

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. MA-007-14

(MANAGEMENT SERVICE REMOVAL)

RICHARD C. BLANK,)	
)	
Appellant,)	
)	
v.)	RULING ON RECONSIDERATION
)	
STATE OF OREGON, CONSTRUCTION)	
CONTRACTORS BOARD,)	
)	
Respondent.)	
_____)	

Richard C. Blank (Blank or Appellant) seeks reconsideration of this Board’s December 4, 2014, order, which adopted the administrative law judge’s recommended order that the appeal be dismissed. *Blank v. State of Oregon, Construction Contractors Board*, Case No. MA-007-14 (December 2014). Although objections had been filed by Appellant, the Board determined that the Appellant’s objections were untimely filed.

In his motion, Appellant asked that we reconsider our conclusion that the objections were untimely and that we review the merits of the case. The Board granted reconsideration and, on January 22, 2015, oral arguments were heard on the timeliness of the objections as well as the merits of underlying dispute.

The issues for the reconsideration hearing were:

1. Did the Appellant timely file his objections?
2. If the objections were not timely filed, did the Appellant have good cause sufficient to excuse the late filing?
3. Did the Construction Contractors Board (CCB) appropriately remove Richard Blank from management service, and dismiss him from state service, effective March 20, 2014, for failing to intervene to stop a pattern of sexual harassment of a

subordinate by another employee, and thus committing misconduct, malfeasance and unfitness to render effective service under ORS 240.555?

For the purposes of this reconsideration order, we reach no conclusion about the timeliness of the filing and assume without deciding that the Appellant's objections were timely filed. We therefore proceed directly to the merits of the case. Having reviewed the record in this case and Appellant's objections, we conclude that the CCB did not violate the statute in removing and dismissing Blank.

RULINGS

At hearing and during oral argument, Appellant objected to the admission of Exhibit R-7, an investigative report. Appellant asserts that this report is inadmissible because it "relates alleged admissions of [Blank] and others in a loose, narrative style, with speculative and probabilistic conclusions, and contains fragments of sentences with ambiguous meaning."

OAR 115-010-0050(1) provides that "[e]vidence of a type commonly relied upon by reasonably prudent persons in conduct of their serious affairs shall be admissible." Exhibit R-7 consists of a 79-page report that contains information describing the process used by the investigator, a summary of the investigator's findings, and notes from interviews with Blank and several other witnesses to the events at issue. In addition, attached to the report is more than 100 pages of documentary evidence gathered during the investigation, many of which relate directly to the allegations at issue in this matter. Investigative reports such as this are frequently prepared by investigators in disciplinary matters, and employers often rely on these reports in determining whether discipline is appropriate. To the extent that any summaries of witness statements in the report were inaccurate or wrong, Appellant had the opportunity to call those witnesses to testify in this proceeding to correct or contradict the report. Blank also had the opportunity to testify directly to any inaccuracies regarding the report's summaries of his statements. In sum, we conclude that the report submitted by CCB meets the standards for admissibility under our rules and was properly received by the ALJ.

The remaining rulings of the ALJ were reviewed and are correct.

FINDINGS OF FACT

The Parties

1. The CCB is a state agency that regulates construction contractors who work on real property.
2. At the time of his termination, Blank was the CCB Enforcement Section Program Manager, a Principal Executive Manager C position in management service. He had served at that level since 2001 with some intervening work out of class as a Principal Executive Manager D in 2008. Before his managerial service, Blank worked as an Administrative Specialist 2 at CCB, a position in the classified service, beginning in 1999.

3. The employees of CCB are subject to statewide policies and rules from the Department of Administrative Services (DAS). DAS Statewide Policy 50.010.01, Discrimination and Harassment Free Workplace, provides in part:

“(a) **Discrimination, Workplace Harassment and Sexual Harassment.** The State of Oregon provides a work environment free from unlawful discrimination or workplace harassment based on or because of an employee’s protected class status. Additionally, the state of Oregon provides a work environment free from sexual harassment. Employees at every level of the organization, including state temporary employees and volunteers, must conduct themselves in a business-like and professional manner at all times and not engage in any form of discrimination, workplace harassment or sexual harassment.

