

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. MA-09-09

(MANAGEMENT SERVICES APPEAL)

BILLY MABE,)	
)	
Appellant,)	
)	RULINGS,
v.)	FINDINGS OF FACT,
)	CONCLUSIONS OF LAW,
STATE OF OREGON, DEPARTMENT)	AND ORDER
OF CORRECTIONS,)	
)	
Respondent.)	
_____)	

Neither party objected to a Recommended Order issued on March 9, 2009, by Administrative Law Judge (ALJ) B. Carlton Grew following a hearing on June 11, 15, and 16, 2009, in Salem, Oregon. The record closed on August 5, 2009, with the submission of the parties' post-hearing briefs.

Jaime B. Goldberg, Attorney at Law, Portland, Oregon, represented Appellant Mabe.

Kathryn A. Logan, Senior Assistant Attorney General, Labor and Employment Section, Department of Justice, Salem, Oregon, represented Respondent.

On March 3, 2009, the State of Oregon (State), Department of Corrections (Department), removed Appellant Billy Mabe from the management service, and dismissed him from state service effective March 5, 2009. On March 24, 2009, Mabe filed a timely appeal of these actions. Mabe contends that his removal and dismissal did not meet the standards of ORS 240.570(3) and (4) and 240.555.

The issues are:

(1) Did the Department remove Mabe from management service in violation of ORS 240.570(3)?

(2) Did the Department dismiss Mabe from state service in violation of ORS 240.570(4) and ORS 240.555?

RULINGS

The rulings of the ALJ were reviewed and are correct.

FINDINGS OF FACT

1. The Department of Corrections (Department) is a state agency responsible for operating correction facilities in the state of Oregon.

2. On July 1, 1991, the Department hired Billy Mabe as a Corrections Officer, a classified service position. Mabe was promoted to Corrections Sergeant in 1999. On June 28, 2001, the Department promoted Mabe to Correctional Lieutenant, a management service position. Mabe's September 8, 2008 evaluation rated him as meeting or exceeding Department expectations.

3. Mabe was also a Chief Master-at-Arms in the US Navy Reserves. He attended military training one weekend a month and occasionally performed some tasks or training during the week. In 2008, Mabe was preparing for a planned September deployment to Iraq¹.

4. Mabe worked at a minimum security Department facility called the South Fork Forest Camp (Camp). The Camp has 200 inmate beds supervised by 28 security staff. The Camp is located in the Tillamook Forest, approximately 28 miles east of Tillamook on Oregon Highway 6. Mabe usually worked Sundays through Thursdays, from 6:00 a.m. to 2:00 p.m.

5. Mabe reported to Camp Commander Jeff Boyer, who was also located at the Camp. Boyer reported to Superintendent Paula Myers, whose office is located at the Columbia River Correctional Institution (CRCI) in Portland.

¹This deployment was ultimately rescheduled.

6. Mabe's position at the Camp was Operations Lieutenant. His duties included supervising a shift of security staff, conducting shift bidding, fighting forest fires, and serving as Institution Staff Deployment System (ISDS) Coordinator. The Department classified Mabe's position as eligible for time-and-one half pay for overtime work.

7. As the ISDS Coordinator, Mabe was responsible for creating and maintaining daily rosters (security staff work schedules) and employee work records on the Department computer system. Mabe printed out and distributed each day's roster sheet a week ahead of time. The roster sheets included sections with the names of employees who were scheduled to work or scheduled to be absent, and spaces for the names of employees with unscheduled absences. The officer-in-charge (OIC) of each shift, who was often Mabe himself, would write notes on the printed roster sheets regarding changes in employees' work schedules. Those notes explained which employees were absent, worked overtime, or had other assignments for the day. After the shift, the OIC returned the annotated roster sheet to ISDS Coordinator Mabe, who recorded any changes into the Department computer system. Mabe also kept track of this information through employee leave request and overtime authorization forms submitted by employees. Mabe reviewed the time sheets of other Camp employees, except those of his wife, Susan Mabe, who also worked at the Camp.

8. Mabe, like all other management security staff, was responsible for completing his own time sheets and employee leave request forms. Mabe's time sheets were reviewed and signed by Camp Commander Boyer.

9. Other lieutenants also filled the OIC role. Although Mabe's duties sometimes took him away from the Camp, Mabe did not have backup assistance for all of his ISDS work. Sergeant Craig Burr prepared schedules and rosters in Mabe's absence, but did not record them in the Department computer system. Cheryl Hallowell, Camp Management Assistant/Executive Support for the Camp Commander, reviewed Camp employee time sheets when Mabe was out.

Department Policies Regarding Leave and Time Sheets

10. Department policies require employees to submit a signed time sheet at the close of every month. Mabe understood that signing the time sheet was a representation that it was accurate.

11. Under written Department policies, salary or comp time is provided at the rate of one and one-half hours for every overtime hour actually worked and is recorded on the employee's time sheet. Lieutenants may accrue up to 80 hours of comp time.

12. Department policies require that employees fill out an employee leave request form for absences from work. Mabe may have provided copies of some of his military orders to Camp Commander Boyer, who did not keep them. Mabe routinely failed to file employee leave request forms for his non-military absences. No supervisor or financial service employee challenged his failure to do so prior to the events at issue here.

13. At the Camp, lieutenants had an informal practice of adjusting hours worked which they referred to as "flex time."² Under this practice, a lieutenant who had worked more hours than scheduled could balance that extra time worked by taking an equivalent amount of time off on another scheduled shift within 30 days.³ Camp Commander Boyer asked that lieutenants who wished to use flex time notify him in advance that they were going to do so. Boyer was not aggressive about policing this practice, and kept no records of flex time granted. In practice, lieutenants' flex time was run by the honor system, with each lieutenant keeping track of his or her own flex time. Lieutenants did not record their usage or accrual of flex time on their time sheets.

Mabe's Timekeeping Practices

14. Mabe regularly used flex time to vary his schedule as he chose. Mabe also used comp time, which he recorded and used within Department guidelines. Until the events at issue here, no supervisor or financial services employee challenged Mabe's use, or failure to document his use of flex time. However, because he was the Camp ISDS Coordinator, Mabe was the person most familiar with Camp employee time sheets, schedules, and actual hours worked by employees.

