

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. MA-14-12

(MANAGEMENT SERVICE REMOVAL)

YVONNE BELL,	)	
	)	
Appellant,	)	
	)	RULINGS,
v.	)	FINDINGS OF FACT,
	)	CONCLUSIONS OF LAW,
STATE OF OREGON, DEPARTMENT	)	AND ORDER
OF TRANSPORTATION,	)	
	)	
Respondent.	)	
_____	)	

Neither party objected to a Recommended Order issued on September 19, 2012, by Administrative Law Judge (ALJ) Wendy L. Greenwald, following a hearing held on June 21 and 22, 2012, in Salem, Oregon. The hearing closed after the receipt of the post-hearing briefs on July 23, 2012.

John D. Burgess, Attorney at Law, Burgess Callahan LLC, Salem, Oregon, represented the Appellant.

Stephen D. Krohn, Senior Assistant Attorney General, Labor and Employment Section, Department of Justice, Salem, Oregon, represented Respondent.

On April 11, 2012, the State of Oregon, Department of Transportation, Driver and Motor Vehicle Services (DMV or Department) removed Yvonne Bell, a management service employee, from management service and returned her to classified service. On May 11, 2012, Bell filed a timely appeal of the removal.

The issue presented for hearing is:

Did DMV, consistent with the terms of the Last Chance Agreement signed by Appellant Yvonne Bell, meet the standard in ORS 240.570(3) when removing her from management service?

## RULINGS

The ALJ's rulings were reviewed and are correct.

## FINDING OF FACTS

1. Yvonne Bell was hired by DMV as a Public Service Representative 3 in November 1995. She was promoted to the management service position of support services supervisor 2 in DMV's Processing Services Group (PSG) in May 1998, where she was the unit manager of the Vehicle Mail Unit 1.

2. Administrator Tom McClellan oversees all of DMV's operations. Kathy Hanson was the supervisor of PSG, which consists of the Mail Transaction Section (MTS), Vehicle Transaction Section (VTS), and two other sections. Keith Nardi is the manager of MTS, which includes the Vehicle Mail Unit 1 and three other units. Nardi supervises the MTS unit managers, including Bell.

3. Bell is passionate and smart, and does not hesitate to express opinions. She sometimes speaks in a louder than normal voice and often gestures with her hands when she speaks. Bell is also originally from the South, speaks with a Southern dialect, and sometimes uses words like "y'all."

4. On January 11, 2008, MTS Manager Nardi issued Bell a written reprimand for violating DMV's policy and PSG's expectations by engaging in unprofessional and inappropriate conduct as a unit manager by using profanity and making disrespectful, derogatory, and offensive remarks directed at another unit's employees; failing to follow her supervisor's instructions; and not responding in a forthright manner to a supervisor's questions during the investigation. In the reprimand, Nardi reminded Bell that PSG's expectations required employees to not engage in inappropriate and unprofessional conduct among and between team members that may be offensive or have an adverse effect on relations with customers or co-workers; explained that such offensive conduct included "refraining from: using profanity, making disrespectful, derogatory, sarcastic or flippant remarks, raising or speaking in a loud voice or arguing;" directed her to comply with PSG's expectations and model appropriate and professional conduct as a unit manager; and notified her that any recurrence of misconduct of the same or similar nature could result in more severe discipline.

5. In Bell's evaluation covering the period November 2007 through October 2008, Nardi found that Bell had met expectations, exceeded expectations, or was exceptional in all categories. Under the category addressing communication, Nardi found that Bell had met expectations and included a comment that she was a good communicator and listener, but "[o]ccasionally, [sic] Yvonne [Bell] will speak up where she could have made a better choice of words or communication style. Yvonne is aware of this and has worked on improving her style to a higher level managerial communication."

6. On July 12, 2010, Administrator McClellan suspended Bell for one-week without pay and reassigned her as the unit manager of a different MTS unit based on her failure to follow her manager's directive to implement a physical inventory reconciliation process; providing false, inaccurate, or misleading information to her manager to conceal noncompliance with that directive;

directing an employee to make false statements during the investigation regarding the noncompliance; and failing to follow directives not to speak with DMV employees during the investigation. In addition, McClellan and Bell executed a last chance agreement (LCA), which was effective for 24 months.

7. McClellan believed Bell's actions were sufficient to warrant removal from management service, but decided not to remove her because Bell had 14 years of service; she seemed truly contrite about what she had done and stated an intention to discontinue her misconduct; a group of employees petitioned McClellan not to remove Bell; the inventory control expectations at the time were not entirely clear; and Bell agreed to comply with the LCA. In the suspension letter, McClellan notified Bell that "[y]our behavior and how you carry out your managerial responsibilities from this point forward will be closely monitored to ensure your compliance with the terms of the Last Chance Agreement."

8. The LCA stated that Bell understood DMV had been prepared to remove her from her management service position, but agreed to give her a last chance to demonstrate her suitability for continued employment in her position through her conduct and compliance with the terms of the LCA. The LCA required that Bell understand the one-week suspension was a "final warning" and agree that engaging in acts of misconduct, failing to carry out her duties, or failing to meet "Supervisor Expectations" would be a breach of the LCA. Among others, the acts of misconduct listed in Section 1. b. of the LCA included,

"(1) Engaging in inappropriate and unprofessional conduct as a Unit Manager, including but not limited to using profanity and making disrespectful, derogatory and offensive remarks to or against others, either as individuals or as a group;

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"(5) Failing to conduct myself professionally at all times in the workplace;

"(6) Failing to support, establish and maintain positive, productive and professional relationships between the Unit I supervise and other Units, as well as other Service Groups."

