

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. MA-003-16

(MANAGEMENT SERVICE DISMISSAL)

RHONDA SHULT,	)	
	)	
Appellant,	)	
	)	
v.	)	RULINGS,
	)	FINDINGS OF FACT,
	)	CONCLUSIONS OF LAW,
STATE OF OREGON, DEPARTMENT OF	)	AND ORDER
HUMAN SERVICES,	)	
	)	
Respondent.	)	

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On September 20, 2016, the Board heard oral argument on Appellant’s objections to an August 24, 2016, recommended order issued by Administrative Law Judge (ALJ) B. Carlton Grew, after a hearing held on April 6, 7, and 28, 2016, in Salem, Oregon. The record closed on May 27, 2016, following receipt of the parties’ post-hearing briefs.

Richard E. Slezak, Attorney at Law, Salem, Oregon, represented Appellant.

Margaret Wilson, Senior Assistant Attorney General, Department of Justice, Salem, Oregon, represented Respondent.

On February 22, 2016, the State of Oregon, Department of Human Services (Department) removed Appellant from management service and did not restore her to classified service, effectively terminating her employment. On March 15, 2016, Appellant filed a timely appeal.

The issue is:

Did the Department violate ORS 240.555, ORS 240.570 or Appellant’s federal due process rights when it removed Appellant from management service and dismissed her from state service, effective February 24, 2016, for: (1) inability or unwillingness to fully and faithfully perform the duties of the position satisfactorily; and (2) other unfitness to render effective service?<sup>1</sup>

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<sup>1</sup>The appeal also alleged a violation of Department rule 70.000.02. We do not have jurisdiction over violations of agency rules. *Honeywell v. State of Oregon, Department of Corrections*, Case No. MA-014-10 (February 2011); *Payne v. Dept. of Commerce*, 61 Or App 165, 174, 656 P2d 361 (1982).

We conclude that the Department did not violate ORS 240.555, ORS 240.570 or Appellant's federal due process rights in removing Appellant from management service and dismissing her from state service.

### RULINGS

At hearing, Appellant sought to introduce into evidence a copy of the material that she had provided to the Department and DA in response to the DA's proposed decision to "Brady list" her.<sup>2</sup> The material included a seven page response written by Appellant (which the Department does not object to) and 113 pages of supporting documents from the relevant Department case files. The Department objected to the admission of the attachments as irrelevant and as inappropriately distributed confidential material.

The Department argued that the evidence was irrelevant because the merits of the DA's decision to Brady list Appellant were irrelevant to this case. The Department contended that only the fact of the Brady listing, and its scope, were relevant to this action. Appellant contended that the documents were evidence of her lack of culpability regarding the issues raised by the DA and therefore should have been considered by the Department in its decision to terminate Appellant, and in this Board's review of that decision. The ALJ withheld ruling on the issue until issuance of the Recommended Order. In that order, the ALJ properly excluded the attachments to the response as irrelevant because the Department had no control over the DA's decision or its consequences for child welfare cases.

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

### FINDINGS OF FACT

1. The Department is an Oregon state agency. During the events at issue, Appellant was employed by the Department in state service as defined by ORS 240.015(4).
2. At the time of her February 2016 removal, Appellant was a Child Welfare Supervisor in the Department's Benton County office, a management service position that she had held since September 2009. Previously, Appellant worked as a Department Child Welfare Social Services Specialist (caseworker or SS1), a classified service caseworker position, for six years. Until the action at issue here, Appellant had not been disciplined.
3. During the events at issue, Appellant's immediate supervisor was Program Manager Mary Moller, who in turn reported to District Manager Marco Benavides.
4. As a child welfare supervisor, Appellant was responsible for providing clinical supervision to child welfare caseworkers. That work involved group and individual supervision, including coaching and training new caseworkers, as well as assisting in career planning for senior caseworkers. Her supervisory role also included "setting the tone of a successful casework unit"

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<sup>2</sup>Due process requires that a prosecutor disclose all material evidence that is favorable to the defense, including potential witness impeachment information. *See Brady v. Maryland*, 373 US 83 (1963); *United States v. Bagley*, 473 US 667 (1985).

and seeking to “achieve the [Department’s] goals of integrity, stewardship, responsibility, respect and professionalism.” The caseworkers supervised by Appellant participated in court proceedings on a regular basis. Appellant’s position also required performing SS1 work when those caseworkers were absent or their positions were vacant.

