

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. MA-7-07

(REMOVAL FROM MANAGEMENT SERVICE)

LARRY BELCHER,)	
)	
Appellant,)	
)	
v.)	RULINGS,
)	FINDINGS OF FACT,
STATE OF OREGON,)	CONCLUSIONS OF LAW
DEPARTMENT OF HUMAN SERVICES,)	AND ORDER
OREGON STATE HOSPITAL,)	
)	
Respondent.)	
_____)	

Neither party filed objections to a Recommended Order issued by Administrative Law Judge (ALJ) Wendy L. Greenwald on February 7, 2008, following a hearing before ALJ Susan Rossiter on August 14, 15, and 16, 2007 in Salem, Oregon. The record closed on September 5, 2007 upon receipt of the parties' post-hearing briefs.

Richard F. McGinty, McGinty & Belcher, P.O. Box 12806, Salem, Oregon 97309-0806, represented Appellant.

Donna R. Bennett, Assistant Attorney General, Labor and Employment Section, Department of Justice, 1162 Court Street N.E., Salem, Oregon 97301-4096, represented Respondent.

On May 14, 2007, the State of Oregon, Department of Human Services, Oregon State Hospital, removed Appellant, Larry Belcher, from his position in the

management service and restored him to a position in the classified service as a mental health registered nurse.¹ It based the removal on ORS 240.570(3) and asserted that Belcher was unable or unwilling to fully and faithfully perform the duties of the position satisfactorily. On June 12, 2007, Belcher filed a timely appeal, asserting that he was removed from management service in violation of ORS 240.570(3).

The issue presented is:

Was Belcher disciplined or removed from management service in violation of ORS 240.570(3)?

RULINGS

1. Belcher objected to the ALJ's framing of the issue. He proposed that the issue be modified to include the question of whether his discipline or removal was the act of a reasonable employer. The ALJ appropriately identified the issue as whether the State violated the statute.

2. The ALJ properly admitted Exhibit R-2 over Belcher's objection. Exhibit R-2 is a Letter of Warning addressed to Belcher. It indicates that another employee filed a complaint against Belcher. It further states that an investigation found no misconduct, but it encourages Belcher to obtain additional training regarding his communication and management style. Belcher objected on grounds that he did not sign Exhibit R-2 and it was not referred to in the Removal Letter. Witnesses with first-hand knowledge laid a sufficient foundation for the admission of Exhibit R-2. In addition, Belcher acknowledged that he received a copy of Exhibit R-2. Exhibit R-2 is also relevant as part of Belcher's general work history, even though it is not specifically referred to in the removal notice.

3. The ALJ's other rulings were reviewed and are correct.

FINDINGS OF FACT

1. The Department of Human Services (Department or DHS) is an agency of the State of Oregon. The Oregon State Hospital (OSH) is a public psychiatric hospital which operates under the Department.

¹The Department used the terms "Demotion to Mental Health Registered Nurse" and "Restoral to Classified Represented Service and Administrative Reassignment" in identifying the discipline imposed on Belcher. We will use the term "removal from management service" in referring to these disciplinary actions.

Belcher's Work History

2. On January 4, 1993, OSH hired Larry Belcher as a mental health staff registered nurse (RN) in Unit² 40C, Child, Adolescent, and Geropsychiatric Treatment Services. On March 27, 1995, OSH promoted Belcher to mental health charge RN for Unit 40C. On December 1, 1997, it promoted Belcher to mental health supervising RN (supervising RN) for Unit 40C, a management service position.

3. In November 2003, Belcher received an evaluation covering the period from February 2002 to December 2003. He received an overall rating of "Meets/Exceeds Expectations." In the 40 areas in which he was evaluated for his management skills, he received 3 "Outstanding" marks, 25 "More Than Satisfactory" marks, and 12 "Satisfactory" marks.

4. On November 17, 2003, Belcher transferred to the position of supervising RN for Unit 41B in the OSH Forensics Rehabilitation and Transitional Services Program. This program was later renamed the Forensic Psychiatric Services Program (FPS). At all times relevant to this matter, John Keogh was the FPS program director and Sue Zakes was the FPS associate program director.

5. As the supervising RN for Unit 41B, Belcher was responsible for "the overall 24-hour operation, management, supervision, and implementation of the medical aspects of the unit program through program development, staff development, and interdisciplinary communication." In this position, Belcher provided direct patient care and was the direct supervisor of RNs and other direct patient care staff. Belcher's direct supervisor was the FPS associate director of nursing.

6. On April 21, 2005, the Department issued Belcher a letter of warning, which the Department does not consider to be discipline. Belcher was never allowed the opportunity to challenge the letter of warning. The allegation that prompted the letter of warning was found unsubstantiated. However, the Department counseled Belcher in the letter regarding his negative interactions with subordinates and encouraged him to attend additional training on communication and management skills, and to seek feedback from peers and subordinates when appropriate.

7. On August 31 and September 1, 2005, Belcher attended a training entitled the "Essentials of Human Resource Management." The training provided an overview of human resources philosophy and expectations, recruitment and selection,

²The parties used the terms "unit" and "ward" interchangeably.

communicating expectations, and progressive discipline and employee grievances. One section of the training addressed expectations of managers as leaders, indicating, in part, that a manager will “[m]odel the behaviors and actions you expect of others ”

8. On March 21, 2006, Belcher attended a training entitled “Creating A Positive Work Environment: A Legal Framework.” The training covered DHS management competencies, managing for results, civil rights laws, conducting effective interviews, workplace harassment, and an overview of federal and Oregon disability laws. The training materials identify jokes as an example of speech that could create liability for workplace harassment.

9. On April 12, 2007, Belcher acknowledged his receipt of DHS policies and procedures, including Policy DHS-060-013, Harassment-Free Workplace, which states in part:

“Failure to Comply: Failure to comply with this policy may result in disciplinary action up to and including dismissal from state service. Managers and supervisors who know or should know of conduct in violation of this policy and who fail to report such behavior, or fail to take prompt, appropriate, corrective action, are subject to disciplinary action up to and including dismissal from state service.

