7 (citing Admin. R. Tr. vol. 3, 39, June 23, 2009)). Caroselli was notified of his reassignment by letter dated March 7, 2008, from the RIDOT Chief Engineer, Kazem Farhoumand (“Farhoumand”). Id. at 6 (citing Admin. R. Tr. vol. 3, 30-31, June 23, 2009). The letter clearly stated that Caroselli was relieved of all duties and responsibilities as Chief Civil Engineer in the Construction Management Section and that he was “not to initiate contact with any DOT Construction or Materials Section personnel unless [he was] given specific permission to do so by [his] supervisor” (hereinafter, the “March 7, 2008 directive”). Id. at 6 (citing Admin. R. Tr. vol. 3, 30, June 23, 2009).

Although no wrongdoing was found with respect to the I-Way Project concrete, Caroselli was not transferred back to his previous position. Instead, he was permanently assigned to the Division of Highway and Bridge Maintenance by RIDOT Director Michael P. Lewis (“Director Lewis”) on June 20, 2008. Id. at 7, 12 (citing Admin. R. Tr. vol. 3, 45-46, June 23, 2009).

Despite the specific direction not to contact the Construction Management Section, on April 29, 2008, Caroselli requested a Construction Management password to the RIDOT’s internet-based computer system. This internet-based computer system was known as the Project Management Portal (“PMP”). (Termination Letter, Dec. 19, 2008, at 3.) Specifically, the PMP was a computer system used by the RIDOT and its contractors and consultants to track, manage,

and facilitate public works construction projects. Within the PMP system was a Secured Dialogue Module that allows RIDOT employees to have secured internal discussions about contractors. This Secured Dialogue Module could only be accessed by RIDOT personnel with an appropriate password. Contractors also had passwords for the PMP system; however, contractor's passwords did not grant access to the Secured Dialogue Module.

Sometime after his March 7, 2008 reassignment, Caroselli spoke with Laura Gammino, the president of Shire Corporation ("Shire") and contractor of the RIDOT. The two became acquainted when Caroselli oversaw work by Shire as the Chief Civil Engineer for the Construction Management Section and Maintenance Division. Without authority, Caroselli provided his PMP system password to Laura Gammino in May of 2008. At the time he shared his password with Laura Gammino, he knew that his action would provide Laura Gammino greater access in the PMP system. (Termination Letter, Dec. 19, 2008, at 3.) Caroselli's reason for providing his PMP password to Laura Gammino was to enable Shire to review the status of a contract change order.

RIDOT noted the breach of security, and as a result, a State Police investigation commenced. As part of the investigation, Caroselli provided a voluntary witness statement on August 8, 2008. In his statement, Caroselli admitted that he furnished his PMP password to Laura Gammino, and he acknowledged his reason for doing so: to grant Shire greater access and privilege within the PMP system. (Termination Letter, Dec. 19, 2008, at 3.)

As a result of his actions, Caroselli was informed by letter that the State was considering disciplinary actions against him, which could result in employment termination. (Letter of Notice, Oct. 23, 2008.) The letter specified two allegations against Caroselli: first, that Caroselli was insubordinate when he contacted Shire after he was specifically directed not to participate in

any Construction Management activities, and second, that Caroselli provided his PMP password to Shire in violation of the RIDOT computer policy regarding passwords and the PMP system. (Letter of Notice, Oct. 23, 2008.)

A pre-disciplinary hearing was conducted on December 8, 2008. During the pre-disciplinary hearing, evidence was presented that Caroselli's role as Chief Civil Engineer required that he "exercise and maintain . . . the utmost integrity and highest ethical standards," as well as protect the interests of the state at all times. (Termination Letter, Dec. 19, 2008, at 2.) Evidence was also presented that Caroselli's PMP system password allowed Shire access to confidential and privileged information otherwise not provided to contractors. At the hearing, Caroselli admitted and confirmed that he gave his PMP system password to Laura Gammino. Id. Caroselli argued, however, that he did not violate any departmental policies because the information he shared was public information subject to the Access to Public Records Act; the information was not accredited sensitive information; and the information was non-critical data that did not play a role in the health, safety, and/or security of the RIDOT or the citizens of Rhode Island. Id. at 3.

On December 19, 2008, Caroselli received a letter, signed by Director Lewis, summarizing the December 8, 2008 pre-disciplinary hearing and terminating Caroselli's employment. The letter set forth the rationale that supported the RIDOT's finding of just cause to terminate Caroselli. (Board Final Decision at 1.) Specifically, the letter provided that Caroselli acted against the best interest of the State in the following manner:

- “1. You engaged, at various times, in activities to allow access to state property and resources, intentionally violated the state Computer Use Policy.
2. You provided Rhode Island Department of Transportation (RIDOT) proprietary information to unauthorized person(s) and a

business entity (the Shire Corp.) and gave access to unauthorized user(s) to RIDOT's Project Management Portal (PMP).

3. You engaged in activities to facilitate the use of state property and/or resources to intentionally conspire with an unauthorized user(s) and a business entity (the Shire Corp) to give access to intellectual property owned by RIDOT.

4. You requested and obtained a password for you to access the PMP with the intention of sharing this access to an outside business entity (the Shire Corp.).

5. You engaged in activities to misuse the state Internet system in violation of the state Computer Use Policy when you provided an unauthorized user to access RIDOT's Project Management Portal (PMP) with your assigned administrative password.

6. You admit to supplying documents and access codes (password) to the PMP to an unauthorized user(s) and a business entity (the Shire Corp.) in dereliction of your obligation and responsibility to your employer the Rhode Island Department of Transportation (RIDOT), thus compromising DOT's ability to protect the interests of the taxpayers and State of Rhode Island.

7. You engaged in activities that violated the public's trust.

8. You engaged in activities to violate the Rhode Island Personnel Rules and Regulations, including but not limited to section 6.02 entitled CONDUCT OF EMPLOYEES.

9. You engaged in activities in April and May 2008 that constitute gross insubordination as they violate directives issued to you on March 7, 2008 relieving you of all duties/responsibilities as a Chief Civil Engineer in the Construction Management Section.

10. You engaged in activities that may have benefited an outside entity/business (the Shire Corp.) thereby compromising your employer, the State of Rhode Island.

11. You were insubordinate in your failure to follow department and/or state policies.

12. You engaged in activities, at various times, to intentionally circumvent established State administrative procedures and/or policies." (Termination Letter, Dec. 19, 2008, at 2).

The letter concluded that Caroselli's termination was effective as of December 20, 2008.

Caroselli appealed his termination on December 24, 2008 to the Personnel Appeal Board. (Board Final Decision at 1.) Evidentiary hearings were scheduled to determine if there were substantial grounds for the termination of Caroselli. Hearings were held on May 7, 2009; June 2,

2009; June 23, 2009; July 29, 2009; August 6, 2009, September 24, 2009; and November 17, 2009.