“(b) **Higher Standard.** *Managers/supervisors are held to a higher standard and are expected to take a proactive stance to ensure the integrity of the work environment. Managers/supervisors must exercise reasonable care to prevent and promptly correct any discrimination, workplace harassment or sexual harassment they know about or should know about.*

“(c) **Reporting.** *Anyone who is subject to or aware of what he or she believes to be discrimination, workplace harassment, or sexual harassment should report that behavior to the employee’s immediate supervisor, another manager, or the agency, board, or commission Human Resource section, Executive Director, or chair, as applicable. A report of discrimination, workplace harassment or sexual harassment is considered a complaint. A supervisor or manager receiving a complaint should promptly notify the Human Resource section, Executive Director, or chair, as applicable.”*

“* * * * *

“(g) **Penalties.** Conduct in violation of this policy will not be tolerated.

“(A) Employees engaging in conduct in violation of this policy may be subject to disciplinary action up to and including dismissal.

“* * * * *

“(C) An agency, board or commission may be liable for discrimination, workplace harassment or sexual harassment if it knows of or should know of conduct in violation of this policy and fails to take prompt, appropriate action.

“(D) *Managers and supervisors who know or should know of conduct in violation of this policy and who fail to report such behavior or fail*

to take prompt, appropriate action may be subject to disciplinary action up to and including dismissal.” (Italics added.)

4. DAS Statewide Policy 50.010.03, Maintaining a Professional Workplace, provides in part:

“(a) **Conduct** Employees at every level of the agency should foster an environment that encourages professionalism and discourages disrespectful behavior. All employees are expected to behave respectfully and professionally and refrain from engaging in inappropriate workplace behavior.

“(b) **Addressing Inappropriate Workplace Behavior**

“(A) *Supervisors must address inappropriate behavior that they observe or experience and should do so as close to the time of the occurrence as possible and appropriate.*

“(B) If an employee observes or experiences inappropriate workplace behavior and the employee feels comfortable in doing so, they should:

“(i) redirect inappropriate conversations or behavior to workplace business; and/or

“(ii) tell an offending employee his/her behavior is offensive and ask him/her to stop.

“(c) **Reporting Inappropriate Workplace Behavior**

“(A) *An employee should report inappropriate workplace behavior he/she experiences or observes to his/her immediate supervisor as soon as practicable. If the employee’s immediate supervisor is the one engaging in the inappropriate behavior, the employee should report the behavior to upper management, the agency head or Human Resource section, as soon as practicable. The report may be made orally or in writing.*

“* * * * *

“(d) **Responding to a Report of Inappropriate Workplace Behavior**

Inappropriate workplace behavior must be addressed and corrected before it becomes pervasive, causes further workplace disruption or lowers employee morale. Unless the agency decides otherwise, the supervisor of the employee allegedly engaging in the inappropriate workplace behavior must investigate the report as soon as possible.

“(e) **Consequences**

“(A) Any employee found to have engaged in inappropriate workplace behavior, will be counseled, or, depending on the severity of the behavior, may be subject to discipline, up to and including dismissal.

“(B) *A supervisor who fails to address inappropriate behavior, will be counseled, or, depending on the severity of the behavior, may be subject to disciplinary action, up to and including dismissal.*

“(f) **Retaliation** Retaliating against someone for reporting or addressing inappropriate workplace behavior is prohibited. The agency will investigate reports of retaliation. Any employee found to have engaged in retaliation may be subject to discipline, up to and including dismissal.” (Italics added.)

5. Blank signed acknowledgements of Policy 50.010.03 on April 7, 2010, stating “I understand that as a State of Oregon employee, the policy applies to me. I also understand that any violation of the policy constitutes misconduct.”

6. Blank attended the following training relevant to the issues in this case: “Preventing and Minimizing Lawsuits” (2009); “Documentation, Discipline and Discharge” (2009); “How to Deal With Unacceptable Employee Behavior” (2010); and “Employment Discrimination Based on Protected Class Status” (2010).

7. During the events at issue here, Blank reported to CCB Administrator Craig Smith. Smith, in turn, reported directly to the Board members of the CCB. Within the CCB work unit at issue here, Smith had a reputation as a micromanager.

8. Before the events at issue, CCB had not imposed any discipline on Blank.

9. During the events at issue here, Traci Barnett was CCB’s human resources manager and the sole human resources employee at CCB. Barnett reported to Smith.

10. Employee EL¹ is a Compliance Specialist at the CCB and has held that position since 2006. He is of Japanese and Native-American descent.

11. Throughout his employment, EL reported to Blank. The two were also close personal friends who often communicated at work daily, often for lengthy periods of time, and met outside of work for activities such as attending sporting events.