“All DHS staff are expected to provide a work environment free from behavior, action, or language, which may be perceived by others as hostile, intimidating, or abusive. The purpose of this policy is to prohibit discrimination and workplace harassment; to clarify conduct that constitutes workplace harassment; and to provide an effective complaint procedure for employees who believe they have been victims of prohibited conduct.” (Emphasis in original)

10. The employees Belcher supervised saw him as helpful, jovial, and outspoken. Associate Program Director Sue Zakes felt that Belcher’s work performance was good.

Yates’ Work History

11. In October 2004, Richard Yates became the Unit 41B director. Yates’ direct supervisor was Associate Program Director Zakes. In this position, Yates

“* * * administers and directly and indirectly supervises assigned unit staff through program development and implementation, development of policy and procedure, unit management, staff meetings, supervisory sessions, training, etc. * * *”

Yates’ staff and coworkers saw him as a serious, private, and intelligent person with a dry or ironic sense of humor. Yates was a hard worker and his supervisors, coworkers, and subordinates liked and respected him. Yates and Belcher worked well together and had a relationship of mutual respect.

12. When Yates first began as Unit 41B director, he also temporarily covered the job he had vacated while a replacement was sought. Sometime later, in addition to Unit 41B duties, Zakes and Keogh asked Yates to cover for another unit director. The second unit was located in a separate building. Yates worked in this double assignment for approximately ten months.

13. In April 2006, Keogh and Zakes asked Yates to fill in as the director of Unit 50J, in addition to his Unit 41B assignment. Yates agreed to the double assignment, contingent on Zakes’ and Keogh’s agreement that it would be for a limited period of time. However, the double coverage lasted approximately 10 months, through February 2007.

While in these double assignments, Yates worked long hours under stressful working conditions. In the Unit 50J assignment, Yates also dealt with difficult staff issues. During the double assignments, Yates felt that he could not do a good job on either unit and could only identify and deal with high priority issues. After finishing his second double duty in February 2007, Yates was tired and emotionally worn out. Yates used the first couple of months after the double assignment ended to catch up on employee evaluations, get more familiar with patients, and deal with his backlog.

“Jokes” and Other Events Occurring Prior to Education Day

14. Practical jokes are not an everyday part of the FPS culture. However, staff have occasionally played jokes on each other. Some staff have also received training on using humor to help patients. The training teaches staff to use humor to break down patients’ barriers, although staff are also taught that some patients do not respond to humor.

15. Photography is a hobby of Yates. During his time as Unit 41B director, Yates occasionally altered photographs by inserting photographs of the faces

of Unit 41B staff into another photograph. These altered photographs were either given to staff, shown to staff, and/or posted in the unit logbook. Some situations in which Yates altered photographs included:

(a) When the previous unit director was retiring, Yates and other staff put together a memory scrap book. In contributing to the memory book, Yates inserted photographs of the faces of Unit 41B staff members into a photograph of the Unit 41B building.

(b) Yates altered a Lord of the Rings movie photograph by substituting the faces of the day shift line staff for the characters' faces and changing the title to "Lord of the Grins." The swing shift line staff, who saw the altered photograph, asked Yates to create a similar photograph using their faces. Yates was not as familiar with the swing shift employees, so he asked them to decide which employee's face should be substituted for which character. Yates then created a second "Lord of the Grins" photograph, inserting faces of the swing shift line staff.

(c) At the request of Mental Health Technician Steve Krank, Yates inserted the faces of Krank and Krank's wife into a photograph of Sonny and Cher.

(d) After George Mason University beat the University of North Carolina in the NCAA basketball tournament, Yates inserted a photograph of North Carolina graduate Dr. David Eason's face into a photograph of a statue of George Mason. Yates put the altered photograph in Eason's office.

(e) After Belcher told Yates about a Christmas lights display in his neighborhood, Yates photographed the light display and then inserted Belcher's face into the photograph of a house he thought was Belcher's. When Yates gave Belcher the altered photograph, Belcher told Yates that the photograph was of his neighbor's house. Belcher had not given Yates permission to take the photograph or put his face into it. Belcher was not offended by the picture.

16. In a sex offender treatment program at OSH that was previously discontinued, staff used an instrument to record the physical responses of a sex offender while the sex offender discussed a sexual experience. The "sheep tape," which provides a graphic description of sex with a sheep, was left over from this program. Yates gave Belcher the tape and said it was funny. Belcher listened to the tape, and at a subsequent staff meeting, staff joked about Belcher listening to the tape.

17. At one time, Belcher did not notice a door had been freshly painted and put his hand on the wet paint. The next day, Yates put wet paint signs on Belcher's office door. At the time, Belcher did not know who had put the signs on his door.

18. Sometime after Yates started his second double assignment, Dr. Eason approached Belcher about playing a joke on Yates. They would pretend that Yates was going to be permanently reassigned to Unit 50J. Eason and Belcher enlisted Keogh's help. Keogh, Eason, and Belcher were aware that Yates would be unhappy about a reassignment to Unit 50J. Keogh asked to meet with Yates. Prior to the meeting, Belcher told Yates that he overheard Eason and Keogh arguing over Yates' permanent reassignment to Unit 50J. Later, Eason confirmed this and told Yates he would accompany him to Keogh's office. Eason and Yates went to Keogh's office and waited for Keogh for approximately 30 minutes. When Keogh finally arrived, he began to talk seriously about assigning Yates to Unit 50J. When Yates became upset, Keogh quickly told Yates that it was an April Fools' joke. Yates later told Belcher that the joke had been skillfully carried out. Yates felt that the April 2006 joke was painful, but did not report this incident. No one was disciplined as a result of this incident.³

19. Yates supervised Unit 41B Psychiatric Social Worker Maren Walta. Around April 1, 2007, Walta and another employee filled Yates' office with balloons as an April Fools' joke. When Yates opened the door the balloons fell out. Yates took photographs of the balloons and thought the incident was funny. The balloons stayed in his office for a couple of days, after which Walta removed them. Yates did not know who put the balloons in his office or who removed them.