5. Appellant’s supervisory work included training and coaching SS1s regarding how to testify and sometimes attending court with them. Appellant’s backup social service specialist work included appearances in court as a witness. In late 2015, Appellant had been appearing in court more than previously due to a staffing shortage. The Department expected Appellant to be in personal contact with courts for consultation and case review “daily/weekly.” Court work was both formally, as a witness, and informally, as a participant in discussions with court and county district attorneys and staff, primarily in Benton County.

6. Appellant spent 10 to 15 percent of her time dealing directly with the courts or issues raised by the courts. The caseworkers she supervised regularly participated in court proceedings. The cases that Appellant worked on herself could also result in court proceedings. As a result, Appellant’s ability to participate in court proceedings, and to supervise caseworkers who participated in court proceedings, was an essential part of her position.<sup>3</sup>

7. The child welfare litigation in Appellant’s office was handled by the Benton County DA’s Office. Beginning in January 2014, if not before, some Benton County deputy district attorneys became disenchanted with Appellant’s work. The attorneys’ negative experience with Appellant led them to question her viability as a participant in their cases.

8. On August 5, 2015, John M. Haroldson<sup>4</sup>, the Benton County DA, wrote Appellant and her program manager that he was considering placing Appellant on a Brady list. Placing Appellant on the Brady list meant that district attorneys would be required to notify opposing parties and their attorneys of evidence that the district attorneys believed was material to Appellant’s lack of credibility and professionalism, such as evidence of false statements and delaying discovery. Haroldson’s letter stated that Appellant had made misrepresentations to the court and parties, disregarded court orders, exhibited gross incompetence, and subverted judicial administration. Haroldson cited Appellant’s conduct in four specific cases and several alleged discovery violations in additional cases. The letter offered Appellant a chance to respond in writing to the DA’s office’s Brady Review Committee.

9. On August 22, 2015, Appellant provided the Department with a specific, detailed response to the allegations, to be forward to Haroldson and the Brady Review Committee. The response included a seven page document written by Appellant, and 113 pages of supporting documents from the cases at issue. Appellant denied all of the allegations. That same day,

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<sup>3</sup>At hearing, Appellant acknowledged that her court-related time was 10 to 15 percent of her work. As described in more detail below, Appellant separately acknowledged that she could not remain in her position if she was unable to perform that court-related work. Thus, any suggestion that court-related work was inessential to her position is not credible.

<sup>4</sup>The Benton County DA is an elected official, and the DA’s office is a separate entity from the Department. The Department has no control over the DA’s decisions regarding placing individuals on a Brady list. *See* ORS 8.610 *et seq.*

Appellant sent an email to Department District Manager Benavides, vigorously denying the DA's allegations. The Department forwarded the material to the DA.

10. On October 7, 2015, Haroldson wrote Appellant, her attorney, and Department District Manager Benavides. He stated that the Brady Review Committee had decided that Appellant would be placed on the Brady list in current and future cases.

11. Specifically, Haroldson stated:

“It is the finding of the Brady Review Committee that on at least one occasion, [Appellant] acted dishonestly, making misrepresentations(s) to the court, several parties and attorneys. We further find that on a number of other occasions, [Appellant] was negligent regarding her duties and incompetent in properly supervising those individuals that were handling cases which she supervised.”

12. Haroldson also stated:

“Accordingly, in future cases where [Appellant] is involved, either as a supervisor, caseworker, or in any capacity where she may be called as a witness by our office, or where other individuals who may be called as witnesses might be required to base some portion of their testimony, professional opinion or conclusions upon the word or work of [Appellant], the State would be obligated to disclose the existence of those materials which were attached as exhibits to the August 5, 2015 letter.”