At the first hearing, the Board confirmed jurisdiction to hear the appeal, stating that Caroselli was a classified employee. Id. at 2-3 (citing Admin. R. Tr. vol. 3, 16-17, May 7, 2009; Admin. R. Tr. vol. 3, 3-5, June 2, 2009). The Board then heard testimony from Chief Engineer Farhoumand. Id. at 5-6 (citing Admin. R. Tr. vol. 3, 5, 28, June 23, 2009). Farhoumand testified that his March 7, 2008 directive to Caroselli required Caroselli to ask permission of Farhoumand or Frank Corrao, Caroselli's supervisor in the Construction Management Section and Maintenance Division, before Caroselli worked on construction projects, including contacting contractors or responding to inquiries initiated by contractors. Id. at 6-7 (citing Admin. R. Tr. vol. 3, 29-30, 35-37, 40, June 23, 2009). Farhoumand admitted that he was unaware of a written policy restricting a State employee from providing his or her PMP password to contractors. He explained, nonetheless, that "any person working for the state, especially a person in a high level supervisory position, such as Mr. Caroselli, must understand that a personal password is never to be provided to anyone, especially to an outside contractor who is not authorized to view all the information in the PMP system." Id. at 16-17 (citing Admin. R. Tr. vol. 3, 59-60, July 29, 2009). He was unaware if the PMP system was ever accredited by Rhode Island or if the PMP system was deemed confidential by Rhode Island. Id. at 12 (citing Admin. R. Tr. vol. 3, 141, 144, June 23, 2009).

Farhoumand explained that the State had several areas of concern if a contractor gained access to confidential internal information protected by a PMP password. Specifically, access would allow a contractor to review the State's engineering estimates and use this information during the bidding process; enable a contractor to use the internal RIDOT dialogue against the

State when processing claims or change orders; or reveal the State's weaknesses or strengths in determining claims and change orders. Id. at 11, 13 (citing Exhibit 1, Farhoumand Witness Statement, July 18, 2009; Admin. R. Tr. vol. 3, 121-25, 127, July 29, 2009).

The Board found that Farhoumand was a credible witness who presented clear and believable testimony; that the directive to Caroselli was clear; and that there was no evidence that Farhoumand ever authorized or directed Caroselli to speak with Shire or to provide his password to Shire. Id. at 6, 16. The Board noted that Farhoumand acknowledged he was unsure whether there was a written policy regarding the use of PMP system passwords; however, the Board found particularly credible Farhoumand's statement that surrendering a password to a contractor is:

“like providing a key to a room, and that regardless of whether there is a written state policy or not, any person working for the state, especially a person in a high level supervisory position such as Mr. Caroselli, must understand that a personal password is never to be provided to anyone, especially to an outside contractor who is not authorized to view all the information in the PMP system.” Id. at 16-17 (citing Admin. R. Tr. vol. 3, 59-60, July 29, 2009).

The Board concluded that Caroselli should have referred any contractor that contacted him to Farhoumand or Corrao. In addition, Caroselli should not have concerned himself with Shire's inquiry unless and until he was authorized to do so by Farhoumand or Corrao. Id. at 17.

David Giardino (“Giardino”), a thirteen year RIDOT consultant, also testified about the development of the PMP system. Giardino owned the consulting company Plexus Corporation (“Plexus”) at the time it developed the PMP system for the RIDOT. Id. at 17 (citing Admin. R. Tr. vol. 3, 78-79, July 29, 2009). He testified that, while the PMP system was being developed, he had discussions with Caroselli about the system. Id. at 17 (citing Admin. R. Tr. vol. 3, 79, July 29, 2009).

Giardino also testified about the specific development of the PMP system as a project-tracking system for the RIDOT. Id. at 17 (citing Admin. R. Tr. vol. 3, 86-88, July 29, 2009). The PMP system was designed as a password protected system with multiple tiers of access to information. For example, an Area Engineer, such as Caroselli, had access to all the PMP modules in construction for all of his or her projects. Id. at 18 (citing Admin. R. Tr. vol. 3, 101, July 29, 2009). In its decision, the Board described Giardino's testimony as "a straight forward and clear description of the PMP system and how it operates." Id. at 21.

The State's final witness was Detective Lieutenant John Lemont ("Detective Lieutenant Lemont") of the Rhode Island State Police. Detective Lieutenant Lemont was in charge of the white collar crime unit and was assigned to investigate the unauthorized access into the RIDOT's PMP system. Id. at 22 (citing Admin. R. Tr. vol. 3, 180, July 29, 2009). Detective Lieutenant Lemont explained that his investigation began in April of 2008. Id. at 22 (citing Admin. R. Tr. vol. 3, 181-82, July 29, 2009). Through the investigation, Detective Lieutenant Lemont learned that Anthony Mesiti ("Mesiti"), the Chief Engineer for Shire, had unauthorized access to the PMP system. Id. at 22-23 (citing Admin. R. Tr. vol. 3, 187-88, July 29, 2009).

Detective Lieutenant Lemont testified that during the investigation, he interviewed Caroselli, who admitted that he requested a PMP password and provided the password to Laura Gammino. Id. at 24 (citing Admin. R. Tr. vol. 3, 193, July 29, 2009). Detective Lieutenant Lemont confirmed that Laura Gammino was given the password by Caroselli, who conceded that such action would grant Shire access to an otherwise confidential area of the PMP system, which was not accessible to the public or contractors. Id. at 24 (citing Admin. R. Tr. vol. 4, 31-32, August 6, 2009). Detective Lieutenant Lemont then explained that he notified the RIDOT on

August 4, 2008 of the results of his investigation. Id. at 24 (citing Admin. R. Tr. vol. 4, 32, August 6, 2009).

The Board found Detective Lieutenant Lemont's testimony was "highly credible and professional," and the statements from Caroselli admitting that he provided his password to Shire were "clear and straight forward." Id. at 26. The Board also noted Detective Lieutenant Lemont indicated he did not find a written policy relating to the PMP system. Id. at 25 (citing Admin. R. Tr. vol. 4, 38, August 6, 2009).

The Board's decision continued with a summary of the September 24, 2009 hearing, including the testimony of George Ley ("Ley"), a RIDOT Chief Civil Engineer in the Construction Section. Id. at 26 (citing Admin. R. Tr. vol. 4, 5, September 24, 2009). Ley was the successor of Caroselli on the I-Way Project. Ley recalls telling his staff that they could contact Caroselli because Caroselli had intimate knowledge of the I-Way Project. Id. at 26-27 (citing Admin. R. Tr. vol. 4, 11-12, September 24, 2009). The Board concluded that Ley was a credible witness and that Ley's testimony confirmed that the PMP passwords were to be kept confidential. Id. at 27-28 (citing Admin. R. Tr. vol. 4, 54, 60-61, September 24, 2009). The Board noted that Ley never provided testimony that Caroselli was ever authorized or directed to speak with Shire. Id. at 28.

Thomas Gammino, the Vice President of Shire and the husband of Laura Gammino, testified on September 24, 2009. He explained that Shire contacted Caroselli because Farhoumand issued the director to do so. Thomas Gammino explained that he told Farhoumand, "[I'd like to get my money on the Point Street project. What's holding it up, where is it,'] and [Farhoumand] said ['T]alk to Jim Caroselli; that was one of his projects.[']" Id. at 29 (citing

Admin. R. Tr. vol. 4, 78, September 24, 2009). Thomas Gammino also testified that he told Farhoumand:

“[‘]You are the chief engineer; you know about it.[’]
[Farhoumand] said [‘]I’m not too familiar with it.[’] He said,
[‘T]alk to Jim.[’] And I had said, [‘O]kay,[’] I said, [‘]well, why
can’t you talk to him[?’] He said, [‘W]ell, you call him and then
tell him to call me.[’]” Id. at 29 (citing Admin. R. Tr. vol. 4, 78,
September 24, 2009).

