EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. MA-015-14

(MANAGEMENT SERVICE DISCIPLINE)

MICHAEL S. PALMER, Appellant, v. STATE OF OREGON, DEPARTMENT OF CORRECTIONS, Respondent.	)	RULINGS, FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

Appellant filed objections to an August 6, 2015, recommended order issued by Administrative Law Judge (ALJ) Martin Kehoe, after a hearing was held before ALJ Julie Reading on April 30 and May 1, 2015, at the Snake River Correctional Institution in Ontario, Oregon.[1] The record closed on June 15, 2015, upon receipt of the parties' post-hearing briefs. The parties waived oral argument and submitted the matter on written argument in lieu of oral argument.

Shawnee Perdue, Wieland Perdue PLLC, Boise, Idaho, represented Appellant at the hearing and filed objections to the recommended order. Subsequently, Appellant appeared *pro se*.

Brena Moyer-Lopez, Senior Assistant Attorney General, Labor and Employment Section, Department of Justice, Salem, Oregon, represented the Respondent.

On August 21, 2014, Appellant filed a management service discipline appeal with this Board contesting actions taken by the State of Oregon, Department of Corrections (DOC).

The issue is: Did DOC discipline Appellant in accordance with ORS 240.570(3) when it issued Appellant a written reprimand and removed him from DOC's Tactical Emergency Response Team (TERT)?

[1]The matter was transferred to ALJ Kehoe in a periodic reassignment of cases.

For the reasons set forth below, we conclude that DOC's action was consistent with the statute and we will dismiss the appeal.

RULINGS

The rulings of the ALJs were reviewed and are correct.

FINDINGS OF FACT[2]

1. DOC maintains a prison facility in Ontario, Oregon called the Snake River Correctional Institution (SRCI). At that site, correctional officers generally report to sergeants, who report to lieutenants, who report to captains, who report to assistant superintendents, who report to Superintendent Mark Nooth. The facility's correctional officers, corporals and sergeants are represented by a union, the American Federation of State, County and Municipal Employees. The lieutenants and their superiors are unrepresented and are commonly referred to as "managers" and "supervisors."

2. Some DOC employees are selected to temporarily "work out of class" and perform the duties of higher-ranking employees while maintaining their prior pay rates. Work-out-of-class positions are considered developmental positions.

3. DOC can also assign employees to its TERT, which performs specialized work related to inmate disturbances and hostage rescues. Any full-time DOC employee can apply and potentially be assigned to the TERT. Employees who are selected and serve as members of the TERT receive a four percent pay differential. TERT duties are performed in addition to an employee's regular duties.

4. Appellant has worked at SRCI since he was hired as a correctional officer on July 10, 2000. Appellant later joined DOC's TERT in June 2005 and eventually became an assistant squad leader for the group. From June 8, 2008 to June 14, 2009, Appellant served as a work-out-of-class sergeant. On April 21, 2013, he was promoted to sergeant. On May 26, 2013, Appellant became a work-out-of-class lieutenant. On February 16, 2014, he was promoted to lieutenant and began a six-month trial service period.

5. In 2003, SRCI was involved in a class action lawsuit filed by 20 of the facility's female employees. The lawsuit, which was settled, alleged gender discrimination and sexual harassment. Since that time, the facility's administrators have been particularly sensitive to those issues and have implemented a number of "respectful-workplace" policies and procedures.

6. In May 2014, one of Appellant's subordinate sergeants told Appellant that one of the sergeant's subordinates, Officer EE, was being disrespectful and not completing assigned

[2]Appellant objected to several findings of fact in the recommended order, but failed to cite to any specific evidence in the record that would support those objections. Nonetheless, we have reviewed the record with Appellant's objections in mind, and we conclude that the ALJ's findings of fact are accurate.

shakedowns in spite of a warning that the sergeant had given him the day before.[3] Subsequently, Appellant spoke with EE about DOC's expectations of him and put a "verbal notation" about the occurrence in EE's personnel file. DOC does not consider such notations to be a form of discipline.

