

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. MA-5-06

(MANAGEMENT SERVICE APPEAL)

KENNETH C. HERBST,	)	
	)	
Appellant,	)	
	)	
v.	)	RULINGS,
	)	FINDINGS OF FACT,
STATE OF OREGON,	)	CONCLUSIONS OF LAW,
DEPARTMENT OF PUBLIC SAFETY	)	AND ORDER
STANDARDS AND TRAINING,	)	
	)	
Respondent.	)	
_____	)	

Neither party objected to a recommended order issued on June 30, 2008, by Administrative Law Judge (ALJ) B. Carlton Grew following a hearing on May 3, 4, June 7, 8, and 21, 2007, in Salem, Oregon. The record closed on October 2, 2007, with the submission of the parties' post-hearing briefs.

Judy Danelle Snyder, Attorney at Law, 1000 S.W. Broadway, Suite 2400, Portland, Oregon 97205, represented Appellant.

Linda J. Kessel, Senior Assistant Attorney General, Labor and Employment Section, Department of Justice, 1162 Court Street N.E., Salem, Oregon 97301-4096, represented Respondent.

On May 25, 2006, Appellant Kenneth C. Herbst filed this appeal of his removal from a management service position in the Department of Public Safety Standards and Training (Department or DPSST). The hearing was postponed at Herbst's request pending the completion of related criminal proceedings. The alleged

wrongful conduct for which Herbst was discharged included failure to report an incident of physical injury to another person, failing to adequately report a 9-1-1 call to his supervisor, engaging in domestic abuse, misidentifying himself as a state police officer, and violating a release agreement and restraining order.<sup>1</sup> The issue in this case is whether DPSST violated ORS 240.570(5) and 240.555 in dismissing Herbst from state service.

### RULINGS

1. The rulings of the ALJ have been reviewed and are correct.

### FINDINGS OF FACT

#### Parties

1. DPSST is an agency of the State of Oregon, subject to the State Personnel Relations Law (SPRL), ORS 240.005 *et seq.*

2. During the events at issue, Kenneth Herbst was a captain with DPSST, employed in management service as defined by ORS 240.212.

#### DPSST

3. DPSST is responsible for basic training and certification of the more than 32,000 individual public safety providers in Oregon. Only DPSST certifies police officers in Oregon, and DPSST rules set the minimum standards for employment as a law enforcement officer in Oregon. *See* OAR 259-008-0010.

4. DPSST runs the state training academy for the public safety professions, including police officers, corrections officers, parole and probation officers, firefighters, telecommunication operators, and emergency medical dispatchers.

5. DPSST provides basic or advanced training to 8,000 to 10,000 officers per biennium. DPSST provides a 16-week basic police academy training program for new recruits employed by police departments in Oregon. This basic training includes a wide variety of subjects.

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<sup>1</sup>On May 30, 2006, DPSST Director John Minnis wrote Herbst's attorney to state that two other matters discussed in the termination letter were not "used to support the decision to end Mr. Herbst's employment," and we do not consider them here.

6. Domestic violence issues are a significant part of DPSST training, and Oregon law requires that DPSST file annual reports with the legislature regarding the domestic violence training it provides.<sup>2</sup>

7. DPSST minimum standards for law enforcement officers, set out in the Oregon Administrative Rules, include a requirement that all officers must be of good moral fitness:<sup>3</sup>

“(6) Moral Fitness (Moral Character) All law enforcement officers must be of good moral fitness.

“(a) For purposes of this standard, lack of good moral fitness means conduct not restricted to those acts that reflect moral turpitude but rather extending to acts and conduct which would cause a reasonable person to have substantial doubts about the individual’s honesty, fairness, respect for the rights of others, or for the laws of the state or the nation.

“(b) The following are indicators of a lack of good moral fitness:

“(A) Illegal conduct involving moral turpitude;

“(B) Conduct involving dishonesty, fraud, deceit, or misrepresentation;

“(c) Intentional deception or fraud or attempted deception or fraud in any application, examination, or other document for securing certification or eligibility for certification;

“(D) Conduct that is prejudicial to the administration of justice;

“(E) Conduct that adversely reflects on his or her fitness to perform as a law enforcement officer. Examples include

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<sup>2</sup>ORS 181.712 provides, “No later than January 1 of each year, the Department of Public Safety Standards and Training, in consultation with the Board on Public Safety Standards and Training, shall submit to the Legislative Assembly, as provided in ORS 192.245, a report on the implementation of child abuse and domestic violence training provided by the department.”

<sup>3</sup>While not findings of fact, the text of the rules is set out here to aid the reader.

but are not limited to: Intoxication while on duty, untruthfulness, unauthorized absences from duty not involving extenuating circumstances, or a history of personal habits off the job which would affect the officer's performance on the job which makes the officer both inefficient and otherwise unfit to render effective service because of the agency's and/or public's loss of confidence in the officer's ability to perform competently.

“(c) If reliable evidence is received by the Board or Department that a law enforcement officer lacks good moral fitness, a rebuttable presumption will be raised that the law enforcement officer does not possess the requisite moral fitness to be a law enforcement officer. The burden shall be upon the law enforcement officer to prove good moral fitness.” OAR 259-008-0010(6).

8. DPSST expects its training staff to meet these ethical and moral standards. DPSST expects all employees in the Training Division to display an attitude, appearance, presence, and demeanor that demonstrate a high standard of agency professionalism. DPSST also expects its employees to conduct themselves, on and off duty, in such a manner as to not bring discredit on DPSST.

9. DPSST Policy 200 provides in part:

“Employees shall conduct themselves at all times, both on and off duty, in such a manner as to not bring discredit on the Department. Conduct unbecoming an employee includes that which brings discredit on the Department or its employee or that which impairs the operation or efficiency of the Department or employee.”

10. DPSST staff are role models for police, and that status is very important to the success of DPSST's mission.

11. DPSST also has rules applicable to the use of force. DPSST Policy 202 provides in part:

“6. Physical Force – Actual physical contact with a person, and/or the use of chemical agents on a person, for the purpose of overcoming resistance to lawful authority.

- “7. Physical Injury (ORS 161.015 sub. 6) – Impairment of physical condition or substantial pain.
- “8. Serious Physical Injury (ORS 161.015 sub.7) – Physical injury which creates a substantial risk of death or which causes serious and protracted disfigurement, protracted impairment of health, or protracted loss of impairment of the function of any bodily organ.
- “9. Use of Force Incident – Any incident when deadly physical force, non-deadly physical force, or physical force is utilized by Department personnel. Includes any discharge of a firearm (except to destroy an animal for public safety or humanitarian reasons, or during approved firearms training).
- “10. Totality of the Circumstances – All factors considered. With respect to use of force, circumstances include, but are not limited to, comparative size; physical, emotional and mental condition; skill level of combatants; nature of the offense; weapons; and availability of assistance.

**“PURPOSE**

“The purpose of the Use of Force policy is to ensure that certified personnel of the Department exercise their authority to use force consistent with state and federal law, Department policy and training standards.

**“POLICY**

“The Department recognizes and respects the value of each human life. A balancing of all human interests is required. It is the policy of the Department to use only the force that is necessary and reasonable to bring an incident under control, while protecting the safety of the certified law enforcement person or other persons.

“The use of force by public safety officers, whether deadly or non-deadly, is frequently closely scrutinized by the criminal justice system, media and the citizens we serve. Therefore, certified law enforcement personnel must be prepared to articulate and justify the reasoning applied when the use of force is necessary. Toward that end, the totality of the circumstances leading to and justifying the use of force must be carefully documented.

“Employees who are not certified as police, corrections or parole and probation officers are not expected to use physical force in the performance of their duties. Should they find themselves in a position requiring the use of physical force, they are to comply with statutes applicable to non-peace officers.

“1. A certified law enforcement person shall only use that force reasonably necessary in the performance of his/her duties in the following circumstances:

“A. In self defense; or

“B. In the defense of another person; or

“C. To bring an incident under control.

“2. No certified law enforcement person shall use unreasonable or excessive force upon any person.

“3. All use of force by certified law enforcement personnel shall comply with current statutes, Department rules, policies, procedures, current case law and training.

“4. The degree of force used shall be the amount reasonably necessary to overcome resistance being employed by the person, or the immediate threat the person poses to the certified person or other persons.

“\* \* \* \* \*

## “Reporting Use of Force

- “1. All use of force incidents are subject to a supervisory investigation and/or a written report when:
  - “A. Use of force results in an apparent or reported injury.
  - “B. A non-deadly weapon is used on a person (baton, chemical agent) or a strike or blow is delivered to the body.
  - “C. A firearm is drawn or discharged in the furtherance of the Department’s policy *Responsibilities and Requirements of Certified Personnel*, except for firearms training or practice.
  - “D. A supervisor deems a report of the use of force is necessary.
  - “E. A supervisor will review the specific circumstances of the incident and immediately report the circumstances to the Director, Deputy Director or designee.
  - “F. A supervisor who is not certified or certified in a different discipline than that of the reporting certified employee who exercises use of force or authority outside the normal scope of duties shall notify and consult with a certified supervisor who is certified in the same discipline as the employee making the report.” (Emphasis in original.)