15. Mabe often accrued flex time by arriving at work up to 30 minutes before his scheduled shift to relieve the on-duty lieutenant, or by staying late. He kept track of his accrual and use of flex time only in his head, if at all, and believed he could use accrued flex time at any time, even months after it was accrued.

16. One of Mabe's duties as ISDS Coordinator was to review time sheets, rosters, and related forms for approximately 28 employees. Staff Deployment System

²The Department has no written personnel policies or rules regarding flex time applicable to Mabe's position. A dictionary definition of flex time is "a system that allows employees to choose their own times for starting and finishing work within a broad range of available hours," *Merriam-Webster Online Dictionary*, retrieved December 14, 2009, from <http://www.merriam-webster.com/dictionary/flexitime>.

³Flex time was thus unlike comp time, which was taken at the rate of time and one half.

Manager Cherie Greenwade believed that Mabe's ISDS work should take between five to ten hours a week to complete.

17. Department policies require that changes to a shift roster ("exceptions"), such as unscheduled medical leave, be entered into the Department computer system within 72 hours after the shift ended. Mabe was often two to three weeks behind in making these entries. In addition, Greenwade frequently had to remind Camp employees that time sheets and the ISDS system records had to be identical. After other Camp employees learned about Mabe's impending discipline, they compared their time sheets with shift records. Some of them found discrepancies, and some substituted vacation time for time reported on their time sheets as hours worked because of those discrepancies.

18. Mabe generally knew his work schedule in advance. His practice for completing his own time sheet was to fill it out days or weeks in advance on his computer. He typically signed his time sheets just before turning them in without reviewing them to see if they reflected any changes in his time at work.

19. As part of his ISDS duties, Mabe compared the shift roster sheets and overtime authorization forms with each Camp employee's time sheets. He then recorded any changes in the employee's time in the ISDS system. However, Mabe did not make these comparisons with his own time sheet, and never recorded any changes to his time sheet.

20. On occasion, Mabe failed to claim overtime when he was entitled to it. On one such occasion, Mabe worked 5.25 overtime hours on July 11, 2008, and did not enter these hours on his time sheet. On another occasion, Mabe did not claim all of his time worked fighting fires.⁴

21. Camp Commander Boyer reviewed Mabe's time sheets. Boyer never identified any problems with the accuracy of Mabe's time sheets prior to the Department's December 2008 investigation.

22. During 2008, Mabe had between 661.05 and 701.05 hours of unused sick leave, and between 84 to 170.26 hours of unused vacation leave. He also had between 12 and 67.75 hours of unused comp time during the year.

⁴Mabe does not claim that this time worked offsets any time not worked at issue in this case.

May 13, 2008

23. The printed staff roster for May 13, 2008, listed Mabe as scheduled to work from 6:00 a.m. to 2:00 p.m. After the roster was printed, Mabe's name was crossed out and the notation "A-2" (a code for sick leave) was written next to his name. Mabe's name was also listed under the "unplanned absences" section of the roster, with "A-2" again next to his name. Mabe did not submit an employee leave request for this day, and Mabe's time sheet does not note that he took sick leave on that day. Instead, it indicates that Mabe worked eight hours on May 13.

24. At a December 18, 2008 meeting at which Columbia River Correctional Institution (CRCI) Security Manager Harlow interviewed Mabe,⁵ Mabe stated that "maybe" he had taken a "flex day" on May 13 to make up for prior overtime work, and that the "A-2" was "coded wrong."⁶

⁵As noted below, Mabe made oral statements to Department officials regarding his timekeeping on two occasions, at an investigatory interview with Columbia River Correctional Institution Security Manager Dean Harlow on December 18, 2008, and at his pre-termination hearing on February 17, 2009. Mabe also submitted a written statement at his pre-termination hearing, much of which he read aloud. Mabe also testified at the hearing in this case.

⁶Notes from the December 18 interview report the following exchange:

"Harlow: You were off May 13 for vacation, but it was not charged on the time sheet, which shows straight time.

"Mabe: Maybe it was a flex day for overtime. Jeff is okay with this if accrued extra time.

"Harlow: Shouldn't that be recorded as comp?

"Mabe: Just a half hour here and there is not ID'd as CTA.

"Harlow: There's one more sheet.

"Mabe: Either I coded it wrong or Burr coded it.

"Harlow: What should it be?

"Mabe: I don't know. I come in at 5:30 to relieve the graveyard Lieutenant. I should be off at 13:30 and sometimes I stay late.

(Continued...)

25. During his pre-termination meeting on February 17, 2009, Mabe prepared and read a statement explaining what happened on May 13 as follows:

“To this portion of your claim I am unsure of what happened. I have been unable to locate any information. I've checked the call-in forms and was unable to locate a form for that day. If I had called off sick the OIC on duty when I called off should have filled one of these forms out. I was at work for the 2 days scheduled prior to this one (11th and 12th) and the two days scheduled afterwards (14th & 15). I've checked my personal calendars and records at home and have been unable to find anything related to this day and I do not recall anything happening on this day.

“I suppose it is possible I called off and mistakenly forgot to change my time sheet. If this is the case I will gladly assist in correcting this and have the time taken from my sick leave. Please note that I had approximately 665 hours of sick leave at this time so I would have no reason nor would I ever consider to deliberately not use it.”

OSCI Audit, June 15-21, 2008

26. During the week of June 15-21, 2008, Mabe joined a security audit team inspecting the Oregon State Correctional Institution (OSCI) in Salem. This was Mabe's second assignment to assist in a facility audit. Each member of the audit team was assigned five or six audit standards to review during the workday and a perimeter review during one evening. When the audit required review of OSCI documents, such as manuals and post orders, those documents were not removed from OSCI premises. Each

(...Continued)

“Harlow: Who do you relieve?”

“Mabe: Stated who.

“Harlow: Are you being directed to be there at 05:30?”

“Mabe: No, it's professional courtesy.

“Harlow: Don't be at work on non-scheduled hours. Start at 06:00 and end at 14:00. The next one is June 5, marked military leave, paid 8 hours straight time.

“Mabe: Couldn't tell you. I marked the rest as CTL, this was June 5 and probably would have been in military time. I may have been in school, probably an error. I do my time sheet a day ahead; I just get going on things.”

member provided the results of his or her review to Audit Team Leader Gerald Long, who input that data into the final document. The team gave its final written report to OSCI management on the morning of June 19.