The LCA also stated that DMV would follow its usual procedures in investigating any potential violations of the LCA, but required Bell to

"acknowledge and agree that any alleged misconduct on my part, or my alleged failure to meet the Supervisor Expectations, that is sustained will be cause for my immediate removal from management service or dismissal from state service for violating the terms and conditions of this Last Chance Agreement. I understand that such action may be appealed only on the basis of whether or not the terms and conditions of this Last Chance Agreement were violated."

9. In late July 2010, Bell returned from her suspension and was reassigned as the Customer Database Unit manager. Nardi, who continued as Bell's immediate supervisor, was responsible for monitoring Bell's compliance with the LCA.

10. In Bell's evaluation covering the period from November 2009 through October 2010, Nardi found that Bell had met expectations, exceeded expectations, or been exceptional in all categories except People Management. Under that category, Nardi found that Bell needed improvement and summarized the circumstances which were the basis for the suspension and LCA. Nardi commented that since her reassignment, Bell had performed her job in an acceptable manner, met performance targets and budget performance, been timely with employee appraisals, communicated well with her staff, and interacted well with peers and subordinates. Nardi stated further that "I trust this episode has taught Yvonne a valuable lesson and we will never see a repeat of this type of behavior again."

11. On May 11, 2011, Bell attended a joint work session for MTS and VTS managers and employees. Sometime later, Hanson informed McClellan that concerns had been raised regarding Bell's behavior at the meeting. After Human Resources (HR) conducted an investigation, McClellan decided that Bell needed to be reminded she was required to behave professionally under the LCA. He told Hanson to issue Bell such a reminder.

12. On May 26, 2011, Nardi met with Bell to discuss the events in the VTS/MTS work session and warned her that he thought her behavior in the meeting did not comply with the LCA expectations requiring her to conduct herself professionally at all times and support, establish, and maintain positive, productive, and professional relationships between her unit, other units, and other service groups. On May 31, 2011, Nardi issued a follow-up memorandum to Bell to remind her of the expectations in the LCA that she was required to meet and her agreement

"\* \* \* that failure to meet the expectations will be cause for your removal from management service. I told you that it is very important that you keep aware of the agreement you signed, maintain compliance with the agreement, and that you are not perceived by others as acting inappropriately.

"I am asking you to make sure you are following proper conduct as a PSG unit manager."

13. Bell was responsible for conducting and signing the evaluations of employees in her unit. Nardi reviewed and signed all evaluations conducted by the unit managers. Sometime prior to May 18, 2011, Bell presented Nardi with an evaluation of employee Jane Doe,<sup>1</sup> which covered the time period before and after Bell's assignment to the unit. After reviewing the evaluation, Nardi asked Bell to add a comment about conduct that the prior unit manager had observed. Bell objected because she had not observed the conduct herself. Nardi said Bell could state in the evaluation that the comment was based on the prior manager's observations.

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<sup>1</sup>Jane Doe is a pseudonym.

14. Sometime in June or July 2011, Bell met with PSG Manager Hanson regarding concerns she had about Nardi.<sup>2</sup> Bell told Hanson that she felt there was a move to get rid of her, she was being railroaded out, and Nardi was micromanaging her. Hanson told Bell that she was not being railroaded out, but she was under a microscope because of the LCA and Nardi was observing her closely because he was responsible for monitoring her compliance. During this conversation, Bell also told Hanson that Nardi had told her to lie about one of her employees in a performance evaluation. Hanson told Bell she would talk to Nardi about the evaluation.

15. When Hanson spoke with Nardi, he explained that he had asked Bell to include a comment in Doe's evaluation based on behavior that had been observed by her prior unit manager and had told Bell that she could state that the comment was based on the prior manager's observations. Hanson asked Nardi to retrieve Doe's file from Bell, which he did. When Nardi reviewed Doe's evaluation, he asked Bell why she had not included the comment he had requested. After Bell responded that she had not wanted to include them, Nardi sternly asked Bell why she told Hanson that he had forced her to change the evaluation.<sup>3</sup>

16. Bell last signed her support services supervisor job description on October 31, 2011. The description's areas of responsibility included a section entitled "Team Participation," which required that Bell utilize "verbal skills to defuse potentially hostile situations; and making a conscious effort to resolve conflicts;" and "[m]aintain a flexible attitude and work ethic when dealing with co-workers." In addition, the position's working conditions provided for "[c]ontinual adherence to professional demeanor in interactions with co-workers and customers." These provisions had been part of Bell's job description for a number of years.

17. In November 2011, Nardi issued Bell an evaluation covering the period of November 2010 through October 2011. Nardi found that Bell met expectations, exceeded expectations, or was exceptional in all categories. Under additional comments, he stated that Bell was a caring person, that she was interested in the betterment of her co-workers and subordinates, that she had had a good year, and that he appreciated her contributions.

#### Events Leading to the Removal Decision

18. Prior to December 9, 2011, DMV established a stakeholder group to participate in an informal interview process with candidates applying to replace PSG Manager Hanson. The stakeholder participants were told that the interviews were to be informal and relaxed, the candidates

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<sup>2</sup>Resolution of the conflict between Hanson's testimony that this meeting occurred around May and Bell's testimony that the meeting occurred in July is not critical to our decision.