April 2007 Education Day

20. The OSH Education, Development, and Safety Department (EDD) develops and presents an annual Education Day training (Ed. Day). Although this training is mandatory for all staff, including managers, FPS managers did not always attend Ed. Day. The topics on the agenda for Ed. Day 2007 included infection control, HIV, self disclosure, fire safety, developing cultural competencies, and patient abuse. Employee training on such topics is necessary to maintain OSH's certification. Due to his workload, Yates had not attended Ed. Day since 2003.

21. FPS holds a management meeting once a week. Managers are responsible for making sure the staff members they supervise attend Ed. Day. During a

³This incident will be referred to as the April 2006 joke.

management meeting prior to April 2007, Ed. Day attendance statistics were passed out, and the managers discussed who was out of compliance and how to address it.

Belcher was responsible for the attendance of the staff under his supervision. Belcher worked with Mental Health Technician Steve Krank to schedule employees for Ed. Day. Krank told Belcher that he would like to have 100 percent unit participation on Ed. Day.

22. After the management meeting, Belcher became aware that Yates had not attended Ed. Day since 2003.⁴ Belcher came up with an idea to get Yates to attend. He wanted Yates to attend in order to improve the unit's statistics, to get 100 percent unit participation, and to play a practical joke on Yates. Belcher wanted the Ed. Day joke to be fun and he did not intend to hurt, humiliate, or demean Yates. Belcher had no responsibility to ensure that Yates attended Ed. Day.

23. Sometime prior to Ed. Day, Belcher approached Associate Program Director Zakes and asked if she had a good sense of humor. Zakes said she thought she did and wanted to know why he asked. Belcher reminded Zakes that about a year earlier, a joke had been played on Yates. Belcher told Zakes that he had a fun way to get Yates to Ed. Day. Belcher's idea was to create a festive situation somewhat reminiscent of the old television show "This is Your Life," where someone comes to an event for one reason and then finds out they are there for a different reason. He told Zakes that he "wanted Yates to go to Ed. Day and play a joke on him, have an easy chair with 'welcome Dick' on it." Belcher asked Zakes to set up a meeting with Yates in her office so Yates' schedule was clear to attend Ed. Day. Belcher thought Zakes could schedule a meeting to go over care plans or something similar, although he did not specifically discuss this with her. Zakes told Belcher to let her know the date for Ed. Day and that she would help.⁵

24. After talking with Belcher, Zakes told Program Director Keogh that Belcher had asked her to participate in a ruse to get Yates to Ed. Day. Zakes told Keogh that "Belcher had organized a practical joke on Yates to get him to Ed. Day." Keogh was

⁴Belcher testified that Krank brought up Yates' attendance, but Krank did not recall such a discussion. We need not resolve this conflict because the manner in which Belcher learned of Yates' poor attendance record at Ed. Day is not critical to our decision.

⁵Belcher testified he also met with Zakes to make sure that the joke would not result in Yates getting into trouble for his prior failure to attend Ed. Day. However, there is no other evidence Belcher ever told Zakes about this concern.

also told there would be a special chair. When Zakes told Keogh, he laughed and said it sounded like fun.

25. Sometime after he met with Zakes, Belcher called EDD Executive Support Specialist Patricia Kuust to reserve a place for Yates on Ed. Day. Belcher then called Zakes and told her that Ed. Day was scheduled for April 24. At some time prior to Ed. Day, Belcher also told Zakes that the EDD staff were going to provide a comfortable chair and possibly balloons and a banner for Yates.

26. Prior to Ed. Day, most of the day and swing shift staff in Unit 41B became aware of the Ed. Day joke. Unit 41B holds staff meetings once a week at which the line staff and clinical management team discuss unit matters, such as policies and client issues. Sometime after a staff meeting prior to April 24, Belcher told some of the staff about the planned Ed. Day.⁶

27. Belcher and other staff also discussed the Ed. Day joke on several occasions in the Unit 41B staff office. Krank, Walta, RN Lynn VanDyke, Mental Health Technician Sue Miller, Gilbert Arguello, and Recreational Therapist Debra Lamp were present during some of these discussions. During these discussions, some employees asked Belcher what the bosses would think. Belcher stated that Zakes was aware of and even participating in the joke. Lamp felt the planned joke was somewhat "over the top." She asked Belcher whether it was appropriate to take Yates away from work for the entire day and told Belcher not to make Yates mad. Belcher said that Yates could leave at the first break. Belcher did not give Lamp's concerns much weight because he felt Yates would respond well to the joke.

28. Belcher contacted EDD Director David Alligood about the practical joke, since Alligood is responsible for what occurs in all of the EDD classrooms. Belcher told Alligood that Yates was deficient in his attendance at Ed. Day and that Belcher would like to get Yates to attend this year. Belcher mentioned that Yates would likely be retiring soon. Belcher also told Alligood that he wanted to have fun getting Yates to attend Ed. Day and that Zakes was aware of, and on board with the joke. Belcher asked

⁶Recreational Therapist Kurtis Drake testified that after the staff meeting, he asked Belcher if Belcher was sure the joke was a good idea, and Belcher told Drake it would be okay. Belcher testified that this conversation with Drake did not occur. We find that Belcher's recollection is most likely accurate. Belcher readily admitted that another recreational therapist, Debra Lamp, had expressed concerns about the joke. Belcher also admitted that many of his staff questioned whether his superiors had approved of the joke. In light of these admissions, we find it unlikely Belcher would deny the conversation with Drake if it had occurred.

Alligood to come up with a way to get Yates to Ed. Day. Belcher did not tell Alligood what would happen to Yates at Ed. Day. Alligood agreed to help.

