

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. MA-9-05

(MANAGEMENT SERVICE APPEAL)

CHLOE MINARD,	)	
	)	
Appellant,	)	
	)	
v.	)	RULINGS,
	)	FINDINGS OF FACT,
STATE OF OREGON,	)	CONCLUSIONS OF LAW
DEPARTMENT OF TRANSPORTATION,	)	AND ORDER
DRIVER AND MOTOR VEHICLE DIVISION,	)	
	)	
Respondent.	)	
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This Board heard oral argument on June 14, 2006, on Appellant's objections to the Recommended Order issued by Administrative Law Judge (ALJ) B. Carlton Grew on February 21, 2006, following a hearing on November 18, 2005, in Salem, Oregon. The record closed on December 23, 2005, with the submission of the parties' closing briefs.

Kevin T Lafky, Attorney at Law, Lafky & Lafky, 429 Court Street N.E., Salem, Oregon 97301, represented Appellant.

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

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On July 20, 2005, Chloe Minard, a management service employee, timely filed this appeal of a reprimand, effective June 22, 2005, issued by her employer, the State of Oregon, Department of Transportation, Driver and Motor Vehicle Division (Employer or Department).

The parties stipulated that the issue before this Board is: Did the Department reprimand Appellant on June 22, 2005, in violation of ORS 240.570(3)? For reasons which follow, we conclude that the Department did not violate ORS 240.570(3) when it reprimanded Appellant

### RULINGS

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

### FINDINGS OF FACT

1. Minard has worked for the Department for approximately 20 years. At the time of her reprimand, Minard was a customer service manager in the Department's McMinnville office. Her supervisor was Billie Brown, Department northwest region manager. Brown also supervised five or six other service managers and offices.

2. As a customer service manager, Minard's duties included supervising Department customer service staff, relieving or assisting her subordinates at the customer service counter, and performing drive tests for individuals seeking an Oregon driver's license.

3. Brown formally evaluated Minard for the period from July 1999 to June 2000. The evaluation rated Minard's work as "outstanding." In March 2002, Brown recommended that Minard get 40 hours of vacation time as a reward for the quality and amount of her work.

4. In October 2003, Brown and other high-level Department managers decided that customer service managers should perform 50 drive tests each year.<sup>1</sup> This expectation was communicated to Minard shortly afterwards. Because of their other duties and the newness of this requirement, many (if not all) customer service managers did not meet the 50-drive test goal in 2004. In May 2004, Minard took a drive test refresher course because she had not been required to give them for several years. However, because Minard was on modified duty, she performed no drive tests in 2004, and she received no adverse comments or discipline for that.

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<sup>1</sup>A drive test typically takes 15 to 25 minutes. At the McMinnville office, the drive test begins and ends at the Department office, on Highway 99, and includes downtown and a residential area.

5. In November 2004, Brown issued a "Letter of Concern/Expectation" to Minard for what Brown described as concerns about Minard's judgment, honesty, and failure to follow instructions. The Department does not consider such a letter to be disciplinary in nature. Minard responded in writing on January 3, 2005, disputing Brown's version of some of the events and citing Department policies. On January 5, 2005, Minard followed up with a second letter regarding the standard procedures used by other Department offices and asked that the letter of concern be removed from her personnel file. Brown declined to do so.

6. At all times material to this proceeding, Minard understood that a large part of her job consisted of performing "counter work," which involved relieving her subordinates at the counter and assisting them when customers were waiting. However, neither Minard's position description nor other Department policies contains the explicit requirement that a customer service manager spend fifty percent of his or her time, or any other specified amount of time, at the counter.

7. From January 1, 2005 to April 8, 2005, Minard was on various forms of medical leave, including leave under the Oregon Family Leave Act (OFLA), ORS 659A.150 to 659A.186. She was originally scheduled to be off work for six weeks for knee replacement surgery and physical therapy, but a post-surgical infection led to a lengthy recovery period with intensive antibiotic treatment. She received intravenous antibiotics<sup>2</sup> from mid-February until she was released for work on April 7. She continued taking multiple oral antibiotics after that. Minard's treating physicians were Malcom Snider, MD, and John Girod, MD.

8. While Minard was on medical leave, Esther Jensen performed Minard's duties. During that time, approximately 14 weeks, Jensen performed five drive tests.

9. While Minard was off work, Brown and Minard spoke by telephone a few times regarding Minard's return to work. Brown told Minard that Minard could not have any further modified duty, but would have to perform all the duties of her position.