27. The printed audit report used a checklist format. The report identified a standard and provided spaces to indicate whether the institution was “compliant” with the standard and to add a brief comment. For example,

05.03.01	An effective communication system is maintained that provides instant communication between the control center and offender living areas, security posts, and all areas of the facility and mutual aide agencies.	Compliant
05.03.02	Sound security practices are observed in the consistent, responsible use of interlock systems, sallyports, communication equipment, door locking systems, security gates, etc. for which the control center is responsible.	[left blank]
* * *		
06.01.03	All movement systems have a safeguard system to ensure that inmates arrive at their destination, including: <ul style="list-style-type: none"> • Communication that alerts staff that a specified inmate(s) is to be in their area at a specified time; • Predetermined time frames for movements and excessive time limits; and • Written procedure specifying reporting actions to be taken if inmate(s) do not arrive within the specified time or do not report to the assigned area. 	Compliant

28. The audit team did most of its work inside the secured portion of OSCI. Each team member was required to sign in and out of the facility each day.

29. On Saturday, June 14, 2008, Mabe worked a regular workday at the Camp. He then drove a State vehicle to his home in Garibaldi, approximately ten miles north of Tillamook, intending to drive directly to Salem the next day. On Sunday, June 15, Mabe realized that he had forgotten his briefcase, and drove back to the Camp, where

he used his work computer for approximately 74 minutes.⁷ Mabe then left for Salem. Mabe testified that, depending on the level of traffic, that trip could take two and three quarters to three hours; the travel reimbursement form (filled out by Hallowell and signed by Mabe) lists the duration of Mabe's June 15 trip as two hours; Department witnesses believed that, based on the distance, it would be a two hour drive. The Department credited Mabe for 3 hours and 14 minutes of work on June 15.

30. On Monday, June 16, Mabe entered OSCI at 7:11 a.m. and left at 3:50 p.m., working through lunch. Mabe testified that he worked an additional hour reviewing and planning in his hotel room.⁸ The Department credited Mabe for 8 hours and 39 minutes of work on June 16.

31. On Tuesday, June 17, Mabe entered OSCI at 7:20 a.m. and left at 3:36 p.m., working through lunch. Again, Mabe testified, he spent an hour reviewing and planning later that evening. The Department credited Mabe for 8 hours and 16 minutes of work on June 17.

32. On Wednesday, June 18, Mabe signed into OSCI at 7:25 a.m. and left at 2:00 p.m., returned at 8:31 p.m., and left at 9:30 p.m. Mabe then joined other audit team members for an hour-long drive around the perimeter of OSCI to audit its lights,

⁷Mabe believed that since he was in a State car, all of his driving time was work time. The Department argued that Mabe was "commuting to his work site" on June 15 when he drove from home to the Camp, not performing Department work. (Department post-hearing brief at 6.) The employer appears to be correct as a matter of policy, but there is no evidence that Mabe intended to misrepresent his time for that period. The Department considered Mabe's driving time to be the travel time from the Camp to Salem on June 15, 2008 to be work time.

⁸The parties vigorously contest whether Mabe did any work during these evenings. The Department argues that (1) there was no work to be done; (2) Mabe was not permitted to remove any documents from OSCI, so there was no material other than his notes he could review at night in his hotel room; (3) he did not log on to the Department computer and e-mail system at all during audit week; and (4) because the audit report was designed as a checklist, it would be unnecessary and not particularly useful for Mabe to review audit standards ahead of time or take extensive notes.

Mabe's explanations of what he did during those evenings were not specific and his explanations changed after the Department presented its evidence. Despite the obvious importance of the issue, Mabe never specified what he did in the evening except review his notes (the form, extent, and content of which he did not disclose) and the previous year's audit, and take the perimeter tour. We conclude that, based on Mabe's shifting, general explanations, and his final admission on cross examination that he worked less than 40 hours during the week of June 15 through 21, Mabe did not perform significant work in the evenings except for the perimeter review.

fencing, and mobile patrols, from 8:31 p.m. to 9:30 p.m. The Department credited Mabe for 8 hours and 34 minutes of work on June 18.

33. On Thursday, June 19, Mabe signed into OSCI at 8:02 a.m. and left at 11:07 a.m. During his pre-dismissal hearing, and in his written pre-dismissal statement, Mabe claimed work time only for OSCI and the drive home. At hearing, Mabe testified that he drove to the Camp, worked during the afternoon, and then returned home.⁹ Mabe's travel reimbursement form states that he arrived at the Camp at 7:00 p.m. The Department credited Mabe for 5 hours and 19 minutes of work on June 19.

34. On Friday, June 20 Mabe took a flex day. He was not scheduled to work on June 21.

35. Mabe wrote a statement regarding the audit week, which he read aloud and discussed during the February pre-termination hearing:

"There wasn't an 'overpayment' in this case. Firstly, I had travel time on Sunday June 15th and would have again had travel time on Thursday June 19th. It is well known that during audits you are required to be at the facility being audited at various times visiting all of the shifts. It is also expected that you take pertinent information related to the audit back to the hotel with you for further review, which I did. If I had kept a log of the time I spent on this in and out of the institution I'm sure it would show I worked more than the 40 hours I claimed this week."¹⁰

36. Audit team leader Lieutenant Long believed that there was no need to do any work in the evening besides the perimeter review, and testified to that effect at hearing. After this testimony, Mabe testified on direct examination that, while in his

⁹Department records, however, do not support Mabe's claim that he worked at the Camp on Thursday, June 19. According to Department computer records, Mabe did not log in to the Department computer or e-mail system between Sunday, June 15 and Sunday, June 22, although he testified that he did check his e-mail during the audit. Mabe produced no evidence except his testimony to support the additional hours of work at the Camp on June 19. We find it unlikely that Mabe would fail to check his e-mail on his first day back in the office after a week's absence, and unlikely that there was no evidence (other than his testimony) that he worked on June 19 as claimed.

