

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. MA-8-08

(MANAGEMENT SERVICE REPRIMAND)

LESLIE E. DICKEY,	)	
	)	
Appellant,	)	
	)	
v.	)	RULINGS,
	)	FINDINGS OF FACT,
	)	CONCLUSIONS OF LAW,
STATE OF OREGON,	)	AND ORDER
DEPARTMENT OF CORRECTIONS,	)	
OREGON STATE PENITENTIARY,	)	
	)	
Respondent.	)	
_____	)	

Neither party objected to a recommended order issued on January 9, 2009, by Administrative Law Judge (ALJ) Wendy L. Greenwald following a hearing on October 21, 2008, in Salem, Oregon. The hearing closed after the parties presented oral closing arguments.

Leslie E. Dickey, Corvallis, OR, appeared *pro se*.

Stephen D. Krohn, Sr. Assistant Attorney General, Labor and Employment Section, Department of Justice, Salem, OR, represented Respondent.

On August 27, 2008, the State of Oregon, Department of Corrections, Oregon State Penitentiary (Department or State), issued a written reprimand to Leslie Dickey, a management service employee. On September 24, 2008, Dickey filed a timely appeal of the reprimand.

The parties stipulated that the issue is:

Was Appellant disciplined in violation of ORS 240.570(3)?

For the reasons set forth below, we conclude that the Department did not violate ORS 240.570(3) when it reprimanded Appellant.

### RULINGS

1. The Department moved to dismiss the appeal on the grounds that this Board lacks jurisdiction over appeals of reprimands of management service employees under ORS 240.560(1). Under ORS 240.570(4), a management service employee may appeal a disciplinary action. A reprimand is one form of discipline that an employee may appeal. *Carter v. State of Oregon, Department of Corrections*, Case No. MA-12-99 at 11 (September 2001); *Hill v. State of Oregon, Department of Transportation*, Case No. MA-7-02 at 2 (November 2002). The motion is denied.

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

### FINDING OF FACTS

#### Background

1. Leslie Dickey began his employment as a correctional officer for the Department on November 16, 1987. On April 25, 1999, Dickey was promoted to correctional sergeant; on August 8, 1999, Dickey was promoted to correctional lieutenant; and during 2007, Dickey worked for a period of time as an acting captain. Dickey performed well throughout his employment with the Department. On December 26, 2007, Dickey was selected as Manager of the Year for 2007.

2. Department policy 20.1.2, "Code of Ethics," requires that all Department employees read and sign form CD 1382, which provides:

"As an employee, volunteer or contract service provider of the Oregon Department of Corrections, I will value and maintain the highest ideals of professional and compassionate public service by respecting the dignity, cultural diversity and human rights of all persons, and protecting the safety and welfare of the public.

“I accept that my fundamental duty is to serve the public; to safeguard lives and property, to protect Department of Corrections incarcerated persons against deception, oppression or intimidation, violence or disorder.

“I will be constantly mindful of the welfare of others. To the best of my ability, I will remain calm in the face of danger and maintain self-restraint in the face of scorn or ridicule.

“I will be honest and truthful. I will be exemplary in obeying the law, following the regulations of the department, and reporting dishonest or unethical conduct.

“I acknowledge that I have been selected for a position of public trust and I will constantly strive to be worthy of that trust and to be true to the mission and values of the Department of Corrections.”

3. Department policy 20.1.3, “Code of Conduct,” provides in part:

“Every employee of the Department of Corrections shall constantly strive to attain the highest standards of conduct and professional public service. This requires that employees be faithful to the principles of providing professional services, adhering to the code of ethics and meeting the vision, values, rules, policies and procedures of the department. Employee’s conduct must be above reproach and must not impugn the credibility and honesty of the department, its employees, or the corrections profession. \* \* \*

“\* \* \* \* \*

“D. Relationships with Colleagues/Courtesy Toward Others

“1. Employees shall, in the performance of their duties, be respectful, courteous, and considerate toward all members of the department and the general public. Employees shall not use terminology that disrespects the dignity or violates the human rights of others. Employees shall not use physical force, threats or

intimidation toward fellow employees, family members of employees, or visitors while at a department work site.”

4. Department policy 60.1.1, “Acceptable Use of Electronic Information Systems,” provides that the Department’s electronic information systems and the information on the systems are the Department’s property and are to be used for Department business, with limited exceptions. The policy also states:

“D. **Information on department systems should be considered public information.** Employees should be aware that information, regardless of origin, on department systems, including PCs, e-mail, correspondence, etc., except as restricted by prior copyright, HIPAA, or Oregon Statute, may be considered public information and could be disclosed at any time without permission or knowledge of any systems users. Except as noted in this policy, users may not expect that any personal use of department systems is private.