<sup>3</sup>At the hearing, Bell testified that in response to Nardi's requests that she change Doe's evaluation, she intentionally deceived Nardi by creating a second evaluation for Doe, which included the comments Nardi had asked her to include. Bell gave the second evaluation to Nardi to sign, asked Doe to sign the original and second evaluations and told Doe she intended to submit the original evaluation to Doe's official personnel file and keep the second evaluation in her desk. Bell then placed the original evaluation in Doe's official personnel file and placed the second evaluation in her supervisor file. Prior to the hearing, Bell's supervisors were unaware that Bell had done this.

would not be scored on the interview questions, and the participants were to provide their impressions of the candidates' responses to McClellan.

19. On December 9, the stakeholder group met to agree on the questions to be used during the informal interview process. The meeting was facilitated by PSG Processing Support Section Manager Donna Damme and HR Manager Steve Tong. Other participants included PSG unit managers Bell, Caroline Sanchez-Ruiz, and Andre Orso; and PSG employees JS, WH, DP, JV, DC, and RK.<sup>4</sup> At the beginning of the meeting, McClellan made a brief appearance, during which he reiterated the purpose of the stakeholder group. The group then proceeded to look at the 28 proposed interview questions, which had been submitted by the participants prior to the meeting. The questions were presented on a written list, without any indication of who had submitted the question. The meeting participants understood they were to use the time during the meeting to come to agreement on approximately eight questions.

20. At Damme's suggestion, the group considered the questions in the order listed. The first question was "[e]ven the best bosses generate complaints from their employees now and then. What complaints would the people you've managed have about you?" Tong commented that he thought the question was good, but needed to be worded differently so the candidates were not put on the defensive. Sanchez-Ruiz and several other participants agreed with Tong's comment and expressed a similar need to soften the question. Orso expressed a concern that the word "complaint" could have different meanings.<sup>5</sup>

21. Bell told the group that the question was hers and disagreed with the suggestions that it needed to be softened. She explained that she wanted to know the types of issues the candidates had with their direct reports, which would tell her what kind of leader they were and whether they were a micromanager. Bell said that changing the question would not get her the kind of response or have the impact she wanted.

22. The discussion of Bell's question continued for 10 to 15 minutes. Several participants including Tong, Orso, WH, and Sanchez-Ruiz offered suggestions on how to reword the question to address the group's concerns. When WH offered her suggestion, she indicated that she thought the direction the question was headed was good because it would provide insight into how a boss would deal with such situations.

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<sup>4</sup>We have used initials to represent employees on the committee.

<sup>5</sup>Credibility resolutions regarding what occurred at the December 9 meeting have been made based upon a review of the entire record and all of the exhibits as well as an assessment of the demeanor of the witnesses. To the extent there is a conflict in the evidence, we find most credible the testimony of Damme, Sanchez-Ruiz, JS, WH, and JV. These witnesses were unbiased, in that there is no evidence they were anything more than co-workers or employees who had no animosity toward Bell. In addition, both Damme's and Sanchez-Ruiz's statements were made soon after the meeting occurred and, while the recollections of the five witnesses were not identical, they were remarkably similar.

23. During the discussion, Bell disagreed with the proposed changes to her question. She explained that she got the question from a recruiting website and wanted it asked as written. Bell argued strongly and passionately for her question as written, became upset, spoke loudly, and gestured with her arms. JS recognized that Bell was upset and loud, but thought Bell was just being herself. In a mild manner, Tong tried to explain to Bell why the question was not appropriate for the type of informal interview the stakeholders were conducting. He also tried to help the group reach agreement on some form of her question.<sup>6</sup> Bell told the group that it was her question, she wanted it to be read just as it was written, and nothing they could say would change her mind. As the discussion continued, Bell's behavior became excited, argumentative, aggressive, and even hostile and abrasive. At times, she almost shouted.<sup>7</sup> At one point, Bell slapped her open palms on the table and raised herself up to emphasize her point.<sup>8</sup>

24. Since the group could not reach agreement on Bell's question, the facilitators proposed that the group move on to the other proposed questions. Bell then sat back in her chair and, because she was cold, folded her arms across her chest and covered them with her sweater. As a result, it appeared to JV that Bell did not want to participate further in the meeting.<sup>9</sup> The participants proceeded to discuss, modify, and reach agreement on other questions. During the discussion of other questions, Bell was sometimes disruptive when others were talking.<sup>10</sup> After some of the questions were reworded and accepted by the group, Bell asked Damme to do a thumbs up or down on her

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<sup>6</sup>Although Bell argued that it was Tong who caused the heated discussion, we credit the testimony of WH, who described Tong's responses to Bell as mild-mannered; Sanchez-Ruiz, who testified that Tong's interactions with Bell were not heated, but that Tong had just tried to explain why the question did not work; and DC, who testified that there was no reason for Bell to be on the defensive during the meeting.

<sup>7</sup>Bell testified that she only spoke loudly and assertively, and DC testified that she did not believe Bell was yelling or that Bell's conduct at the meeting was remarkable. However, our findings are consistent with the following testimony and statements of other meeting participants. Damme—that Bell "became upset" and used a "raised voice;" Sanchez-Ruiz—that Bell "continued to rant and rave" and "was literally shouting;" JV—that Bell was "upset," "distracted," and "raising her voice and gesturing with her arms;" WH—that Bell was "excited" and "emotional (toward hostile)," and acted "abrasively;" and JS—that Bell was "upset," "argumentative," "loud," "hostile," "aggressive from the get go," and "mad." In addition, Bell's behavior was sufficiently disruptive to cause DC to warn Bell to stop talking.