¹⁰The record establishes that from June 16 through June 19, Mabe was inside OSCI only between 7:11 a.m. and 3:50 p.m. The only time Mabe visited OSCI during other hours was on June 18, when he made a perimeter inspection from 8:31 p.m. to 9:30 p.m. There is no evidence that Mabe visited all of the shifts. Nor is there evidence that Mabe took pertinent information related to the audit back to the hotel with him for further review. At most, he took some notes he had made with him.

hotel room in the evening, he reviewed his notes regarding the day's inspection and looked at a copy of the previous year's audit. When Mabe was confronted on cross-examination with the fact that the hours he testified to working were well under 40 for the week, Mabe responded that keeping track of his hours in his head was accurate, and that he had intended to make up the missing hours at a later date.¹¹

37. According to his time sheet, Mabe worked 40 hours the week of the audit.

38. The Department credited time worked to Mabe for the audit week as follows:

6/15/08 (Sunday)	3 hours, 14 minutes
6/16/08 (Monday)	8 hours, 39 minutes
6/17/08 (Tuesday)	8 hours, 16 minutes
6/18/08 (Wednesday)	8 hours, 34 minutes
6/19/08 (Thursday)	5 hours, 5 minutes
6/20/08 (Friday)	0 (flex day)
6/21/08 (Saturday)	0
TOTAL	33 hours, 48 minutes

August 6, 2008

39. The staff roster for August 6, 2008, lists Mabe as scheduled to work. After the roster was printed, his name was lined out and the notation "A-2" (sick leave) added. That notation is also lined out. Mabe's name appears in the "unplanned absences" section of the August 6 roster, with the notation A-2 marked beside it. This notation is also marked out, and the notation "comp" is written in. Mabe did not fill out an employee leave request for this day. His time sheet indicates that he worked eight hours that day.

40. At the December 18, 2008 investigatory interview, the February 17, 2009 pre-dismissal meeting, and at the hearing, Mabe stated that he could not remember what he did on August 6. Mabe could not recall if he worked at the Camp or at a different location, or if he was "called off" as not needed because the shift was fully staffed without him. Mabe also stated that he may have forgotten to change his time sheet. At

¹¹The Department contends that the employees working on the audit were working less than eight hours a day and that Mabe should have claimed personal leave for the missing hours. It seems odd that the Department would assign Mabe and the other auditing lieutenants to duties that would require them to take personal leave. As Mabe notes in his brief, Wall and Wylie would each have at least thirteen hours of work to make up on Friday to complete a 40 hour work week.

his February 17 pre-dismissal hearing, Mabe explained what happened on August 6 as follows:

"I am unsure of what happened on this day. I have been unable to locate any information. I've checked the call-in forms and was unable to locate a form for that day. If I had called off sick the OIC on duty when I called off should have filled one of these forms out. I was at work for the 3 days scheduled prior to this one (3rd, 4th and 5th) and the day scheduled afterwards (7th). I've checked my personal calendars and records at home and have been unable to find anything related to this day and I do not recall anything happening on this day.

"Looking at the *Daily roster* for this day does cause me some concern. First, under *Second Shift Operations Lieutenant* my name is not crossed off. A2 was obviously written on the right side of my name then it appears it was scribbled out. Normally when a staff member calls off the A2 is written on the left side and the individual's name is crossed out. On the same page under *CO 4* officer Voelker called off and his name was lined through and A2 is noted on the left hand side as it should be. This is what is normally done. Secondly, under the *Unplanned Absences* section my name is written in with A2 for the reason then COMP is written in next to that. The whole entry, my name, A2, Comp, and 8hrs all have a line drawn through it. I have no explanation for why this is. I do not recall marking through my name or scribbling out the A2 and I do not believe any of the handwriting is that of my own. I do not know if I was at work, had called off, or if I was at another location that day.

"I suppose it is possible I called off and mistakenly forgot to change my time sheet. If this is the case I will gladly assist in correcting this and have the time taken from my sick leave. Please note that I had approximately 665-673 hours of sick leave at this time so I would have no reason nor would I ever consider to deliberately not use it."(emphasis in original).

September 4, 2008

41. At the end of August 2008, Mabe worked for 11 days on a fire, receiving 104.5 hours of overtime.

42. The staff roster for September 4, 2008, lists Mabe as scheduled to work. After the roster was printed, his name was lined out with the notation "ML" next to his name. That notation referred to military leave. Mabe did not fill out an employee leave request. His time sheet reflects that he worked eight hours that day.

43. During the December 18 investigatory interview, Mabe stated that he did not recall what had happened, and did not recall whether he or Assistant to the Camp Commander Hallowell had made the entries. At the pre-dismissal meeting in February, Mabe submitted the following statement:

“On the week of September 4th, Major Boyer placed me as acting camp commander during his absence. After a lengthy review of all my records and consulting with my wife on this date I realize that I indeed was gone from the facility for military on this date. I had been called on short notice to report to Portland as the shipment of weapons that were being transported from our activation in Hawaii had just arrived. Please see attached letter from my Commanding Officer J.A. Rial. Also, on the weekend of February 6-8th, 2009 I attended my weekend drill where I inquired on and was informed on how to obtain records of my previous drills that I had been attempting to locate unsuccessfully since December 18th, 2008. I have also attached this documentation.

“This leaves us with the fact I was paid for this day when I should have taken comp time or vacation. I have no good explanation for this other than with the short notice I simply forgot to change it on my time sheet as I didn't expect to be away from the institution that day. Please note that at the end of September I would have had approximately 67 hours of comp time, 153 hours of vacation, and 24 hours of Discretionary leave my books. I would have no reason not to use those hours for this day. I did not nor would I ever deliberately pay myself for hours I did not work.

“I will gladly assist in correcting this and have the time taken from the appropriate leave or take LWOP for this day if you feel this is the correct action to take.” (Footnotes omitted.)

Mabe also stated at the pre-dismissal hearing that he had been “complacent” in documenting military leave.

November 13, 2008 Road Closure

44. Mabe was scheduled for military training on Friday and Saturday, November 14 and 15, and to pick up weapons for the training on Thursday, November 13. Mabe did not, however, put this information on his staff roster. Mabe testified that he received a call on November 12 that his assignment to pick up the weapons was cancelled. As a result, Mabe stated that he planned simply to report for work on November 13 without telling anyone in advance.¹²

¹²The military training schedule for November states that the training would take place November 14 through 16, and did not include November 13. Mabe testified credibly that part

45. On November 13, 2008, a landslide closed part of Highway 6 between Tillamook and the Camp, making the Camp accessible only from the Portland direction of Highway 6. Although it was still possible for employees living on the coast to reach the Camp through a lengthy detour, several employees chose not to report for work that day. Those employees included Mabe, his wife (Susan Mabe), a corrections officer, and Hallowell.