29. Belcher also talked with EDD Nurse Educators Nancy Stephens and Dawnielle Lorren-Roberts. Belcher told them that he wanted to make a special day for Yates on Ed. Day, since Yates had not attended for a very long time. He also told them that Yates was getting close to retirement, that this would be the last Ed. Day Yates could attend, and that other managers were helping him with the joke. Stephens asked if Yates would be okay with the joke and if Belcher had Yates' supervisor's approval. Belcher told them Yates would be okay and that he had talked to both Zakes and Alligood about the joke. Stephens said she was surprised Alligood was involved because she did not think Alligood had a sense of humor. Belcher asked if Lorren-Roberts and Stephens could provide a special chair so Yates would be comfortable, and maybe a banner to make it festive. Lorren-Roberts agreed to provide the chair and the sign.

30. Maren Walta, a psychiatric social worker under Yates' supervision, originally heard about the Ed. Day joke at a staff meeting. Initially, Walta did not see a problem with the joke, but later she heard that Yates' supervisors were going to follow him to Ed. Day. On April 23, Walta sent Belcher an e-mail which stated:

"I hope you are well. I have heard rumors that J Keogh and Sue Zakes will follow D Yates over tomorrow to ED Day. Not that you asked, but I thought I would volunteer. I would not appreciate it if D Yates (my supervisor) followed me over ... Having his superiors involved probably is not politically smart."

Belcher responded to Walta's e-mail: "Just some rumor mill stuff. I don't know where it comes from."

31. On April 23, Kuust, Alligood, Lorren-Roberts, Stephens, and Safety Officer George Tucker set up the classroom for Ed. Day. Lorren-Roberts brought in an easy chair, which was the most comfortable chair in EDD, and put it in the back of the classroom. A pillow and shower slippers were also set by the chair and a sign saying "Dick Yates" was placed on it.

32. On April 23, Zakes told Yates that she and Keogh wanted to meet with him at 7:45 a.m. the next morning. She did not tell him the purpose of the meeting. Yates spent the night worrying about the meeting because the only other times Keogh and Zakes had both met with him were to ask him to cover two units. Yates could not think of any other reason for the meeting and was particularly confused because the

meeting was scheduled for 7:45 a.m., which was earlier than Zakes typically arrived for work.

33. On April 24, the day of the training, Belcher arrived at the Ed. Day classroom at about 7:45 a.m. He saw the chair, pillow, shower slippers and sign, and assumed that the EDD employees had provided them. He had purchased some yellow caution tape and draped it around the chair as an additional decoration.

34. Yates arrived for the April 24 meeting with Zakes and Keogh around 7:45 a.m. Keogh was not present. When Zakes told Yates that she did not know the purpose of the meeting, Yates felt relieved, because he believed this meant he would not be reassigned. A little before 8:00 a.m., Alligood called Zakes and told her that the State Fire Marshal was in his office regarding a complaint about Unit 41B and that Yates needed to come deal with it. Unit 41B is a separately licensed residential facility and Yates is listed as the administrator on the license. A visit from the Fire Marshall was very unusual. After Zakes told him, Yates was so concerned that he left immediately to meet with the Fire Marshall without meeting with Keogh.

35. Alligood met Yates at the door of the 40 Building looking very worried. He gave Yates a copy of the building blueprint for Unit 41B in case he needed it for the discussions with the Fire Marshall. Alligood then walked Yates to the Ed. Day classroom, where he said the Fire Marshall was waiting. Belcher took a photograph of Yates walking to the classroom, although Yates was not aware of this. When Yates got to the classroom door, he looked at Alligood with confusion. The room was generally set up in a classroom format with chairs in rows. Alligood motioned to the easy chair in the back corner of the room. Yates saw that the chair had a hand printed sign on it that said "Dick Yates," yellow caution tape draped in front of it, and a pillow laying on it. Yates also saw two strands of blue and yellow streamers draped on the chair and red patient shower shoes sitting in front of the chair. Yates realized that the Fire Marshall complaint had been a ruse to get him to the classroom and this was a joke. Some students and training staff, who were in the classroom when Yates arrived, laughed. Belcher took pictures of Yates standing in the door.

36. When Yates saw the chair he felt shocked. However, he smiled because he felt he had no choice but to play along with the joke. Yates sat in the chair and put on the shower shoes.⁷ As this occurred, some people laughed and Belcher took

⁷Yates testified that Alligood pulled back the crime scene tape and motioned for Yates to sit in the chair, which he did; gave Yates the shower slippers, which Yates put on; and gave Yates a walkman. Alligood testified he did not do this. This conflict in testimony is not relevant to the issue of Belcher's discipline, and therefore we do not resolve it.

another photograph. Yates was taken aback by the whole situation and worried about needing to return to his meeting with Zakes and Keogh. Yates called Zakes who made a comment about not having to meet. Yates then realized that the meeting with Zakes had been part of the ruse to get him to Ed. Day. He said something like, “[Y]ou’re a rat, a rat.”⁸ Belcher took a photograph of Yates calling Zakes. After the call with Zakes, Yates felt that because his supervisor was involved in getting him to Ed. Day, he had to be a good sport about the joke. Yates remained in the easy chair during the entire Ed. Day. Yates felt embarrassed, humiliated, and ashamed, but he did not show this outwardly. He felt he was being punished, humiliated, and shamed for failing to attend Ed. Day in previous years. He also felt he was being made a public spectacle so that others would not skip Ed. Day. Belcher left the Ed. Day classroom when the actual training began.

37. Lamp arrived for the Ed. Day class after Yates was already seated. From observing Yates’ body language, Lamp thought he was angry. During the 10:00 a.m. break, Lamp asked Yates why he did not leave. Yates said that he could not. Yates had not been directed to stay in the chair all day. However, he felt that because his supervisors had been involved in getting him to Ed. Day, he had to attend the whole training. After Ed. Day was over, Lamp told Belcher that Yates had not been happy.