## Herbst

12. During most of the events at issue, Herbst was 5’ 10” tall, weighed 185 pounds, and was age 42. Herbst was divorced during the events at issue. He has two biological children from that marriage: a son, age 14, and a daughter, age 11, who visited his household on a regular basis. Herbst had also adopted his ex-wife’s two children from a previous marriage.

13. Herbst was first certified as a police officer in 1992. He was employed by the Coos Bay Police Department from 1991 to 1998, and the Keizer Police Department from March 1998 to October 2000. Herbst was vice president of the Keizer police officer's labor organization during some of that time. Beginning in 1993, he taught police tactical skills classes at DPSST as a part-time lead instructor.

14. On October 30, 2000, DPSST hired Herbst as a full-time instructor, a classified position in the state service with a rank of lieutenant. DPSST certified Herbst to teach the subjects of law enforcement professionalism, ethics, dealing with the mentally ill, use of force, defensive tactics, tactical ground fighting, interview and interrogation, officer in court, traumatic incident awareness, critical incident awareness, investigations, elder abuse, and other subjects.

15. Herbst's investigations courses included a domestic violence component. In his ground-fighting class, Herbst taught students about favored techniques, including neck and hair holds.

16. On October 1, 2003, Herbst was promoted to academy training supervisor, a management service position with the rank of captain. His duties included identifying, recruiting, training, and evaluating instructors and their performance; providing guidance and serving as a mentor and role model; developing and implementing the police program curriculum; fostering trust and promoting team building; explaining training programs to legislators, criminal justice officials, and the media; and investigating and imposing discipline on students for misconduct.

17. As academy training supervisor, Herbst was also responsible for directing DPSST's day-to-day police training and for making decisions related to scheduling, resource allocation, instructor assignments, and student conduct. On a daily basis, Herbst's decisions could affect 30 DPSST instructors and 200 students.

18. As academy training supervisor, Herbst attended the graduation ceremony for the basic police training academy, and administered the Criminal Justice Code of Ethics oath to the students.

19. Herbst swore to follow the Criminal Justice Code of Ethics, which states in part:

"I WILL keep my private life unsullied as an example to all; maintain courageous calm in the face of danger, scorn, or

ridicule; develop self-restraint; and be constantly mindful of the welfare of others. Honest in thought and deed in both my personal and official life, I will be exemplary in obeying the laws of the land and the regulations of my department. Whatever I see or hear of a confidential nature or that is confided to me in my official capacity, will be kept ever secret unless revelation is necessary in the performance of my duty.

“I WILL never act officiously or permit personal feelings, prejudices, animosities, or friendships to influence my decisions. Without compromise and with relentlessness, I will uphold the laws affecting the duties of my profession courteously and appropriately without fear or favor, malice or ill will, never employing unnecessary force or violence, and never accepting gratuities.

“I RECOGNIZE my position as a symbol of public faith, and I accept it as a public trust to be held so long as I am true to the ethics of The Criminal Justice System. I will constantly strive to achieve these objectives and ideals, dedicating myself before God to my chosen profession ” (Emphasis in original, footnote omitted.)

20. Herbst’s job required daily contact with DPSST staff, managers, and the director. Herbst was also in regular contact with community members across the state, including other state and federal agency staff, members of Congress and the Legislature, the Governor’s staff, local elected and appointed officials, local non-government service providers, and the public.

### Cuda

21. During most of the events at issue, Janet Cuda was 5’ 4” tall, weighed 120 pounds, and was age 36. Cuda has some history of involvement with abusive men. She often drinks to excess, favoring alcohol energy drinks such as “Sparks.” She has had gaps in her memory and memory problems since childhood. Her drinking further impairs her memory.

## Herbst and Cuda<sup>4</sup>

22. In the spring of 2005, Herbst and Cuda lived in the same apartment complex. They met for the first time on May 1, 2005, in the laundry room. Herbst was immediately enamored with Cuda. He began driving by her apartment, observing her, and writing in his journal about her activities, including her laundry day and men who accompanied her. Within a short period of time they became lovers and Herbst was frequently spending the night at her apartment. Herbst often slipped out of his apartment to see Cuda after his children went to sleep and returned in the mornings before they awoke.

23. Herbst and Cuda decided to move in together at a house in Keizer. They gave 30-day notices at their apartments on June 13, 2005, and moved into the house on July 13, 2005. Cuda's son lived with them at the house, where he had his own bedroom, and Herbst's two children stayed with them according to their visitation schedule. The house was owned by a Keizer police officer that Herbst knew.

24. Cuda paid for a landline phone in her name at the house. On August 1, 2005, Herbst updated his personal information at DPSST to identify that line as his home phone. Herbst also had cell phone service with two phones, one of which he gave to Cuda early in their relationship. Cuda paid Herbst for the use of the cell phone.

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<sup>4</sup>The evidence and testimony demonstrates that both Cuda and Herbst have significant problems with credibility. Analysis of the facts relevant to this issue could fill a novel. For purposes of this order, we make the following findings: During the critical events at issue here, Cuda was intoxicated. Independent of her use of alcohol, Cuda also has longstanding memory problems. In addition, Cuda is prone to exaggeration and possibly paranoia. She may also, intentionally or not, fill in gaps in her memory with her imagination. (Three of Cuda's sisters and one brother-in-law testified that they did not believe Cuda was a truthful person and that Cuda made allegations of abuse at the end of some of her relationships without having told family members about such abuse during those relationships.) Despite these substantial issues, we conclude that Cuda's contemporaneous statements and testimony reflected her recollection of events. During many of the events at issue here, Herbst had consumed alcohol, but did not appear to be intoxicated. During many of the events at issue here, Herbst was angry. He admittedly engaged in calculated, deceptive, and aggressive physical conduct with his significant others. In addition, Herbst had a substantial reason—his position with DPSST—for being less than candid about his interactions with Cuda. Viewing the record as a whole, we conclude that Herbst was less than candid with the 9-1-1 dispatcher and investigating police about the events at issue here. His demeanor during his testimony was polished and professional, but the content of his testimony cannot be reconciled with important physical evidence and is unconvincing in other respects.

25. Herbst continued to document his life with Cuda in his journal, praising her cooking, her thoughtfulness, her spirited nature, and her lovemaking.

26. At the end of June 2005, Herbst wrote in his journal that, after saying “too much” to Cuda, she reacted with sadness and said her feelings for him had gone. Herbst wrote that he was devastated and that he would be trustworthy.

27. In late June or early July 2005, on a camping trip, Cuda saw Herbst become frustrated and hit his son with the back of his hand. In late July or August, Cuda saw Herbst do the same thing to his daughter.

28. On August 1, 2005, Herbst wrote an enthusiastic entry about Cuda in his journal, and noted that August 1 was “3 mos fr. 1<sup>st</sup> sight 5-1 Sunday.” This is the last journal entry in evidence.

### September 2005 Incident

29. One evening in September 2005, Cuda, Herbst, and Herbst’s son had pizza at a restaurant. Cuda and Herbst shared a pitcher or more of beer. They returned home and gathered in the living room. At some point, Cuda began playfully trying to wrestle with Herbst’s son as she occasionally did with her own son. Herbst’s son was unused to this kind of play, and Herbst stepped in and began wrestling with Cuda. The wrestling got out of hand. Cuda bit Herbst on the arm. This angered Herbst, and he used his ground-fighting techniques to flip her over onto her back and simultaneously roll on top of her. Herbst placed his forearm across Cuda’s neck/collarbone area, immobilizing her, and spoke to her in a harsh tone, saying “Stop. It’s not funny anymore.” Pinned and helpless, Cuda began to panic and perceived herself to be deprived of air and about to lose consciousness. Herbst then got up and left the room.<sup>5</sup>

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<sup>5</sup>This incident, which Cuda described as strangling her to the point of unconsciousness, was part of the criminal indictment against Herbst. According to the police report, in his initial discussion with police about the incident on February 9, 2006, Herbst’s son described the incident as Cuda biting Herbst while wrestling, Herbst pushing Cuda backwards and getting on top of her, and then choking Cuda across the neck with his arm. In his testimony at Herbst’s criminal trial in December 2006, the son stated that Herbst put his arm on Cuda’s collarbone, not her neck. We note that Herbst was trained in ground-fighting techniques and was likely precise in the moves and grips he used. Cuda did not have such training, and likely generalized and exaggerated the weight and pressure being applied to her chest and neck. We conclude that Herbst immobilized Cuda and impaired her breathing, and perhaps the flow of blood to her brain (either because of his hold, his weight, or both), but did not put his hands around her neck and did not attempt to strangle Cuda or make her unconscious.

30. Visibly upset, Cuda got up, picked up her purse and left the house.<sup>6</sup> She did not return home until 3:00 a m., telling Herbst that he didn't "have to do that."

31. At some point after this incident, Cuda began flinching when Herbst raised his arm, and sometimes left the house for extended amounts of time.