7. At the time, Appellant was having a secret extramarital affair with EE's ex-wife, Officer JE, who was also one of Appellant's indirect reports. (JE's supervisor, a sergeant, reported to Appellant.) Because of Appellant's rank and the nature of the work at the facility, Appellant could be required to personally oversee JE's duties at any time. In practice, Appellant occasionally supervised JE while she worked a graveyard shift. Additionally, Appellant was giving her advice and guidance about interviewing and promotions.

8. In early May 2014, Captain Gilberto Rodriguez overheard some coworkers saying that Appellant was having an extramarital affair with an unnamed subordinate correctional officer. A few days later, Rodriguez shared that rumor with Assistant Superintendent of Security Judy Gilmore. Rodriguez also met with Appellant, told him about the rumor, and warned him that being involved and having sex with someone at work could be bad for Appellant's career as a manager, as managers need to be above reproach at all times. In response, Appellant said that he was "not involved in any kind of relationship." Shortly after speaking with Rodriguez, Appellant went to his immediate superior, Captain Randy Gilbertson, and told him that there may be a rumor about Appellant having a relationship with JE, and that the rumor was untrue.

9. On May 19, 2014, DOC received a public hotline complaint call from a former correctional officer who had resigned in April 2014. Among several related allegations, the caller alleged that Appellant was having sex with JE at work while the two worked a graveyard shift, and that JE received special privileges and was relieved from posts. The caller also alleged that JE had been sending inappropriate messages and naked pictures to Appellant's DOC-issued cellphone.

10. The complaint was forwarded to DOC's Human Resources Division (HR), and HR Managers Lori Holcomb and Jana Wilson were tasked with conducting an investigation. The two set out by requesting Appellant's phone records, text messages, and emails. The phone records that they received shortly thereafter showed that Appellant and JE had shared four different phone calls between February 25 and March 5, 2014. They did not immediately receive records of Appellant's text messages or emails.

11. Holcomb and Wilson interviewed Appellant on May 29, 2014. At the beginning of the interview, Appellant was presented with the allegations from the hotline complaint. In response, Appellant said he was "astonished" and asked, "[a]re they saying I had sex with her?" He was also asked if he had engaged in a sexual relationship with JE while at work, and Appellant replied, "no, not at any time." Appellant then went on to indicate that he had sent JE a few text messages to occasionally ask her how she was doing. He also said that he had only spoken with JE on his DOC cellphone to give her advice about interviewing for a work-out-of-class sergeant position, and claimed that he could not recall exchanging any personal emails with her. At the

[3]In this Order, we will refer to certain individuals by initials rather than their full names.

conclusion of the interview, Wilson advised Appellant to keep the investigation confidential while it was ongoing and said that he could only discuss it with her, Holcomb, or Gilmore.

12. Shortly after the interview, Appellant spoke with Gilbertson and Rodriguez about the hotline complaint allegations, the HR investigation, and what had transpired during the interview. In addition, Appellant confessed that he had a personal relationship with JE and had used his work cellphone for personal use. Appellant then asked Gilbertson if he could call JE. Gilbertson replied that he would not advise calling her if there was a conflict, but could not tell Appellant not to call her if it was a healthy relationship. He also told Appellant to be truthful throughout the investigation. Rodriguez told Appellant to report his relationship with JE to Gilmore and to clarify the answers that he had given during his interview. At the time, Appellant appeared to be nervous, upset, and worried.

13. Next, at approximately 3:30 p.m. that day, Appellant went to Gilmore's office and disclosed that he had a personal relationship with JE outside of work and had exchanged "maybe two or three emails" with her. In response, Gilmore told him that she had to "protect the agency" and would have to report his comments to HR. Additionally, she directed Appellant to submit a timeline by June 1, 2014, and to indicate when the relationship started and ended, what Appellant did with JE, how often they were together, whether the two went on dates, whether they also went out with other people or double-dated, and whether they spoke on the phone. Appellant said that he would comply. During the meeting with Gilmore, Appellant was emotional, nervous, and remorseful.