38. Approximately 40 students and trainers attended Ed. Day, the majority of whom were represented staff. Alligood looked into the classroom later in the morning and saw Yates sitting in the chair with his feet stretched out. Yates had a clipboard in his hand and was taking notes on the presentation. Yates did not look upset.

39. Sometime later that day, Belcher showed Zakes the Ed. Day photographs on his camera and told her and Keogh that he thought the joke had gone well. Belcher went home for lunch on Ed. Day and printed the photographs. Belcher then labeled the photographs with captions, such as “Just Waiting for Dick,” “The Long Walk,” “I have Been Had,” and “Can I Get a Pardon.” On returning to work, Belcher placed the captioned photographs in the unit’s day book at the nurses’ station so that other staff could see them. The day book is where information is passed from one shift to another, so the photographs were available to all unit employees. Belcher’s intent in placing the photographs in the day book was to be funny, not offensive.

40. At the end of Ed. Day, Safety Officer Tucker stopped Yates as he left and took him to Alligood’s office. Tucker asked Alligood if there was anything else that

⁸Zakes recalled that Yates called her and said this after Ed. Day was concluded. Resolution of this conflict about the timing of this statement is not critical to our decision.

needed to happen regarding Ed. Day. When Alligood said no, Yates left. No one had asked Tucker to do this.

41. Zakes saw Yates after Ed. Day and she thought he looked unhappy or angry. Zakes said to Yates, "Now I'll get payback," but Yates just walked past her. At this point, Zakes realized there was a problem. Yates did not recall seeing Zakes.

42. On April 25, Yates did not go to work because he was so upset about what had happened the previous day. He wrote a statement outlining his concerns about the incident. On April 26, Yates met with OSH Human Resources Analyst Cynthia Gregory to talk about his concerns. Because Yates was upset and his voice was shaking, Gregory read the statement that Yates had prepared. Gregory asked a few questions about the statement and then told Yates he could go home if he did not feel he could work. Yates went home. Yates' statement summarized his reaction to Ed. Day as follows:

"My record is one of excellent compliance to requirements and follow-through with assignments. It is not, and has never been, necessary to use anxiety, fear, embarrassment, humiliation and shame to make me do my job. I would hope that it was not necessary to use me as a public spectacle so that others would hesitate to skip Ed Day, but that seems to have been what was done. Since so many people planned, participated or observed all of this I am sure that the story will be making the gossip rounds. The picture Larry took will probably be on GroupWise. I dread the inevitable comments and jokes. I dread listening to people who think I do not get the joke. I slept little again last night and called in today.

"What happened to me should happen to no one."

43. After Yates left her office, Gregory immediately consulted Department Senior Human Resources Manager Cheryl Miller about Yates' complaint. Miller had been assigned to Oregon State Hospital since March 2004. Miller directed Gregory to conduct an investigation. Between April 26 and May 9, Gregory interviewed Zakes, Alligood, Keogh, Tucker, Belcher, Yates, Walta, Drake, Lorren-Roberts, and Kuust.

44. Gregory had previously met with Belcher to discuss management issues. Gregory found Belcher to be friendly and engaging, but noted that he had some difficulty communicating with staff. She found that Belcher would sometimes intend to communicate one thing, but the staff would perceive something different. Gregory also

believed that Belcher sometimes used e-mail when face-to-face communication would have been better.

45. On April 26, Gregory interviewed Belcher. Belcher was aware that Gregory was conducting an investigation, but he did not know its focus. After some initial discussion of the Ed. Day events, Belcher said that he “owns this” and did not want to get anyone in trouble. Belcher also admitted he could see how the joke might have been misinterpreted, but he had no malicious intent. Belcher said that the day after the joke, he brought in donuts to share with Yates and staff so he could tell Yates that he had been a good sport. When Gregory brought up the harassment policy, Belcher became concerned. After the interview, Gregory walked over to the nurses’ station with Belcher to retrieve the Ed. Day photographs.

46. Belcher was asked to attend a second interview to provide further clarification on the Ed. Day events. Belcher asked if the investigation could result in discipline. When Gregory told him it could, Belcher told her he intended to bring a representative. Gregory later left a message for Belcher indicating that she had talked to senior management and that the second interview was canceled. As a result, Belcher never had an opportunity to explain his understanding of the Walta e-mail or provide other clarifications to Gregory.

47. Gregory’s report of the investigation, dated May 4, concludes that:

“The evidence and interviews support the following disciplinary charges:

- “A. Belcher planned, coordinated and carried out a practical joke in a public setting.
- “B. Several staff recall telling Belcher it was not a good idea to play a joke on Yates and two staff indicated that Belcher ignored their cautions.
- “C. Belcher’s action created an intimidating and humiliating environment.
- “D. Keogh, Alligood, and Zakes took no action to stop Belcher and ensure that a well-respected employee was not set up for public ridicule on Ed. Day.”

48. On May 8, 2007, Gregory presented her investigation report to Senior Human Resources Manager Miller. After consulting with the Department of Justice attorney-in-charge of the Labor Section regarding discipline of executive service

employees, Miller presented the investigation report and recommendations for discipline to OSH Superintendent Marvin Fickle and Assistant Superintendent Maynard Hammer. Fickle requested that Miller consult with Department upper management regarding the level of discipline.

49. Management service discipline is governed by the Department of Administrative Services (DAS) Policy 70.000.01. Section 1 of the policy provides in part:

- “(b) Management service employees may be disciplined pursuant to ORS 240.570(3) if the employee is unable or unwilling to fully and faithfully perform the duties of the position satisfactorily. The cause for discipline may be for:
 - “(A) conduct, performance, or behavior including acts or omissions on or off the job which may interfere with the mission or operations of the agency or which affect the employee’s suitability for the management service position; or
 - “(B) other conduct, performance or behavior which affects the employee’s suitability for the management service position.
- “(c) Except for reprimands, specific warning, in any reasonable form (whether oral or written), of the agency’s concerns and reasonable opportunity to correct the problem shall be given to the employee prior to the imposition of discipline unless the employee knew or should have reasonably known the conduct could lead to disciplinary action.
- “(d) The agency head or designee shall determine the severity of the disciplinary action based upon: the seriousness of the employee’s conduct, performance, or behavior; the level of fault; the unsuitability of the employee; the needs of the agency; and other considerations pertinent to the facts warranting discipline, including mitigation or the lack thereof,

that weigh upon the discipline imposed. The severity of the discipline must have a reasonable basis in fact.”