13. Appellant believed that Haroldson's decision was erroneous and in bad faith. Appellant had attempted to discuss the issue with Department managers, but received no substantive responses, and believed that the Department was not appropriately supportive of her regarding this dispute.

14. On October 28, 2015, without advising or consulting with her supervisors, Appellant filed a complaint with the OSB against Haroldson and Deputy DA Farnworth. In her cover letter, Appellant stated in part:

“In August of this year I received notice of the DA's intention of placing me on the Brady Law List. I am a Child Welfare Supervisor for the Benton County DHS office and this is ruining my career as I know it. The allegations are absolutely false. I believe this to be defamation of character. My employer does not support these allegations either but if I am 'Bradied' then there is nothing they can do. I cannot remain in my position.”

15. Appellant's bar complaint included her cover letter, the initial letter from Haroldson with its attachments, Appellant's response letter (without the attachments), and the decision of the Brady Review Committee. Appellant did not obtain permission from the Department or Haroldson to disclose these documents to the OSB, nor did she notify them that she intended to, or had done so.

16. Appellant reviewed the documents before she sent them, and attempted to redact client names and other material that she believed constituted personally identifying information or that was otherwise confidential. She failed to redact one minor child's first name, and the birth date of another child.

17. Believing that it was not necessary to do so, Appellant did not attempt to redact court hearing dates, the number of children in the relevant families, the ages at which children were abused, or the specific injuries to children.<sup>5</sup>

18. On November 2, OSB Assistant General Counsel Troy J. Wood responded to Appellant's complaint, with copies to Haroldson and Farnworth. Wood stated, in part:

"You have expressed concern that there is no merit to Mr. Haroldson's claims. We must conclude that there is no sufficient basis to warrant a referral to Disciplinary Counsel's Office for further review.

"\* \* \* \* \*

"The evidence you submitted shows that Mr. Haroldson has an arguable basis to pursue the Brady review. \* \* \*.

"Because we find no professional misconduct, we will take no further action on this matter. \* \* \*.

"Generally, documents maintained by the OSB are a public record. The documents you presented in support of your complaint against the Lawyers state that they are protected by ORS 419A.255 and may not be disclosed to the public. So that these documents are not maintained as a public record by the OSB, we are returning them to you. \* \* \*."

19. On November 16, Department Human Resource Analyst Edward Terry, as part of an investigation of Appellant's conduct, emailed the OSB to seek a copy of Appellant's submissions. On the same day, the Department transferred Appellant to its Albany office and barred her from working on cases.

20. On December 7, 2015, the Department conducted a fact-finding interview with Appellant. Appellant denied the allegations regarding confidentiality, but did not claim that she could still perform the duties of her position if she was placed on the Brady list.

21. On January 26, 2016, the Department issued Appellant a pre-disciplinary meeting notice under "ORS 240.570(3) -- Inability or unwillingness to fully and faithfully perform the duties of the position satisfactorily." The notice cited: (1) the DA's decision to place Appellant on the Brady list; (2) Appellant's failure to follow DHS privacy policies and ORS 419B.035 through her submission of materials to the OSB; and (3) Appellant's failure to align her behavior

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<sup>5</sup>There is no evidence that this material was sufficient to identify any children or families to a person not already familiar with their cases.

with Department “Core Values” of respect, responsibility, integrity and professionalism through her conduct.

22. On February 5, the Department held Appellant’s pre-dismissal meeting, which Appellant attended with her attorney.

23. On February 22, 2016, the Department sent a notice to Appellant that she had been “remov[ed] from management service with effective end of state service” pursuant to ORS 240.570, 240.570(5)(b) and 240.555 for the same reasons cited in the pre-disciplinary meeting notice.”

24. Regarding the Brady listing, the Department stated in part:

“As a [Department] employee in Child Welfare, the [Department] relies on you and your staff to represent the agency in court and work collaboratively with the District Attorneys and their staff, as well as other legal entities in representing the clients we serve before State courts and judicial proceedings. This is an integral part of your position. Your inability to represent or to clinically supervise those staff that are required to represent the Agency in court hearings and judicial proceedings effectively precludes you from performing the essential functions of a Child Welfare Supervisor \* \* \*.”