46. On the morning of November 13, Susan Mabe called the Camp and spoke with Lieutenant Lohr, telling him that she would not be coming to work that day.¹³ She later called in again to say that she would not be at work the following day. Neither Billy Mabe nor Susan Mabe worked at the Camp on November 13.

47. Previously, Camp employees believed that Department management did not require them to use accrued leave if they chose not to report to work due to road conditions. Instead, employees understood that any time off due to poor road conditions would be considered "time worked" and reported as regular hours worked on time sheets. Accordingly, Susan Mabe, the corrections officer, and Assistant to the Camp Commander Hallowell filled out their time sheets in this manner. Mabe's time sheet listed eight hours of regular work November 13.¹⁴

48. A handwritten note on the staff roster for November 13, 2008, lists Mabe as being on military leave, but his time sheet indicates eight hours of regular work.

49. Later, Superintendent Myers instructed Camp staff that, if they had chosen not to report to work on November 13, they would have to use some type of accrued leave for the day instead of reporting it as "time worked." Hallowell decided to pursue the matter, asking for guidance from higher levels of Department management, to no avail. Mabe then changed Hallowell's and the corrections officer's time sheets, replacing

of his training duties sometimes required him to travel to another location to pick up equipment the day before a scheduled training. Mabe supplied a letter from Naval Commanding Officer J.A. Rial which confirmed that Mabe sometimes had those additional duties, but did not specifically state that Mabe had been assigned those additional duties on November 13.

¹³Lohr testified that he recalled the conversation, but did not recall Susan Mabe telling him that Billy Mabe would also not report for work on November 13. Susan Mabe testified that she had told Lohr, in her first call, that Billy Mabe also would not report. It is unnecessary for us to resolve this conflict in the testimony.

¹⁴Mabe testified that he filled out his time sheets in advance and did not change them. If that were true in this case, one would expect Mabe's time sheet to reflect military leave for November 13, which it did not.

the eight regular work hours with vacation time.¹⁵ Mabe did not, however, change his own time sheet to reflect that he did not work on November 13. Therefore, his time sheet continued to show that he had worked eight regular hours on November 13, 2008.

50. At the pre-dismissal hearing, Mabe stated that it never occurred to him to change his time sheet.

51. In December 2008, Superintendent Myers requested copies of the time sheets for three Camp employees, including Susan Mabe, to determine whether Camp employees had coded their time sheets regarding the landslide day as she had directed. Although she had not requested Billy Mabe's time sheet, his time sheet was provided to her with the rest.

52. When Myers reviewed the time sheets, she discovered that Mabe had failed to code his time as directed. Accordingly, Myers asked Columbia River Correctional Institution (CRCI) Safety Manager Greg Smith to review Mabe's time records. After doing so, Smith discovered several discrepancies between the rosters and Mabe's time sheets.

53. On December 18, 2008, CRCI Security Manager Dean Harlow contacted Mabe at the Camp and asked him to report to CRCI in Salem for a "payroll meeting." Mabe reported as directed. Shortly after the meeting began, Mabe realized that the meeting was part of an investigation of his timekeeping practices. Mabe felt blindsided, and became upset and defensive. He continued to answer Harlow's questions, however.¹⁶

54. After the meeting, Mabe angrily confronted Superintendent Myers and demanded to know why she was "messing with him." Myers replied that she was not "messing with him," and that if she were, he would know it.

55. Based on the discrepancies in Mabe's time sheets, and Mabe's responses at the December 18 interview, Myers asked Harlow to further investigate Mabe's timekeeping and leave requests. Harlow provided an investigative report to Myers on January 21, 2009.

56. On February 3, 2009, Myers sent Mabe a pre-dismissal letter. The letter stated that Mabe could be subject to dismissal based on ten incidents in which Mabe allegedly was untruthful in his time records. The pre-dismissal letter cited incidents on

¹⁵Mabe did not oversee his wife's time sheet.

¹⁶The meeting was not tape recorded. Lieutenant Chuck Haas took notes of the meeting.

January 31, April 6, May 13, June 5, June 13, the week of June 15, August 6, August 14, September 4 and November 13, 2008.

57. The notice also included allegations that Mabe made statements during the investigatory meeting which he subsequently “recanted” and that he had otherwise been untruthful by claiming a lack of training regarding time records.

58. On February 17, 2009, Superintendent Myers conducted Mabe’s pre-dismissal hearing. At the start of the hearing, Superintendent Myers removed the June 13, 2008, events from the list of alleged misconduct. During the hearing, Mabe provided pre-written and oral responses to the nine remaining allegations concerning discrepancies in recording his time.

59. At the pre-dismissal hearing, Mabe contended that his lapses stemmed in part from complacency and a lack of training on the time record system.

Dismissal Letter

60. After the hearing, Myers withdrew allegations regarding Mabe’s timekeeping on January 31, April 6, June 5, and August 14. By letter dated March 3, 2009, Myers dismissed Mabe from state service effective March 5, 2009. The reasons stated for the dismissal were “misconduct, inefficiency, and other unfitness to render effective service pursuant to ORS 240.555” and inability or unwillingness “to fully and faithfully perform the duties of the position satisfactorily pursuant to 240.570(3)” citing the events described above. The facts and charges cited in support of the dismissal from state service were “Untruthful Statements/Inappropriate Conduct” in regard to time sheet entries for : (1) May 13, 2008; (2) the week of June 15, 2008; (3) August 6, 2008 (4) September 4, 2008 and (5) November 13, 2008. The letter stated, in relevant part:

“During [the predissmissal] meeting, you said you are unsure what happened on May 13, 2008 and that it is possible that you called off and mistakenly forgot to change the time sheet. When discussing the time in question for June 15 – 20, 2008 you stated that it is well known that during audits you are required to be at the facility being audited at various times visiting all shifts. You went on to say that it is expected that you take pertinent information related to the audit back to the hotel with you for further review. For the August 6, 2008 incident you stated that you do not know what happened on this day and that it is possible that you mistakenly forgot to change your time sheet. When asked about the September 4, 2008, you admitted that you should have applied comp time or vacation, must have forgotten to change your time sheet, or didn’t expect to be away from the institution that day. Regarding November 13,

2008, you said you were scheduled for military leave until it was cancelled; that you then intended to show up to work, but there was a landslide that blocked the road so you could not come to work. For this date, you corrected other timesheets for other staff in similar situations, but admitted that you neglected to correct your own time sheet. We discussed your accuracy and you reported that when doing other employees' time keeping you had minimal discrepancies.