50. Section 2 of DAS Policy 70.000.01 also sets out procedures for management service discipline, including:

“(b) When disciplinary action other than reprimand is contemplated, the agency head or designee shall give the employee an opportunity to respond before taking final disciplinary action. After considering the employee’s response, if any, the agency head or designee shall determine the appropriate level of discipline within 21 calendar days. * * *”

51. Miller consulted with the Department’s Human Resources Executive Team and reviewed the Management Service Discipline policy regarding the appropriate discipline for participants in the Ed. Day joke. Miller felt that removal from management service was appropriate for Belcher because he was the supervising RN. In that position, Belcher controlled the attitudes and behaviors on the ward, and supervised the least educated, lower-wage workers. These workers often were the ones disciplined for inappropriate actions in the ward. Miller believed it was important for managers to set the tone in the wards and send the appropriate message to these employees. She also believed that Belcher’s conduct did not set a good example for these workers, and that the practical joke and the public humiliation of a coworker showed Belcher was unwilling to fully and faithfully perform the duties of the position. Miller concluded that Belcher failed to provide a work environment free from harassment which may be perceived by others as hostile, intimidating, or abusive in violation of DHS-060-013. Miller’s conclusion was shared by the DHS Human Resources Executive Team.

52. By personnel actions dated May 8, 2007, the Department suspended Keogh, Zakes, and Alligood without pay for one week for their involvement in and failure to stop the Ed. Day practical joke. Both Keogh and Zakes were apologetic. Alligood felt that he should have been absolved from responsibility based on the involvement of Zakes and Keogh. A manager who has received a one-week suspension will not generally be considered for promotion.

53. On May 9, 2007, Belcher met with Miller, Superintendent Fickle, and Deputy Superintendent Hammer. Belcher brought his attorney to the meeting, but the attorney was not allowed to participate. Superintendent Fickle delivered a personnel action letter to Belcher and told Belcher that he felt Belcher was responsible for the culture at the hospital and for the discipline of other managers. The personnel action

letter notified Belcher that effective May 14, he was demoted to a mental health registered nurse position, restored to classified represented service, and administratively reassigned to Unit 35A.

54. On June 12, 2007, Belcher filed a timely appeal of his removal from management service.

CONCLUSIONS OF LAW

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

2. The Department violated ORS 240.570(3) when it removed Belcher from management service and restored him to a position in the classified represented service.

The Department removed Belcher from his position in management service because he played a practical joke on a coworker. ORS 240.570(3) permits the Department to remove an employee from 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 discipline complied with ORS 240.570(3). OAR 115-045-0030(6); and *Ahlstrom v. State of Oregon, Department of Corrections*, Case No. MA-17-99 at 14 (October 2001). The Department meets this burden of proof if we find its actions were “objectively reasonable.” *Brown v. Oregon College of Education*, 52 Or App 251, 628 P2d 410 (1981); and *Morisette v. Children’s Service Division*, Case No. 1410 at 23 (March 1983). A significant factor for this Board’s consideration is whether the employee “can no longer be an effective and trusted management service employe.” *Reynolds v. Department of Transportation*, Case No. 1430 at 10 (October 1984).

Basis for the Discipline

An objectively reasonable employer disciplines employees “in good faith and for cause.” *Bellish v. State of Oregon, Department of Human Services, Seniors and People with Disabilities*, Case No. MA-23-03 at 8 (April 2004). Therefore, we first consider whether the Department has proved the charges that are the basis of the removal decision.

It is undisputed that Belcher conceived of, participated in, and oversaw the execution of a practical joke. Belcher intended the joke to be humorous, not malevolent or malicious. Belcher outlined his idea to his superior, the associate director of FPS, who

not only approved of the joke but assisted with it. Belcher also received assistance with the joke from other management staff. The FPS director was aware of the joke and did not object to it. Unfortunately, the joke did not turn out as anyone involved expected. Yates, the recipient of the joke, was embarrassed and humiliated. He believed he was being punished and held up for ridicule. In addition, the involvement of Yates' supervisor made Yates feel that he had no choice but to remain in this embarrassing situation throughout the entire training.

We conclude that Belcher's actions and behavior in conceiving and executing the Ed. Day practical joke violated the Department's Harassment-Free Workplace Policy, DHS-060-013. Belcher caused a situation that Yates perceived as embarrassing, hostile, and intimidating.

The Department argues that Belcher's conduct went beyond just playing a practical joke. The Department asserts that, as a matter of pride, Belcher was so motivated to get Yates to attend Ed. Day to achieve 100 percent attendance for the unit that he failed to consider the impact of the joke on Yates or others. The Department also asserts that Belcher "deceived" Zakes and the other managers when he led Zakes to believe that the Ed. Day event would be more of a "day of celebration" of Yates. However, the evidence does not support that Belcher had a hidden or ulterior motive, or that he deceived other managers who participated in the joke.

Belcher never hid his intent to get Yates to attend Ed. Day. He shared this intent with Zakes and everyone else with whom he discussed the joke. Keogh told the investigator that Zakes told him that "Belcher had organized a practical joke on Yates to get him to Ed. Day." Belcher never attempted to hide the reason behind the joke.

The evidence also fails to support the Department's contention that Belcher deceived management to get its cooperation and approval for the joke. Both Zakes and Keogh used the term "joke" and/or "practical joke" in their interviews with the investigator. Neither used the term "celebration." They also knew that the joke involved getting Yates, a very private person, to attend Ed. Day and that other staff, including unrepresented staff, would also attend. Belcher also told them that there would be an easy chair with a "welcome Dick" sign on it.