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<sup>2</sup>According to Minard, the intravenous antibiotics caused her to have "severe, uncontrollable diarrhea and vomiting." Minard's sister, Mary Hupy, visited Minard every day between the January surgery and April 9, when Minard returned to work. Hupy assisted Minard in getting to her frequent doctor's appointments. Hupy recalled that Minard's bad nausea and diarrhea continued into April, but "probably not in May."

10. Minard was scheduled to return to work on Saturday, April 9, 2005. Minard and Brown met on Friday, April 8, to discuss her return. Minard provided Brown with a release from Dr. Snider which stated that Minard was "able to return to work full time with NO limitations" on April 7. Brown told Minard that she was expected to perform the full range of her position's duties upon her return, including drive tests and counter work, and that she would not be placed back on modified duty.

Brown also explained to Minard that she had exhausted her leave under Department policies and that, until she accrued more leave, any leave would be recorded as "LU (unauthorized leave without pay)." Minard, who worked a Tuesday through Saturday shift, viewed these restrictions as requiring her to choose between medical appointments and her work record. She also viewed this as an indication that it would be imprudent to approach her Employer about the effect of any continuing medical issues on her work. Minard feared that she would never be able to physically perform her work at her previous level.

11. Minard returned to work on April 9, 2005. She was still taking antibiotics and seeing a physical therapist.

12. On April 13, Dr. Girod examined Minard. In a letter to two of Minard's other doctors, Dr. Girod noted that she was two weeks into her course of oral antibiotics, which he planned to continue until Minard had taken the antibiotics for three months. He also wrote, "[s]he stopped the Rifampin again because of a rash. However, she is tolerating the Moxifloxacin without problems. There has been no significant diarrhea."

13. On April 29, Minard signed a position description that listed drive tests and counter assistance tasks as duties of her position, along with a variety of other duties. This was the only written document she received regarding the expectation that she would perform drive tests and assist at the counter, but she acknowledged at hearing that both duties were part of her job.

14. Minard lives in Keizer. It takes about 45 minutes to commute between her home and her office in McMinnville. In early April 2005, Minard's diarrhea required her to make frequent stops at public rest rooms in gas stations and fast food restaurants during her commute.

15. Department branch customer service managers report monthly on the number of drive tests and certain counter tasks they perform. Brown receives copies

of those reports for the employees she supervises, including Minard. In early May, Brown noticed that Minard had apparently performed no drive tests since her return to work on April 9.

16. In April and May, Brown and Minard communicated daily, through telephone calls or e-mails, on a variety of Department matters, as Brown did with the other customer service managers. The two did not discuss drive tests or counter work. Brown scheduled a May 11 meeting with Minard as part of her supervision of Minard. Brown planned to review and discuss Minard's work and that of Minard's subordinates.

17. On May 11, 2005, Minard and Brown met and discussed Minard's work, including the drive test reports and Minard's lack of tests. Brown told Minard, "I need to see some drives from you next month,"<sup>3</sup> and she warned Minard that failure to do the tests would result in "consequences" to Minard. Minard stated that she would start doing the tests. Brown did not have a specific number of drive tests in mind, and the two did not discuss specific numbers. Brown would have been satisfied if Minard had performed "some" drive tests.

18. Brown and Minard also discussed the circumstances under which Minard was to do counter work, namely when other employees were at lunch, or when the counter lines were "backed up," but that Minard need not be at the counter "all day every day." Minard told Brown that she was at the counter primarily on Tuesday, Friday, Saturday, and during employee lunches.

19. Between May 11 and June 7, Minard and Brown continued to communicate daily. They did not discuss drive tests.

20. On May 23, Dr. Girod examined Minard. He wrote to her other physicians, "[Minard] is doing fairly well. She has had no new problems. She is taking

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<sup>3</sup>Brown meant that she expected to see April and May drive tests by Minard reported in the next statistics report, which Brown would receive in early June. Minard testified that she thought Brown meant that she could wait until June before conducting drive tests. Whatever Minard thought on May 11, her June 7 telephone call to Brown establishes that Minard knew she was expected to perform drive tests in May.

the Moxifloxacin daily. There has been no diarrhea or rash and her knee has been stable.”<sup>4</sup> He planned to continue the Moxifloxacin for six more weeks.<sup>5</sup>

21 On June 7, 2005, Minard called Brown to inform her that she had not performed any drive tests during May. Minard stated that this was because her antibiotic treatment caused diarrhea and she didn’t want to be far from a bathroom. This was the first time Minard had told Brown of this medical issue. Minard stated that she had not raised the issue before because she found it embarrassing. Minard asked if she needed to give Brown a note from her physician. Brown stated that she intended to raise the issue with Department Human Resources staff because Brown had directed Minard to perform drive tests in May, Minard had not done so, and Minard had not raised this medical issue sooner