Based on the conversation with Farhoumand, Thomas Gammino contacted Caroselli concerning contract issues on many occasions after the March 7, 2008 directive. Id. at 29 (citing Admin. R. Tr. vol. 4, 78-79, September 24, 2009).

On cross-examination, Thomas Gammino explained that Farhoumand authorized him to speak with Caroselli at “a meeting”; however, he could not remember when the meeting occurred or who was present at the meeting. Id. at 29-30 (citing Admin. R. Tr. vol. 4, 84-86, September 24, 2009).

After summarizing Thomas Gammino’s testimony, the Board found “the testimony of Mr. Gammino to be virtually worthless,” and “seriously biased against DOT because he is a principal in Shire.” Id. at 30. Further, the Board found that Thomas Gammino was not a believable witness in light of his inability to pinpoint when Farhoumand allegedly told him to contact Caroselli. Id. at 30. Accordingly, the Board concluded that Farhoumand was the more credible witness. Id. at 30-31.

The Board then summarized and analyzed the testimony of Joseph Pemantell (“Pemantell”), an auditor in the external audit section at the RIDOT. Id. at 31 (citing Admin. R. Tr. vol. 4, 91, September 24, 2009). Pemantell was familiar with the PMP system based on his past work. He explained that the PMP system included a public portion that could be accessed without a password. He also testified that the public could access the password-protected

information; however, on cross-examination, Pemantell explained that a password was required to gain access to the Secured Dialogue Module portion of the PMP system. Id. at 31-32 (citing Admin. R. Tr. vol. 4, 114-15, September 24, 2009).

The Board found that Pemantell was biased. Id. at 32. The Board also observed that Pemantell's testimony regarding his inability to access the PMP system Secured Dialogue Module without a password confirmed that a PMP password protected the confidential internal discussions of RIDOT employees and confidential information on claims and change orders. Id. at 32. Further, the Board concluded that regardless of the information available to the public, Pemantell's testimony was not relevant as to the inappropriateness of a supervisor in providing his password to an outside contractor. Id. at 33.

Finally, the Board heard from Caroselli. Caroselli acknowledged that there was a RIDOT policy stating that State employees were forbidden from giving their passwords to the State's computer system to anyone; however, he indicated that he was not aware of any guidelines or policies relative to releasing public information or any written policies regarding the PMP system. Id. at 34, 36, 37, 38 (citing Admin. R. Tr. vol. 4, 144-46, 188-89, 193, September 24, 2009). Caroselli explained that he was not concerned with giving out his PMP password because there was no policy restricting him from providing his password. Id. at 37 (citing Admin. R. Tr. vol. 4, 200, September 24, 2009).

Caroselli also testified that he never used the PMP system. Therefore, he did not know whether Shire would have greater access in the PMP system than it would normally have with its own PMP password. He explained that it was not until after he shared his password with Shire that he realized his action in doing so provided Shire with "slightly more" access in the system. Id. at 37 (citing Admin. R. Tr. vol. 4, 201, September 24, 2009). He explained that even with

slightly more access, “there would be nothing they could get that would be beyond that I’d normally give if they would stop by my desk.” Id. at 38 (citing Admin. R. Tr. vol. 4, 201-02, September 24, 2009).

Caroselli explained that he released his password to Shire because he was “acting on the direction of a superior who sent Shire to me to get information.” Id. at 35 (citing Admin. R. Tr. vol. 4, 191, September 24, 2009). Caroselli failed to confirm this authorization and as such did not have personal knowledge regarding the authorization to speak directly with Shire. Id. at 43 (citing Admin. R. Tr. vol. 4, 108-10, November 17, 2009). It was Caroselli’s intention in releasing his password “to resolve an issue that [was] outstanding for over a year . . . [and] to get the information from the PMP to resolve the issue.” Id. at 35-36 (citing Admin. R. Tr. vol. 4, 191, September 24, 2009).

Caroselli also testified to his understanding of the March 7, 2008 directive. Caroselli asserted that he “took the letter as [‘]don’t call us, we’ll call you,[’]” but that “probably every day [he] was called on something.” Id. at 36 (citing Admin. R. Tr. vol. 4, 196, September 24, 2009). He also explained that in May of 2008, he continued to be informed of the status of construction projects and that his time was still being charged to the I-Way Project. Id. at 37 (citing Admin. R. Tr. vol. 4, 196, September 24, 2009).

After summarizing Caroselli’s testimony, the Board concluded that Caroselli was “at times evasive and at other times misrepresented the facts.” Id. at 47. The Board also found that “his explanation regarding why he provided his personal PMP password to Mrs. Gammino makes no sense to this Board.” Id. at 48. Although he was allegedly trying to help Shire resolve a password matter, the Board concluded that “there was no convincing evidence that Mr. Caroselli was in fact authorized or directed by any of this superiors to work to attempt to resolve

Shire's alleged password problem." More importantly, there was no evidence that Caroselli was authorized to provide his personal, high level access PMP password to Shire. The Board concluded that it was reasonable to infer that Caroselli provided the password because he had some sort of personal relationship with Mrs. Gammino. Id.

On June 18, 2010, the Board issued an Order upholding the RIDOT's termination of Caroselli's employment. The Board concluded that

"(1) Mr. Caroselli improperly provided his personal password to an outside business entity, thereby granting that entity significantly more access to the DOT Project Management Portal (PMP) computer system than the outside entity should have had, including access to internal information that the outside entity was unauthorized to utilize, and (2) in violation of a direct order issued by Mr. Caroselli by the Acting Chief Engineer of DOT by letter dated March 7, 2008, Mr. Caroselli continued to participate in activities related to the Construction management Section of DOT." (Board Order, June 18, 2010, at 1-2.)

The Board's Order provided that "[a] Decision setting forth in greater detail this Board's findings of fact, conclusions of law, and analysis in this matter will be set forth in a forthcoming Decision[.]" (Board Order, June 18, 2010, at 2.)

On March 11, 2011, Caroselli filed a Motion for Writ of Mandamus, requesting that the Superior Court compel the Board to issue a full decision; however, before the Superior Court ruled on the motion, a Final Decision was issued on March 21, 2011. In the Final Decision, the Board denied and dismissed Caroselli's appeal because "the evidence overwhelmingly establishes that (a) the termination of Mr. Caroselli was based upon substantial grounds, (b) was for the good of the service, and (c) Mr. Caroselli's termination was related to personal deficiencies of Mr. Caroselli, including inappropriate activities and conduct worthy of termination." Id. at 58.

On March 25, 2011, Caroselli filed an alternative Motion for Entry of Judgment for failure of the Board to issue a Final Order and failure to delineate findings of fact and conclusions of law. The Superior Court heard Caroselli's motions, which were ultimately denied on April 7, 2011. (Caroselli v. R.I. Dep't of Admin. Pers. App. Bd., No. 11-5408, Apr. 7, 2011 (Order), Taft-Carter, J.) Before the Court is Caroselli's instant appeal, pursuant to § 42-35-15, to which the Board objected.