14. On May 30, 2014, Appellant went to JE's house and spoke with JE about the hotline complaint allegations and his interview, warned her that she might be interviewed as well, and told her not to lie or cover up their relationship.

15. Gilmore checked her email inbox on June 2, 2014, and had received nothing from Appellant. She then sent Appellant an email and repeated her request for a timeline. (The email did not repeat the additional instructions outlined above.) Appellant's subsequent response claimed that he had misunderstood her due date. It also indicated that he had first spoken with JE on January 29, 2014, during an active shooter training, and that the two had met and agreed to stop seeing each other on May 19, 2014.

16. Holcomb and Wilson also interviewed JE on June 2. During the interview, JE admitted that she and Appellant were engaged in a sexual relationship, but asserted that, while at work, the two had never had physical contact and had never been alone in a room with the door closed. JE further admitted that the two had exchanged text messages, but claimed that the messages were not sexual in nature. In addition, she clarified that she was not coerced into the relationship and was never promised anything. She separately revealed that Appellant had gone to her house on May 30th and had spoken with her about the investigation.

17. Shortly after the June 2 interview ended, JE left Holcomb a voicemail message stating that she wanted to change a prior answer to say that she actually could not recall whether there were any text messages of a sexual nature.

18. On June 3, 2014, Appellant called JE to talk about her interview and see if she was alright.

19. Around that time, HR's ongoing investigation revealed that Appellant had exchanged over a hundred emails and over a hundred instant messages with JE. An examination of those communications showed that the two had routinely used DOC equipment to have personal conversations, exchange mildly flirtatious banter, and coordinate seeing each other at work, and that Appellant had called JE pet names such as "momma," "baby," and "hon." The investigation also revealed that Appellant had exchanged a large number of text messages with JE via his DOC cellphone, and that many of those messages contained pictures and videos. (HR was unable to view the contents of Appellant's text messages without a subpoena, but was able to view a detailed text message log.)

20. Holcomb and Wilson interviewed Appellant a second time on June 6, 2014. During that interview, Appellant admitted that he had unprofessionally used his DOC cellphone to send personal texts to JE, and that some of those could have had "a sexual nature" or included "references to sex." He also conceded that he had "messed up" by using his work cellphone and instant messages to communicate with JE, and that the pet names he had used were inappropriate for a lieutenant to use with an officer. Appellant claimed, however, that he had not made JE promises of any kind and never coerced, intimidated, or threatened her. When Appellant was asked why the timeline he gave Gilmore was so vague, he said, "just because," and explained that he did not think that the circumstances between the beginning and end of the relationship were important "because nothing had gone on at work." He further explained that he had spoken with Gilbertson because Gilbertson was his immediate superior, and that he had only spoken with Rodriguez indirectly. In addition, Appellant admitted that he had spoken with JE at her house after his first interview, and revealed that he had called JE on June 3, 2014.

21. On June 28, 2014, as a result of the seriousness of the allegations against him, Appellant was reassigned from his security position to an office position. He remained in that administrative role until August 4, 2014. While performing that assignment, Appellant was barred from participating in TERT activities.

22. Around the time that Appellant was reassigned, EE and his union alleged that Appellant's above-referenced verbal notation of EE was retaliatory and motivated by Appellant's relationship with EE's ex-wife. Subsequently, DOC removed the notation from EE's file.

23. At the conclusion of the investigation, Holcomb and Wilson generated a formal investigative report. After reviewing the report, Gilmore, Nooth, and other DOC administrators discussed what charges and discipline were appropriate. When making its determinations, the group considered discipline that had been issued for others at DOC's various locations, Appellant's positive employment history and work performance, the significance of Appellant's supervisory/leadership role, and the SRCI's prior "sexualized environment" and problematic history with sexual discrimination and harassment. They also wanted to make sure that JE was not a victim. Ultimately, it was determined that Appellant would receive a written reprimand and be removed from the TERT, but would not be terminated.