22 On June 10, Minard and Brown had another telephone conversation about drive tests. Brown told Minard that she would need a doctor’s note describing what Minard could and could not do based on her condition and the position description. Minard told Brown that she felt discriminated against because of her leave and her disability, and questioned the need for a doctor’s statement. Brown replied that she needed the doctor’s note to establish what Minard could and could not do. Brown added that her reports indicated that Minard was not doing the level of counter work they had discussed on May 11.<sup>6</sup> Minard stated that Brown planned to take action against her because she hadn’t done “4 drives,” the number done by the manager who did the fewest besides Minard. Minard stated that she was aware she had to perform 50 drives per year, but there was lots of time for that. Brown’s notes of the conversation state in part:

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<sup>4</sup>Minard testified that she was embarrassed about discussing her diarrhea with her physician, but that she told him that the diarrhea was “manageable.”

<sup>5</sup>Minard’s course of treatment caused her to experience random events of diarrhea, which made it difficult for her to drive for extended periods of time. Minard testified that she was unable to perform the drive tests because of her diarrhea. Although this may have been the case when she first returned to work, we conclude that her diarrhea had substantially abated between April 13 and May 23. These are the dates that Minard visited Dr. Girod. His chart notes from each meeting and his follow-up letters to Minard’s other physicians indicate that Minard had no diarrhea. We find Dr. Girod’s chart notes, letters, and testimony to be credible regarding Minard’s medical condition.

<sup>6</sup>Minard did not dispute that her level of work at the counter did not meet the level discussed on May 11

“[Minard] said that she didn’t know what she was supposed to do I have told her to do drive tests, work the counter, do second id checks and she can’t do it all. She feels pulled in a dozen directions and she can’t do that.

“[Minard] said if I quit taking medication I can do drive tests, is that what you want me to do? I told her that I wasn’t saying that she should stop taking her medication. She said that was the only way that she could give drive tests. I asked if that was wise and she said that was her issue, not mine. She asked if she still needed the doctor’s note if she started doing drive tests. I told her that I needed the doctor’s note to tell me what she could and couldn’t do. She said that would require another doctor visit that would cost her \$400 and that she couldn’t do it on Monday’s, her day off, and so she would need to have other leave time off. She asked again if she started doing drive tests would she need a doctor’s note. I said I wouldn’t need it.

“[Minard] said she would start doing drive tests tomorrow.”

Brown and Minard also discussed the issue of counter work during this meeting. Again, according to Brown’s notes:

“I told her that I would have information to take forward about why she was unable to do the full range of her job duties. I also brought up that she was not working the counter as much as I expected.

“Chloe said that she works the counter when the number of customers waiting increases but it has been slow and there hasn’t been a need for her to work the counter.

“I pointed out that there were days when she had 5 employees and she didn’t work the counter. She said that was true and she didn’t think she had to work the counter until there were a certain number of customers waiting. (I didn’t ask what that magic number was.)”

23. After this discussion, Minard performed four drive tests during June 2005. The record does not show whether Minard increased her counter work.

24. On June 22, 2005, Brown reprimanded Minard. The reprimand provided in relevant part as follows:

**“FACTS SUPPORTING THIS ACTION:**

**“Failing to follow instructions and failing to perform the duties of your position**

- “1. On April 8, 2005, you brought a doctor’s note to me regarding your return to work from a medical leave. We discussed the fact that the doctor’s note released you to perform the full range of your duties and with this release you were expected to perform all duties. We also discussed that DMV had previously modified your job duties for the maximum amount of time provided to employees for a non-workers’ compensation condition prior to your medical leave and that DMV would be unable to provide an extension.
- “2. On May 11, 2005, we met and discussed that, although you are required to conduct drive tests as part of your position, you had not performed that function since your return to work on April 8, 2005. I informed you that you were expected to conduct drive tests and that and if [*sic*] you did not conduct drive tests during the month of May that disciplinary action would be taken. You stated that you understood.
- “3. On June 8, 2005, you called me to explain that you did not conduct any drive tests during the month of May due to the fact that you were on antibiotic medication that prevented you from being away from facilities. You did not share this information with me in May and you did not receive authorization to modify your job duties.