32. On September 20, 2005, Cuda was intoxicated, refused to stay in the house with Herbst, wanted to drive away in her car, and ultimately ran outdoors in her pajama bottoms with no shoes. After Cuda returned to the house, Herbst stayed up all night with her and called in sick to work the next day

33. Later, Herbst's supervisor, Campbell, spoke to him about missing work. Herbst told Campbell that he was having problems with his alcoholic girlfriend and was trying to get her to move out.<sup>7</sup>

### **January 2006 Incident**

34. In December 2005, Cuda heard a voicemail for Herbst from a woman who had met Herbst while a student at DPSST. Cuda believed Herbst had a romantic connection with the woman and decided to move out of the house. Cuda discussed the woman over the telephone with her friends. Herbst eventually learned about the woman and decided he wanted Cuda to move out.

35. In early January 2006, Cuda began gradually moving her things out of the house and stopped spending every night there. Cuda and Herbst continued to be in a relationship, however, and Cuda spent the night in the house several times in January. In the view of both Herbst and Cuda, the relationship was changing but not ending.

36. By Saturday, January 21, 2006, only a small number of Cuda's possessions remained in the house. She had some personal belongings in the garage, a large desk in the house, and some framed pictures under the master bedroom's bed. Her landline telephone at the house was no longer in service, and Cuda had given her house and garage keys to Herbst sometime previously.

37. On January 21, Cuda spent the night with Herbst. Cuda spent part of the next day at the house doing laundry and asked Herbst if she could spend the night

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<sup>6</sup>Cuda testified that her throat was sore from this event for a few days.

<sup>7</sup>DPSST officials regarded Herbst's apparent lack of action until December 2006 regarding this claimed goal as indicative of his lack of candor.

with him again. At first, Herbst said no, but later in the evening he told her to get her things and come back.

38. As Cuda left to get things she needed to spend the night, Herbst told her not to be late or he would lock the door. Cuda joked that she would always have a key, meaning a key to Herbst's heart, and would be able to get in. Herbst thought Cuda meant that she had a literal key to the door. This angered him.<sup>8</sup>

39. Herbst expected Cuda to stop by her friends' place down the street and return with some overnight things within five or ten minutes. When she failed to appear or call after half an hour or so, Herbst concluded that she was not coming back, left a message on her phone not to come back, and prepared for bed. He put his service revolver in his work bag and placed it on the floor by the head of his bed.

40. Cuda called back and said she was coming over. Shortly thereafter, Herbst heard her knock on the door.

41. Cuda returned to the house sometime after 9:00 p.m. with a basket of overnight things. She was visibly drunk.<sup>9</sup> Herbst had been drinking that day as well, but was not obviously impaired.<sup>10</sup> Herbst let her in. He was wearing just pajama bottoms. Cuda put a plastic laundry basket with some overnight things on the floor of the entry hallway, and put her short winter coat on top. Her wallet and cell phone were in pockets of, or on top of, the coat. Cuda removed her shoes but kept her socks on.

42. Herbst demanded that Cuda give him her key. Cuda denied having a key and offered her key ring to him as evidence. Herbst tried several of these keys in the door; after he found that none of them worked, he returned the key ring to Cuda.

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<sup>8</sup>Herbst testified that he invited Cuda over to spend the night as a ruse to get the key and the cell phone from her. Herbst testified that he needed to obtain these items to make a complete break with Cuda, and that he planned to get these items, lock her out, and never see her again. As DPSST notes, Herbst's claim is at odds with the fact that Cuda had a number of items still at the house.

<sup>9</sup>When Cuda was booked into the Marion County jail at 11:22 p.m., she did not appear intoxicated to Officer Gonzalez.

<sup>10</sup>Keizer Police Officer Carroll believed that Herbst did not appear intoxicated. DPSST officials who reviewed the transcripts of the police calls and who were familiar with Herbst's voice believed that Herbst sounded intoxicated.

43. Herbst then demanded that Cuda give him \$40.00 to have the locks changed. Cuda said she had only a few dollars and that he was welcome to them. Herbst opened her wallet and saw the singles. Then he opened another compartment of the wallet containing several \$20.00 bills. Herbst removed \$40.00 and put the wallet in the basket<sup>11</sup>

44. Herbst then told Cuda that he was taking the cell phone which he had given her. As Herbst reached for her coat, Cuda refused, saying that “[y]ou can’t take the phone back, that’s my only lifeline to [her son].” She also told Herbst that she needed her phone for work. Herbst took the phone from the pocket of her coat.

45. Herbst then carried the phone and the money to the master bedroom at the end of the hall and put them on the bed.

46. When Herbst turned around, Cuda was behind him asking for the phone and money back. Herbst told Cuda to leave. In the tight quarters of his bedroom, one of them knocked a coat tree over. Herbst began pushing Cuda down the smooth hard floor of the hallway toward the front door. Cuda resisted.

47. Cuda shouted several times, “Let go, let go, let go.”<sup>12</sup>

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<sup>11</sup>Herbst offered various versions of how he obtained the \$40.00 and cell phone in his two statements to Keizer police and his testimony at hearing.

<sup>12</sup>During his cross-examination, Herbst testified:

“Q And then you were trying to get her out of your house?”

“A. Yes. About the time -- well, when you say ‘then’, you mean after I put the money and the phone on my bed?”

“Q. Um-hum (affirmative).”

“A. Yes. I was asking her to leave and I was trying to guide her out towards her stuff to leave.”

“Q And you were trying to get her by the upper arms?”

“A. Initially when I went back down that hallway from the bedroom, yeah, I had one upper arm and one hand in her chest area -- upper chest area, saying, ‘Come on, come on,’ moving her backwards.”

“Q. And I think you testified that you were trying to grab her by the upper arms and she was saying, ‘Let go, let go, let go’?”

“A. No. I never testified to that. She was never saying, ‘Let go.’ The only times I was holding her arms is when she was falling or when I was guiding her around.”

48. At this point, Herbst apparently had the only second thoughts about his actions. He considered giving Cuda back the phone and her money, but decided against it.<sup>13</sup>

Herbst's primary concern, and the reason for the struggle, was Cuda's desire to retrieve the \$40.00 and cell phone, and Herbst's determination to retain them.<sup>14</sup>

49. At some point during the struggle, Herbst punched Cuda in the bicep; grabbed and squeezed her upper arm hard enough to leave finger-shaped bruises; and shoved her.<sup>15</sup> As a result of Herbst's punch or shoving, Cuda's stocking feet, and possibly Cuda's inebriation, Cuda fell and hit her head so hard on the wall that Herbst was concerned about it. This did not cause Herbst to change his actions.

50. When Cuda got to her feet, Herbst noticed that she was considerably less steady on her feet. Herbst continued to shove her down the hall and tell her to leave.

51. Cuda fell a second time, this time near metal doors enclosing the laundry machines. Herbst used a hair hold on Cuda<sup>16</sup> at the back of her head, and began

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<sup>13</sup>There is evidence that, on several occasions after Cuda moved out, she asked to spend nights with Herbst and Herbst agreed.

<sup>14</sup>Herbst testified that he was concerned about Cuda getting to his bedroom because his service revolver was on the floor in a duffel bag. He also told this to Officer Carroll during his follow-up visit on January 25.

<sup>15</sup>According to the police reports, Herbst initially told Officer Carroll that Cuda was holding on to his wrists and would not let go as he backed her down the hall. Later, Herbst told Carroll that he placed one hand on her upper chest and another on her right arm, palm open, as he walked her backwards down the hall. Herbst testified that the bruises on Cuda's arms resulted from his holding Cuda up by her arms so that she would not fall and hurt herself: "I really didn't think she was injured at that point, you know. Other than I knew she would have probably some finger marks on her upper arms from me holding her up when she fell and things like that." This testimony was inconsistent with Cuda's injuries. Herbst also testified that Cuda fell because she was so intoxicated that her attempts to "spin" around him in her stocking feet caused her to lose her balance.

<sup>16</sup>Herbst testified that Cuda grabbed her own hair. In light of Cuda's contemporaneous comments and consistent references to Herbst pulling her hair, Herbst's familiarity with hair holds as control techniques, and the surrounding circumstances, we conclude that Herbst, at the very least, used hair hold control techniques on Cuda.

pulling her and forcing her to move face down toward the front door.<sup>17</sup> In pain, Cuda reached up and scratched at Herbst's wrist. Her left hand slid along the baseboard, and then the bottom of the metal laundry closet doors. A metal burr on a bent exposed edge of the doors cut her left hand as she slid by.<sup>18</sup>

52. Cuda showed Herbst the cut on her hand and said "Look what you did." Herbst then used his own cell phone to call the police non-emergency line<sup>19</sup> in order to document her injury.<sup>20</sup>

53. The transcript of the call is as follows:

"Sunday, 1/22/06 at 9:47 p.m.

**"Herbst:** --- - I am not touching you.

**"Dispatch:** Keizer Police.

**"Cuda:** No, you did

**"Herbst:** Hello?

**"Dispatch:** Hello?

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<sup>17</sup>Officer Goodman testified that it was impossible to pull someone across space by their hair without leaving a trail of bloody hanks of hair. Campbell testified that competent use of hair pulling techniques could induce the victim to move any direction the hair puller wanted. We also note that Cuda appeared to have a full, healthy head of hair and was short and slight of build, and that the floor was smooth and shiny.

<sup>18</sup>At the time, Cuda believed she had been cut by a nail protruding from the baseboard. Herbst testified that Cuda received the cut when she fell and splayed her arms out. The nature of the cut appears to be more consistent with Cuda's version of events.