<sup>8</sup>While DC testified she did not remember Bell slamming her hands on the table, and Bell denied doing so, our finding is consistent with the testimony and statements of meeting participants, including Sanchez-Ruiz's recollection regarding Bell "slamming her hands on the table" and WH's statement that Bell put her open flat hands on table firmly and raised herself up. Tong also recalled that Bell "slapped her hands on the table."

<sup>9</sup>Our finding that Bell folded her arms across her chest because she was cold is consistent with her testimony and the testimony of Sanchez-Ruiz that Bell grabbed her sweater and covered herself up, folding her arms. However, JV's assumption that Bell's actions meant she was not going to participate further was not unreasonable based on Bell's behavior as a whole.

<sup>10</sup>In this finding, we credit JV's testimony that Bell behaved in a disruptive manner a number of times when others were talking.

question. This resulted in an additional attempt to reword Bell's question, which Bell adamantly and loudly rejected. At several points during the meeting, Tong, Damme, or others suggested that the group revisit Bell's question for more discussion.<sup>11</sup> Bell continued to refuse to accept any changes to her question.

25. At one point near the end of the meeting, Bell raised her voice and told the group it was her question, she should be able to ask it as written, and if she wasn't allowed to, the group should just forget it. While Bell was talking, DC made a horizontal gesture with her right hand from left to right across her own throat to signal Bell to stop talking. DC, who ate lunch with Bell every day, knew that Bell was under scrutiny because of the LCA, which she was familiar with and recognized was "pretty strict," and that Bell was "under the gun" because of the incident in the May MTU/VTU meeting. DC gestured to Bell to stop talking because she thought that it was in Bell's best interest to stop talking. In response to DC's gesture, Bell stated "[DC] asked me to stop. Y'all do whatever y'all want - I don't care."<sup>12</sup> After making this statement, Bell did not participate further in the discussion of the questions. As a result of Bell's behavior over the course of the meeting, the atmosphere became tense, awkward, uncomfortable, and unproductive.<sup>13</sup> This was JV's first experience with this type of meeting, but he was so uncomfortable due to Bell's conduct that he decided he would not volunteer again.

26. RK's shift ended at 3:30 p.m. A week prior to the December 9 meeting, RK told Bell she was concerned that the meeting was scheduled to go until 4:00 p.m. Bell, who was not currently RK's supervisor, had supervised RK previously and RK felt very close to Bell. Bell told RK that she would talk with Damme, who was facilitating the meeting. When Bell raised RK's concern with Damme, Damme indicated that she did not think there would be a problem because the meeting would not last that long.

27. At approximately 3:30 p.m. during the December 9 meeting, Bell leaned over and whispered to RK that it was almost time for her to leave. RK did not respond to Bell or immediately get up and leave because she did not want to interrupt the person speaking. Bell then interrupted the

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<sup>11</sup>Although Bell argues that it was Tong who repeatedly returned to her question and pushed her to change it, we credit the testimony of Damme and RK that Tong was not the only meeting participant who suggested revisiting Bell's question.

<sup>12</sup>Although DC did not remember Bell making this response, Sanchez-Ruiz recalled Bell's response in her written statement made just after the December 9 meeting and Bell admitted to making this statement during her interview on January 20, 2012.

<sup>13</sup>While Bell argues that it was Tong who was responsible for any tension in the meeting, our finding is consistent with the following testimony and statements of other meeting participants: Sanchez-Ruiz—Bell's statement after DC signaled her to stop "in combination with her body language and demeanor was both unprofessional and unnecessary. It was extremely awkward for everyone in the room" and the meeting got heated; JV—Bell's conduct "made others uncomfortable" and the "tension in the room made it feel awkward;" WH—the meeting's atmosphere was "awkward and tense. Everyone tried to be collaborative with Yvonne [Bell], but unsuccessfully;" and JS—Bell's "behavior made the meeting uncomfortable. She would not calm down. She was wasting time."

speaker by stating loudly and aggressively “[RK], you have to go! You’re off and we ain’t payin’ overtime!”<sup>14</sup> Bell said this because she was trying to make sure RK did not work beyond the end of her schedule. RK became embarrassed and immediately left the meeting.

28. RK was not embarrassed by how Bell spoke to her and did not think Bell was being rude to her because she saw this as part of Bell’s demeanor, but she was embarrassed that she interrupted the person who was speaking when she left.<sup>15</sup> RK would have felt better about the situation if Damme had acknowledged her leaving and told her that she would be notified of the group’s decisions. Other participants were embarrassed about how Bell treated RK, and believed Bell’s behavior toward RK was angry, derogatory, and rude.<sup>16</sup>

29. At the end of the meeting, as the participants were leaving, Bell leaned over the table and asked sarcastically whether anyone had their question approved by the group.<sup>17</sup> When Sanchez-Ruiz responded that she had, Bell stated that was good because hers had not been approved.

30. After the meeting, Sanchez-Ruiz expressed concern about Bell’s behavior to Damme and Tong. In late December 2011, at Tong’s request, managers Sanchez-Ruiz, Orso, and Damme provided him with their written statements of what occurred during the December 9 meeting. In January 2012, Nardi, Damme, Tong, and HR Manager Diane Phillips discussed the concerns raised about Bell’s behavior during the December 9 meeting and decided that a further investigation should be conducted. Since HR Manager Phillips was only working part-time, Tong interviewed DC and RK and took notes of their responses. Tong and Nardi also interviewed Bell. Tong then gave the information he had collected to Administrator McClellan, who directed Tong to pursue the investigation further. At this point, Tong and Phillips realized that Tong was a potential witness to the events since he was present at the meeting, so Phillips took over the investigation.