II

Standard of Review

The Superior Court's review of an administrative decision is governed by § 42-35-15 of the Administrative Procedures Act ("APA"). Section 42-35-15(g) reads as follows:

"(g) The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings or it may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inference, conclusions or decisions are:

- (1) In violation of constitutional or statutory provisions;
- (2) In excess of the statutory authority of the agency;
- (3) Made upon unlawful procedure;
- (4) Affected by other error of law;
- (5) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
- (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion." Sec. 42-35-15(g).

In conducting a review, this Court "shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact." Ctr. for Behavioral Health, Rhode Island v. Barros, 710 A.2d 680, 684 (R.I. 1998) (citations omitted). The Court must affirm the agency's decisions on questions of fact, unless such decisions are "totally devoid of competent evidentiary support in the record." See Baker v. Dep't of Employment and Training Bd. of Review, 637

A.2d 360, 363 (R.I. 1994). “In essence, if ‘competent evidence exists in the record, the Superior Court is required to uphold the agency’s conclusions.’” Auto Body Association of Rhode Island v. State of Rhode Island Department of Business Regulation et al., 996 A.2d 91, 95 (R.I. 2010).

On questions of law, “[w]here the provisions of a statute are unclear or subject to more than one reasonable interpretation, the construction given by the agency charged with its enforcement is entitled to weight and deference, as long as that construction is not clearly erroneous or unauthorized.” Gallison v. Bristol School Committee, 493 A.2d 166 (R.I. 1985). However, the Court is not bound by the agency’s decisions of law, and reviews these questions de novo. Arnold v. R.I. Rhode Island Department of Labor and Training Bd. of Review, 822 A.2d 164, 167 (R.I. 2003). Ultimately, issues of statutory interpretation and agency jurisdiction are questions of law for which the Court is responsible. City of East Providence v. Public Utilities Comm’n, 566 A.2d 1305, 1307 (R.I. 1989).

III

Analysis

The Court is called upon to decide whether competent evidence exists in the record to support the Board’s decision. Caroselli argues that that Board’s decision should be reserved because the decision is made upon unlawful procedure; clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; characterized by an abuse of discretion; and violates his procedural and substantive due process rights. The Board avers that the Final Decision is made upon lawful procedure; supported by competent evidence; not characterized by an abuse of discretion; and not in violation of Caroselli’s procedural and substantive due process rights. The Court will examine each issue in turn.

A

Lawfulness of the Procedure

The first issue before the Court is whether the Board's decision was made upon unlawful procedure. The timeframe in which the Board is required to issue its decision is governed by § 36-4-42. Specifically, § 36-4-42 provides that "[w]ithin thirty (30) days after conclusion of the hearing the personnel appeal board shall render a decision and shall notify the affected employee and other interested parties of the decision[.]" Sec. 36-4-42.

Caroselli argues that the thirty-day provision in § 36-4-42 is mandatory and that the Board's failure to render a decision within the thirty-day requires the reversal of the Board's Final Decision. The Board, on the other hand, argues that the time period set forth in § 36-4-42 for deciding appeals is directory rather than mandatory, and therefore, Appellant's requested relief should be denied.

Section 36-4-42 governs appeals from an appointing authority to the Board. Our Supreme Court has interpreted statutory provisions that seem to require public officers to take certain actions within a specified period of time to be directory rather than mandatory. See Washington Highway Dev., Inc. v. Bendick, 576 A.2d 115, 117 (R.I. 1990) (holding that a statutory provision requiring a decision on a wetland application within within six weeks was directory). Timing provisions "designed to secure order, system and dispatch" are generally held to be directory unless specific language is included in legislation expressing an "intention to make compliance [with the timeframe] a condition precedent to action" or invalidating a belated hearing. Providence Teachers Union, Local 958 v. McGovern, 113 R.I. 169, 177, 319 A.2d 358, 363-64 (1974).

Requirements comprising the essence of a statute are mandatory; however, statutory requirements concerning notice and public hearings that are directed at public officers are incidental to a regulatory scheme and are not mandatory. Gryguc v. Bendick, 510 A.2d 937, 941 (R.I. 1986). Therefore, imperfect compliance with the time requirements does not negate an agency's action. Id.

Here, § 36-4-42 contains neither an express intention to mandate compliance with its time frame nor creates a limitation on the Board's power. See Providence Teachers Union, Local 958, 113 R.I. at 177, 319 A.2d at 363-64. Further, no negative terms accompany § 36-4-42. See Gryguc, 510 A.2d at 941 (explaining that when sanctions for failure to meet a particular requirement are absent from a statutory scheme, there is support for interpreting the provision as directory rather than mandatory). Accordingly, since § 36-4-42 merely sets forth the procedure for merit-based appeals rather than sanctions for untimeliness, the thirty-day provision in § 36-4-42 is directive. Therefore, § 36-4-42 does not invalidate the Final Decision rendered by the Board, which was after thirty days.

In addition, Caroselli argues that he was prejudiced by the Board's failure to render a decision within thirty-days. The prejudice, he argues, is his inability to resolve his employment issues, thus requiring him to seek judicial relief by filing a mandamus with the Court to compel agency action. See Beauchesne v. David London & Co., 118 R.I. 651, 661, 375 A.2d 920, 925 (1977) (noting availability of judicial remedies during lapses in temporal framework set forth by statute). This Court finds that the inability to resolve his employment issues amounted to a mere inconvenience, not prejudice. Accordingly, the Board's written Final Decision cannot serve as grounds for reversal or remand because Caroselli has not demonstrated any prejudice from such delay. See Piccerelli v. Zoning Board of Review of Barrington, 107 R.I. 221, 266 A.2d 249, 253

(1970). The Court, therefore, finds that the Board's Final Decision was not made upon unlawful procedure.

B

Weight of the Evidence

Caroselli also argues that the Board's finding that he violated a PMP password policy and defied a direct order is clearly erroneous because the Board based its findings on unreliable and untrustworthy evidence and ignored reliable and relevant pieces of evidence. The Board's findings of fact and conclusions of law regarding both the PMP password policy and the direct order will be addressed in turn.

1

PMP Password Policy

Caroselli avers that the Board's finding that he violated an existing PMP password policy is clearly erroneous. He singles out a number of findings by the Board, which he argues are not supported by evidence. For example, Caroselli argues that there are no exhibits or credible testimony to support (1) that Caroselli's password allowed access to much more information in the PMP system than a contractor's password; (2) that Caroselli knew of the hierarchical nature of the PMP password system; (3) that Caroselli understood the confidential nature of the PMP system or acknowledged that he understood a password should not be shared; (4) that it was irrelevant that the PMP system was not formally certified as confidential by the State or that there was no formal written policy about keeping passwords confidential; (5) that contractors were given their own PMP passwords so that they could have access to what the State determined the contractor needed in the PMP system; (6) that the PMP system was protected by law, regulation, or policy; (7) that Caroselli's explanation as to why he chose to deal with Shire

did not make sense; or (8) that disclosure of a PMP password was sufficient reason for termination. The Board, however, argues that in light of the totality of the evidence, the Board's decision was based on competent evidence and justified given the gravity of the situation.