12. EL’s position is in a bargaining unit represented by the American Federation of State, County & Municipal Employees (AFSCME). EL has been president and chief steward of the CCB local for the last eight years.

¹We have elected to identify this employee by his initials rather than full name.

13. During the events at issue here, employee WR² was employed by CCB as an Information System Specialist in the Information Technology (IT) Department, reporting to the IT manager, Shelly Wiles. WR, an 18-year employee, had a longstanding personal connection to CCB Administrator Smith. WR's IT work occasionally brought him to Blank and EL's work area. WR's position was also in the AFSCME bargaining unit, and he was a former union local president. The CCB IT Department is located in a locked room some distance from EL's work location. However, for the period at issue here, WR's work station was in the CCB server room, where he was alone.

14. Beginning in August 2011, and continuing through 2013, WR engaged in a pattern of homophobic and ethnicity-based harassment of EL.³ WR's harassment included the following acts:

- Attached pink streamers to the handlebars of EL's Harley Davidson motorcycle;
- Logged in to EL's state-owned computer and put a racially insensitive picture on his computer;
- Logged in to EL's state-owned computer to change the computer wallpaper to include an image of scantily clad males in Speedo swimsuits;
- Signed EL up on mailing lists aimed at gay readers so that EL would receive unwanted mailings at work, including gay pornography;
- Left a DVD of the film "Brokeback Mountain" on EL's desk;
- Sent EL an e-mail in which WR refers to a "male gay black lover" WR had invented and repeatedly mentioned to EL; and
- Put a note on the back of EL's vehicle that said "I ♥ PENIS."

15. During the same period, when EL would talk to men, WR would repeatedly stand behind the men and make kissing sounds and facial expressions. WR also arranged for EL, who is not tall, to receive advertisements for elevator shoes.

16. Blank was aware of all of the conduct listed above shortly after it occurred, usually by hearing of it from EL.⁴

²This employee will also be identified by his initials.

³There is no evidence that WR's behavior was based on any actual knowledge or evidence of EL's sexual orientation.

⁴Appellant asserted that CCB had not met its burden of proof in establishing that he knew of all of the incidents of harassment listed in Findings of Fact 14 and 15. In support of this position, Appellant relies on statements made by EL during his testimony at the hearing. After reviewing EL's testimony in conjunction with the other evidence in the record, we disagree.

17. Before August 2011, EL participated in bantering with WR and did not inform WR that his conduct was unwelcome and inappropriate. In August 2011, EL informed WR in a heated conversation that his actions were not welcome and inappropriate. Blank was aware of this change in EL' approach to WR, but was also aware that WR's conduct before August 2011 was nevertheless inappropriate.

18. Throughout much of the period of WR's harassment, EL was concerned that, if he reported the harassment, he might endanger WR's job. EL believed that, as a union official, it was morally wrong and dishonorable for him to cause another bargaining unit member to lose his or her job. The harassment took a toll on him, however, and he did want it to end.

19. In February 2013, shortly after the "I ♥ PENIS" sticker appeared on his car, EL went to Barnett to complain and get her assistance in obtaining security camera footage of the employee parking area at the time the sticker was put on his car.

20. In early 2013, two classified CCB mailroom employees discovered mail addressed to EL that contained content inappropriate for work. The mail included material of a sexual nature with a gay theme. They showed the material to their supervisor, CCB Business Manager Stan Jessup. Jessup immediately showed the material to Blank, who responded: "don't let it get to [EL] because he is sensitive about it." The next time that similar mail was received, Jessup contacted CCB Administrator Smith and showed him the material. After that, Jessup gave Barnett the material as it arrived, and HR Manager Barnett would put it in a file.

EL was asked directly if he told Blank of the ongoing harassment by WR, but EL did not answer that question clearly. EL did not testify that he never told Blank about the ongoing harassment, or that he believed that Blank was not aware of it. At best, EL's testimony established that he never made a formal complaint to Blank until early 2013. Further, EL testified that "everybody knew" about WR's harassment of him for years and that it was "not a big secret." Thus, EL's testimony supports, rather than contradicts, the finding that Blank was aware of much of the conduct at issue in the dismissal.

More importantly, Blank's own statements confirm his knowledge of WR's harassment of EL. Although Blank chose not to testify at the hearing, the record contained a transcript of Blank's statements made during his pre-dismissal meeting. In that meeting, despite being told that this was his opportunity to refute the charges or offer mitigating information, Blank initially refused to comment about the specific allegations. However, he then proceeded to admit that he was aware of some of the incidents.