<sup>19</sup>At the time of this call, the Keizer police non-emergency line was answered in the same call center as 9-1-1 calls.

<sup>20</sup>Herbst did not contact the police when it became apparent that Cuda did not want to leave his home without the phone, nor did he contact them when, according to his version of events, Cuda fell on her own, appeared to hurt her head, and appeared less steady on her feet as a result. The cut on Cuda's hand, and her immediate accusation to Herbst, put Herbst on notice that now *Cuda* could document what *Herbst* had done, and the 9-1-1 call appears to have been Herbst's attempt to regain the upper hand and preempt any such actions by Cuda.

**“Herbst:** Hi. This is --

**“Dispatch:** What’s going on there?

**“Herbst:** This is Ken Herbst and I have my ex-girlfriend here. She will not leave my home.

**“Dispatch:** What’s the address, Ken?

**“Cuda:** You wanted -- asked me to be here so you can fuck --

**“Dispatch:** Well, what --

**“(End of Call)”**<sup>21</sup>

54. Herbst claimed that at the end of this call Cuda grabbed at the phone Herbst was using, causing one of them to push the phone’s power button, disconnecting the call. Cuda claimed that Herbst cut off the call himself because of her shouting. We believe it is unlikely that Cuda was able to reach that close to Herbst’s face and hold on with sufficient force to cause Herbst’s hand to push the off button. In addition, Cuda’s voice is heard shouting, but at some distance from the phone. At some point during their struggle, perhaps this one, Herbst crushed Cuda’s hand in his, causing bruises to her palm and base of her thumb.

55. Herbst called the police again. Because of the disconnection, and the nature of the call, the police call center treated the second call as a 9-1-1 call. Excerpts of the transcript of the call follow.

“Sunday, 1/22/06 at 9:50 p.m.

**“Dispatch:** Keizer Police

**“Herbst:** Hello. This is Ken Herbst.

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<sup>21</sup>The 9-1-1 call was transcribed. The 9-1-1 transcript states that, at this point, Cuda said, or shouted “You wanted -- asked me to be here so you can fuck --” We have listened to the recording of the 9-1-1 calls, and cannot determine what Cuda said, but the pattern of syllables is not consistent with the 9-1-1 transcript’s version of “You wanted -- asked me to be here so you can fuck --.”

**“Dispatch:** Okay, Ken. I -- I need your address. I was just trying to find that.

**“Herbst:** It’s -- yeah. it’s [redacted].

**“Dispatch:** Okay.

**“Herbst:** And right now I just need help getting her out because...

**“Cuda:** I’m going out.

**“Dispatch:** Does she live there?

**“Herbst:** No. She’s been out for quite a while, but she’s...we...she’s refusing to leave tonight.

**“Dispatch:** Okay. How long... was she an invited guest or...

**“Herbst:** Stay right there.

**“Dispatch:** Okay.

**“Herbst:** Yes. Yes, she was invited...

**“Dispatch:** Okay.

**“Herbst:** ... and then when she showed up I asked her for my house keys back and...

**“Cuda:** I don’t have any.

**“Herbst:** ... my phone back and once she gave... well, she didn’t want to give me any of it, but now...

**“Cuda:** Yes, I did.

**“Herbst:** But now I took the phone from her and she was -- refuses to leave for about the last 20 minutes.

**“Dispatch:** Okay. And it’s been verbal only? Has it gone physical at all?

**“Herbst:** Well, slightly. I mean, she’s grabbing my wrist and I’m pushing her away and, yeah, she...I don’t how [*sic*] she hurt her hand, but she just hurt her hand. She’s got a cut on her hand.

**“Dispatch:** Okay. Does she need an ambulance?

**“Herbst:** Oh, no.

**“Cuda:** No.

**“Dispatch:** Okay.

**“Herbst:** And I -- and I have cuts on mine from her nails on my wrist.

**“Dispatch:** Okay.

**“Herbst:** You need to leave. Just leave. Go outside. This is my house. Go.

**“Dispatch:** Okay. Is she intoxicated or under the influence of anything?

**“Herbst:** Yeah. Yes, she is. Yes, she is.

**“Dispatch:** Okay. Have you been drinking?

**“Herbst:** Well, no, I...I had some earlier during the game today, but they can check me out. I’m not inebriated or anything.

**“Dispatch:** Okay. Have you been... have you been... anyone there using any type of drugs or anything like that?

**“Herbst:** No.

**“Dispatch:** Okay.

**“Herbst:** No drugs.

“Dispatch: Any weapons at all?

“Herbst: No weapons.<sup>[22]</sup>

“Dispatch: Okay.

“Herbst: No.

“Cuda: No. No.

“Herbst: Please go. Please go. Go. If you’d go I can handle it. Go.

“\* \* \* \* \*

“Herbst: You need to leave.

“Dispatch: What is your date of birth?

“Cuda: You have my phone.

“\* \* \* \* \*

“Herbst: \* \* \* Please go outside.

“Cuda: I want my phone.

“Herbst: No.

“Dispatch: Okay.

“Herbst: It’s my phone.

“\* \* \* \* \*

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<sup>22</sup>At hearing, Herbst testified that he physically restrained Cuda because he was concerned she would go to his bedroom and get his service revolver. Herb’s discussion with the 9-1-1 dispatcher to the contrary indicates he was not concerned about weapons at the time of the incident.

**Herbst:** Don't touch me.

**Cuda:** I'm not touching you.

**Herbst:** Go outside, please. Please go outside.

**Dispatch:** Okay.

**Cuda:** I want my phone.

**Herbst:** It's pretty calm right now. She's just talking with me now.

**Dispatch:** Okay.

**Cuda:** I want my phone and my money.

**Herbst:** Just go outside.

**Cuda:** You took money out of my wallet.

**Herbst:** How about tell the officers. Just go outside and tell the officers.

**Cuda:** Well, you're an officer so they're going to believe you.

**Herbst:** Yes, I am. Go outside. I'm a police officer

**Dispatch:** With who?" (Bold in original )

56. When the dispatch operator asked "With who?," she appeared to have a tone of surprise and dismay in her voice.

57. The conversation continued:

**Herbst:** With the State Police. I'm a...I work at the...I worked in Keizer before I worked here, so they'll know me when they show up.

**“Dispatch:** Okay.”<sup>23</sup> (Bold in original.)

58. DPSST officials believed that Herbst’s statements about where he worked were intended to mislead the dispatcher into thinking Herbst was a state trooper, which would be considered a higher status position. Herbst testified that he was simply unable to follow through with the explanation of where he worked because he was moving around to prevent Cuda from getting past him to get to her money and phone. In light of the often calculated nature of Herbst’s other responses, we conclude that Herbst communicated only the information to the operator that he wanted to communicate. Cuda first raised the issue of Herbst’s officer status in the conversation, and Herbst confirmed it as indicated above. However, when the Dispatcher said “With who?,” her voice contained a tone of surprise and dismay. In light of that fact, and on this record, it appears that Herbst responded in a manner which sought to avoid identifying his position and his employer, not to claim a different position and employer.

59. The conversation with the 9-1-1 dispatcher continued:

**“Cuda:** I want to (unintelligible).

**“Herbst:** Fine. Go out.

**“Cuda:** But you have my phone.

**“Herbst:** She just lives down the street at some friends’ house.

**“Dispatch:** Okay. Shelly? Shelly?

**“Herbst:** Will you please go outside?

**“Cuda:** No.

**“Herbst:** Go. Go out there.

**“Cuda:** Can I please have my phone?

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<sup>23</sup>Officer Rowe’s report on the incident states that a Salem police officer identified Herbst as a “State Police Captain at the DPSST training center.” In a summary of Herbst’s certified police officer work experience Herbst prepared prior to his termination, Herbst identifies his previous DPSST position as “State of Oregon Police Training Lieutenant at (DPSST).”

**“Herbst:** No. You need to leave

**“Cuda:** You’re the one who invited me here to fuck you.

**“Herbst:** You can tell the officer that. I also told you to leave a million times.

**“Dispatch:** Mr. Herbst? Are all your weapons secured?

**“Herbst:** My weapons are all secured.

**“Dispatch:** Okay.

**“Herbst:** Yeah. And there’s no...there’s no problem with that.

**“Dispatch:** Well, I...I understand that. I just want to make sure and I’m sure you understand why.

**“Herbst:** I do. I do understand.

**“Cuda:** You know, I’m not worried about it.

**“Herbst:** Just stay by the door.

“\* \* \* \* \*

**“Herbst:** You probably should wait now. Don’t -- don’t leave now. Why don’t you wait.

**“Cuda:** I want my phone.

**“Herbst:** Just wait.

**“Dispatch:** Okay. Is there any way for you guys to go into separate rooms until, you know, the units arrive there? So, you guys can try and like --

**“Herbst:** Don’t. Just step out. Stay there. Yeah, we can. We can. Stay in there until they get here. They’re going to be out --

**“Cuda:** Don’t pull my fuckin’ hair.

**“Herbst:** I’m not pulling -- oh, nice. She saying I’m pulling her hair. Hey. Close the door, please. Please close the door.