The Rhode Island Supreme Court has often stated that “[a] court must not substitute its judgment for that of the agency in regard to the credibility of the witnesses or the weight of the evidence concerning questions of fact.” See Costa v. Registry of Motor Vehicles, 543 A.2d 1307, 1309 (R.I. 1988); Carmody v. R.I. Conflict of Interest Commission, 509 A.2d 453, 458 (R.I. 1986). An administrative decision, however, can be vacated “if it is clearly erroneous in view of the reliable, probative, and substantial evidence contained in the whole record.” Newport Shipyard, Inc. v. Rhode Island Commission for Human Rights, 484 A.2d 893 (R.I. 1984). Substantial evidence is that which a “reasonable mind might accept to support a conclusion.” Id. at 897 (quoting Caswell v. George Sherman Sand & Gravel Co., 424 A.2d 646, 647 (1981)).

In its decision, the Board reviewed the testimony of Farhoumand, Giardino, Detective Lieutenant Lemont, Ley, Mr. Gammino, Pemantell, and Caroselli, and made specific findings of fact as to the credibility of each witness as well as considered the testimony in light of both issues that were before the Board. As to the PMP password policy, the Board carefully examined the testimony of each of the witnesses.

The Board first examined Farhoumand's testimony, which it concluded was clear and believable. (Board Final Decision, at 16.) In particular, the Board agreed with Farhoumand that

“providing a password is like providing a key to a room, and that regardless of whether there is a written state policy or not, any person working for the state, especially a person in a high level supervisory position such as Mr. Caroselli, must understand that a personal password is never to be provided to anyone, especially to

an outside contractor who is not authorized to view all the information in the PMP system.” Id. at 16-17.

The Board then discussed Giardino’s testimony. It found Giardino’s testimony was “straight forward and [a] clear description of the PMP system,” as to how the PMP system operates, and the multi-tiered nature of the PMP system. Id. at 21. In addition, Ley and Pemantell’s testimony was found by the Board to confirm the password arrangement for the PMP system and that the PMP passwords were kept confidential. Id. at 28, 32-33. Even though Pemantell testified that he could access internal discussions regarding change orders by making a request to the RIDOT, the Board concluded that there was no credible evidence to support Pemantell’s testimony. Id. at 33.

Further, the Board carefully scrutinized Caroselli’s testimony. The Board noted that Caroselli knew of the hierarchical nature of the PMP password system based on his admission to Detective Lieutenant Lemont. The Board supported this finding with Giardino’s testimony that Caroselli was involved in the development of the PMP system. Id. at 52-53; see R.I. Pub. Telecomm. Auth., 650 A.2d at 485 (An agency is empowered to draw reasonable inferences from the evidence presented before it).

The Board also considered that there was “not a shred of evidence that Mr. Caroselli was authorized by DOT to provide his personal, high level access PMP password to Shire.” Id. at 48. Although there was testimony that the PMP was not formally certified as confidential by the State, the Board correctly concluded that this fact was “irrelevant” and that it was inconceivable that Caroselli “would not understand the confidential nature of a password protected computer system.” Id. at 53; see Ryan Iron Works, Inc. v. NLRB, 257 F.3d 1, 6 (1st Cir. 2001). The Board also found credible Farhoumond and Lieutenant Detective Lemont, who both testified that, although there was formal written policy concerning the confidentiality of passwords, State

employees “should understand that a password should not be shared.” Id. at 53-54. The Board reinforced this finding with Ley’s testimony that the PMP passwords were to be kept confidential and by highlighting that “Caroselli acknowledged as much when he testified that he would not give out the password to his State computer that allowed him access through the state firewall and into the State computer system.” Id. at 27-28, 54. Based on the testimony concerning the secured nature of PMP passwords and Caroselli’s responsibilities as a high-level supervisor, the Board concluded that disclosure of the PMP password “was sufficient reason, in and of itself, for the termination of Mr. Caroselli for the good of the service,” and that the State met its burden of proof establishing that Caroselli’s dismissal was based on substantial grounds. Id. at 50, 55 (citing Aniello v. Marcello, 162 A.2d 270 (R.I. 1960); Hardman v. Personnel Appeal Board, 211 A.2d 660 (R.I. 1965)).

Accordingly, after a careful review of the record above, this Court finds that the findings Caroselli challenges does not violate the “clearly erroneous” standard set forth in § 42-35-15(g)(5). Indeed, under Rhode Island law, the Superior Court must uphold an agency’s findings of fact when they are supported by any legally competent evidence in the record. R.I. Pub. Telecomm. Auth. v. R.I. Labor Relations Bd., 650 A.2d 479, 485 (R.I. 1994) (emphasis added). The Board exercised its discretion in assessing the witnesses’ credibility and weighing the evidence before it. Although Caroselli may believe that the Board relied on untrustworthy evidence, it is for the Board to analyze, assess, and determine the weight to be given to the evidence. See Restivo v. Lynch, 707 A.2d 663 (R.I. 1998) (explaining that it is not the role of the court to “weigh the evidence, to pass on the credibility of witnesses, or to substitute [its] findings of fact for those made at the administrative level.”). Only where the factual conclusions of the administrative agency are “completely bereft of competent evidentiary support in the

record” is reversal mandated. Sartor v. Coastal Resources Mgmt. Council, 542 A.2d 1077, 1083 (R.I. 1988).

Here, the Board cited to the record to support each finding of fact, and the Board summarized and addressed the evidence and arguments presented by the State and Caroselli during the hearings. R.I. Pub. Telecomm. Auth., 650 A.2d at 485. Because the Board’s decision was based on “relevant evidence that a reasonable mind might accept as adequate to support [the] conclusion,” this Court is compelled to find that the Board’s decision was based on substantial evidence and is not clearly erroneous. Indeed, when reviewing an agency’s decision, the Superior Court “shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact.” Sec. 42-35-15(g); Barrington Sch. Comm. v. R.I. State Labor Relations Bd., 608 A.2d 1126, 1138 (R.I. 1992). Accordingly, the Court finds that the Board’s decision is not clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record.

2

Insubordination

As to the finding of insubordination, Caroselli argues that the Board did not make the requisite findings of fact and conclusions of law in determining that Caroselli defied Farhoumand’s March 7, 2008 directive that he “not . . . participate in any activities related to the Construction Management Section unless or until directed otherwise.” Specifically, Caroselli argues that the following findings by the Board were not based on any evidence or the Board ignored contrary evidence when it found the following: (1) that Caroselli’s communication with Shire and request for a PMP password violated the March 7, 2008 directive; (2) that Laura Gammino approached Caroselli and attempted to get Caroselli’s personal password based on the

phone calls, which the Board also found to undermine Caroselli's credibility; (3) that Caroselli was either improperly participating in official State construction business in violation of the March 7, 2008 directive or that he filed a false reimbursement report with the State; (4) that the phone calls, which were numerous and took place after March 7, 2008, were personal in nature; and (5) that the reason Caroselli was willing to blatantly breach his duty to the State and provide his personal PMP password to Gammino was based on their personal relationship.