31. In late February 2012, Phillips provided DC and RK with Tong’s notes of their interviews and asked them to review the notes for accuracy. RK responded that she did not feel her statement had been accurately conveyed by Tong and provided Phillips with her revised statement. DC responded to Phillips that she was appalled at how badly her interview responses had been misinterpreted and provided Phillips with a revised statement. On February 23 and 24, Phillips

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<sup>14</sup>Although Bell and DC dispute that Bell used the word “ain’t,” our finding that she did is consistent with RK’s testimony that Bell told her “they ain’t, aren’t” going to pay you overtime, and Sanchez-Ruiz’s statement which was made soon after the meeting. In addition, DC indicated in her statement that Bell’s delivery of the message to RK could have seemed derogatory. At the hearing, she testified that her use of this word meant Bell was loud and could have appeared to be aggressive.

<sup>15</sup>RK admitted if she had behaved as Bell had, her behavior would have been rude.

<sup>16</sup>This finding is based on witness statements or testimony, including DC, who acknowledged that Bell’s statement to RK could have seemed derogatory; Sanchez-Ruiz, who stated that Bell “angrily dismissed” RK; and JS, who testified that Bell’s dismissal of RK was “not nice” and “rude.”

<sup>17</sup>While Bell downplayed the tone of her final comments, WH and JS indicated in their statements that Bell spoke sarcastically.

interviewed Tong, DP, JS, JV, and WH. During these interviews, Phillips took notes of each person's description of the December 9 meeting. She then wrote up their responses from her notes and sent them what she had written so they could confirm its accuracy. JV, WH, JS, and Tong notified Phillips that the written statements she prepared were accurate. DP provided Phillips a revised witness statement. Phillips also asked Damme, Orso, and Sanchez-Ruiz to review and sign their statements, which they did. Phillips then provided the witness statements to McClellan.

32. On March 6, 2012, McClellan issued Bell written notice of a pre-removal process, which was scheduled for March 13. The notice included the statement of the facts that McClellan was considering and provided:

“At issue is whether you have violated the terms of the LCA by the manner in which you addressed others during the meeting on December 9, 2011. The questions include whether your disagreement was conveyed in a hostile and confrontational manner. Also at issue is the question of whether your communication with represented employee [RK] toward the end of the meeting was disrespectful and derogatory.”

33. Bell filed a written response to the notice of pre-removal, in which she stated that her statements and gestures had been mischaracterized; that she had not made certain statements or slammed her hands on the table; that her question would not have put the candidates on the defensive; that she should not be penalized just for disagreeing with other participants' opinions; that she had used her normal speaking style for which she had never previously been criticized; that she had not acted unprofessionally or violated the LCA; that she thought the concerns raised were not directed at the question she proposed, but with the fact she had proposed it; and that Nardi was retaliating against her for talking to Hanson about his harassment of her.

34. After receiving Bell's response, McClellan asked Phillips to obtain a response from Hanson about Bell's assertion that Nardi was retaliating against her and to confirm the accuracy of several other meeting participants. McClellan also talked with Hanson, who said Nardi had done a good job enforcing the LCA, been firm when it was required, and provided coaching as needed. McClellan concluded that Bell displayed inappropriate conduct for a manager based on the witness statements; all were similar in content except for those made by DC and RK. In deciding to remove Bell from management service and return her to classified service, he also considered that Bell's reference to the incident that resulted in the LCA as a "lapse in judgement" seemed to show a lack of appreciation for the severity of her prior misconduct, and Bell's failure to take responsibility for her actions and blaming others made it unlikely that she would change. He also considered that Bell was a hard worker, who was dedicated, skilled, and had much to contribute to the organization.

35. By letter dated April 6, 2012, McClellan notified Bell that, effective April 11, 2012, she was being removed from management service and returned to classified service due to her behavior during the December 9 meeting, which violated the LCA, and her inability or unwillingness to fully and faithfully perform the duties of her position satisfactorily under ORS 240.570(3). The letter reviewed Bell's employment and discipline history, recited sections 1. b. (1), (5), and (6) of the LCA, and set out the following factual basis for the discipline:

- “3. The first question reviewed was one that you proposed. It read, ‘Even the best bosses generate complaints from their employees now and then. What complaints would the people you’ve managed have about you?’ According to others attending the meeting, most felt that this question should be reworded so that it would not put the candidates on the defensive. However, you were adamant that the question should remain as it was written. You said that you found it on the internet, so it was a good question.
- “4. When others offered different, softer ways to ask the same question, you objected with a raised voice, gesturing with your arms and slamming your hands on the table.
- “5. Finally you said that if the group wanted the question changed, you wanted to remove it from consideration altogether. You said ‘Y’all do whatever y’all want, I don’t care!’ You said ‘I’m through’, sat back in your chair and crossed your arms.
- “6. When the meeting ended, you asked if anyone got their question in. When someone responded that they had, you then said in a sarcastic manner, ‘Good, ‘cause I didn’t!’ and abruptly left the room.
- “7. Prior to the end of the meeting, at 3:30 PM, you interrupted the group’s discussion by addressing an employee ([RK]) sitting across the room who used to work in your Unit. You knew that the employee’s work shift ended at 3:30 PM. You said in a loud voice, ‘You have to go! You are off and we ain’t paying you overtime!’ The employee gathered her things and quietly left the room. Witnesses as well as the employee herself were uncomfortable and/or embarrassed by the manner in which you addressed her and directed her to leave the meeting, an action which you had no authority to take as you are not her manager, and for which you had no responsibility as you were not in charge of the meeting.”