When asked again to respond to the specific items listed in his pre-dismissal letter, Blank was more forthcoming and admitted that he was aware of the specific items listed in the pre-dismissal letter. When asked why he failed to act in response to that knowledge, Blank responded that "I didn't know what to do. And that's about as honest as I can be is I didn't know what to do."

Blanks' statements at the pre-dismissal meeting are consistent with summaries of statements Blank made to the investigator in three separate interviews as well as statements made by other CCB employees during the investigation. If these statements were incorrect or taken out of context, Blank certainly could have explained as much by testifying at the hearing. In the absence of such testimony, this evidence is un rebutted, and is sufficiently credible to establish by a preponderance of the evidence that Blank knew of the harassment directed at EL.

21. During this period, EL and Blank repeatedly discussed WR's actions. Between May and October 2013, EL told Blank that "this needs to stop." EL also told Blank that CCB employees were ganging up on him, and tattling on him to make his life miserable. Blank told EL that he didn't know what to do about the harassment.

In early September 2013, EL asked AFSCME Council Representative Randy Ridderbusch for advice. EL told Ridderbusch that he had informed Blank of the abuse, that Blank would do nothing, and that he had given up on Blank. Ridderbusch suggested that they meet with Barnett. That meeting took place on September 16. At the meeting, EL and Ridderbusch focused on ending the conduct and did not name the individual. Barnett quickly identified the individual as WR, and it was apparent that she was already aware of some of the instances of harassment. The meeting with Barnett did not result in any change in WR's conduct or CCB's lack of response to that conduct.

22. On September 20, 2013, Smith and EL had a conversation in the men's room about WR's harassment. Blank entered the room during the conversation, and Smith suggested that the conversation move to Blank's office. During that conversation, EL described the conduct of WR and argued that it was inappropriate and offensive. Smith disputed EL's views, stating that he believed that WR was a "good guy." Blank offered little comment during the meeting.

23. Blank told no one else about EL's workplace concerns and Blank took no action to stop it.

24. Blank was personally and privately supportive, and personally loyal, to EL.

25. On October 17, 2013, EL submitted a tort claims notice to Smith and DAS. The notice stated that EL was "being subjected to a severe and pervasive hostile work environment of which his employer had notice and failed to take meaningful action to stop the ongoing pattern of co-worker harassment." The notice included a chronological list of events and stated that the harassment began in 2006 and persisted despite EL's "reports" to CCB managers. In response to the notice, the Department of Justice hired private attorney Jill Goldsmith as a Special Assistant Attorney General to investigate the matter. Goldsmith began her investigation in the fall of 2013. Her charge was simply to determine what had occurred, not to make disciplinary recommendations.

26. Goldsmith interviewed 20 CCB employees, including EL, WR, Blank, Smith, Barnett, and WR's supervisor Wiles. Goldsmith interviewed EL twice and Blank three times.

27. Goldsmith also reviewed CCB e-mail files and other documents, including the "I ♥ PENIS" sign left on EL's car and multiple examples of gay pornography and other gay-themed mailings that EL received at work.

28. Blank told Goldsmith that he had done nothing about the harassment and did not realize that he could do anything about it. Blank said that when EL came to him about a problem, Blank would say that he was not sure what to do or if there was anything that he could do. Blank stated that he viewed EL's disclosures as "friend to friend" rather than employee to manager.

Blank also told Goldsmith that EL had been telling him, since the “I ♥ PENIS” sticker was put on his car, that “this needs to stop.”

29. On January 30, 2014, Goldsmith submitted her 79-page report to the CCB, along with approximately 100 pages of exhibits. Detailed summaries of Goldsmith’s interviews of CCB employees take up 60 pages in the report.

30. On February 12, 2014, Smith tendered his resignation to the CCB, effective on the appointment of an interim Administrator. Because he retired, CCB made no personnel deliberations or decisions regarding Smith.

31. During early 2014, HR Manager Barnett was out on leave. The CCB entered into an interagency agreement with the Department of Consumer and Business Services (DCBS) to have that agency provide human resources services to CCB. Pursuant to that agreement, DCBS Human Resources Analyst 3 Linda Bures effectively became the CCB human resources manager in mid-February.