“Conclusion:

“In taking into account your responses for the above allegations in question, I find your reasons highly disconcerting. By your own admission you stated that you would complete your timesheets ahead of time and in so doing you would have me believe that any mistake was unintentional. Yet all payroll rosters are signed at the end of the month; therefore, I believe you should have been fully aware of making the necessary changes in leave designation for that month. I find that your acknowledgment that the incidents involving May 13, 2008, August 6, 2008, September 4, 2008, and November 13, 2008 were designated inappropriately by yourself as evidence that you acted negligently and in a manner not consistent with what should be expected of you not only as a state manager, but a manager who is also the staff deployment coordinator and thus oversees the payroll timesheets. In regard to your time management during the OSCI audit during the week June 15, 2008 and the November 13, 2008 incident, I find your statements to be inconsistent. Honesty and integrity are essential characteristics for a person in your position as a certified Correctional Series Employee. Your time sheets will be corrected to reflect accrued leave for May, 13, 2008, June 20, 2008, August 6, 2008, September 4, 2008 and November 13, 2008.

“I have taken your record into consideration and I have found that throughout this process you have been inconsistent in your explanations and you admitted you have willfully neglected your duties. As such, I am dismissing you from state service.”

61. On February 24, 2009, the Department reprimanded Camp Commander Boyer in writing. The reprimand stated, in relevant part:

“During the course of an investigation completed on January 6, 2009 into the use of leave and time keeping by Lt. Billy Mabe, it was revealed that as his supervisor, you had not required Lt. Mabe to produce the necessary military orders or submit leave requests for leave time taken. Your failure

to make certain that Lt. Mabe's information was correct resulted in overpayments to Lt. Mabe. You had also not reviewed the roster to ensure accuracy as the Camp Commander as required by policy."

Department Policies

62. DOC Policy: 20.1.2, Code of Ethics, states in part:

"I will value and maintain the highest ideals of professional and compassionate public service by * * * protecting the safety and welfare of the public.

"I accept that my fundamental duty is to serve the public; to safeguard lives and property * * * .

"I will be honest and truthful. I will be exemplary in obeying the law, following the regulations of the department * * * .

"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."

63. DOC Policy 20.1.3, Code of Conduct, states 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.

" * * * * *

"Employees shall not knowingly commit or omit acts which constitute a violation of any of the policies, rules, procedures, regulations, directives, or orders of the department.

" * * * Employees shall be truthful in rendering any report, in giving testimony, or in giving any official statement about any action taken that relates to the employee's employment or position. Every employee is obligated and shall promptly report to the proper line authority any illegal

acts, acts that would pose an immediate threat to the safety, security and welfare of staff and inmates, violations of post orders, rules, regulations, policies and procedures. An employee who has knowledge of such conduct by other employees is encouraged to inform those employees committing the act that unless they turn the information in themselves, the employee will have to do it for them. Employees who possess factual knowledge of behavior that should be communicated to the proper authority and choose not to report it may be subject to disciplinary action.”

64. DOC Policy 40.2.1, "Staff Deployment System," states in part:

“The institution staff deployment coordinator shall be responsible for maintaining daily rosters and work records, verifying accuracy of records, and maintaining physical records in accordance with state archivist schedule.

“Planned leave approval, denial or pending decisions shall be noted on the CDI form and returned to the employee prior to the date requested. A copy of the CDI form shall be retained in a time and attendance file. Upon approval of individual planned leaves, the institution staff deployment coordinator shall enter the leave information in the ISDS leave requests module.

“ * * * * *

“An employee leave request (CDI) form must be submitted for any time loss.

“ * * * * *

“The officer-in-charge shall be responsible for the documentation and accuracy of the daily roster variance and exception notation. The completed daily roster shall be routed to the institution staff deployment coordinator at the end of the shift to be recorded in ISDS.

“All adjustments to the daily assignment roster shall be recorded by the officer-in-charge on the exception section of the roster or on the form provided by institution staff deployment coordinator.

“The vacant post shall be listed first followed by the action taken: relieved with an employee assigned to a shift relief position, by substituting with staff from another post, or overtime.

“The absence category for the absence shall be listed if known by the OIC.

“ * * * * *

“The ISDS Coordinator will record and make adjustments to the exception sheet when the absence category was unknown by the OIC.”

65. DOC Policy 20.8.3, Special Leaves with Pay, states in part:

“An employee shall be granted military training leave with pay for a period not exceeding 15 calendar days or 11 work days in federal training year if the employee:

“1. Has been employed with the State of Oregon or its counties, municipalities, or other political subdivisions for 6 months or more immediately preceding application for military leave;

“2. Is a member of the National Guard or reserve component of the United States armed forces; and

“3. Has provided advance written or verbal notice of the absence.”

66. DAS Policy 60.000.25, Military Leave, states in part,

“(A) When an employee is called to annual active duty for training or active duty in lieu of training, an employee shall be granted military training leave with pay for a period not exceeding 15 calendar days or 11 work days in any federal training year if the employee:

“ * * * * *

“(iii) has provided advance written or verbal notice of the absence, except in instances involving "military necessity" or where the giving of notice is otherwise impossible or unreasonable.

“(B) To receive pay for the annual active duty for training, the employee must provide, before, during or after the leave, and at the agency's request, confirming documentation which indicates the call-up was for annual active duty for training or active duty in lieu of annual training. The agency shall request confirming documentation (military orders, training/drill schedule or other official documents) for the absence.”

Department Discipline in Other Cases

67. In *The Association of Corrections Employees v. State of Oregon, Department of Corrections (Oregon State Penitentiary)* (Tornquist, 2003), the Department terminated a corrections employee for (1) failing to report personal relationships with inmates' families, and (2) claiming through counsel at the pre-termination hearing that she did not remember spending the night with the family of an inmate. The Arbitrator upheld that termination.

68. In *Oregon American Federation of State, County and Municipal Employees & Kenneth Hackett v. Department of Corrections (Eastern Oregon Correctional Institution)* (Pesonen, 2005), the Department terminated a corrections employee for (1) using sick leave when he was, in fact, at a poker tournament, and (2) falsely denying the accusations and providing an "increasingly tattered story" which finally ended with a "grudging and ambiguous" confession. The Arbitrator upheld that termination.