Caroselli cites to Department of Administration, a Superior Court case that is not binding on this Court, for support that "[w]here other evidence in the record detracts from that relied upon by the agency (the court) may properly find that the agency rule was arbitrary and capricious." Dep't of Admin. v. Pers. Appeal Bd., C.A. 04-3177, 2004 WL 2821637 (R.I. Super. Dec. 2, 2004). Specifically, Caroselli argues that the Board's evaluation of the witnesses is evidence of bias and that the Board's decision is therefore arbitrary and capricious, as the Board did not truly consider the whole record. The Board, however, contends that in light of the totality of the evidence, the Board's decision was based on competent evidence in the record that Caroselli defied the March 7, 2008 directive.

As previously noted, a court must not "substitute its judgment for that of the agency in regard to the credibility of the witnesses or the weight of the evidence concerning questions of fact." See Costa, 543 A.2d at 1309. An administrative decision, however, can be vacated "if it is clearly erroneous in view of the reliable, probative, and substantial evidence contained in the whole record." Newport Shipyard, Inc. v. Rhode Island Commission for Human Rights, 484 A.2d 893 (R.I. 1984).

Upon review, it is the conclusion of the Court that the record contains substantial, reliable, and competent evidence to support the conclusions of the Board. The Board's findings

of fact clearly indicate that the Board assessed the credibility of each of the testifying witnesses, weighed the evidence presented, and awarded due consideration to each. In particular, the Board first examined the testimony of Farhoumand. The Board concluded that Farhoumand was a believable witness and that Farhoumand's testimony concerning the March 7, 2008 directive, which required Caroselli to refer any contractor's inquiries to Farhoumand or Corrao, was "a clear order to him that had no ambiguity." (Board Final Decision, at 16-17.) Caroselli was not to handle an inquiry "unless and until authorized to do so by Mr. Farhoumand or Mr. Corrao." Id. at 17. The Board found no evidence whatsoever that Farhoumand ever "authorized or directed Mr. Caroselli to speak with Shire about its alleged password problem," or "authorized, directed, or in any manner permitted Mr. Caroselli to provide his personal password to the PMP system to Shire." Id. at 16.

In addition, the Board found Detective Lieutenant Lemont's testimony was "highly credible and professional" and that his statement regarding Caroselli's admission to provided his personal PMP password to Shire was "clear and straight forward." Id. at 26. The Board found Ley to be a "credible witness," but that his testimony did not support that Caroselli "was in any way authorized or directed to speak with Shire to resolve their alleged password problem." Id. at 26-28; see Mendonsa v. Corey, 495 A.2d 257, 263 (R.I. 1985) (An appointing agency, which had before it the individual witnesses and had the opportunity to judge their credibility, was in a better position than the court to resolve the conflict.).

As for Thomas Gammino's testimony that Farhoumand told him to contact Caroselli sometime after March 7, 2008, the Board found his testimony "to be virtually worthless." Id. at 30. Specifically, the Board found his testimony was "seriously biased" because he is a principal of Shire. The Board also found that Thomas Gammino's testimony was not believable because

Thomas Gammino “was unable to pinpoint when Mr. Farhoumand allegedly told him to contact Mr. Caroselli.” Id. at 30. Accordingly, the Board concluded that “[i]t was impossible for this Board to conclude from Mr. Gammino’s testimony whether or when that conversation occurred,” and in weighing Farhoumand’s testimony against Thomas Gammino’s testimony, the Board found Farhoumand’s testimony to be more credible. Id. at 30; see Costa, 543 A.2d at 1309 (A court must not substitute its judgment for that of the agency in regard to the credibility of the witnesses, or the weight of the evidence concerning questions of fact). The Board also concluded that even if Farhoumand told Thomas Gammino that he could speak to Caroselli about Shire’s claim against the State, “[n]o testimony whatsoever was provided by Mr. Gammino (or otherwise) that anyone authorized or directed Mr. Caroselli to provide his personal PMP password to Shire.” Id. at 30-31.

In addition, the Board carefully assessed Caroselli’s testimony with respect to the March 7, 2008 directive. The Board considered Caroselli’s repeated requests for a password to the PMP, which is primarily a construction management computerized system, as well as his communication with Shire in concluding that Caroselli violated the March 7, 2008 directive. Id. at 55-56; see R.I. Pub. Telecomm. Auth., 650 A.2d at 485 (explaining that an agency is empowered to draw reasonable inferences from the evidence presented before it). The Board considered that “there was no convincing evidence that Mr. Caroselli was in fact authorized or directed by any of his superiors to work to attempt to resolve Shire’s alleged password problem.” Id. at 48-49. The Board took particular note of Caroselli’s own admission that he “did not seek permission from his supervisor to obtain a PMP password to or to provide it to Shire.” Id. at 56. This, the Board found, was “clearly an activity that would have needed permission from one of Mr. Caroselli’s supervisors.” Id. at 56. The Board also relied on telephone calls between

Caroselli and Laura Gammino as “overwhelming evidence” that Caroselli was “constantly involved in Construction Management Section activities with Shire” in direct violation of the March 7, 2008 directive or that he was involved in a personal relationship of some sort with Laura Gammino. Id. at 57.

The Board concluded that Caroselli was “a witness who was at times evasive and at other times misrepresented the facts.” Id. at 47. Specifically, Caroselli was elusive in describing his understanding of the March 7, 2008 directive. The Board noted that the explanation as to why he provided his personal PMP password to Laura Gammino made no sense. Id. at 48, 54. Rather, it was concluded that there was “enough evidence in the record to allow for reasonable conclusions to be drawn” that Caroselli’s attempt to resolve Shire’s password problems resulted from a personal relationship between he and Laura Gammino. Id. at 48. Caroselli’s credibility was undermined “when he signed his monthly cell phone cost reimbursement reports and dramatically under disclosed (and under reimbursed) the State for the personal calls on those reports.” Id. at 48, 57.

Accordingly, after a careful review of the record, this Court finds that the conclusions Caroselli challenges are supported by legally competent evidence in the record and do not violate the “clearly erroneous” standard set forth in § 42-35-15(g)(5). See R.I. Pub. Telecomm. Auth., 650 A.2d at 485. Caroselli contends that the Board relied on untrustworthy evidence. However, the Court finds that the Board exercised its discretion in assessing the witnesses’ credibility and weighing the evidence before it. See Ryan Iron Works, Inc. v. NLRB, 257 F.3d 1, 6 (1st Cir. 2001) (detailing that a court will not disturb the Board’s findings as to the credibility of witnesses as long as the Board’s position “represents a choice between two fairly conflicting views” and “does not overstep the bounds of reason”); Costa, 543 A.2d at 1309 (explaining that a

court must not substitute its judgment for that of the agency in regard to the credibility of the witnesses, or the weight of the evidence concerning questions of fact). As discussed above, it is for the Board to analyze, assess, and determine the weight to be given to the evidence. Only where the factual conclusions of the administrative agency are “completely bereft of competent evidentiary support in the record” is reversal mandated. Sartor v. Coastal Resources Mgmt. Council, 542 A.2d 1077, 1083 (R.I. 1988).