36. In the removal letter, McClellan also addressed some of the issues that Bell had raised during the pre-removal process. McClellan indicated that Bell’s disagreement with others during the meeting was not at issue; instead, it was the manner in which she expressed her disagreement. McClellan responded that he had not considered her use of the words “y’all” and “ain’t” to be derogatory, but included these words to provide accurate quotes of the words that witnesses reported she had said. McClellan notified Bell that the witnesses had confirmed she had used the word “ain’t” and that her use of the word was also supported by her response during the initial interview process. Finally, in response to her assertion that Nardi had been retaliating against her, McClellan explained that Hanson told him she viewed Nardi’s conduct as holding Bell accountable to the LCA and Nardi was neither a witness nor a complainant in the removal decision.

37. McClellan's removal letter concluded:

"At issue is whether you have violated the terms of the LCA by the manner in which you conducted yourself during the meeting on December 9, 2011. The questions include whether your disagreement was conveyed in a professional and appropriate manner, and whether you were modeling appropriate behavior and actions to represented staff. Also at issue is the question of whether your communication with represented employee [RK] toward the end of the meeting was reasonably viewed as disrespectful and unprofessional. Based on the preponderance of eye-witness testimony, I conclude that you have violated the terms of your Last Chance Agreement. In light of the prior economic sanction and express warnings in the LCA, plus the memo to you dated May 26, 2011, your conduct is also contrary to the standards of a management service employee under ORS 240.570(3).

"Your behavior as described by the majority of other attendees at the December 9, 2011 Stakeholders' meeting changed the work environment from one that was collaborative to one that was variously described as uncomfortable, awkward, embarrassing and nonproductive. This was because of your demeanor (raising your voice, becoming visibly angry, slamming your hands on the table) and body language (sitting back, arms crossed, not participating further in the meeting). The LCA and the statute require you as a manager to meet the standards set out for you. The Department was willing to give you another chance by entering into a Last Chance Agreement rather than remove you from management service. That willingness had express conditions. When you did not meet those conditions it is necessary to exercise the right to hold you accountable. This action does so."

#### CONCLUSIONS OF LAW

1. This Board has jurisdiction over the parties and the subject matter of this dispute.
2. Bell's removal from management service was consistent with ORS 240.570(3).

#### Standards of Proof

ORS 240.570(3) provides that after completion of trial service, a "management service employee may be disciplined by reprimand, salary reduction, suspension or demotion or removed from the management service if the employee is unable or unwilling to fully and faithfully perform the duties of the position satisfactorily." The employer has the burden of proving that its discipline was consistent with ORS 240.570(3). OAR 115-045-0030(6). *Ahlstrom v. State of Oregon, Department of Corrections*, Case No. MA-17-99 at 14 (October 2001). The employer meets its burden of proof if this Board determines, under all of the circumstances, that the employer's actions were "objectively reasonable." *Brown v. Oregon College of Education*, 52 Or App 251, 260, 628 P2d 410 (1981); *Morissette v. Children's Services Division*, Case No. 1410 at 23 (March 1983).

We review management service disciplinary appeals using a two-step process. *Dubrow v. State of Oregon, Parks and Recreation Department*, Case No. MA-3-09 at 27 (May 2010), *recons.* (June 2010). First, we determine if the employer proved the charges that are the basis of the discipline. *Smith v. State of Oregon, Department of Transportation*, Case No. MA-4-01 at 8 (June 2001) (a reasonable employer is one who “disciplines employees in good faith and for cause”). The employer need not prove all of the charges on which it relies. *Ahlstrom* at 15.

Second, if the employer has proven some or all of the charges, we apply a reasonable employer standard to determine whether the employer was justified in taking the disciplinary action. *Greenwood v. Oregon Department of Forestry*, Case No. MA-03-04 at 30 (July 2006), *recons den* (September 2006). A reasonable employer is one that clearly defines performance expectations, provides those expectations to employees, and tells employees when those expectations are not being met. *Bellish v. State of Oregon, Department of Human Services, Seniors and People with Disabilities*, Case No. MA-23-03 at 8 (April 2004), *recons* (June 2004). A reasonable employer also “imposes sanctions that are proportionate to the offense; considers the employee’s length of service and service record; and applies the principles of progressive discipline.” *Smith* at 8-9. However, a reasonable employer may not be required to use progressive discipline “where an employee’s offense is gross or the employee’s behavior probably will not be improved through progressive measures.” *Peterson v. Department of General Services*, Case No. MA-9-93 at 10 (March 1994).

In applying the “objectively reasonable” standard in management service discipline cases, an employer may hold a management service employee to strict standards of behavior, as long as the standards are not arbitrary or unreasonable. *Helper v. Children’s Services Division*, Case No. MA-1-91 at 22 (February 1992). A significant factor for this Board’s consideration in management service discipline is

“the extent to which the employer’s trust and confidence in the employe have been harmed and, therefore, the extent to which the employe’s capacity to act as a member of the ‘management team’ has been compromised. [Footnote omitted.] In addition, [Board precedents] give weight to the effect of the management service employe’s actions on the mission and the image of the agency and the extent to which those actions do or do not reflect the proper use of judgment and discretion.” *Reynolds v. Department of Transportation*, Case No. 1430 at 10 (October 1984).