69. One day during the spring of 2008, a Camp corrections officer called in sick to work. Later that day, he was present at an incident in a Portland night club in which a firearm was discharged. He told the Department that he had been sick, but had felt better and decided to go out. The Department accepted this explanation as truthful. The employee was not terminated, and continues to work at the Camp.

70. In late 2008, Commander Boyer was investigated for a variety of issues relating to his supervision of employees, including lack of supervision of Mabe. After denying that he had used the Department e-mail system to send inappropriate e-mails, and stating that he was careful to delete inappropriate e-mails, Boyer was confronted with numerous instances of such e-mails that he had saved. Boyer had disciplined employees for similar conduct. Boyer responded, "Guilty as charged." As a result of the investigation, Boyer was given a letter of reprimand and removed as Camp Commander, but was not terminated or reduced in rank.

CONCLUSIONS OF LAW

1. This Board has jurisdiction over the parties and subject matter of this dispute.
2. The Department did not violate ORS 240.470(3) when it removed Mabe from management service.
3. The Department did not violate ORS 240.555 when it dismissed Mabe from state service.

Standard for Decision

By letter dated March 3, 2009, the Department dismissed Mabe from state service, effective March 5, 2009. According to the Department, Mabe was guilty of “misconduct, inefficiency, and other unfitness to render effective service” under ORS 240.555, and was unable or unwilling to fully and faithfully perform the duties of his management service position under ORS 240.570(3). Although the Department’s letter does not specifically remove Mabe from management service, dismissal from state service necessarily involves removal from management service, and we do not require that the grounds for removal be separately stated. *Greenwood v. Oregon Department of Forestry*, Case No. MA-3-04 at 27-28 (2006), *recons denied* (2006).

ORS 240.570(3) provides that a management service employee may be removed from the management service only “if the employee is unable or unwilling to fully and faithfully perform the duties of the position satisfactorily.” Under ORS 240.570(5) a management service employee with immediate prior status as a classified employee “may be dismissed from state service only for reasons specified by ORS 240.555 and pursuant to the appeal procedures provided by ORS 240.560.” The reasons for which a regular classified employee may be disciplined or discharged under ORS 240.555 are: “misconduct, inefficiency, incompetence, insubordination, indolence, malfeasance or other unfitness to render effective service.” Under this statutory scheme and because Mabe had status as a classified service employee before he was promoted to the management service, we must consider two separate personnel actions: (1) his removal from management service under ORS 240.570(3), and (2) his dismissal from classified service under ORS 240.570(5) and 240.555. The State has the burden of proving that both actions were lawful. OAR 115-045-0030(6).

We use a two-step process to review the removal of an employee from management service and the dismissal of an employee from state service. We first determine if the State proved the charges upon which these actions are based. If we find the State has proven the charges, we then apply a reasonable employer standard twice to decide if the State’s actions were lawful: first to the removal from management service, and second to the dismissal from state service.

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 when the offense is gross.” *Bellish v. State of Oregon, Department of Human Service, Seniors and People with Disabilities*, Case No. MA-23-03 at 8 (2004), *recons* (June 2004). The reasonable employer standard we use in reviewing a removal from management service differs from the reasonable employer standard we apply in reviewing a dismissal from classified service, however. The employer’s burden to justify a removal from

management service is relatively minor. *Greenwood*, at 29. A management service employee may be held to “strict standards of behavior, so long as these standards are not arbitrary or unreasonable.” *Helper v. Children’s Service Division*, Case No. MA-1-91 (1992). In regard to an employee with law enforcement responsibilities, an employer can reasonably expect that the employee will avoid conduct that would place their personal integrity in question or bring discredit on their commission as a law enforcement officer. *Duncan v. Department of Agriculture*, Case No. MA-01-91 (1992); *Hunter v. OSU*, MA-3-88 (1989), *AWOP* 100 Or App 261, *rev den* 309 Or 698 (1990).

When we apply the reasonable employer test to review a dismissal from state service, we scrutinize an agency’s conduct more stringently, under rules which are substantially different from those governing management service removal. *Peyton v. Oregon State Health Division*, Case No. MA-4-87 (1989). Charges which are adequate to support removal from management service might not be sufficient to justify dismissal from state service. *Stoudamire v. Department of Human Services*, Case No. MA-4-03 (2003). An employer must show that it dismissed the employee in good faith for cause. *Plank v. Department of Transportation, Highway Division*, MA-17-90 (1992).

We begin our analysis by determining whether the State proved the charges upon which its actions are based: untruthful statements and inappropriate conduct.

Untruthful Statements and Inappropriate Conduct¹⁷

The State proved that Mabe intentionally failed to accurately report time worked on his time sheets on May 13, June 15–21, August 6, September 4 and November 13, 2008. Mabe admits that his time sheets were inaccurate for these dates, but defends himself by asserting that he made a conscious decision not to concern himself with the accuracy of his own time sheet, to the point where he would correct others’ time sheets and not his own. Even if we accept this as a defense, it is an acknowledgment that Mabe knew he was violating clear Department rules regarding accurate time sheets and was derelict in his duties.

The Department failed to establish that Mabe “recanted” his statements regarding his work time at the December 18 investigatory interview. The circumstances of the meeting and the notes from that meeting indicate that Mabe was unaware of the actual purpose of the meeting, was unprepared to discuss the details of specific time sheets, and offered qualified explanations. Accordingly, statements he made at the December 18 interview can be excused by Mabe’s anger, confusion and surprise. The Department

¹⁷The State’s charge that Mabe engaged in inappropriate conduct was entirely based on untruthful statements he made on his time sheets and to Department investigators and officials. The State offered no separate instances of Mabe’s inappropriate conduct.

proved, however, that many of the explanations Mabe subsequently gave for his conduct were not truthful.

We reject Mabe's claims that his lack of training in the ISDS was partly responsible for his actions. The evidence shows that Mabe had no apparent difficulties in using this system to review and monitor other employees' time sheets. Mabe's work in the ISDS system is irrelevant to the conduct at issue—his false and inaccurate personal time records.