In this case, the Board cited to the record to support each finding of fact, and the Board summarized and addressed the evidence and arguments presented by the State and Caroselli during the hearings. R.I. Pub. Telecomm. Auth., 650 A.2d at 485. In addition, that the Board explicitly provided its reasoning for finding the State’s witnesses were more credible than Caroselli and his witnesses. Id. (A trial justice may not substitute his or her judgment for that of the agency whose action is under review, even in situations in which the court might be included to view evidence differently and draw inferences different from those of the agency.).

Because the Board’s decision was based on “relevant evidence that a reasonable mind might accept as adequate to support [the] conclusion,” this Court is compelled to conclude that the Board’s decision was based on substantial evidence and is not clearly erroneous. Indeed, when reviewing an agency’s decision, the Superior Court “shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact.” Sec. 42-35-15(g); Barrington Sch. Comm. v. R.I. State Labor Relations Bd., 608 A.2d 1126, 1138 (R.I. 1992). Accordingly, the Court finds that the Board’s decision is not clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record. See Newport Shipyard, Inc., 484 A.2d 893 (R.I. 1984).

C

Just Cause To Terminate Caroselli's Employment

Caroselli also argues that termination from his position with the RIDOT is unduly severe and characterized by abuse of discretion in violation of § 42-35-15(g)(6). The Board argues that there is substantial evidence in the record to support the Board's finding that Caroselli's engaged in misconduct that was just cause for his termination, and therefore, the Board's decision should be upheld.

In reviewing an agency's decision, a "Superior Court justice [is] not permitted to decide whether the division chose the appropriate sanction but instead to determine whether the division's finding . . . was supported by any competent record evidence." Rocha v. State of R.I. Public Utilities Comm'n, 694 A.2d 722, 726 (R.I. 1997). Although the Rhode Island Supreme Court has not elaborated on this principle, the First Circuit Court of Appeals has explained, in the context of reviewing a federal agency's determination, that "[a]n agency's choice of sanction is not to be overturned unless the reviewing court determines it is 'unwarranted in law . . . or without justification in fact[.]'" Broad St. Food Mkt. v. United States, 720 F.2d 217, 220 (1st Cir. 1983) (quoting Kulkin v. Bergland, 626 A.2d 181, 184 (1st Cir. 1980) (quoting Butz v. Glover Livestock Comm'n Co., 411 U.S. 182, 185-86 (1973))); see Rocha, 694 A.2d at 726. Additionally, the First Circuit expressed that when the Legislature "entrusts enforcement to an administrative agency, the choice of a sanction is 'peculiarly a matter for administrative competence.'" Broad St. Food Mkt., 720 F.2d at 220 (quoting Kulkin, 626 F.2d at 184).

Here, the severity of both charges was recognized by the Board. In particular, the Board noted Director Lewis's concerns regarding Caroselli's actions and agreed with Director Lewis's

conclusion that Caroselli's dishonesty and misconduct should result in termination. The Board examined Director Lewis's enumeration of Caroselli's specific violations, which included:

“your violation of a direct order issued by the Chief Engineer, your dereliction of professional duty as a Chief Civil Engineer, your admission you knowingly provided a private contractor your password allowing them special access to proprietary information, and your violation of state Personnel Rules 6.02 Conduct of Employees, constitute actions against the best interests of the state of Rhode Island.” (Termination Letter, Dec. 19, 2008, at 4.)

Director Lewis also quoted the Personnel Rules, which provide that

“it is the duty of every employee to so conduct himself/herself inside and outside his/her office to be worthy of the esteem a public employee must enjoy. Therefore, it shall be the policy of [f] the State of Rhode Island that no state employee shall engage in any outside business activities, however remote from the function of his/her office, which would in any way interfere with the employee's performance of his/her regular duties, or embarrass or bring discredit to either the employee of the state. State employees who avoid or ignore this policy shall be subject to disciplinary action. Furthermore, whenever a state employee shall so conduct himself/herself as to cause scandal or to lose or jeopardize such esteem, (s)he may be dismissed for the good of the service, subject to the provisions of the law and rules.” Rhode Island Personnel Rules, Rule VI, § 6.02.

Ultimately, Director Lewis determined that Caroselli's actions “have resulted in the total loss of trust by this appointing authority in your ability to continue in your professional capacity as a Chief Civil Engineer with the Department of Transportation.” (Termination Letter, Dec. 19, 2008, at 4.)

In reviewing Director Lewis's conclusion, the Board recognized that each of the infractions cited against Caroselli independently were sufficient to warrant termination “for the good of the service.” In fact, the Board concluded that Caroselli's disclosure of the PMP password was sufficient reason, in and of itself, to terminate his employment. See Board Final Decision, at 55. The Board accurately assessed the level of Caroselli's breach of professional

conduct and correctly stated that Caroselli's "continued employment would most certainly impugn the reputation of the State." Id. at 4-5; see also Rocha, 694 A.2d at 726 ("[T]he Superior Court was not permitted to decide whether the division chose the appropriate sanction but instead to determine whether the division's finding was supported by any competent record evidence.").

The Court recognizes that an agency's determination of a sanction involves not only an ascertainment of the factual circumstances, but also the application of administrative judgment and discretion. Kulkin, 626 F.2d 181 (1st Cir. 1980). In this case, the Board was well within its authority, based upon the facts, to rule as it did. Caroselli violated a direct order issued by the Chief Engineer; breached his professional duty as Chief Civil Engineer; knowingly provided his password to a private contractor; and violated the State Personnel Rules 6.02 Conduct of Employees. (Termination Letter, Dec. 19, 2008, at 4.) As Chief Civil Engineer, Caroselli was empowered with an extremely high level of responsibility and reliance. Caroselli's actions unequivocally were a breach of his fiduciary duty as a Chief Civil Engineer, and he clearly failed to protect the best interests of the State by intentionally acting in bad faith to aid a private business entity. See Termination Letter, Dec. 19, 2008, at 4. Pursuant to Section 6.03 of the Rhode Island Personnel Rules, Director Lewis was more than authorized to dismiss Caroselli for the good of the service.

Caroselli's attempt to argue there was no just cause for his termination misses the mark as Caroselli himself admitted that he knew his password would provide Shire with greater access in the PMP system. See Termination Letter, Dec. 19, 2008, at 3; Board Final Decision at 24 (citing Admin. R. Tr. vol. 4, 31-32, Aug. 6, 2009). Further, the fact that the RIDOT lacked a specific written policy of the State that the passwords to the PMP system must be kept confidential does not equate to permission to share PMP system passwords. See State

Department of Corrections v. Rhode Island Brotherhood of Correctional Officers, 867 A.2d 823 (R.I. 2005) (concluding that the fact that there was no specific policy prohibiting the use of Department of Mental Health, Retardation and Hospitals's linens did not equate with permission to remove the property from departmental premises).

Accordingly, the Court concludes the sanction sustained by the Board did not constitute an abuse of discretion. The Court cannot substitute its judgment on findings of fact for that of the Board and cannot modify the sanction imposed by the Board as substantial evidence supports the decision. Culhane, 689 A.2d at 1064-65 (R.I. 1997); Rocha, 694 A.2d at 726. Accordingly, the Court affirms the Board's decision terminating the employment of Caroselli.