“E. **Uses must reflect a professional image.** Uses of department systems do not all have to be formal; however, they must be professional.

“F. **Uses must be lawful.** Uses of department systems must not be false, unlawful, offensive, or disruptive. Unless job duty requires it, no use will contain profanity, vulgarity, sexual content, or character slurs. No use will make rude or hostile reference to race, age, gender, sexual orientation, religious or political beliefs, national origin, health, or disability. \* \* \* ” (Emphasis in original.)

5. Dickey knew about these Department policies. On October 26, 2006, he signed the Code of Ethics form CD 1382. During his employment with the Department, Dickey completed approximately 1,000 hours of training, including training on a respectful workplace, professional ethics, and acceptable use of technology. Dickey knew that he was obligated to act as a role model for the employees under his

supervision and to ensure those employees' compliance with Department policies. Dickey also knew he was responsible for communicating and interacting with Department staff in a professional manner.

### Events Resulting in the Reprimand

6. At the time of the reprimand, Dickey was working as a correctional lieutenant in the security section of the Oregon State Penitentiary Minimum Institution (OSPM). Dickey's direct supervisor was Thomas Wright, OSPM Facility Manager. The Superintendent of the Oregon State Penitentiary (OSP) was Brian Belleque and the Assistant Superintendent was Michael Yoder.

7. For a number of years, Dickey and Lieutenant John Doe<sup>1</sup>, who worked at the Department's Santiam Correctional Institution, had occasionally used each other as a sounding board and vented to each other about work frustrations. It was Dickey's experience that the Department encouraged managers to discuss issues with and to vent to fellow managers. Usually, Dickey talked with Doe about work-related problems.

8. On July 27, 2008, Dickey received an e-mail at work from Doe in which Doe complained that he had been turned down for a number of promotions.<sup>2</sup> Dickey responded to Doe by e-mail as follows in part:

"I think our promotion system is in dire need of change. Sometimes I'm sorry I let them promote me to get me away from the Union. Like you, I'm too stubborn to just lay down in a corner and lick my .... Anyway. :)

"I'm continuing to interview for every position I qualify for, and a couple that I'm not, just to see what happens. Tom Wright is back in the Captain's seat over here after completing his ten month 'Special Project' (being investigated for various things). We've quickly gone back to having some serious staff issues that aren't being well addressed and a huge battle with the Union on the horizon.

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<sup>1</sup>John Doe is a pseudonym. While the parties used the employee's real name, we find no reason to use it in this order.

<sup>2</sup>All subsequent events occurred in 2008.

The last amazing thing we've done over here was to allow a two year officer to investigate a seven year officer after he made allegations that she was having sexual contact with an inmate. SIU came in and found the allegations to be unfounded.... yet you can imagine what that does to staff relationships around here.... Plus they sucked several inmates into the nightmare as well so the population is talking it up. Mess, to say the least. Lieutenant [Jane Roe<sup>3</sup>] also assigned herself to be another investigator so that threw an even bigger wrench into the works. It's a shame you can't issue a large bucket of common sense to everyone we promote to management.

“I think your efforts at OSP were a ‘Piss in the wind maneuver’. I've been here five plus years, supervised the IMU/DSU conversion, was OSPM facility manager for eight months, made Manager of the Year at OSP for 2007... and still can't compete with some of the wonder boys and girls with 1/8'th of my experience. Then it seems about the time they've taken care of all their wonder-kids; rays of golden light spew forth from some upper level managers [*sic*] ass, a heavenly choir sings Ava Maria, and another wonder-child bursts forth. :) I got to witness this DOC miracle during my last interview for ISM. I'm still in awe.... or is it disgust?”

“You can probably tell from the tone of this e-mail that I FINALLY reached the golden age of 55 years with 21 years of service to our department, 36 years of service to the Law Enforcement and Corrections Career Field. I could retire in ten minutes if I chose to. I chose, however, to hang around for another couple of years. Sometimes even when your [*sic*] watching a bad movie, you want to see how it ends :) Plus I'm silly enough to believe that I still might stumble into a position that will give me the opportunity to have a significant positive influence. Those things we, as a Department, do right; we do incredibly right.... those things we keep fucking off, we do that incredibly well also. :)”

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<sup>3</sup>Jane Roe is also a pseudonym