32. On February 18, 2014, Berri Leslie, Deputy Director of the Insurance Division at the DCBS, was appointed interim Administrator of the CCB. As part of her assignment, Leslie was instructed to terminate WR, Barnett, and Blank.

33. On February 24, Leslie issued a pre-dismissal letter to Blank based on his failure to act regarding WR’s harassment of EL. The letter, drafted by Bures, described WR’s conduct as set out in Findings of Fact 14 and 15 above.

34. The CCB issued a pre-dismissal letter to WR. On March 4, 2014, WR attended a pre-dismissal meeting, along with a union representative and a union attorney.

35. On March 5, 2014, Bures held a pre-dismissal meeting with Blank. Interim Administrator Leslie also attended as CCB management. Blank did not bring a representative. At the meeting, Bures reviewed the pre-dismissal letter with Blank paragraph by paragraph. Blank stated that he was aware of WR’s conduct, as listed in the pre-dismissal letter, and that he had learned of it close to the time in which it had taken place. He also acknowledged that EL had told him that the harassment “needs to stop” in the six months before October 2013. Blank also acknowledged that he did not report WR’s conduct to anyone or take any remedial measures.

36. During the pre-dismissal meeting, Blank was offered the opportunity to provide mitigating information to CCB or to refute the allegations in the pre-dismissal letter. Blank admitted knowing of the harassment directed at EL and did not dispute the veracity of the findings of the investigation, which were discussed in some detail. Blank refused to comment on the allegations contained in the pre-dismissal letter, other than debating the use of certain language. At no point during this meeting did Blank specifically deny that he knew of the harassment directed at EL, as alleged in the pre-dismissal letter. His only explanation as to why he failed to take action was that he did not know what to do.

37. CCB Interim Administrator Leslie concluded that Blank's statements at the pre-dismissal meeting, and the evidence obtained through Goldsmith's investigation, warranted Blank's removal from management service and dismissal from state service.

38. On March 20, the CCB dismissed WR from state service. WR's termination did not result in a grievance arbitration.

39. On March 20, 2014, Leslie issued a termination letter to Blank, effective on that date. The letter stated, in part:

"You are aware that, as a manager with the [CCB], you are required to inform your staff of Board and State policies and enforce compliance with such policies. Nevertheless, you failed to take appropriate action when you became aware (or should have been aware) that the conduct of [WR], if accurately described by [EL], violated multiple statewide policies and was inappropriate in the workplace. At the pre-dismissal meeting, you declined to confirm or deny that [EL] told you about his concerns over at least a two-year period. Based on the long time period during which the conduct occurred, your close relationship with [EL], and your descriptions during your investigatory interview of your knowledge of the conduct, we conclude that you knew enough information to know over at least a two-year period that inappropriate conduct was occurring at work. In addition, you failed to inform any member of your management team or human resources of your knowledge of the conduct, of the policy violations and of the inappropriate conduct. Your actions and inactions represent violations of Statewide Policy 50.010.03 Maintaining a Professional Workplace Policy, and Statewide Policy 50.010.01 Discrimination and Harassment Free Workplace Policy.

"You failed to carry out your required managerial responsibilities by failing to take action to correct or to report when you became aware of (or should have been aware of) behavior in the workplace which was clearly inappropriate. Statewide policy makes clear that unsolicited verbal or physical conduct of a sexual nature, such as that of which you became aware (or should have been aware of), can be considered sexual harassment if the conduct is unwelcome and has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive work environment.

"Statewide policy also clearly outlines a manager's responsibility to take proactive steps to ensure the integrity of the work environment. Your inaction exposes the Board to potential liability for a claim of hostile work environment based on sexual harassment. In addition, you have demonstrated serious lack of judgment, as well as disrespect and disregard for the State's policies and reputation by failing to address and respond to repeated inappropriate behavior toward an employee directly under your supervision. You compounded your misconduct by undermining the very policies that you are expected to enforce as a manager.

“Your inaction also rises to the level of misconduct, inefficiency, incompetence, as well as other unfitness to render effective service.

“We have carefully reviewed and considered all the information regarding the proposed removal from the management service and dismissal from state service and the circumstances surrounding this matter. Based on our review, we have concluded that the information presented by you is not sufficient to refute the charges or basis for this action. Your failure to perform your management responsibilities indicates that you are unable or unwilling to fully and faithfully perform the duties of your position satisfactorily. In addition, your inaction in the face of inappropriate workplace conduct constitutes misconduct, inefficiency, incompetence, and other unfitness to render effective service.”