**“Cuda:** You know what? I’ll wait till they get here.

**“Herbst:** Would you close the door though?

**“Cuda:** Why don’t you close the door?

**“Herbst:** Because you’re going to run for the other room. Stop. Go over here.

**“Cuda:** You know what? You have made enough marks on me to (unintelligible).

**“Herbst:** You did that. Come here. Hold it. Come here.

**“Dispatch:** Listen, Ken? Ken? You guys need to go just in separate rooms altogether so that this can deescalate.

**“Herbst:** No. We cannot do that because I don’t trust her in my house.

**“Dispatch:** Okay.

**“Herbst:** The kitchen’s right here. There’s knives. I mean, I don’t trust -- I just don’t want her in my house.

**“Cuda:** I’m not --

**“Herbst:** Stay there.

**“Cuda:** You invited me here to fuck you.

**“Herbst:** Whatever. Stay over there.

**“Cuda:** I did not just (unintelligible).

**“Herbst:** That’s your story. Stay over there by the door.  
Please close the door.

**“Cuda:** I can’t believe that you are doing this.

**“Herbst:** And you had the opportunity to leave. I asked  
you a million times to leave.

**“Cuda:** No, you didn’t.

**“Herbst:** She’s calm. She’s just arguing.

**“Dispatch:** Okay. I’m going...listen? Ken? Ken?

**“Herbst:** Yes?

**“Dispatch:** The officers are arriving outside. Okay?” (Bold  
in original.)

### Keizer Police Response

60 Officers Steve Carroll and Jeffrey Goodman from the Keizer Police Department reached the house at approximately 9:55 p.m., along with a supervisor and another individual from the Keizer Police Department who had heard that Herbst was involved in the incident.

61. Officer Goodman had worked with Herbst at the Keizer Police Department. Officer Carroll was a relatively new officer, but knew Herbst from classes he took from him at DPSST. Because Officer Carroll had the least personal contact with Herbst, he was assigned to lead the investigation of the incident and to write the police report.

62. Officer Carroll went into the house to interview Herbst while Officer Goodman talked with Cuda, who by that time was outside the house in the driveway, leaning on her car with her laundry basket of items on the hood. Cuda was upset and crying.

63. Cuda did not trust the officers and was reluctant to tell them about what had happened. She told the officers very little and did not show them her injuries,

other than the obvious cut on her hand. When asked how she hurt her hand, she told them it happened when Herbst attacked her in the hallway, grabbed her by the hair, and dragged her down the hallway. She was also reluctant to allow Goodman to photograph her so Goodman photographed her from a distance <sup>24</sup>

64. Herbst, who was still shirtless, revealed scratches on his chest and wrists and told Officer Carroll that Cuda grabbed his wrists and would not let go. He said Cuda was drunk and hurt herself when she fell down as she tried to push past him in the hallway to retrieve the cell phone and money. Herbst did not tell Carroll about the location of his guns.

65. Carroll did not look for Herbst's work bag, check his weapons, or verify that they were secure.

66. Goodman and Herbst checked the hallway to see where Cuda cut her hand and to see if there was any hair or blood present. They found the metal burr on the laundry appliance door, but found no hair or blood. Goodman took photographs of Herbst, Cuda, and the hallway.

67. When police respond to a domestic disturbance, ORS 133.055(2) requires officers to arrest a member of a household if they have probable cause to believe that the member has assaulted another member of the household. <sup>25</sup>

68. Officer Carroll arrested Cuda as the "primary aggressor" and took her to the Marion County Jail. Thirty-three minutes had elapsed from Carroll's appearance until Cuda's arrest. On the way to the jail, Cuda told Officer Carroll that Carroll did not know what happened and that Herbst had punched her. Believing that

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<sup>24</sup>We do not interpret Cuda's reluctance to tell the officers what happened as an indication that Herbst did not harm her. Victims of domestic violence are often hesitant to report abuse to law enforcement officers. We also observe that Cuda's injuries were worse than indicated by Herbst's version of events, and were consistent with injuries typically seen on a domestic violence victim. Herbst's injuries were more consistent with injuries seen on a primary aggressor.

<sup>25</sup>ORS 133.055(2)(a) provides: "when a peace officer responds to an incident of domestic disturbance and has probable cause to believe that an assault has occurred between family or household members \* \* \* or to believe that one such person has placed the other in fear of imminent serious physical injury, the officer shall arrest and take into custody the alleged assailant or potential assailant."

Cuda was claiming Herbst punched her in the eye, Carroll looked at her face and did not see a black eye.<sup>26</sup>

69. Cuda was booked by Deputy Jose Gonzales. Gonzales noticed several significant injuries on Cuda that led him to question whether the right person had been arrested. Gonzalez noted that Cuda had a cut on her left hand, bruising and swelling on the other hand, a significant knot on her forehead, a large deep bruise on her bicep, and additional bruises on her upper arms.<sup>27</sup> Cuda did not appear to be intoxicated or have difficulty speaking or keeping her balance.

70. Gonzales asked Cuda what happened. Cuda said that an argument with her boyfriend got out of hand and he beat her up. Gonzales took pictures of Cuda's injuries and told her she should report what happened. Cuda replied that she could not file a police report because her boyfriend had been a Keizer police officer and was now a captain at DPSST.

71. Seeing a Keizer police officer as he was processing Cuda, Gonzales mentioned that pictures should be taken and a thorough investigation conducted. The Keizer officer contacted Officer Carroll, who returned to the jail to question Cuda further and to take additional photographs.

72. After Cuda's arrest, Herbst attempted to call his supervisor, Assistant Director of Academy Training Mark Ayers. Getting no answer, Herbst called Deputy Director Eriks Gabliks. After receiving no answer from him either, Herbst called Training Division Director Campbell. Waking Campbell, Herbst told Campbell that he had called 9-1-1 because Cuda would not leave the house, that Cuda had been arrested for domestic violence, and that he would be to work late the following morning because he had to deal with the aftermath.<sup>28</sup>

73. On January 25, 2006, at 8:30 p.m., Officer Carroll met Herbst at the house for a follow-up interview. Herbst told Carroll that the only reason he let Cuda

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<sup>26</sup>Goodman testified that Cuda's head injury could have come from having a tantrum in the back seat of the police cruiser and hitting her head on the plexiglass there. Carroll never reported such conduct on Cuda's part.

<sup>27</sup>Cuda also had a bruise on her knee

<sup>28</sup>Campbell testified that he does not recall Herbst mentioning domestic violence, and that he told Herbst in a telephone conversation Herbst recorded that "If you had mentioned domestic violence, I don't recall, but that's certainly entirely possible. It was late at night "

come over on the night of January 22, 2006, was to get the house key. He told Carroll that Cuda handed him \$40.00 and gave him the cell phone.

74. Herbst told Carroll that he put one hand on the center of Cuda's chest and the other hand on her right arm, and used his open palms to push her so he would not hurt her. Herbst told Carroll that Cuda spun around to get around him as he pushed her backwards down the hallway and was so drunk she fell down, hit her head, and cut her hand. He told Carroll he didn't want Cuda going to the bedroom at the end of the hallway because he keeps a work bag with his firearm in that room, and that Cuda knew this.

75. On January 27, at 2:30 a.m., Officer Carroll met Cuda for a follow-up interview. No one else was home and Cuda was uncomfortable with Carroll's presence. Cuda did not let him into the residence and the interview was conducted on the doorstep and foyer of the residence.

76. Cuda told Carroll that she could only remember bits and pieces of the evening of January 22. Cuda said that Herbst had held her hand so she could not leave and that her hand was bruised from him squeezing her hand. She reported the bruise on her bicep was from Herbst grabbing her right bicep and pushing her down the hallway. She reported that Herbst dragged her down the hallway by her hair and she reached up to scratch Herbst's hands to get free. She thought the mark on her head was from hitting a wall and the bruise on her knee was from falling. She reported additional bruises on her upper arm where Herbst grabbed her. Carroll took additional photographs.

77. Cuda asked two friends to photograph her injuries the day after the January 22 incident and then again several days later. Cuda delivered the photographs to Officer Carroll.

78. A few days after Cuda's arrest, Cuda's family came over with two pick-up trucks to remove the rest of her property from Herbst's house. While they were there, Herbst gave Cuda's brother-in-law, Travis, \$40.00 because he had decided that Cuda was telling the truth when she denied having a key to the house. Herbst also gave Travis a note of apology for the involvement of their family in the circumstances.

### **The Investigation, Indictment, and Arrest**

79. On February 9, 2006, the Marion County District Attorney's office asked the Salem Police to further investigate the January 22 incident between Herbst and Cuda. The Salem Police assigned Officer Bennett Rowe to investigate. Officer Rowe

had experience and special training on domestic violence cases and was part of the Domestic Violence Response Team administered by the Marion County District Attorney's Office.

80. Officer Rowe reviewed the Keizer police reports and photographs, interviewed Cuda, and asked her to re-enact the incident. He also interviewed Herbst's son. Officer Zambrano accompanied Rowe during his interviews of Cuda and Herbst's son.

81. On February 9, late in the workday, Rowe left a message on Herbst's DPSST voicemail. As a result, Herbst telephoned an attorney, who advised Herbst to contact him if Herbst was contacted for any kind of an interview.