9. After sending the e-mail to Doe, Dickey sent a copy to his home e-mail account and inadvertently printed it. Somehow, the printed copy of the e-mail got mixed in with other work-related documents in the officer-in-charge (OIC) office

10. At the end of his work day, Lieutenant Jane Roe relieved Dickey. Later that day, an inmate complained to Roe about a day shift Department employee. Since the inmate was unable to identify the employee, Roe went through the staff rosters for the week located in the ISDS box in the OIC office.<sup>4</sup> As she was going through the rosters, Roe found the July 27 e-mail that Dickey sent to Doe. When Roe read the e-mail, she was shocked and hurt by the contents. Roe believed some of the statements in the e-mail were not true. Roe was concerned about who might have found the e-mail, and to whom the e-mail might have been distributed. In addition, Roe was worried that the e-mail could adversely affect her career. Roe was also upset about the negative references to the Department and her supervisor, Facility Manager Wright.

11. On July 28, Roe gave the July 27 e-mail to Facility Manager Wright. Wright then e-mailed a copy of the e-mail to Superintendent Belleque and Assistant Superintendent Yoder, stating:

“Lt. [Roe] came to me with this document. She said that Lt. Dickey left it [sic] among [sic] the break sheets. She said he leaves paperwork around and she normally just places it into his box. She was extremely upset when she read the context and doesn’t appreciate Les sharing untruths about her, or the others mentioned. I asked her who [Doe] is. She told me he was a Lieutenant. I advised her to not speak about the document. I told her I would follow it up to my Exec. Team member for consult.”

12. Wright also initiated an incident investigation by filling out an incident investigation form and checking the box on the form labeled “Administrative Action Necessary.”<sup>5</sup> Wright forwarded the incident investigation form to Assistant Superintendent Yoder, who also recommended that administrative action be taken and

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<sup>4</sup>Roe was unable to identify what the acronym ISDS represented, but testified that she was referring to the deployment employees’ time sheet box

<sup>5</sup>The other boxes on the form that Wright could have checked were labeled “Refer to Special Investigations” and “No Further Action ”

forwarded the form to Superintendent Belleque. After evaluating the contents of the e-mail, Belleque determined that administrative action was necessary, that the e-mail violated Department policies, and that the Department should discipline Dickey. Belleque then decided to meet with Dickey to ask him whether he wrote the e-mail and, if so, why he did. Normally, Belleque did not conduct this type of interview; however, Belleque did not think it was appropriate for Dickey's immediate supervisor Wright to interview Dickey since Wright was named in the e-mail.

13. Dickey did not work on July 28 or 29. When he returned to work on July 30, Facility Manager Wright told him to report to Superintendent Belleque's office. When Dickey arrived at the Superintendent's office, and before he met with the Superintendent, Dickey learned that an officer had been killed in a motorcycle accident. Dickey was deeply upset by this news.

14. Assistant Superintendent Yoder also attended Dickey's meeting with Belleque. During the meeting, Belleque showed Dickey a copy of the e-mail and explained that Lieutenant Roe had found it in the inmate crew sheets in the OIC office. Dickey told Belleque that it would not have been in that location, since Dickey did not work with inmate crew sheets. Belleque asked Dickey if he had written it. Dickey was very upset about the death of his fellow officer, and was also shocked by what Belleque was telling him. Dickey looked at the e-mail and admitted that he wrote and printed it. When Belleque asked Dickey why he wrote the e-mail, Dickey said he had fallen into a negative place in his dialogue with Lieutenant Doe. When Belleque asked Dickey why he had printed the e-mail, Dickey responded that he was "not always real bright." During the interview, Dickey told Belleque that he was embarrassed, sorry, humiliated, and that "You won't see anything else like this." Dickey was too distraught to provide any additional response. At the end of the interview, Belleque asked Dickey to return the copy of the e-mail because this was Belleque's only copy. Dickey did not ask Belleque for a copy of the e-mail.

15. After meeting with Dickey, Belleque then considered an appropriate level of discipline. Belleque recognized that inappropriate e-mails, such as the one that Dickey sent, were infrequent but were nonetheless a problem in the Department. Belleque felt it was important for managers to set an example regarding this issue and that formal discipline was necessary. Dickey's action in sending the e-mail had also affected Belleque's trust in Dickey. Belleque decided to issue the lowest level of formal discipline, a letter of reprimand, based on Dickey's length of service with the Department and his past performance.