### Basis for Removal

We begin by considering whether DMV proved the charges on which Bell’s removal from management service was based. DMV removed Bell from management service for acting contrary to the standards in ORS 243.570(3) and violating the requirements in the LCA that she (1) not engage in inappropriate and unprofessional conduct as a unit manager, including but not limited to using profanity and making disrespectful, derogatory, and offensive remarks to or against others, either as individuals or as a group; (2) conduct herself professionally at all times in the workplace; and (3) support, establish, and maintain positive, productive, and professional relationships between the employees in her unit, other units, and other service groups. DMV charged that Bell violated these requirements during the December 9 meeting by: (1) conveying her disagreement over the

suggestions for modifying her proposed interview question in an unprofessional and inappropriate manner, (2) failing to model appropriate behavior and actions for non-management employees during those discussions, and (3) communicating in a disrespectful and unprofessional manner with employee RK.

Bell asserts that she did not act in an unprofessional manner during the December 9 meeting because she was entitled to voice her opinion that she did not want to modify her question; to get upset and respond assertively, passionately, and exuberantly when others continually pushed her to change it; and to express her dissent in the manner she did in a meeting of her peers. Bell contends that HR Manager Tong created the true tension in the room by his presence, in what was supposed to be an open stakeholder meeting, and by repeatedly returning to Bell's question, attempting to control the meeting, and exerting control over the process, which "had the effect of forcing the members to either capitulate to his requests or to come in conflict with him." (Appellant's Post-hearing Brief at 2.) Finally, Bell argues that she did not yell at RK or make RK uncomfortable and that other participants only misunderstood the situation and assumed Bell was misbehaving "because the meeting was tense and that Bell was recalcitrant in the face of Tong's insistence." (Appellant's Post-hearing Brief at 3.)

Based on the cumulative factual evidence, DMV proved that Bell acted in an unprofessional and inappropriate manner as a unit manager and failed to support, establish, and maintain positive, productive, and professional relationships with other managers and employees during the December 9 meeting. First, Bell did not act in a manner consistent with the type of meeting she was attending. The purpose of the shareholder meeting was for the participants to come to agreement on approximately 8 out of 28 questions for an informal interview process. Such a task required teamwork, cooperation, collaboration, and flexibility on the part of the participants. Yet Bell showed none of those qualities during the meeting. She was completely focused on her own goal of getting the group to agree to her question as written, was unwilling to listen to other participants' concerns or suggestions about her question, interrupted the discussion of other questions, and then stopped participating in the group's discussion entirely when she did not get her way.

Second, even if Bell was entitled to defend her question as written, the manner in which she did this was neither professional nor appropriate for a unit manager. Bell's behavior went well beyond assertive to aggressive, hostile, and abrasive. She not only spoke loudly, but she raised her voice to a point at which she was almost shouting. She did more than gesture with her hands in an exuberant manner. She slammed her open palms on the table and raised herself up to emphasize her point. Bell's actions were sufficiently abrasive to cause DC to signal Bell to stop talking and her sarcastic departing comments showed a lack of respect for other participants' questions and the group's efforts as a whole. As a direct result of Bell's conduct, the meeting became so awkward and uncomfortable that one of the employees decided he would never volunteer for such a meeting again.

Bell's placement of the blame for her reactive behavior and the meeting's tense interactions on HR Manager Tong is not supported by the evidence. We fail to understand how Tong's mere presence in a stakeholder meeting created tension. The managers and employees in the meeting were developing questions to be used as part of a hiring process, which is an area in which an HR manager would be expected to provide expertise and advice. Since Tong acted as a co-facilitator, it was

entirely appropriate that he exerted some control and direction during the meeting regarding the process of narrowing the list of questions. In addition, other meeting participants besides Tong raised concerns about Bell's question, suggested changes to soften it, and suggested that her question be revisited later in the meeting. In fact, Tong was described by meeting participants as speaking in a mild manner during the discussion of Bell's question and just trying to explain to Bell why the question needed to be softened. Even DC, who was Bell's supporter, testified that Bell had no reason to be defensive.

Bell also failed to model appropriate behavior and actions for employees during the shareholder meeting discussions. Bell's assertion that she was in a meeting of her peers is simply not true. Bell was a manager in a meeting at which both managers and non-management employees were present. While none of the employees may have worked directly under Bell, she still had an obligation to perform at the standard of a manager during the meeting. Bell failed to model conduct supporting DMV's team-oriented environment or behavior and showed no effort to resolve conflict in a positive manner or be flexible. She clearly did not meet the expectation of leading by example.

Finally, Bell communicated to employee RK in a disrespectful and unprofessional manner. Bell may have been trying to protect RK from working beyond her shift and had, in fact, tried to address the potential overtime situation for RK prior to the meeting. It is unfortunate that neither Damme nor RK's manager addressed the potential overtime issue prior to the meeting. However, Bell's interruption of the meeting and her abrupt and forceful dismissal of RK was unprofessional and inappropriate. Even if RK was not embarrassed by Bell's dismissal because she understood Bell's demeanor, she was embarrassed that Bell's directive required her to interrupt the speaker when she left. In addition, other managers and employees viewed Bell's dismissal of RK as derogatory and rude. Even her supporter DC recognized that Bell's dismissal of RK could have appeared derogatory. Bell should not have dismissed RK or any employee in this manner, nor should other employees, who apparently did not know Bell as well as RK, have to observe a manager treating an employee this way.

#### Level of Discipline

Since we have found that DMV proved the charges against Bell, we now turn to whether DMV imposed an appropriate level of discipline. Bell argues that she should not have been removed from management service because such discipline is excessive in light of the "mild and otherwise unremarkable events of the meeting;" the fact that LCA did not impose a heightened professional standard; she was just being herself during the December 9 meeting and had not previously been notified her normal behavior was inappropriate; and the Department's method of investigation in this matter was alarming, biased, in contravention of procedural and substantive requirements, and demonstrated an effort to get rid of Bell. (Appellant's Post-hearing Brief at 5.)