82. After Herbst left work on February 9, Rowe reached Herbst on his cell phone. Rowe tried to arrange an interview with Herbst, but Herbst directed him instead to Officer Carroll at the Keizer Police Department. Officer Rowe told Herbst that he already had Officer Carroll's report and wanted Herbst to come in and talk to him. Herbst refused because he felt that Rowe treated him like an unsophisticated criminal instead of a police officer and said he wanted to talk to his attorney before he talked to anyone. Herbst never talked to Rowe.

83. Based on the information gathered at that point, Officer Rowe believed there was probable cause to believe Herbst had engaged in domestic violence and issued a probable cause statement.

84. On February 9, 2006, an arrest warrant was issued and officers of the Salem Police Department arrested Herbst at his home.

85. Officer Rowe continued his investigation. He listened to the 9-1-1 recording and reviewed the booking photographs of Cuda's injuries. Rowe also interviewed additional witnesses including Cuda's friend Erica Baca, Cuda's sister Monica Braff, Deputies Mendez and Gonzales from the Marion County Jail, and the former DPSST student with whom Herbst allegedly had an affair. In his final investigative report, Rowe did not include a record of his interview with the former DPSST student who had denied an affair with Herbst.

86. On February 13, 2006, Herbst was arraigned at the Marion County Circuit Court on domestic violence charges. He was indicted by a Marion County Grand Jury for domestic violence on March 10, 2006.

### **Restraining Order Violation Complaint**

87. On January 26, 2006, Herbst obtained a restraining order against Cuda. On January 30, Herbst telephoned Steve Braff, husband of Cuda's sister Monica Braff, to inform them of the restraining order. Also on January 30, Cuda applied for, and received, a restraining order against Herbst.

88. On March 8, 2006, Cuda complained to the Salem Police Department that Herbst had violated his restraining order by coming to a popular Keizer bar on a night that he knew Cuda frequented the bar. Cuda reported that Herbst had approached her in the bar, stared at her for a length of time, smirked at her, and then left. The investigating police officer spoke with Cuda's friends who were present that night. Based on the friends' statements that it appeared to them that Herbst left as soon as he saw Cuda, the officer concluded that there was no probable cause to conclude that Herbst had violated the restraining order.

### **Herbst's Dismissal from Employment with DPSST**

89. On February 10, 2006, DPSST learned of Herbst's arrest and placed him on administrative leave with pay pending an investigation of his conduct. DPSST officials reviewed the evidence obtained by the Marion County District Attorney's office, including the Keizer Police reports, the Salem Police investigation report, a recording of the 9-1-1 calls, the photographs of Cuda's injuries, and related evidence. On March 30, 2006, DPSST gave Herbst a predissmissal letter.

90. The predissmissal letter cited (1) excessive absences from work; (2) failure to report the September 2005 incident; (3) failure to disclose physical violence when he reported the 9-1-1 call to his supervisor; (4) his arrest, arraignment, and indictment for three counts of domestic violence; (5) the Marion County District Attorney's investigation, including the police reports and photographs showing Cuda's injuries; (6) misidentifying himself as a state police officer; (7) the report of a sexual relationship with a DPSST student; and (8) violation of Herbst's release agreement and restraining order.

91. At Herbst's request, the predissmissal meeting was postponed to April 25, 2006. At the meeting, Herbst provided DPSST with a written response from his attorney denying all the charges and asserting that Cuda was not credible. The letter also attacked the Salem Police investigation as inadequate and asked for an independent DPSST investigation.

92. Herbst's predissmissal response letter did not provide Herbst's version of events or explain Cuda's injuries. Herbst did not make a statement about the allegations at the predissmissal meeting except to explain his reliance on the response letter.

93. As part of DPSST's decision-making process, DPSST Director John Minnis and Training Division Commander Campbell reviewed the evidence described above. Among other accomplishments, Minnis had been a police officer for 27 years, including 11 years as a detective primarily working on child abuse and sex abuse cases, and Director of DPSST since 2004. Campbell is a highly experienced investigator who has investigated thousands of cases, several hundred of which were domestic abuse cases. Minnis and Campbell concluded that the investigation was sufficient for purposes of a personnel action. They concluded, based on the investigation material, that it was more likely than not that the incidents took place, that Herbst was the primary aggressor, and that domestic violence had occurred.

94. Campbell concluded that Herbst's descriptions of events were inconsistent with human behavior and consistent with the conduct of the primary aggressor in a domestic violence situation, and he concluded that Cuda's conduct was consistent with that of a domestic violence victim.

95. On April 28, 2006, DPSST issued a dismissal letter based on its conclusions that Herbst had engaged in acts of domestic violence, had violated the release agreement and restraining order, and had misidentified himself as a state police officer.

96. The DPSST dismissal letter stated in part:

**"CONCLUSION:**

"It is the responsibility of the Board on Public Safety Standards and Training to set the standards, and of the Department to uphold them, in such a way to ensure the highest levels of professionalism and discipline.

"Board instruction provides that these standards shall be upheld at all times unless there is a specific finding of substantial and compelling reason that demonstrates that neither the safety of the public or respect of the profession will be compromised by a waiver.

“In addition to being a DPSST Academy Training Supervisor, you are certified as a Law Enforcement Officer. OAR 259-008-0010, Minimum Standards for Employment as a Law Enforcement Officer, provides in part:

“(6) Moral Fitness (Moral Character). All law enforcement officers must be of good moral fitness as determined by a thorough background investigation.

“\* \* \* \* \* [quoting OAR 259-008-0010(6)(a), (b), and (c)]

“Although you are not currently employed as a Law Enforcement Officer, you currently maintain your Law Enforcement Officer certification and credentials and retain police powers by virtue of your employment.

“DPSST is empowered under ORS chapter 181 to establish reasonable minimum standards of physical, emotional, intellectual and moral fitness for public safety personnel and instructors.

“\* \* \* \* \* [quoting ORS 181.640(1)(a)]

“DPSST Community partners, students, employees, and others rely on you to set the standard and to serve as a model of professionalism.

“As a former Law Enforcement Officer, a DPSST Academy Training Supervisor, and a DPSST Certified Instructor, you have taken training and provided training in defusing arguments. You knew or should have known the importance of separating yourself from the reported victim during the 9-1-1 incident.

“Your behavior as reported in the Keizer Police Department and Salem Police Department reports and as documented by the 9-1-1 tapes, represent poor judgment and behavior that is unbecoming a Law Enforcement Officer, a DPSST Academy Training Supervisor, and a DPSST Certified Instructor.

“By your actions, you have crossed the threshold of acceptable conduct.

“Regardless of your guilt or innocence as may be decided by Marion County Circuit Court, you have failed to maintain a positive image for both yourself and DPSST.

“The reference to a sexual relationship with a student, if true, is sufficient for dismissal.

“Your actions and inactions related to the Marion County Circuit Court indictment are not in conformance with Department policies, rules and procedures, and alone would require your dismissal from state service.

“Your conduct as described above does not meet the Department’s minimally expected level of performance for its employees, and more specifically, does not meet the minimally expected level of performance for a DPSST Academy Training Supervisor.

“The above actions occurred despite your knowledge of how those actions could impact your ability to remain a role model for this agency. Your conduct, as described, reflects disregard for the tenets of professionalism required for DPSST instructors and has the potential to bring disrespect upon DPSST within the law enforcement agencies that it serves and the State of Oregon.

“Due to the conduct described in the Marion County District Court Indictment:

- “1. You do not meet the standards of conduct provided in DPSST Policy 200, Standards of Conduct.
- “2. You are ineligible for the authorities provided by DPSST Policy 201, Responsibilities and Requirements of Certified Personnel.

- “3. You have failed to follow the philosophies provided in DPSST Policy 202, Use of Force.
- “4. You are ineligible to carry a DPSST badge and official credential card or to carry a firearm as a Certified Law Enforcement Officer as provided by DPSST Policy 203.
- “5. You are ineligible to serve as a DPSST Training Captain as provided by DPSST Policy 324.

“Based on the information received to date, we have concluded that you do not meet the moral fitness standard that serves as the foundation for law enforcement and the mission of this agency.

“Your position is critical to achieving the mission of this Department and due to the Marion County District Court Indictment, you are currently unable to serve as DPSST Academy Training Supervisor or as a DPSST Certified Instructor.

“We believe this information is sufficient to lead us to the conclusion that you cannot represent DPSST.

“We have also concluded that, regardless of your criminal culpability with regard to the Marion County District Court Indictments, your actions and inactions as described in the investigation materials render you unsuitable for DPSST employment.

**“FINAL ACTION:**

“The above facts establish violations of and failure to meet the requirements of DPSST rules, policies, and guidelines and failure to meet the standards of the conduct DPSST reasonably expects from you as a manager. For these reasons, you are dismissed from State service, pursuant to ORS 240.570(5), effective May 2, 2006.” (Emphasis in original )

97. On May 30, 2006, responding to a May 11 letter from Herbst's attorney, Minnis stated that the information about excessive absences and about a relationship with a student was not used to support the decision to terminate Herbst.

98. Herbst's criminal case was tried in front of a judge in November 2006. Herbst was acquitted. The transcribed testimony of several witnesses at the criminal trial is part of the evidence in this case. Herbst did not testify at the criminal trial.