16. On August 27, Belleque issued a letter of reprimand to Dickey, which provided in relevant part:

“ACTION: Letter of Reprimand

“GROUND: Just Cause

“BACKGROUND:

“\* \* \* \* \*

“FACTS SUPPORTING DISCIPLINE:

“On Monday, July 28, 2008, Lieutenant [Jane Roe] approached Minimum Facility Manager, Thomas Wright, and gave him a copy of an e-mail she had found among documents that were in the ISDS Coordinator’s return mail box in the OSPM OIC’s Office. The document appeared to be an e-mail you wrote to Lieutenant [John Doe], Santiam Correctional Facility.

“\* \* \* \* \*

“In this e-mail, you shared confidential information regarding personnel actions with a person who was not a party to the investigation. You shared negative comments about your supervisor and discussed confidential personnel information about him to another manager. You made derogatory comments about your peer, Lieutenant [Roe], to another manager. In the e-mail, you made derogatory comments about Lieutenant [Doe]’s new supervisor, thus undermining his authority. You alluded to *‘serious staff issues that aren’t being well addressed and a huge battle with the Union on the horizon.’* When asked about this during our interview, you stated you were referring to the issue of the current SIU staff investigation; however, your e-mail led the reader to believe there were significant labor issues that were not being addressed at OSPM. During our discussion, you indicated this was not the case.

“By sending this e-mail to Lieutenant [Doe], you undermined your supervisor’s authority. You undermined the credibility of the OSP Administration and the promotional selection process. You undermined the authority of Lieutenant [Doe]’s supervisor. You shared confidential personnel information with an uninvolved party. By leaving this e-mail where other staff found it, you created a difficult working environment with your peer and a potentially hostile work environment.

“The above conduct falls below the minimal conduct standards this Department can reasonably expect from its correctional staff regardless of any rule or procedure violations. Lieutenant Dickey, your inappropriate use of the computer is unacceptable. As a manager, you are responsible for setting an example for all staff to emulate and to hold other staff and inmates accountable for following rules, policies, procedures, and post orders. If there are decisions being made or situations within the DOC that you disagree with, you should raise them through the appropriate channels instead of using an e-mail that is very inflammatory and disrespectful. Any further incidences of a similar nature will lead to progressive discipline up to and including the initiation of the pre-dismissal proceedings.” (Emphasis in original.)

17. Belleque later realized that the Department included inappropriate grounds for disciplining Dickey in the letter of reprimand. Rather than citing to ORS 240.570(3), the Department had cited to the just cause standard. However, Belleque still believed the reprimand was appropriate as issued. Belleque felt that the reprimand met the standards established under either just cause, which is a higher standard than that applied to management service employees, or ORS 240.570(3). The Department also did not include any notice of Dickey’s right to appeal the discipline in the reprimand.

### CONCLUSIONS OF LAW

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

2. The Department did not violate ORS 240.570(3) when it reprimanded Leslie Dickey for sending the July 27 e-mail and leaving it where other staff could find it.

ORS 240.570(3) provides that a “management service employee may be disciplined by reprimand \* \* \* if the employee is unable or unwilling to fully and faithfully perform the duties of the position satisfactorily.” The State has the burden of proving that its discipline complied with ORS 240.570(3). OAR 115-045-0030(6); *Ahlstrom v. State of Oregon, Department of Corrections*, Case No. MA-17-99 at 14 (October 2001); *Hill v. State of Oregon, Department of Transportation*, Case No. MA-7-02 at 11 (November 2002). In order to prevail, the State must show that under all the circumstances, the discipline it imposed on a management service employee is “objectively reasonable.” *Brown v. Oregon College of Education*, 52 Or App 251, 628 P2d 410 (1981); *Morisette v. Children’s Services Division*, Case No. 1410 at 23 (March 1983). In *Morisette*, we explained this standard as follows:

“\* \* \* 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* at 23, citing *Brown v. Oregon College of Education*.

If the State gives more than one reason for its discipline, we may conclude that the discipline is “objectively reasonable,” even though the Department has not proven all of the reasons. *Hill*, MA-7-02 at 12.

Dickey does not dispute that he sent the e-mail, that he printed the e-mail and negligently left it in an area where other staff could find it, and that he violated Department policies in doing so. Dickey also agrees that he deserves some form of discipline for these actions. Dickey asserts that the Department’s actions were defective for two reasons. First, Dickey contends that the Department failed to provide him with appropriate due process when it imposed the reprimand. Second, Dickey argues that the Department chose a level of discipline that was excessive.

We begin by considering Dickey's contention regarding due process. Dickey asserts that the Department failed to give him notice of his appeal rights, a copy of the e-mail that was the basis of the discipline, clear notice of where the e-mail was found, and a reasonable opportunity to "present mitigating facts and circumstance which \* \* \* would have resulted in a significantly lower level of discipline."