24. On July 28, 2014, Nooth and Gilmore met with Appellant and presented him with the disciplinary document. At that time, the two explained why the action was warranted and expressed their concerns and disappointment. In response, Appellant apologized, said he felt bad and was willing to "take his lumps," and signed the document. It was the first time that Appellant had been disciplined.

25. The written reprimand did not discipline Appellant for having sex at work, for having an off-duty sexual relationship with JE, for the improper use of DOC property, or for sexual harassment. Instead, it charged that Appellant violated DOC's code of ethics and respectful-workplace policy and breached the confidentiality of an ongoing investigation. Additionally, it stated that Appellant was to be removed from the TERT immediately. As a result of that removal, Appellant lost the affiliated four percent pay differential.

26. DOC's code of ethics requires that employees be "honest and truthful" and be "exemplary" in reporting dishonest or unethical conduct and in following the regulations of the department. Those regulations include DOC's code of conduct, which states that an employee's conduct must be above reproach and not impugn the credibility of DOC, its employees, or the corrections profession. The code of conduct also states that employees shall not knowingly commit acts that constitute a violation of the policies, rules, procedures, regulations, directives, or orders of the department. A related policy requires that employees declare potential conflicts of interest in writing to their superiors.

27. DOC's respectful workplace policy prohibits behavior, action, and language that may be perceived by others as discriminatory or harassing. It further states that employees at all levels are expected to interact with coworkers in a businesslike and professional manner at all times, and that supervisors shall act as role models for subordinates.

28. On August 4, 2014, Nooth sent Appellant a letter stating that, due to the issuance of a written reprimand, Appellant was immediately being removed from management promotional trial service and returned to the rank of sergeant.[4] Without the discipline, Appellant's trial service period would have expired on August 15, 2014.

CONCLUSIONS OF LAW

1. This Board has jurisdiction over the parties and the subject matter of this dispute.

2. DOC's disciplinary action was consistent with ORS 240.570(3).

As an initial matter, we must first decide which of DOC's actions are at issue in this case and which statutory standards apply. Appellant contends that both the reprimand and the removal from the TERT were part of a single disciplinary action, as the removal from the TERT also carried a corresponding loss in pay. As such, both actions should be subject to review under ORS 240.570(3). DOC asserts that the only disciplinary action subject to our review under this portion of the statute is the reprimand, as the removal from the TERT involved "merely a removal

[4]The removal from management trial service has not been (and cannot be) appealed to this Board. *See Tucker v. State of Oregon, Department of Human Services*, Case No. MA-06-11 at 2 (September 2011).

of a discrete duty" that cannot be appealed. In the alternative, DOC argues that the removal was a reassignment that is subject to review only under the lower standard of ORS 240.570(2), which requires us to determine whether the reassignment of work was "for the good of the service."

We begin by reviewing the disciplinary document itself, which DOC labeled as a reprimand. The label that an employer gives a disciplinary document, however, is not dispositive of its nature. Rather, we look at the substance of the action taken. Here, the disciplinary letter not only reprimanded Appellant for the alleged misconduct, but also informed Appellant that it was removing him from the TERT. By that action, Appellant suffered a four percent reduction in salary. Further, the removal from the TERT and the reprimand were based on the same facts and reasons. Thus, we find that the reprimand and removal from the TERT were part of a single disciplinary action, and should be considered together under the standards of ORS 240.570(3).

Legal Standards

Appellant contends that DOC violated ORS 240.570(3), which provides in part 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." As the employer in this case, DOC has the burden of proving that its discipline was consistent with that subsection. *See* OAR 115-045-0030(6); *Ahlstrom v. State of Oregon, Department of Corrections*, Case No. MA-17-99 at 14 (October 2001). In order to meet that burden, DOC must ultimately show that, under all the circumstances of the case, the discipline imposed was "objectively reasonable." *Brown v. Oregon College of Education*, 52 Or App 251, 260, 628 P2d 410, 415 (1981).