“4. Counter operations for a Customer Service Manager should represent approximately 50% of your time. Since April 9, 2005, you have worked the counter a portion of 17 days out of 31 possible days. You modified your job duties without authorization. You did not perform the full range of duties assigned to your position as you were instructed when you returned from medical leave.[<sup>7</sup>]

“SUMMARY:

“\* \* \* \* \*

“You were given expectations of performing the full range of duties, which included counter operations and drive tests. You stated that you understood the expectations and the consequences. You knew that I review the monthly statistics of each field office and for each Customer Service Manager. You did not inform me of your inability or unwillingness to perform the full range of duties in a timely manner. You took it upon yourself to modify your duties without authorization or management’s knowledge. You notified me after the fact that you were not conducting drive tests and you did not tell me that you were not performing the full amount of time to counter operations. You had an obligation to inform me immediately that you were not fulfilling the entire role and duties of a Customer Service Manager. Modifying your duties without management’s authorization was exceeding the authority of your position.

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<sup>7</sup>According to the evidence presented at hearing, the telephone conference took place on June 7, rather than June 8. Similarly, the number of days that Minard worked the counter was 14, not 17, out of 31. We conclude that, from the time she returned to work until she was reprimanded, Minard performed counter work to her own standards, and not to the standards Brown set. Minard was aware of this. Nevertheless, we have found that the District had no written policy or procedure which required a customer service manager to spend approximately fifty percent of their time on counter work. Insofar as the Department relied on that standard in order to reprimand Minard, that reliance was unjustified.

“As a manager, your position is one of trust and integrity. Your actions of acting without management authorization, withholding information, and failing to follow instructions, demonstrated poor judgment and eroded the trust management had in you. It will be up to you to demonstrate integrity and to earn the trust of management ”

Department Deputy Director Mike Marsh denied Minard’s internal appeal on August 3, 2005. This appeal followed

### CONCLUSIONS OF LAW

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

2 The Department did not violate ORS 240.570(3) when it reprimanded Chloe Minard for failing to follow instructions and failing to perform the duties of her position.<sup>8</sup>

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<sup>8</sup>OAR 115-45-040(2) provides in relevant part that “[t]he parties shall have 14 days from date of service of the Recommended Order to file specific written objections with the Board.” The ALJ upheld the reprimand on both grounds advanced by the Department.

Appellant filed timely written objections to one of the ALJ’s conclusions, *i.e.*, that she had not performed sufficient drive tests. However, Appellant did not object to the ALJ’s other conclusion, *i.e.*, that she failed to meet Departmental standards regarding the percentage of her time she spends on counter work. Nevertheless, during oral argument, Appellant focused almost exclusively on the ALJ’s conclusion regarding counter work, the issue to which she did not object. In so doing, Appellant exceeded the scope of her written objections to the Recommended Order.

We have refused to consider objections which did not meet the timeliness requirements of OAR 115-45-040(2). *Portland Federation of Teachers v. Portland Public School District No. 1 and Oregon School Employees Association*, Case No. C-76-78, 4 PECBR 2290, 2293 (1979); *Teamsters Local Union 670 v. Linn County Parks and Recreation Department*, Case No. C-40-80, 5 PECBR 3081 (1980). Ordinarily, we would apply the same sanction here: we would not consider Appellant’s arguments to this Board concerning counter work. We do not impose that sanction, since we reach the same result whether or not we consider the issues raised by Appellant for the first time at oral argument. That is, the Employer acted reasonably when it reprimanded Appellant because she failed to do sufficient test drives, so we do not need to reach the counter work issue.

## Legal Standards

A management service employee may be reprimanded if she “is unable or unwilling to fully and faithfully perform the duties of the position satisfactorily.” ORS 240.570(3). In reviewing an appeal of such discipline, this Board must determine whether, under all of the circumstances of the case, the Department’s action is “objectively reasonable.” *Bellish v State of Oregon, Department of Human Services, Seniors and People with Disabilities*, Case No. MA-23-03 (April 2004); and *Morisette v Children’s Services Division*, Case No. 1410 (March 1983).

This Board has stated that:

“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, supra*, at 8.

We have also held that a management service employee may be held to high standards of behavior, so long as those standards are not arbitrary or unreasonable. *Stoudamire v. State of Oregon, Department of Human Services*, Case No. MA-4-03 (November 2003); *Helper v Children’s Services Division*, Case No. MA-1-91 (February 1992). In addition, the State need not prove all of the charges on which it relied in disciplining a management service employee, *see, e.g., Patrick v Department of Agriculture*, Case No. MA-2-91 (June 1991), or removing that employee from management service, *see, e.g., Greenwood v Oregon Department of Forestry*, Case No. MA-3-04 (July 2006); *Reidy v Oregon Government Ethics Commission*, Case No. MA-6-85 (August 1986), and cases cited therein. Further, we may consider any damage to trust in the relationship between a management

service employee and the employer. *See Reynolds v. Department of Transportation*, Case No. 1430 (October 1984).