Since Dickey filed a timely appeal, the Department's failure to include notice of his appeal rights in the reprimand did not prejudice his ability to contest the reprimand or result in any other harm. In addition, the Court of Appeals has held that the appointing authority has no statutory duty to inform employees of the applicable procedures for a management service appeal under ORS 240.560(1). *Lamb v. Cleveland*, 28 Or App 343, 559 P2d 527 (1977).

In regard to the other alleged due process violations, our cases establish the level of due process necessary when the State reprimands a management service employee. In *Jones v. State of Oregon, Department of Human Services*, Case No. MA-17-02 at 5-6 (February 2003), we recognized that unlike a management service employee who has been demoted or removed, a management service employee who has been reprimanded has been deprived of no property interest and has suffered no economic harm. Accordingly, we concluded that when the State reprimands a management service employee, it need only give the employee "written notice of the discipline and state the statutory grounds on which it relied and the supporting facts." *Jones* at 6.

Here, we conclude that the Department provided more than adequate due process to Dickey. Before it issued the reprimand, a Department manager met with Dickey, notified him of the facts upon which the Department's proposed disciplinary action was based, and gave him an opportunity to present a response and any mitigating circumstances. Any confusion during the investigatory interview about where the e-mail was found was insignificant. Dickey admitted that the e-mail he reviewed was the one he sent and the written reprimand told Dickey where the e-mail was found. In addition, since Dickey did not ask for a copy of the e-mail, the Department had no reason to know that he wanted a copy to compare with his original

The written reprimand which the Department issued to Dickey included clear notice of the facts and policies on which the discipline was based. The Department acknowledged it erred by failing to tell Dickey the appropriate statutory grounds for the discipline. However, Dickey does not challenge the sufficiency of the notice of statutory grounds for the discipline. Under these circumstances, the Department met its obligation to provide due process in this case.

Next, we consider whether the level of discipline the Department imposed on Dickey was excessive. Whether discipline imposed is proportionate to the offense committed is one of the factors we consider when we determine if an employer's disciplinary action was "objectively reasonable." We have described the qualities of a "reasonable employer" as follows:

"A 'reasonable employer' is one who disciplines employees in good faith and for cause, imposes sanctions that are proportionate to the offense, considers the employee's length of service and service record, and applies the principles of progressive discipline, except where the offense is 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). A reasonable employer also clearly defines performance expectations, expresses those expectations to employees, and informs them when performance standards are not being met. *Stark v. Mental Health Division, Oregon State Hospital*, Case No. MA-17-86 (January 1989). In addition, a reasonable employer administers discipline in a timely manner. *Flowers v. Parks and Recreation Department*, Case No. MA-13-93 (March 1994). \* \* \*" *Bellish v. State of Oregon, Department of Human Resources, Seniors and People with Disabilities*, Case No. MA-23-03 at 8 (April 2004), *recons* (June 2004).

Here, the Department acted reasonably when it reprimanded Dickey. The Department gave Dickey clear notice of its expectations regarding professional behavior in the workplace and appropriate use of the Department equipment and facilities. The Department's decision to discipline Dickey was made in good faith and for cause – Dickey admitted that the e-mail he sent on his Department computer through the Department e-mail system was "unprofessional and inappropriate." Although Dickey may not have intended to leave the e-mail in a place where other staff could read it, his negligence resulted in the discovery of the e-mail by another Department employee who was upset by the e-mail's content.

The level of discipline imposed by the Department was proportionate to Dickey's offense. In choosing the mildest type of formal discipline—a written reprimand—Superintendent Belleque considered the nature and seriousness of the misconduct to which Dickey admitted, as well as a number of mitigating factors. These factors included Dickey's lengthy service to the Department, his lack of prior discipline,

and his distinguished career. We also note that one of the actions for which Dickey was reprimanded—leaving a printed copy of the e-mail in an area where other staff might find it—was negligent rather than intentional. Based on a consideration of all the circumstances, the Department’s decision to reprimand Dickey in writing was objectively reasonable. We will dismiss the appeal.

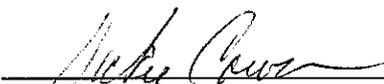
ORDER

The appeal is dismissed.

SIGNED AND ISSUED this 5<sup>th</sup> day of May 2009.



Paul B. Gamson, Chair



Vickie Cowan, Board Member



Susan Rossiter, Board Member

This Order may be appealed pursuant to ORS 183.482.