#### CONCLUSIONS OF LAW

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

2. The Department did not violate ORS 240.555, ORS 240.570 or Appellant’s federal due process rights in removing Appellant from management service and dismissing her from state service, effective February 24, 2016, for: (1) inability or unwillingness to fully and faithfully perform the duties of the position satisfactorily; and (2) other unfitness to render effective service.

The Department terminated Appellant for two reasons: (1) her inability to perform any litigation-related job functions because the DA’s office determined that it would place her on its Brady list; and (2) because Appellant included material with her complaint to the Oregon State Bar, which the Department contends was confidential. Because it is dispositive, we address only the Brady-list reason.

ORS 240.570(3) provides that a “management service employee may be \* \* \* removed from the management service if the employee is unable or unwilling to fully and faithfully perform the duties of the position satisfactorily.” The Department has the burden of proving that its decision to remove Appellant from management service did not violate ORS 240.570(3). *See* OAR 115-045-0030(6). The Department meets its burden of proof if this Board determines, under all of the circumstances, that the Department’s actions were objectively reasonable. *Brown v. Oregon College of Education*, 52 Or App 251, 260, 628 P2d 410 (1981).

Most appeals under ORS 240.570(3) concern a disciplinary decision by a state agency, typically related to some workplace action of the employee. Here, however, the Department’s decision to remove Appellant from management service arose because a different entity (the DA’s

office) placed Appellant on a Brady list (described above). The Department asserts that the Brady list placement rendered Appellant unable to fully and faithfully perform the duties of her position. *See* ORS 240.570(3).

Appellant does not dispute that the DA decided to place her on the Brady list. Appellant disputes, however, that her job duties that are subject to the Brady listing are an “essential” part of her position because the Department failed to so indicate on her position description.<sup>6</sup> In other words, Appellant asserts that she could “fully and faithfully perform the duties of the position satisfactorily,” despite being placed on the Brady list. *See id.*

In support of this assertion, Appellant testified that her appearances in court were limited and her most recent appearances were only the result of staff reductions. She further maintained in her closing argument that the evidence at hearing was “mixed” as to whether the Brady listing prevented her from performing essential functions of her position.

We determine that the evidence in the record demonstrates that Appellant’s appearances in court, along with training, coaching, and supervising others who appeared in court, were sufficiently significant parts of her job, such that being Brady listed rendered her unable to fully and faithfully perform the duties of her position. Although actual testimony in court constituted a relatively small amount of Appellant’s work time, the Brady listing would be triggered by her direct or supervised contact with any child welfare matter that would proceed to court in the future, or her supervision of a caseworker who testified in court. There is no evidence in the record, and Appellant does not contend, that there are child welfare matters, or child welfare caseworkers, that could be identified as never becoming involved in litigation. In Appellant’s words, “this [Brady listing] is ruining my career as I know it. \* \* \*. [I]f I am ‘Bradied’ then there is nothing [the Department] can do. I cannot remain in my position.” Therefore, we conclude that the Brady listing deprived Appellant of the ability to fully and faithfully perform the duties of her position. *See id.*

Appellant next contends that the Department’s acceptance of the Brady listing effectively deprived her of due process of law because she was unable to contest the DA’s determination on which the Department based its action. The difficulty with Appellant’s argument is that the DA’s office is an independent entity that is inextricably connected to Appellant’s work. As set forth above, when the DA’s office placed Appellant on the Brady list, it effectively prevented Appellant from fully performing her job duties. As Appellant acknowledged in her OSB complaint, the Department had no control over that decision.<sup>7</sup> As a result, the Department had no power to compel the DA’s office to rescind its decision to place Appellant on the Brady list. The Department’s duty was to provide due process to Appellant regarding its decision to terminate her employment, not

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<sup>6</sup>We disagree with Appellant’s assertion that we should uphold the Department’s action only if we determine that the job duties affected by the Brady listing were “essential.” ORS 240.570(3) imposes no such requirement. In any event, even if we were to conclude that ORS 240.570(3) is violated when an employee is removed for an inability to fully and faithfully perform only *essential* job duties, we would reach that same conclusion in this case. We would do so because the record is sufficient to establish that the Brady listing deprived Appellant of her ability to satisfactorily perform an essential job duty—*i.e.*, appearing in court, and training, coaching, and supervising others who appear in court.