We conclude that Bell's removal from management service, based on her violation of terms in the LCA, was consistent with ORS 240.570(3). We disagree with Bell's characterization of the events of the meeting as mild and unremarkable. As we have explained, although Bell described her usual communication style as passionate and assertive, her behavior during the December 9 meeting went well beyond that. In fact, Bell's conduct was sufficiently uncooperative and abrasive to cause

a manager to raise concerns about it right after the meeting, an employee to signal her to stop talking during the meeting, and another employee to decide he would never volunteer to participate in such a meeting in the future.

Bell also had clear notice of DMV's expectations that she not engage in inappropriate or unprofessional conduct, including making disrespectful, derogatory, and offensive remarks to others; conduct herself professionally at all times; and support, establish, and maintain positive, productive, and professional relationships between her unit, other units, and other service groups. These expectations were neither arbitrary nor unreasonable. They were included in Bell's job description, which required her to adhere to a professional demeanor in her interactions with employees, and were specifically referenced in the 2008 written reprimand, the July 2010 LCA, and the May 2011 warning letter.

In addition, in January 2008, Bell had been disciplined and put on notice that DMV had issues with her personal communication style. In the written reprimand she received at that time, she was reminded that she was expected to act professionally and appropriately, which included refraining from "making disrespectful, derogatory, sarcastic or flippant remarks, raising or speaking in a loud voice or arguing." In her evaluation covering the period from November 2007 through October 2008, her supervisor also commented on Bell's awareness that she needed to improve her communication style to a higher management level, noting that she sometimes "will speak up where she could have made a better choice of words or communication style."

In 2010, Bell was suspended and issued a LCA, which specifically directed her to not engage in inappropriate or unprofessional conduct, including making disrespectful, derogatory, and offensive remarks to others; conduct herself professionally at all times; and support, establish, and maintain positive, productive, and professional relationships between her unit, other units, and other service groups. She was also warned that any violation of these expectations could result in her removal. In May 2011, after concerns were raised about Bell's behavior at a meeting, Nardi told her that her conduct at the meeting may have violated these LCA expectations and issued a written reminder regarding her compliance with the expectations. Finally, Bell's belief that she could continue to act as usual is not credible, since even DC understood that Bell needed to modify her behavior after the LCA and May 2011 memorandum.

We also do not find that the level of discipline was excessive. Bell had engaged in serious misconduct which resulted in the LCA. She recognized that DMV could have removed her from management service because of her misconduct and was clearly aware that the LCA was a final warning. Bell also had agreed that any failure to meet the expectations established by the LCA was cause for immediate removal from management service or dismissal from state service. Since we have found that Bell's behavior in the December 9 meeting did not meet the LCA expectations, DMV was entitled to remove her from management service.

We also conclude that Bell's failure to take responsibility for her actions makes it unlikely that a lower level of discipline would change her behavior. Bell was unwilling to admit that anything she did during the meeting was wrong. Instead, she downplayed her conduct, blamed others for how she had acted, and accused others of being out to get her. She initially blamed her supervisor Nardi

for her removal, but then switched her focus to Tong after the evidence showed that Nardi had little, if anything, to do with the removal decision. And while the issue of any discipline for Bell's conduct in intentionally deceiving Nardi regarding Doe's evaluation is not before us, Bell's testimony that she did this shows her inability to view her actions objectively.

Finally, any errors in DMV's method of investigation were corrected during the investigation itself or are insufficient to overturn the removal decision. We agree that Tong's initial involvement in the investigation of the December 9 meeting, in which he was a participant and potential witness, was not appropriate. However, once DMV realized that discipline might be imposed, Phillips took over the investigation. There is no issue with the managers' statements. Tong did not interview the managers, but only requested that they write a statement of what occurred during the meeting. Any problems with Tong's interviews of DC and RK were addressed when they both submitted revised statements.

Phillips also obtained statements from the four employees who had not been interviewed by Tong, which she put into written form. These employees confirmed that their statements were accurate, both after providing the statements and at the hearing. The statements are not identical except to the extent that they all address the events of the December 9 meeting. The employees often used similar but different words to describe their impressions of Bell's behavior and there is no evidence that Phillips placed words in their mouths or asked leading or suggestive questions. The removal decision was made by the DMV administrator, who reviewed all of the information collected and even directed Phillips to confirm witness statements and obtain additional information in response to Bell's pre-discipline response.

In conclusion, DMV proved that Bell's behavior during the December 9 meeting failed to meet the expectations in the LCA. Therefore, DMV's decision to remove Bell from management service was consistent with the LCA and ORS 240.570(3), and we will dismiss the appeal.

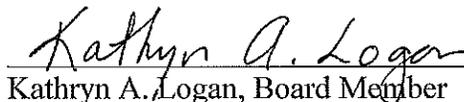
ORDER

The appeal is dismissed.

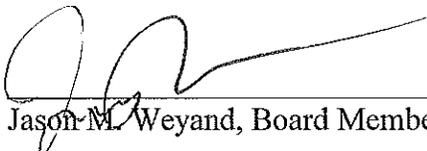
DATED this 12 day of December, 2012.



Susan Rossiter, Chair



Kathryn A. Logan, Board Member



Jason M. Weyand, Board Member

This Order may be appealed pursuant to ORS 183.482.