99. In February 2007, Herbst was in a relationship with Jane Doe. On February 15, Herbst visited a woman he had dated previously, TL, for sex. Prior to going to bed, TL stepped out on the porch to get a telephone message to Doe that Herbst was with her.

100. On the morning of February 16, Herbst checked his telephone messages while seated in his car at TL's home and learned what TL had done.

101. TL told investigating police the following: After learning of TL's contact with Doe, Herbst returned inside and threw a sports drink bottle at her head. TL picked up her cell phone to call 9-1-1. Herbst rushed at her. TL turned away from him and pulled the phone close to her chest with both hands as Herbst put both his arms around her trying to get the phone. According to the police report, "[s]he said [Herbst] did this for almost a minute before finally letting go of her. She told me once [Herbst] had let go of her he pushed her from the left side several times but wasn't able to push her over." She stated that Herbst then walked to the door, threatened her if she called the police, and left.

102. TL also told the officer that in November 2006, Herbst had grabbed her around the throat and choked her to the point that she had difficulty breathing, leaving bruises which were seen by her mother and coworkers. She also stated that in December 2006, Herbst had picked her up and thrown her against the wall.

103. On February 16, 2007, Herbst spoke with the investigating officer, telling him that TL was not credible, had a history of false domestic violence reports, and was a former substance abuser. The police officer's report states, in part,

"Ken [Herbst] told me once he was back inside the house he was standing next to the couch with his back to the door and then bent over to pick some of his stuff up when he heard [TL] call him an 'Asshole.' He said the next thing he knew was his Gatorade bottle hitting the wall and water

splashing all over the place. Ken said he turned to look at [TL] and said, 'What the fuck is your problem.' He said [TL] responded with something like, 'What are you going to do shoot me now?'

"He told me he said, 'Are you crazy, that's just plain stupid.' Ken said he walked over to the front door and as he passed [TL] she picked up her cell phone and said I am going to call the police. He said [TL] by this point was standing next to her couch with the cell phone in her hand. At first Ken said 'I grabbed for it but she clutched it to her chest and went down onto the couch screaming.'

"I asked Ken if he actually got a hold of the phone. He said, 'No I only reached for it.' I told Ken that he just said he had grabbed for it but now says he only reached for it. Ken told me this time, 'I held my hand out and asked for the phone because I didn't want her to do anything stupid.'

"I asked Ken if at any point while he was grabbing, reaching or holding his hand out for the phone did he physically touch [TL] in anyway. He told me, 'No.' I asked Ken what happened next. He said after [TL] started screaming he started to walk out the door then turned around and said to her, 'Don't call me or try to contact anyone I know or I will have you charged with telephonic harassment.' Ken said once he had told her that he left the house and went to work.

"I asked Ken if he had threatened her at anytime. He said he didn't and there was no reason for him to do so. I asked Ken if he had physically touched her or hurt her today or in the past. He said he had never done anything like that to her. I asked Ken if that was true why would [TL] say he had choked her so badly back in November that she had bruises which had been seen by her mother and fellow co-workers. Ken didn't immediately reply but then finally said, 'I hope you are not going to believe what her mother says because she is just as crazy.' I asked Ken if that was the case then why would [TL] also say her co-workers saw it as well. He told me he didn't know."

104. In a letter dated February 22, 2007, TL recanted her allegations about Herbst. In the letter, TL stated:

“2/22/2007

“This letter is in regards to the complaint I filed last Friday Feb. 16th 2007. I do not wish to pursue charges against Mr. Kenneth Herbst and wish to withdrawl [*sic*] my statements against him. I do not fear Mr. Herbst and at the time of the complaint was very angry with him due to personal issues between us. I am making this statement of my own free will and in no way has anyone talked me into it or threatened me. I do realize that I can be charged with false report and will respect what ever choice is made in this matter. I will not pursue these charges and hope that all legal matters will be dropped against Mr. Herbst. Thank you for your time, [TL]”

105. Herbst had called TL and apologized prior to TL’s sending her February 22 letter.

### CONCLUSIONS OF LAW

1. This Board has jurisdiction over the parties and subject matter of this dispute.
2. DPSST did not violate ORS 240.570(5) or 240.555 in dismissing Herbst from state service.

### Discussion

#### Standards for Decision

ORS 240.570(3) provides that, after completion of trial service,

“the 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.”

ORS 240.570(5) provides that “[m]anagement service employees with immediate prior former regular status in the classified service 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.”

ORS 240.555 provides:

“The appointing authority in any division of the service may suspend, reduce, demote or dismiss an employee thereof for misconduct, inefficiency, incompetence, insubordination, indolence, malfeasance or other unfitness to render effective service.”

In reviewing removals from management service, this Board has used the following standards:

“If performance standards are not arbitrary or unreasonable, given the authority and responsibility of the employe in question, failure to satisfactorily meet these expectations can be cause for discipline or removal even if the standards are very strict. But because the standard in ORS 240.570(3) is not merely a subjective one, this Board still must decide whether under all the circumstances of the case the ‘action [of the employer] is objectively reasonable.’” *Morisette v. Children’s Services Division*, Case No. 1410 at 23 (March 1983).

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

*See also Wesley v. State of Oregon, Employment Department*, Case No. MA-20-02 at 12 (October 2003). A management service employee may be held to “strict standards of

behavior, so long as these standards are not arbitrary or unreasonable.” *Helper v. Children’s Services Division*, Case No. MA-1-91 at 22 (February 1992).

This Board has previously considered the relationship of off-duty conduct to a manager’s ability to perform his or her position. In *Lawson v. Department of Fish and Wildlife*, Case Nos. MA-15/28-94 (July 1995) this Board held that:

“[Off-duty conduct may reflect negatively on the agency and demonstrate] ‘unfitness to render effective service’ in that [the employer] could no longer ‘trust in [the manager’s] integrity,’ an obvious reference to [the manager’s] false denials of wrongdoing. Depending on the circumstances of the case, these can be actionable grounds for discipline even though they arose in the context of off-duty misconduct.”<sup>7</sup>

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<sup>7</sup>*See Duncan v. Dept. of Agriculture*, MA-1-91 (1992) affirming livestock brand inspector’s four month suspension for shoplifting and concluding that the employer could reasonably expect that an employee with law enforcement responsibilities to [*sic*] ‘refrain from intentional wrongdoing which would place [his] personal integrity in question’; *Hunter v. OSU*, MA-3-88 (1989), AWOP 100 Or App 261 (1990), *rev den* 309 Or 698 (1990) affirming employee’s removal from management service for off-duty misconduct which brought ‘discredit’ on his police officer commission; *Donaldson v. Dept. Of General Services*, Case Nos. 1073/1100 (1981) dismissed appeal holding that off-duty vehicle accident was relevant to question of mail truck drivers fitness to render effective service; *Torres v. Bureau of Labor*, Case Nos. 1133/1149 (1981) where wage and hour compliance officer’s involvement with an unlicensed labor contractor was properly considered a ground for dismissal. *Compare Reisner v. Employment Division*, Case No. MA-14-87 (1988) where employer properly removed supervisor for inappropriate off-duty contact with another employee which caused adverse ‘impact on the work setting.’

“It is a reasonably accurate generalization to say that public employees do not, as a condition of employment, give

up the right to conduct their private, off-duty lives as they wish, free from employer scrutiny or intrusion. However, it is also true that employers can require employees to refrain from conduct, even off the job, which would damage the employer's business, its reputation, or the employee's effectiveness. The task here is to weigh these competing interests to determine whether [the employer] was entitled to rely on [the manager's] off-duty activity in dismissing him." *Lawson v. Department of Fish and Wildlife*, Case Nos. MA-15/28-94 at 14-15.

Finally, this Board has previously held that it is reasonable for an employer to expect employees with law enforcement responsibilities to avoid conduct that would place their personal integrity in question or bring discredit on their police officer commission. *Duncan v. Department of Agriculture*, Case No. MA-1-92 (August 1992); *Hunter v. Oregon State University, Police and Security Division*, MA-3-88 (February 1989), *AWOP*, 100 Or App 261, 786 P2d 229, *rev den*, 309 Or 698, 790 P2d 1141 (1990).

With these standards in mind, we turn to the facts of this case. DPSST has a comprehensive set of rules, policies, and guidelines that, consistent with its mission, set standards for law enforcement employees across the state, as well as for its own employees. In his testimony, Herbst agreed with those standards, but disagreed that his conduct had violated those standards. We conclude that the DPSST standards relevant to Herbst's situation were clear, well known to Herbst, and appropriate given his position.

DPSST, which bears the burden of proof in this case, argues that Herbst was a classic abusive partner who sought to misuse his position and experience as a police and DPSST officer to escape accountability for his abusive actions. DPSST argues that Herbst's failure to report the September 2005 incident, his conduct on January 22, 2006, and his subsequent appearance at one of Cuda's haunts were part of that pattern of conduct and justify his termination. Herbst argues that Cuda is not credible, and that his termination was not in good faith for cause because it was based on false and unsupported allegations; a biased, inaccurate, incomplete and deliberately misleading investigation by a Salem police officer; and prompted by DPSST's concern about negative public opinion and damages to its own reputation.