Broadly speaking, a reasonable employer is one that disciplines employees in good faith and for cause; 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, except where the offense is sufficiently serious or unmitigated to warrant summary dismissal. *Nash v. State of Oregon, Department of Human Services*, Case No. MA-008-14 at 23 (December 2014). A reasonable employer also defines performance expectations, clearly expresses those expectations to employees, and informs employees when those expectations are not being met. *Stark v. Mental Health Division, Oregon State Hospital*, Case No. MA-17-86 at 35 (January 1989). In addition, it administers discipline in a timely manner. *Flowers v. Parks and Recreation Department*, Case No. MA-13-93 at 16 (March 1994).

We review management service disciplinary appeals using a two-step process. First, we determine if the employer proved the charges that are the basis of the discipline. If the employer proves some or all of the charges, we then apply the reasonable employer standard to determine whether the employer was justified in taking the disciplinary action that it did. *Greenwood v. Oregon Department of Forestry*, Case No. MA-3-04 at 30 (July 2006), *recons denied* (September 2006). The employer need not prove all of the charges on which it relies. *Ahlstrom* at 15. Moreover, this Board may sustain discipline of a management service employee upon proof of only a single charge. *Carter v. State of Oregon, Department of Corrections*, Case No. MA-12-99 at 12 (September 2001).

Discussion

DOC charged that Appellant: (1) violated its code of ethics by being evasive, not forthcoming and inaccurate during the investigation; (2) violated its respectful workplace policy when he called JE "momma," "baby," and "hon" in emails; and (3) failed to comply with reasonable instructions intended to preserve the confidentiality and integrity of DOC's investigation. We conclude that the DOC has sufficiently proved each of those charges.[5]

When Appellant was presented with the hotline complaint allegations on May 29, he gave his interviewers the misleading impression that he had never had a sexual relationship with JE "at any time." Regardless of whether Appellant was specifically asked whether he had had sex with her "at work," a reasonable management service employee should have understood that information about the existence of an off-duty relationship with JE was critical to the investigation being conducted. His failure to disclose his true relationship at the outset of the investigation was at best incomplete and misleading, and at worst, false. Either way, Appellant violated DOC's code of ethics. We also conclude that Appellant violated the code of ethics when, as outlined above, he routinely minimized and mischaracterized his communications with JE and failed to provide a meaningful timeline that was responsive to Gilmore's questions.

Regarding the remaining charges, the record indisputably shows that Appellant called JE "momma," "baby," and "hon" as alleged. The use of such terms is unprofessional and particularly troubling when used by a superior to a subordinate. Appellant has admitted that his phone usage was unprofessional. It is also quite clear that Wilson advised Appellant to keep the details of the investigation confidential, and that, shortly thereafter, Appellant breached that confidentiality.

For these reasons, we find that DOC has proved that Appellant engaged in the conduct for which he was disciplined.

We now turn to whether DOC's discipline is consistent with what would be imposed by an objectively reasonable employer. Before DOC disciplined Appellant, DOC weighed the fact that Appellant was a long-term employee with excellent performance reviews and no prior disciplinary record. Indeed, the record shows that it was largely because of those factors that Appellant was not terminated. Rather, DOC issued a written reprimand with removal from the TERT. We find this discipline to be a reasonably proportionate response to Appellant's actions.

Appellants conduct amounts to a serious breach of confidence and significant errors in judgment, and DOC employed Appellant in a position that requires honesty and trust. Moreover, as a manager (albeit a relatively new one), Appellant reasonably should have known the importance of honesty and full disclosure during the investigation. *See Mabe v. State of Oregon, Department of Corrections*, Case No. MA-09-09 at 29 (July 2010) (recognizing that "Department [of Corrections'] policies explicitly state that employee truthfulness is important").