Finally, a written reprimand is the mildest discipline which the State can impose. This Board has stated that:

“\* \* \* An employer generally imposes a reprimand to inform the employee that particular behavior is unacceptable and to obtain a correction of that behavior. Because a reprimand does not have an economic impact on an employee, its primary purpose is a form of notice. \* \* \*” *Hill v. State of Oregon, Department of Transportation*, Case No. MA-7-02, at 13 (November 2002).

Brown reprimanded Minard for failing to perform her full range of duties upon her return to work, for failing to inform Brown of this in a timely manner, and for modifying her duties without authorization or management knowledge. According to Brown, this demonstrated poor judgment and eroded the trust management had in Minard.

We conclude that Minard did not perform the full range of duties upon her return to work. Minard was aware that performing drive tests and counter work were important duties of her position, and that she was to perform them upon her return. On April 8, and again on May 11, Brown directed Minard to perform drive tests and counter work. Minard did not perform any drive tests. Minard performed less counter work than discussed in conversations with Brown.<sup>9</sup> We further conclude that Minard did not seek or obtain Brown’s approval to modify her duties.

Minard first contends that her supervisor’s directives were vague. Minard also argues that she thought she could delay conducting drive tests until June. The facts show otherwise. Minard performed no drive tests from her return to work in April until after June 7. Minard understood before June 7 that Brown directed her to conduct drive tests in May—otherwise, she would not have called Brown on that date to confess that she had not conducted any drive tests in May.

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<sup>9</sup>The Department has no written position description or policy which specifically establishes that customer service managers must spend approximately fifty percent of their time on counter work. Further, Brown’s notes of her conversations with Minard do not indicate she informed Minard of the requirement

Minard's second contention is that she lacked the capacity to conduct drive tests or perform significant amounts of counter work because she had to make frequent dashes to the bathroom. Minard did not offer this explanation until June 7, eight weeks after she returned to work, and 27 days after her May 11 meeting with Brown. She then raised with her supervisor, and abandoned, the possibility of a doctor's letter to support her diarrhea claim. At hearing, the Employer proved that the records and recollection of the doctor prescribing antibiotics to Minard did not support her claim. The doctor did not describe such a problem in mid-to-late April, May, or June in his contemporaneous letters or at hearing. Minard offered no witnesses from her workplace describing such bathroom dashes while at work, offered no explanation as to how her gastric problems prevented her from assisting at the counter, and offered no examples of how her condition affected her other work.

The record does not support Minard's medical excuse. But even if it did, Minard was obligated to inform the Employer promptly about her work limitations so the Employer could make other arrangements to insure the work got done. She did not, even though Brown clearly informed Minard that she expected Minard to perform all of the job duties without limitation.

Minard also argues that the Department applied different standards to her than to other managers. She notes that Jensen, who worked as customer service manager when Minard was on leave, performed only five drive tests during that 14 weeks. At that rate, Minard argues, Jensen would not have met the direction of 50 drive tests per year. In fact, many customer service managers failed to perform 50 drive tests in 2004, but none were disciplined for it. According to Minard, she was disciplined for failing to perform a task that neither she, nor anyone else, was told to do. Finally, Minard argues that she had no notice that she was required to spend fifty percent of her time on counter work, as Brown specified in the reprimand.

As to drive tests, Appellant was not disciplined for failing to perform 50 drive tests in a year, but for failing to perform *any* such tests in eight weeks after being specifically instructed to do so. We also note that the excuses which she offered for her non-performance were largely without support on the record. Minard failed to establish that her physical condition prevented her from performing drive tests. As a result, Brown lost trust in Minard. We hold that the Department acted reasonably in reprimanding Minard based on her failure to perform drive tests.

As this Board has previously held, the State need not prove all bases upon which it relied in disciplining a management service employee. We thus do not need to make further determinations regarding the amount of counter work Minard performed, and we decline to do so. We will dismiss the appeal.

ORDER

The appeal is dismissed.

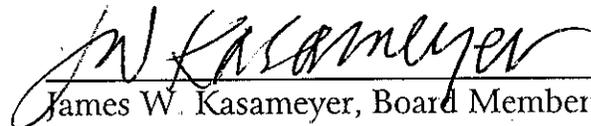
DATED this 25<sup>th</sup> day of September 2006.

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Donna Sandoval Bennett, Chair



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Paul B. Gamson, Board Member



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James W. Kasameyer, Board Member

This Order may be appealed pursuant to ORS 183.482.

\*Chair Bennett is recused from this matter.