40. CCB also placed HR Manager Barnett on administrative leave and issued a pre-dismissal letter to her because she failed to take action after EL reported the “I ♥ PENIS” sign to her in February 2013. Barnett attended a pre-dismissal meeting represented by a private attorney.

41. On April 2, 2014, Barnett and CCB entered into an agreement in which Barnett agreed to resign in lieu of termination, effective April 3.

42. On May 2, 2014, CCB and EL signed a settlement agreement. The State agreed to pay EL \$25,000 in exchange for his release of claims and his agreement to withdraw the tort claim notice and the complaint filed with the Bureau of Labor and Industries.

43. At the hearing, EL testified that he thought his settlement was too low.

44. Blank was present at the first day of hearing, during which CCB presented its case for termination. Blank did not attend the second day of hearing or testify.

CONCLUSIONS OF LAW

1. This Board has jurisdiction over the parties and the subject matter of this dispute.
2. Blank’s removal from management service did not violate ORS 240.570(3), and his dismissal from state service did not violate ORS 240.570(5) and 240.555.

DISCUSSION

Legal Standards

ORS 240.570(3) provides that 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.” Under ORS 240.570(5), a management service employee with immediate prior status as a classified employee “may be dismissed from state service only for reasons specified by

ORS 240.555 and pursuant to the appeal procedures provided by ORS 240.560.” *Mabe v. State of Oregon, Department of Corrections*, Case No. MA-09-09 at 22 (July 2010). Under ORS 240.555, an employee may be disciplined or dismissed for “misconduct, inefficiency, incompetence, insubordination, indolence, malfeasance or other unfitness to render effective service.”

Because Blank had status as a classified service employee before he was promoted to management service, we consider two separate personnel actions: (1) his removal from management service under ORS 240.570(3); and (2) his dismissal from state service under ORS 240.570(5) and 240.555.

CCB has the burden of proving that both actions were lawful. OAR 115-045-0030(6). 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); *Lucht v. State of Oregon, Public Employees Retirement System*, Case No. MA-16-10 at 24 (December 2011). We have defined a reasonable employer as one that “disciplines employees in good faith and for cause; imposes sanctions that are proportionate to the offense; [and] considers the employee’s length of service and service record * * *.” *Zaman v. State of Oregon, Department of Human Resources*, Case No. MA-21-12 at 12 (April 2013). “A reasonable employer also administers discipline in a timely manner and clearly defines performance expectations, provides those expectations to employees, and tells employees when those expectations are not being met. In addition, a reasonable employer applies the principles of progressive discipline, except where the offense is so serious or unmitigated as to justify summary dismissal⁵, or the employee’s behavior probably will not be improved through progressive measures.” *Nash v. State of Oregon, Department of Human Services*, Case No. MA-008-14 at 23 (December 2014) (citations omitted).

We apply a two-step analysis in reviewing appeals under the statute. “First, this Board determines whether the employer has proven the charges that are the basis of the discipline. However, the employer need not establish all of the charges. If we find that the State has proven any of the charges, we then apply a reasonable employer standard to determine whether the State was justified in imposing the disciplinary action that it did.” *Id.* at 24 (citations omitted).

Removal from Management Service

We first determine whether CCB has proven the charges against Blank. Here, CCB established (and Blank does not dispute) that Blank was aware of CCB’s policies against harassment of employees and against inappropriate workplace behavior. CCB also established that WR had engaged in longstanding and egregious harassment of EL, Blank’s subordinate, from approximately August 2011 until shortly before WR’s termination in March 2014. Finally, CCB established that WR engaged in inappropriate conduct even before that conduct was expressly identified by EL as unwelcome.

⁵Our earlier opinions use the term “gross,” *e.g.*, “an employee’s offense is gross.” This term has taken on new meaning since we first used that phrase, and generally is no longer descriptive of the employee actions involved. Our use of a different phrase, however, does not change our test—*i.e.*, some employee actions justify dismissal even where no prior discipline has been imposed.

The issue remaining is whether Blank was aware of WR's conduct, and if so, whether he failed to take action. Blank was aware of many, if not most, of the specific instances of inappropriate conduct and harassment shortly after they occurred. Those instances included the six events listed in the pre-dismissal and dismissal letters. In addition, CCB proved that, shortly after EL discovered racially insensitive and scantily clad male images on his computer, Blank learned that WR was responsible for those images. Blank was also aware of the unwanted and pornographic mail aimed at gay readers being sent to EL, and EL's distress over it, telling mailroom employees who reported it to him "don't let it get to [EL], because he is sensitive about it." Blank also knew about the pink "girl's bicycle" streamers placed on EL's motorcycle.