Belcher did indicate to Zakes and others that he intended the joke to be festive and fun. Unfortunately, to the surprise of Belcher and most of the participants and observers, Yates did not perceive the joke that way. However, the only two real details that Belcher did not share with Zakes were that he draped the chair with yellow caution tape and changed the sign on the chair from "welcome Dick" to "Dick Yates." Otherwise, the final execution of the joke was very close to the concept that Belcher had

originally described. These few changes do not support a finding of deceit, especially since neither Zakes nor Keogh raised any questions or concerns about the details or basic idea of the Ed. Day joke prior to its execution.

Belcher argues we should not find that he violated the harassment policy because the policy was vague and employees did not generally understand it. However, Belcher was a manager, not a classified employee. As a manager, Belcher had an affirmative obligation to not only understand and comply with Department policies, but to enforce these policies. Belcher was provided with the Harassment-Free Workplace Policy and received training on workplace harassment. The training materials specifically identified jokes as an example of an action that could create employer liability. Management service employees may be held to strict standards of behavior, so long as these standards are not arbitrary or unreasonable. *See Morisette* at 23, citing *Brown v. Oregon College of Education*, 52 Or App at 260. It is neither arbitrary nor unreasonable to expect a management service employee to understand a policy that he is obligated to comply with and enforce.

Belcher also argues that the Department should have used a “reasonable person” standard, and under that standard, he did not violate the Harassment-Free Workplace Policy. We need not determine the appropriate standard because even under the “reasonable person” standard Belcher advocates, he still violated the policy. The issue would be whether a “reasonable person” in Yates’ situation would have felt harassed. Belcher does not take Yates’ situation into account in his analysis under the “reasonable person” standard. We cannot say that Yates reacted unreasonably. Several employees who were aware of the joke in advance foresaw the potential for a bad result and questioned the decision to go forward with it.

In a similar vein, Belcher also argues that a violation of the policy cannot be based on Yates’ reaction alone because other employees who were present did not find the practical joke to be embarrassing or intimidating. The argument misses the point. The joke was directed at Yates. In selecting Yates as the subject of the joke, Belcher was responsible for considering Yates’ response to the joke. During his interview with Gregory, Belcher admitted that although it was not his intent, he could see how someone might have reacted negatively in Yates’ situation. In addition, the employees who testified that they did not find the practical joke to be embarrassing or intimidating were not the subject of the joke. These employees also had not just completed a second double assignment that left them “tired and emotionally worn out.” Finally, some employees, such as Lamp, saw the joke as disrespectful, and others, including Zakes and Walta, recognized the joke as a bad idea retrospectively.

We also disagree that Yates overstated his reaction or that he bears partial responsibility for the length of his harassment. There is no dispute that Yates was overworked and, as a result, under a lot of stress. Yates stepped up more than once to help the Department, taking on an unmanageable double work load. Then, Yates found himself the subject of a joke, apparently for failing to meet his Ed. Day obligation. While Yates' reaction was somewhat unexpected and extreme, it was not inconsistent with his level of stress and the circumstances of the practical joke.

Level of Discipline

We next determine whether the level of discipline imposed is objectively reasonable in light of all of the circumstances. In evaluating whether discipline is "objectively reasonable," we have previously held that a reasonable employer

"* * * imposes sanctions that are proportionate to the offense, considers the employee's length of service and service record, and applies the principles of progressive discipline, except where the offense is gross. *Smith v. Department of Transportation*, Case No. MA-4-01 (June 2001); *OSEA v. Klamath County School District*, Case No. C-127-84, 9 PECBR 8832, 8851-8852 (1986). * * *" *Bellish v. State of Oregon, Department of Human Services, Seniors and People with Disabilities*, Case No. MA-23-03 at 8 (April 2004).

We find that Belcher's removal from management service is not objectively reasonable under the circumstances of this case.

A reasonable employer would have considered Yates' emotional condition at the time of the practical joke in determining the appropriate level of discipline. The evidence shows that Yates' strong reaction was due in a large part to the stress and anxiety related to his workload. As Yates testified, at the time the joke occurred, he was tired and emotionally worn out. Zakes, as Yates' supervisor, was certainly in a better position to know about Yates' emotional state than Belcher. Belcher must bear some responsibility for how Yates responded to the joke. Nevertheless, even though the practical joke was certainly the trigger for Yates' strong reaction, the workload that the Department had asked Yates to carry was also clearly part of the cause. A reasonable employer would have recognized that the responsibility for Yates' reaction must be shared.

A reasonable employer would also have considered the lack of clearly defined expectations under the circumstances of this case. *Smith v. State of Oregon*,

Department of Transportation, Case No. MA-4-01 at 9 (June 2001); and *OSEA v. Klamath County School District*, Case No. C-127-84, 9 PECBR 8832, 8851-52 (1986). As this Board previously stated, a reasonable employer “clearly defines performance expectations, clearly expresses those expectations to employees, and informs employees when performance standards are not being met.” *Stark v. Mental Health Division, Oregon State Hospital*, Case No. MA-17-86 at 35 (January 1989).

Belcher admitted that Unit 41B did not have a culture of practical jokes. However, Belcher and others were aware that it was acceptable to play an occasional practical joke in the unit. At least two prior events demonstrate the lack of clear expectations in this case. Belcher and Keogh had both participated, without consequences, in the April 2006 joke involving Yates.⁹ In fact, Zakes admitted that when Belcher first brought up the idea for the Ed. Day joke, he reminded her of the prior April 2006 joke. In addition, Yates himself had provided Belcher with the “sheep tape,” which resulted in Belcher being the subject of humor at a staff meeting, a public event. Under these circumstances, a reasonable employer would find that Belcher had not been given clear expectations that such jokes were so outside the unit culture that he could be removed from his position.