<sup>7</sup>Appellant does not contend that the Department played any role in the DA’s decision to place her on its Brady list, or that it had the power to prevent or overturn that decision.

to make certain that Appellant had received due process from the DA's office. There is no evidence or contention by Appellant that the Department failed to provide due process as to its action.

The DA's Brady list decision was, for the Department, analogous to the Department of Motor Vehicles revoking a Department employee's driver's license. The license revocation would prevent the employee from performing Department work, if required to drive as part of the job, but the Department would bear no responsibility for the license revocation and incur no responsibilities because of it. In short, it is not uncommon that an outside entity might control a licensing, certification, or other similar requirement that is necessary for an employee to fully and faithfully perform the duties of the position. When that outside entity renders a decision that precludes an employee from fully and faithfully performing the duties of a position, the State is not barred from removing the employee from management service.

Consequently, we conclude that Appellant was extended due process rights through this termination and appeal process by the Department, and that there is no evidence or argument presented by Appellant that the Department or this Board has the power or jurisdiction to alter the Brady listing. If the Brady listing itself violated Appellant's rights, she must seek a remedy against the DA's office in another forum.

Appellant also argues that the Department's decision failed to reflect progressive discipline and ignored her twelve years of prior satisfactory service. We conclude that these factors are irrelevant to Appellant's situation, because she was not disciplined. Rather, she was removed from her position for non-disciplinary reasons—because she could no longer fully perform the duties of her position satisfactorily.

In sum, ORS 240.570(3) provides that the Department can lawfully remove an employee from management service for an inability to fully and faithfully perform the duties of the position satisfactorily. We conclude that the DA's Brady listing of Appellant rendered her unable to fully and faithfully perform the duties of her position satisfactorily. Therefore, we conclude that the Department acted as a reasonable employer in removing Appellant from management service after she was Brady listed by the DA.

Accordingly, we need not decide whether the Department's second ground for removal, sending allegedly confidential material to the OSB, violated ORS 240.570(3).

#### Restoration to Classified Service

Appellant served in classified service immediately before her management service position. Relying on ORS 240.570(5), Appellant asserts that she should have been restored to her former classified service position. The Department asserts that due to recent statutory amendments to ORS 240.570(5)<sup>8</sup>, Appellant has no right to be restored to that position. We need not resolve the dispute over the parties' differing interpretations of the statutory changes because, even assuming that Appellant is correct that she still has some restoration rights, ORS 240.555 nevertheless provides that an employer may dismiss an employee from state service "for

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<sup>8</sup>See Or Laws 2014, ch 22, § 1.

misconduct, inefficiency, incompetence, insubordination, indolence, malfeasance or other unfitness to render effective service.”

Appellant’s previous SS1 position in classified service also required significant participation in court. As an SS1, Appellant would still be subject to the Brady listing. We have determined that the Brady listing justified Appellant’s termination from management service because it rendered her unable to fully and faithfully perform the duties of her position. ORS 240.570(3). The evidence in this record is that restoring Appellant to her former SS1 a position would not change her Brady listing, and the listing would still affect not only her more frequent testimony in court, but every case that she worked on that ultimately resulted in litigation. On this record, we conclude that the Brady listing would render Appellant “unfit to render effective service” under ORS 240.555. Accordingly, we need not address the effect of the statutory amendments to the statute on the restoration rights of management employees with prior classified service.

ORDER

The appeal is dismissed.

DATED September 28, 2016.



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Kathryn A. Logan, Chair

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\*Jason M. Weyand, Member



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Adam L. Rhynard, Member

\*Member Weyand recused.<sup>9</sup>

This order may be appealed pursuant to ORS 183.482.

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<sup>9</sup>Member Weyand recused himself from this case and did not participate in oral argument because of his personal knowledge of matters involved in this case.