CCB proved that Blank knew that WR's conduct after August 2011 was unwelcome and distressing to EL. Over the next two plus years, Blank was repeatedly reminded by EL and others that EL was deeply troubled by WR's conduct. This includes a situation between February and April 2013, when EL told Blank that EL "needed this [activity] to stop." Blank was also aware of the August 2011 verbal exchange between EL and WR. Blank knew that WR's conduct was imposing a personal cost on EL. In response to this information, Blank told EL that he did not know what to do.

In the face of this knowledge, Blank did nothing except (1) apparently, be personally supportive to EL, and (2) attend, at Smith's request, an impromptu meeting with EL and Smith to discuss WR's conduct. Blank said nothing substantive at the meeting. In his interview with Goldsmith, and in his pre-dismissal hearing, Blank acknowledged that he had done nothing about the situation and offered no substantive justification or excuse for his conduct.

Blank's only explanation for his conduct in the record is his repeated statement that he "didn't know what to do." That statement, however, means even less than it appears to because the obvious, literal meaning is not accurate. Blank acknowledged receiving policies directing him to report harassment to managers, and there was no evidence that, despite his 15 years at CCB, he was unaware of who WR's supervisor was, who his own supervisor was, who the CCB Board was, or that there were other officials in State government to whom he could have at least attempted to report the harassment.

Further, even if Blank truly did not "know what to do," there is no evidence in the record that he took any steps to find out "what to do." Thus, we are left with a record that demonstrates that Blank was familiar with an extended period of harassment of an employee, was aware of his responsibilities with respect to that harassment, and yet chose to do nothing. For these reasons, we conclude that CCB has proven the allegations against Blank.

Having concluded that CCB has established that Blank engaged in the conduct for which he was dismissed, we must next determine whether CCB's removal of Blank from management service was the action of a reasonable employer. In applying the "objectively reasonable" standard to management service cases, an employer may hold a management service employee to strict standards of behavior, so long as these standards are not arbitrary or unreasonable. *Lucht* at 24; *Helper v. Children's Services Division*, Case No. MA-1-91 at 22 (February 1992). A significant factor for this Board's consideration is the extent to which the employer's trust and confidence in the employee have been harmed, compromising the employee's ability to act as a member of the

“management team.” *Salchenberger v. State of Oregon, Department of Corrections*, Case No. MA-19-12 at 11 (July 2013); *Lucht* at 24. In addition, our precedent gives weight to the effect of the management service employee’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. *Salchenberger* at 11; *Lucht* at 24. We have stated that “[t]he employer’s burden in justifying a removal from management service is relatively minor.” *Zaman* at 15 (quoting *Plank v. Department of Transportation, Highway Division*, Case No. MA-17-90 at 29 (March 1992)).

Under these standards, we conclude that CCB’s removal of Blank from management service was the act of a reasonable employer. It was not unreasonable or arbitrary for CCB to expect that Blank would take steps to report or stop the harassment of EL. However, Blank’s lack of action regarding EL was clearly unreasonable. Blank’s failure to act allowed an unacceptable pattern of improper harassment to continue for a long period. Through his conduct, and his unpersuasive explanation for his conduct, Blank demonstrated that he “is unable or unwilling to fully and faithfully perform the duties of the position satisfactorily.” ORS 243.570(3). Consequently, CCB did not violate ORS 243.570(3) when it removed Blank from management service.

Dismissal from State Service

We now turn to CCB’s dismissal of Blank from state service. Having determined that CCB established that Blank engaged in the conduct for which he was dismissed, we begin our analysis by determining whether Blank’s actions constituted misconduct, malfeasance, or other unfitness to render effective service as asserted by CCB.

This Board has defined “misconduct” as “a transgression of some established and definite rule of action, a forbidden act, a dereliction of duty, unlawful behavior, willful in character, improper or wrong behavior.” *Mabe* at 26. The conduct must also involve intentional wrongdoing. *Greenwood v. Oregon Department of Forestry*, Case No. MA-3-04 at 30 (July 2006), *recons denied*, (September 2006) (emphasis omitted).