The expectations were similarly unclear regarding Belcher’s posting the captioned photographs of Yates in the log book. Yates himself had altered numerous photographs, such as the “Lord of the Grins” photograph, which poked fun at other staff. Many of Yates’ altered photographs had been shared with staff not in the photographs. A reasonable employer would have considered Belcher’s conduct in light of the other altered and captioned photographs that showed staff in a humorous light.

A reasonable employer also would have applied the principles of progressive discipline. DAS Policy 70.000.01 specifically requires that managers receive specific warning and an opportunity to correct the problem before they are disciplined, “unless the employee knew or should have reasonably known the conduct could lead to disciplinary action.” Belcher was a long-term management employee who met or exceeded expectations and had no prior disciplinary record.¹⁰ Belcher had no notice that such practical jokes were a clear violation of the policy, and Belcher’s planning and execution of the joke itself was not a gross violation. The joke was inappropriate; however, it is really Yates’ reaction to the joke that causes the joke to appear to be such

⁹See Finding of Fact 18

¹⁰Belcher was warned about his management style; however, the warning was not disciplinary and the Department did not rely on it in deciding to remove Belcher from management service.

a serious violation. As previously explained, Belcher is not solely responsible for the level of Yates' reaction. In fact, it is doubtful that Belcher or other managers would have been disciplined in the manner they were if Yates' reaction had been less extreme.

We also find that the State's discipline was not objectively reasonable because other managers, who shared responsibility and culpability for the joke, received a lower level of discipline. This Board has considered and rejected a "scapegoat" or "different treatment" defense in two prior removal cases. In *Skillman v. Mental Health Division, State of Oregon*, Case No. 1449 at 14 (March 1985), *AWOP*, 79 Or App 378, 718 P2d 382, *rev den*, 302 Or 36, 726 P2d 935 (1986), this Board upheld a removal from management service in spite of management malfeasance that rivaled the appellant's. This Board found that the appellant's failure to establish safeguards and his authorization of improper purchases were matters integral to the business office function and occurred with knowledge of a serious agency problem that he, as the fiscal manager, was specifically required to guard against. In *Ahlstrom v. State of Oregon, Department of Corrections*, Case No. MA-17-99 (October 2001), the appellant failed to conduct a sufficient investigation of an incident in which inmates threw batteries at staff, failed to inquire into the injuries of an inmate, and communicated in a manner that led staff to believe that he condoned an inmate-on-inmate assault. This Board upheld the appellant's removal despite the fact that other managers may have also engaged in inappropriate conduct in regard to the investigations, because given the appellant's responsibilities, he "engaged in affirmative conduct that violated known department rules and policies." *Id.* at 17.

This Board's rationale in those cases does not apply here. The situation here, to the surprise of all involved, went very wrong. The Department was then faced with a complaint by an emotionally distraught employee. The Department obviously felt the need to hold someone responsible for the situation. As Superintendent Fickle told Belcher, he was being held responsible for not only his own actions, but also for the actions of other managers and the culture of the unit as a whole.

Belcher carried no special responsibility in his position, as compared to other managers, to comply with or enforce the harassment policy. Nor did Belcher violate the harassment policy to a degree more or less than the others involved. The primary distinction between the other managers involved in the joke and Belcher is that Belcher conceived of the joke and oversaw its execution. However, the other managers, including those in positions superior to Yates and Belcher, willingly participated in or condoned the joke. In fact, Belcher specifically consulted with Zakes, Yates' supervisor, and gained approval before moving forward with the joke. At most, these managers lacked knowledge concerning some particulars of how the joke would be carried out. We

find no evidence that Belcher would be any less able to continue as a member of the management team than the other managers involved in the joke.

We are also troubled by the lack of process provided to Belcher prior to his removal. The DAS Management Service Discipline Policy provides that for discipline other than a reprimand, an employee is entitled to “an opportunity to respond before taking final disciplinary action.” Although Belcher had an opportunity to provide information during the investigatory interview, he never had an opportunity to respond to the allegations against him before discipline was imposed. In fact, the Department canceled a meeting with Belcher even though it told Belcher that it needed further clarification of what occurred. A reasonable employer would not have rushed to judgment, but would have allowed Belcher the opportunity to provide a response.

For the foregoing reasons, we conclude that the Department’s decision to remove Belcher from management service was not objectively reasonable and violated ORS 240.570(3).

Remedy

Although we find that the Department did not act reasonably when it removed Belcher from management service, we also find that Belcher’s conduct does warrant some lesser level of discipline. As previously indicated, the Department’s application of inconsistent discipline to the managers involved in Ed. Day is one reason for overturning Belcher’s removal.¹¹ Therefore, Belcher’s removal will be set aside and Belcher shall be made whole for lost wages and benefits, minus a one-week suspension without pay, consistent with the discipline applied to the other managers in this case.¹²

ORDER

Belcher’s removal from management service is set aside. The Department shall immediately reinstate Belcher to his former position. The Department shall make Belcher whole for his lost pay and benefits caused by the removal, minus any interim

¹¹Belcher admitted he would not have appealed if he had received the same discipline as the other managers.

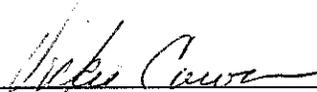
¹²For another case in which this Board overturned the removal of a management service employee and ordered alternative discipline *see Ash v. State of Oregon, Department of Transportation*, Case No. MA-21-98 (June 2000), *AWOP*, 184 Or App 226, 56 P3d 968 (2002). *See also* ORS 240.560(4) (this Board may modify the discipline imposed by the employer “by directing a suspension without pay for a given period * * *”)

earnings, and minus a one-week suspension without pay at his management rate. The Department will remove the Disciplinary Letter of Removal from all of its files and substitute a Disciplinary One-Week Suspension letter in its place.

DATED this 12th day of June 2008.



Paul B. Gamson, Chair



Vickie Cowan, Board Member

*Susan Rossiter, Board Member

This Order may be appealed pursuant to ORS 183.482.

*Board Member Rossiter is recused from this matter.