D

Procedural Due Process and Substantive Due Process

Caroselli argues that the Board's decision violated his constitutional and statutory rights. In particular, Caroselli argues the delay in the published decision and inadequate fact finding impermissibly interfered with his constitutional and statutory rights to due process and unlawfully deprived him of his property interest in his continued employment. The Board, however, maintains that Caroselli's constitutional rights were not violated as he was afforded a pre-disciplinary hearing, Caroselli's received a termination letter explaining the rationale behind his termination, and Caroselli filed a writ of mandamus.

With respect to the procedural due process claim, Caroselli alleges that his termination was pretextual and in bad faith. Caroselli argues that there was not sufficient witness testimony because the Board denied his motion to issue subpoenas for four witnesses. Caroselli also argues that the Board's decision depended on mere opinions of highly partial witnesses, such as

Farhoumand. Finally, Caroselli argues that the State did not provide substantial evidence of its strong interest in the confidentiality of the PMP passwords.

In bringing a procedural due process claim, a claimant must prove, under the Rhode Island and United States Constitutions: (1) that they have a “property interest” or legal entitlement to continued employment; and (2) that the Board deprived Caroselli of that interest without procedural due process of law. Ventetuolo v. Burke, 470 F. Supp. 887, 891 (D.R.I. 1978). In Wilkinson v. State Crime Laboratory Commission, our Supreme Court discussed procedural due process rights for state employment in detail. 788 A.2d 1129 (R.I. 2002). The Rhode Island Supreme Court explained that “achieving permanent classified status under the merit system grants to the state employee in question a legitimate claim to entitlement to continued employment with the state.” Id. 788 at 1138. Accordingly, a state employee with a legitimate claim to entitlement to continue employment “has a property right in continued government employment and is entitled to due-process protections before he or she can be deprived of that property right.” Id. at 1138. However, “a classified employee is not totally insulated from termination.” Id. The Court went on to explain that:

“if the state determines that cause exists to terminate the employee or that it is necessary to lay off, reorganize, or otherwise abolish a classified employee’s position, it is entirely possible, and even probable, that such a decision would be upheld ‘for the good of the service’—unless the decision was arbitrary, pretextual, or irrational. But a rational, non-pretextual, and non-arbitrary employment decision would provide cause for termination—provided, of course, that procedural due-process rights were duly afforded to the terminated employee.” 788 A.2d at 1138.

In this case, the Court finds that there is nothing in the record to indicate that Caroselli’s loss of his position with the RIDOT was arbitrary, pretextual, or irrational. Rather, a review of the Board’s Final Decision and the record clearly demonstrates that Caroselli’s termination was

ground in fact and within the authority vested in the Board. Caroselli was insubordinate and violated the PMP password policy by providing the password to a vendor of the State. This is a grave violation of the policy and of the public trust. See Windross v. Barton Protective Serv., Inc., 586 F.3d 98, 103 (1st Cir. 2009) (insubordination is a legitimate ground for termination of an employee under Title VII); see, e.g., Zukowski v. St. Luke Home Care Program, 206 F. Supp. 2d 236 (D.P.R. 2002) (where disciplinary problems amounting to insubordination by employee, who was over 40 years old and of German national origin, were legitimate, non-age and non-national origin based reasons for terminating employee, and such reasons were not pretexts).

The Board considered the pre-disciplinary hearing, where Director Lewis provided a list of Caroselli's actions that "resulted in the total loss of trust by this appointing authority in your ability to continue in your professional capacity as a Chief Civil Engineer with the Department of Transportation." See Termination Letter, Dec. 19, 2008, at 4; see also Wilkinson, 788 A.2d at 1138 (interpreting that a termination "for the good of the service" under § 36-4-38 exists when "the state determines that cause exists to terminate the employee[.]"). The Board agreed with Director Lewis's conclusion that each of Caroselli's infractions "is independently sufficient to warrant termination," that "continued employment would most certainly impugn the reputation of the State," and that, based on these reasons, Director Lewis concluded that Caroselli should be dismissed "For the Good of the Service." Id. at 4-5; see Wilkinson, 788 A.2d at 1138; see also Kells v. Town of Lincoln, 874 A.2d 204 (R.I. 2005) (explaining that "for the good of the service" is an implicit limitation on the administrator's power to dismiss and requires a showing of cause). Accordingly, this Court concludes that the RIDOT's decision was rational, non-pretextual, and non-arbitrary. Therefore, Caroselli's claim that his procedural due process rights were violated fails.

Caroselli also raises an issue that his termination violated his substantive due process rights. A substantive due process claim can exist when a government decision adversely affects a fundamental right of an individual. Perry v. McGinnis, 209 F.3d 597 (6th Cir. 2000). “Substantive due process analysis involves looking at whether statutes improperly limit an individual’s freedom to act.” In re Advisory Opinion to the House of Representatives, 519 A.2d 578, 581 (R.I. 1997). A substantive deprivation of due process can occur when the government wrongfully interferes with one’s liberties, such as, “freedom from bodily restraint . . . the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, and generally to enjoy privileges long recognized as essential to the orderly pursuit of happiness by a free people.” Id. (citing Board of Regents v. Roth, 408 U.S. 564, 572 (1972)).

“Substantive due process, as opposed to procedural due process, addresses the ‘essence of state action rather than its modalities; such a claim rests not on perceived procedural deficiencies but on the idea that the government’s conduct, regardless of procedural swaddling, was in itself impermissible.” R.I. Econ. Dev. Corp. v. The Parking Co., L.P., 892 A.2d 87, 97 (R.I. 2006) (citing L.A. Ray Realty v. Town Council of Cumberland, 698 A.2d 202, 211 (R.I. 1997) (quoting Jolicoeur Furniture Co. v. Baldelli, 653 A.2d 740, 751 (R.I. 1995)). Where no fundamental interest is infringed on by state regulation and

“where the state’s legislative aim is to promote the health and safety of its citizens—an aim at the core of its police power—the challenger, to prevail under the due process clause, must demonstrate that there is no rational connection between the enacted regulation and the legislative aim.” In re Advisory Opinion, 519 A.2d at 582 (citing Kelley v. Johnson, 425 U.S. 238, 247 (1976)).

Here, Caroselli does not have a cognizable substantive due process claim. Although termination of employment undoubtedly concerns his property interest, he has not demonstrated that any “fundamental” right has been affected. See In re Advisory Opinion, 519 A.2d at 582 (fundamental rights are things such as the right to privacy and the right to travel). Caroselli’s interest in continued employment is not a fundamental right, nor does Caroselli’s employment termination affect a fundamental right. See Nicholas v. Pennsylvania State Univ., 227 F.3d 133, 142 (3rd Cir. 2000) (an interest in continued government employment, even when tenured, is not the type of fundamental right protected by substantive due process). As such, Caroselli fails to make out a claim for a violation of his state or federal substantive due process rights.

IV

Conclusion

After review of the whole record, the Court finds that the Board’s decision was not clearly erroneous in view of the reliable, probative, and substantial evidence. Furthermore, the Court finds that the decision was not rendered in violation of constitutional or statutory provisions and was not an abuse of discretion. Substantial rights of Caroselli have not been prejudiced. Accordingly, the Board’s decision is affirmed.

The parties shall submit a judgment in conformity with this decision.