DPSST argues that Herbst failed to report an "injury" he caused to Cuda in September 2005 when he flipped Cuda over, got on top of her, placed his forearm on her collarbone/neck area, and immobilized her. We have not found that Cuda was physically injured although she was likely shocked and scared. The Department points

to no relevant definition of injury that appears to cover this situation, and we conclude that the Department failed to meet its burden of proof to establish that Herbst did not report an “injury” in this instance.<sup>29</sup>

**January 2006 incident: identification as state police officer**

During the 9-1-1 call on January 22, Herbst told the dispatcher that he was a police officer with the “State Police.”

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<sup>29</sup>DPSST Policy 202, “Use of Force” states in part:

“1. All use of force incidents are subject to a supervisory investigation and/or a written report when:

“A. Use of force results in an apparent or reported injury.

“B. A non-deadly weapon is used on a person (baton, chemical agent) or a strike or blow is delivered to the body.” (Finding of Fact 12.)

ORS 161.015 provides in part:

“As used in chapter 743, Oregon Laws 1971, and ORS 166.635, unless the context requires otherwise:

“\* \* \* \* \*

“(3) ‘Deadly physical force’ means physical force that under the circumstances in which it is used is readily capable of causing death or serious physical injury.

“\* \* \* \* \*

“(6) ‘Physical force’ includes, but is not limited to, the use of an electrical stun gun, tear gas or mace

“(7) ‘Physical injury’ means impairment of physical condition or substantial pain.

“(8) ‘Serious physical injury’ means physical injury which creates a substantial risk of death or which causes serious and protracted disfigurement, protracted impairment of health or protracted loss or impairment of the function of any bodily organ.”

The state contends that Herbst did not correctly identify himself since DPSST is not the State Police. Herbst argues that he accurately described himself as a police officer who worked for the state. Herbst also argues that the record contains two references to him as a state police officer, one from a Salem police officer to Officer Rowe and one by Herbst himself in documents prior to the events at issue. We note that these references were not identical, but they are similar enough to Herbst's comments during the 9-1-1 call to raise questions about the appropriate way to identify him. Herbst also argues that, rather than being deceptive, he was too busy fending off Cuda to complete his description of his current employment.

We have concluded, as a matter of fact, that Herbst did not intentionally misrepresent himself as a state trooper. We have found that Herbst was trying to avoid naming his current employer, not inflate his own status. In addition to the facts that a Salem police officer, and previously Herbst himself, identified Herbst in a similar fashion, we note that the obvious route to exerting more prestige and status with the law enforcement officials he was dealing with would have been to truthfully state his rank, captain. We conclude that the Department has failed to sustain its burden of proof that Herbst intentionally misrepresented himself as a state police officer.

### **January incident: abuse of Cuda**

Herbst emphasizes Cuda's credibility problems regarding most of the events of this case. We agree that Cuda's credibility is substantially impaired. However, we credit her testimony where it is supported by other evidence. Independent of Cuda's credibility, however, Herbst's version of events fails to account for Cuda's injuries, and his (at best) selective statements to law enforcement officials concealed some of his actual motives and conduct. In addition, Herbst's stated motives about lesser events also appear inconsistent with other evidence.

We have found that Herbst invited Cuda to enter his home on the evening of January 22 as a ruse to obtain her house key or money and the cell phone, and used physical force to obtain the cell phone, if not the money, even though he was not entitled to the money, as he later acknowledged. Herbst then used an inappropriate level of physical force to retain the cell phone and money, and to attempt to physically remove Cuda from his home. The force Herbst used went beyond what Herbst described to police that evening as seeking to free himself from Cuda's holding him by his wrists and not letting go; or what he described days later as placing one hand on Cuda's upper chest and another on her right arm, palm open; or even acknowledging "some finger marks on her upper arms from me holding her up when she fell and things like that." Herbst punched Cuda at least once and held Cuda's arm and hand so tightly that his fingers caused bruising. We conclude that it is more likely than not that Herbst knocked

Cuda into the wall and floor as a result of the force he used, causing her to bruise her head and knee. We also conclude that it is more likely than not that Herbst used a hair control technique on Cuda, and that Cuda received the cut on her hand as a result of Herbst's conduct.

When Cuda's cut created apparent evidence of what happened, and she said to him, "Look what you did," Herbst called the police to protect himself from the consequences of injuring Cuda. He misrepresented the situation, initially saying there were no weapons and later portraying himself as having secured his gun. He would later justify his conduct as an attempt to keep Cuda away from that gun. That was also the false basis for his refusal to separate himself from Cuda when requested by the 9-1-1 dispatcher. In fact, Herbst's goals were to retain the items he had either seized by force or had no right to retain while expelling Cuda from the house.

### **Breach of restraining order**

Herbst admits entering a bar that he knew Cuda frequented,<sup>30</sup> saw Cuda, and left afterwards. The parties dispute whether the events were planned by Herbst, and whether he gave her a meaningful stare and smirk for a period of time before leaving. We conclude that DPSST failed to meet its burden of proof to establish this reason for terminating him.

There is no doubt that Herbst came into a bar that he knew Cuda frequented, walked through the bar until he saw Cuda, looked at her, and then left. We acknowledge the Department's argument that what seems like a trivial act to an outsider can be very intimidating to a victim of domestic abuse. Nevertheless, two of Cuda's friends were witnesses, and their observation of the events did not corroborate Cuda's description of the length and significance of Herbst's alleged eye contact with her. Nor did the investigating police officer find probable cause to find a violation of the restraining order. Given witness reports that Herbst promptly left once he saw Cuda in that crowded setting, we conclude that this event does not appear to have been a breach of the restraining order that would support his termination.

### **Due Process**

Herbst argues that he was deprived of due process. In this context, due process requires that when an employer is considering the discharge of an employee, "the

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<sup>30</sup>Given the length of their relationship, we are inclined to disbelieve Herbst's statements that he had no reason to think Cuda might be present at the bar that evening.

employer must give the employee notice of the charges, notice of the discipline being considered, and an opportunity to respond to the charges before a management official with the authority to make the disciplinary decision. *Helper v. CSD*, Case No. MA-1-91 (February 1992); *Tupper v. Fairview Hospital and Training Center*, 276 Or 657 (1976).” *Lawson v. Department of Fish and Wildlife*, Case Nos. MA-15/28-94 at 16. Here, DPSST gave Herbst notice of the charges and sanctions being considered in the predismisal letter. Herbst was given an opportunity to refute these charges at the predismisal meeting. We conclude that Herbst was not denied due process.

### **Political reasons for termination**

Herbst argues that his dismissal was for “political reasons,” namely, “DPSST’s concerns about negative public opinion and damage to its own reputation from the arrest of one of its training officers on allegations of domestic violence.” ORS 240.560(3) provides, “If the board finds that the action complained of was taken by the appointing authority for any political, religious or racial reasons, or because of sex, marital status or age, the employee shall be reinstated to the position and shall not suffer any loss in pay.” However, “[t]his Board has historically held that the ‘political reasons’ proscribed by the statute pertain only to partisan politics. Douglas G. Ellis v. Bureau of Labor, Case No. 94 (1972).” *Foster v. Executive Department, Emergency Management Division*, MA-15-87 at 10 (September 1988) (emphasis in original). The issues identified by Herbst do not fall within the scope of “political reasons” as identified in our case law.

### **DPSST acted as a reasonable employer in removing Herbst from management service and dismissing him from state service**

Herbst, in the course of obtaining and retaining \$40 and a cell phone from Cuda, struck her hard at least once, pulled her hair, squeezed her arm and hand hard enough to cause significant bruises, and then lied about it to police officers. Herbst was also not forthcoming to the 9-1-1 dispatcher and disregarded her suggestions, giving reasons that were not truthful.

That Herbst had alternatives is illustrated by his own testimony, in which he emphasized his police training in the physical manipulation of people without injury while protecting himself, and in his testimony about ending the altercation by returning the money (which he did later in any event) and the cell phone.

In reviewing the photographs of Cuda’s injuries, this Board cannot conclude that DPSST failed to act reasonably in concluding that the individual who caused the injuries, and then failed to adequately explain or take responsibility for them, is an unacceptable role model for police behavior, and is inappropriately employed as an

instructor on issues including domestic violence or as a supervisor of those instructors.<sup>31</sup> DPSST acted lawfully and within its discretion as a reasonable employer in terminating Herbst. Herbst's conduct on January 22, 2006 was a serious breach of Herbst's responsibilities as a DPSST manager and employee, and undermined his trustworthiness and fitness to render effective service. We uphold Herbst's dismissal and dismiss his appeal.

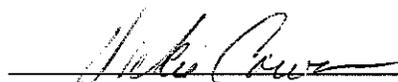
ORDER

Herbst's appeal is dismissed.

DATED this 23<sup>rd</sup> day of October 2008.



Paul B. Gamson, Chair



Vickie Cowan, Board Member



Susan Rossiter, Board Member

This Order may be appealed pursuant to ORS 183.482.

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<sup>31</sup>Regarding the role model issue, it is noteworthy that, as DPSST argues, the testimony of Keizer police officers may have indicated a predilection to "overlook information and invent unlikely scenarios to help Herbst." For example, Herbst testified that Cuda hit her head hard on the wall in the house, but Officer Goodman suggested that Cuda hurt her head on the plexiglass in the police car while having a tantrum.