We conclude that Blank intentionally engaged in the conduct for which he was dismissed from state service—taking no action to stop, or report, a lengthy course of inappropriate conduct violating state policies and laws. Although one might imagine a host of explanations or mitigating circumstances that might excuse that inaction, Blank chose to limit his response to stating that he “didn’t know what to do.” As noted above, Blank had a variety of choices available to him, and chose to do nothing. We conclude that this level of fecklessness, without a credible or meaningful explanation, was a willful dereliction of his duties and constituted willful, intentional actions. Therefore, we conclude that Blank engaged in “misconduct” within the meaning of ORS 240.055.

We turn to whether CCB acted as a reasonable employer in dismissing Blank. When we apply the reasonable employer test to review a dismissal from state service, we scrutinize an agency’s conduct more stringently, under rules that are substantially different from those governing management service removal. *Mabe* at 23; *Peyton v. Oregon State Health Division, Office of Environment and Health Systems*, Case No. MA-4-87 (January 1989). Charges that are adequate to support removal from management service might not be sufficient to justify dismissal

from state service. *Mabe* at 23; *Stoudamire v. State of Oregon, Department of Human Services*, Case No. MA-4-03 at 7-8 (November 2003). An employer must show that it dismissed the employee in good faith for cause. *Mabe* at 23; *Plank* at 29.

We conclude that CCB dismissed appellant in good faith for cause and acted as a reasonable employer under all of the circumstances. Blank knew more details of the harassment than anyone except WR and EL. He knew this information not only from EL, but from other employees, including the mailroom supervisor. He also knew his responsibilities under the state anti-harassment and anti-discrimination policies. Faced with that situation, Blank chose to do nothing and, when confronted about his behavior, provided no credible explanation for his actions and offers nothing in mitigation of his failure to act. When presented with an opportunity to do so in his pre-dismissal hearing and in this hearing, Blank declined. Blank points to no similarly situated employee or group of employees who knew what he did, and made the choices he did, and who did not resign or was not terminated.⁶

Blank contends that CCB did not act as a reasonable employer in dismissing him from state service, emphasizing that the focus of Blank's wrongdoing was supervisory and that no non-managerial employees, except for WR, were disciplined regarding WR's conduct. We disagree with this argument. Blank failed to follow policies that applied to all employees, not just supervisors. His inaction regarding all of the events that he knew of was extreme, and constituted misconduct. The CCB's decision to remove Blank from State service was the act of a reasonable employer.

We also determine that a reasonable employer could conclude that Blank's length of service and value as a manager did not sufficiently mitigate his conduct. Leslie's conclusion that it was not appropriate to retain an employee who had demonstrated no ability or interest in responding to wrongdoing is not unreasonable on this record.

Finally, Blank argues that Leslie was directed to terminate Blank before his pre-dismissal process began. Leslie, however, credibly testified that she had the authority to modify those directions. Moreover, Blank never offered Leslie any differing narrative of events or any satisfactory explanation or mitigating circumstances for his own conduct. For these reasons, we conclude that Blank's conduct was sufficiently egregious to establish that the State acted as a reasonable employer when it removed him from State service.

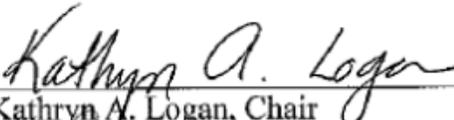
In sum, we grant Blank's request for reconsideration. We reach no conclusion about the timeliness of the filing and assume without deciding that the Appellant's objections were timely filed. We conclude that CCB did not violate ORS 240.570(3), ORS 240.570(5), or ORS 240.555 in removing Blank from management service and dismissing him from state service. Therefore, we will adhere to our prior order dismissing Blank's appeal. Our prior order is withdrawn and replaced by this order.

⁶Blank argues that WR's supervisor should have been terminated, not Blank. However, there is no evidence that the supervisor had anything approaching the level of information possessed by Blank.

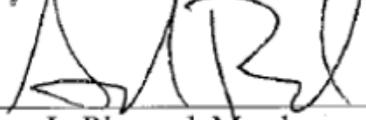
ORDER

1. Reconsideration is granted. Our December 4, 2014 order is withdrawn and replaced with this order.
2. Blank's appeal is dismissed.

Dated this 13 day of March, 2015.


Kathryn A. Logan, Chair


Jason M. Weyand, Member


Adam L. Rhynard, Member

This Order may be appealed pursuant to ORS 183.482.