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[5]In his objections, Appellant challenges various findings of facts in the recommended order as unsupported by the evidence. Appellant further objects to the proposed conclusions of law because they were based on incorrect facts. As noted above, we reviewed Appellant's factual objections but concluded that the ALJ's findings were accurate. Appellant did not raise other objections to the proposed conclusions of law.

DOC's concerns about Appellant's relationship and the behavior associated with it were rational. Whether or not Appellant had ever actually given JE special favors or privileges, rumors spread to that effect, and as evidenced by the hotline complaint and EE's grievance, the relationship created the unacceptable appearance of a conflict of interest. This caused others to question his impartiality, thereby eroding Appellant's effectiveness. *See Zaman v. State of Oregon, Department of Human Services*, Case No. MA-21-12 at 13 (April 2013); *Reisner v. Department of Human Resources, Employment Division*, Case No. MA-14-87 at 14 (June 1988). As a manager, Appellant was reasonably obligated to be proactive and inform his superiors of the potential conflict of interest. *See Buehler v. State of Oregon, Oregon Employment Department*, Case No. MA-17-12 at 18 (March 2013).

In his post-hearing brief, Appellant cites *McGee v. State of Oregon, Department of Human Services, Office of Human Resources*, Case No. MA-05-02 (March 2003), *reversed in part and remanded*, 195 Or App 736, 99 P3d 337 (2004), for the proposition "that a Letter of Reprimand and similar discipline is improper when a management employee has an extra-marital off-duty relationship with a subordinate employee where there is no evidence of coercion or improper influence." However, *McGee* is readily distinguishable, as the appellant in *McGee* was disciplined for purely off-duty conduct, and the relationships and actions at issue therein did not violate the employer's policies, adversely affect the appellant's work performance, involve his subordinates, or result in formal complaints.

As for the second charge, Appellant has conceded that his use of pet names was inappropriate. In light of the facility's prior "sexualized environment," in which staff regularly used inappropriate language, it is understandable why DOC was concerned. DOC can reasonably expect its employees to comply with established policies and to maintain appropriate boundaries with coworkers. *See Clinton v. State of Oregon, Oregon Military Department*, Case No. MA-016-11 at 13 (June 2013). We are unmoved by the possibility that Appellant's messages were not shared with others, that Appellant did not intend for his words to be derogatory or insulting, or that JE never complained about sexual harassment. *See Nash* at 23; *Harlow v. State of Oregon, Department of Corrections*, Case No. MA-028-12 at 16 (January 2014).

DOC was also rightly concerned about preserving the integrity of its investigation. In our view, Appellant's failure to respect the investigatory process is a serious issue and shows a lack of judgment and understanding as a manager, especially when the case involves someone who was expected to conduct confidential investigations of his own. *See Garrett v. State of Oregon, Department of Human Services*, Case No. MA-02-11 at 6 (December 2011); *Schafer* at 22. Additionally, a reasonable employer can impose discipline if a manager fails to follow reasonable instructions. *See Fogleman v. State of Oregon, Department of Corrections*, Case No. MA-10-01 at 27 (May 2003); *Helfer v. Children's Services Division*, Case No. MA-1-91 at 24 (February 1992).

On the subject of the reprimand's TERT removal, we also recognize that, in the past, the TERT has had a negative reputation of being an "old boys' club," and that DOC wanted to change that reputation. Appellant's policy violations and secret affair with a subordinate were at odds with that appreciable goal.

Conclusion

For the reasons set forth above, we conclude that DOC acted as a reasonable employer when it reprimanded Appellant and removed him from the TERT. Therefore, DOC did not violate ORS 240.570(3), and we will dismiss the appeal.

ORDER

The appeal is dismissed.

DATED this 18 day of December, 2015.

Kathryn A. Logan, Chair

Jason M. Weyand, Member

Adam L. Rhynard, Member

This Order may be appealed pursuant to ORS 183.482.