Mabe's repeated claims that he worked more than 40 hours during the audit week of June 15-21, 2008, were revealed to be untrue or inaccurate. Mabe asserted that he worked additional hours in his hotel room, and that "[i]f I kept a log of the time I spent on this in and out of the institution I'm sure it would show that I worked more than the 40 hours I claimed this week." (Finding of Fact 35.) At hearing, however, Mabe testified on direct examination that he spent only one hour on Monday evening, June 16, and another hour on Tuesday evening, June 17, reviewing materials for the audit. We note that the audit primarily involved filling out a lengthy checklist; because of this format, it is unlikely that Mabe needed to review or study any materials. In addition, Mabe's testimony about what he did in his hotel room was vague; he could not explain specifically what materials he reviewed or what notes he took.¹⁸

Mabe also testified that he checked his work e-mails during the week of the audit, and that he worked additional hours at the Camp on June 18. The Department refuted this claim with computer records that showed he did not log on to any DOC computers between June 15 and June 22, 2008. In addition, the credibility of his claim that he worked on June 18 is undermined by his travel reimbursement form which shows that he did not arrive at the Camp until 7:00 p.m. on that date. Finally, Mabe himself admitted that his explanation of the audit week was inaccurate. When cross-examined at the hearing, Mabe testified for the first time that he had intended to make up the time he lacked during the audit week in the following week.

Mabe's claim that he simply did not think to change his own time sheet for the November 13 road washout absence, but changed the time sheets of other employees, is not believable. In sum, Mabe's repeated, vigorous falsehoods, including some regarding relatively minor matters, raise serious questions about his integrity in his work as a

¹⁸Mabe argues that other employees participating in the audit did not work as many hours at the institution as Mabe did. The record does not reveal whether these employees took leave or made up the time later, or were counseled for a failure to do so. If, indeed, audit team employees were not required to work 40 hours that week, that would be a defense to discipline against Mabe for the lack of hours, but not for false information on Mabe's time sheet or false statements at his pre-dismissal hearing.

corrections employee and a firefighter.¹⁹ The State proved that Mabe made untruthful statements, conduct which is inappropriate.

Removal from Management Service

The State demonstrated that Mabe made untruthful statements. We now apply the reasonable employer standard to determine if the State properly removed him from the management service under ORS 240.570(3). That statutory provision permits the State to remove a management service employee only if the employee is unable or unwilling “to fully and faithfully perform the duties of the position satisfactorily.”

As discussed above, the State has the right to hold a management service employee to high standards of behavior, so long as these standards are not arbitrary or unreasonable. The Department reasonably expected that Mabe, who was responsible for overseeing the time sheets of about 28 employees, would keep accurate personal time records. Mabe failed to meet these expectations. He intentionally and repeatedly submitted inaccurate time sheets. In addition, an employer must be able to trust and have confidence in a management service employee’s work. Mabe’s lack of candor about his conduct irrevocably and significantly damaged the Department’s ability to trust him.

In *Tuthill v. Oregon Liquor Control Commission*, Case No. 1423 (1983), *AWOP* 68 Or App 383, 681 P2d 181 (1984), we upheld the removal from management service of an employee who wrongfully accessed a State criminal information database for personal use. When the employer asked the appellant, a supervisor, about prior misuse of the data base, the appellant withheld information about his prior misuse of the data base. We held that the appellant demonstrated an unwillingness to perform his duties fully and faithfully by making personal use of the database and withholding information from his employer. We reached these conclusions even though the employer never asked the appellant whether he personally had misused the database, and even though the employer never specifically directed the appellant to use the system only for official, work-related business. *See also Wesley v. State of Oregon, Employment Department*, Case No. MA-20-02 (October 2003) (upholding removal from management service of an employee who accessed her ex-husband’s confidential wage records for personal use and failed to be candid with her employer during the investigation).

Here, Mabe was even more deliberately untruthful than the appellant in *Tuthill*. Mabe provided inaccurate responses to direct questions from Department supervisors and an investigator. Mabe knowingly submitted incorrect time sheets even though he

¹⁹ When a witness’ testimony is false in one part, the rest of that witness’ testimony should be distrusted. *Wesley v. State of Oregon, Employment Department*, Case No. MA-20-02 (2003).

understood that clear Department rules required him to be accurate and truthful in his time records. We conclude, for the same reasons we did in *Tuthill*, that the State met its burden to demonstrate that Mabe was unable or unwilling to fully and faithfully perform the duties of his management service position. The Department acted reasonably in removing him from management service.

Dismissal from State Service

Next, we consider whether the Department's dismissal of Mabe was lawful under ORS 240.555, which permits the State to dismiss a classified employee only for misconduct, inefficiency, incompetence, insubordination, indolence, malfeasance, "or other unfitness to render effective service." We conclude that the State acted reasonably in dismissing Mabe for misconduct and inefficiency.

Misconduct is "a transgression of some established and definite rule of action, a forbidden act, a dereliction of duty, unlawful behavior, *willful in character*, improper or wrong behavior. . . For purposes of ORS 240.555 'misconduct' involves intentional wrongdoing." *Greenwood* at 30 (quoting *Schellin* at 13-14; emphasis in original, citation omitted).

The State argues that Mabe engaged in misconduct by: intentionally failing to accurately keep track of time worked, intentionally failing to accurately record his time on his time sheets, intentionally failing to check his time sheets before signing and submitting them, and intentionally failing "to be completely honest and truthful during the course of the investigation, up to and including his testimony presented at hearing." (State's Post-Hearing Brief at 15-16.) As discussed above, the Department proved that Mabe intentionally made numerous untruthful statements, contrary to Department policy and rules. Accordingly, the Department demonstrated that he engaged in wilful, improper behavior. The Department proved its charge of misconduct.

In regard to the charge that Mabe was inefficient, the Department contends:

"Inefficiency is the quality of being incapable or indisposed to do that which an employee is required to do.' *Bosserman v. DEQ*, Case No. MA-29-85 at 24 (December 1986). In this case, the actions Lt. Mabe was 'indisposed' to do are the same actions involved in the misconduct charge. Although the brief addresses Lt. Mabe's actions as misconduct due to his intentional wrongdoing, it is important to note that the inability to submit an accurate time sheet, without intentionality, establishes inefficiency." (Department's Post-Hearing Brief at 15.)

We agree, and conclude that the Department demonstrated that Mabe was inefficient because he was unable to perform a basic function of his position, submitting

accurate time records, when he had the responsibility of overseeing that work when performed by the other Camp employees.

Mabe contends, however, that the Department acted unreasonably in dismissing him because it failed to utilize appropriate principles of progressive discipline. As discussed above, a reasonable employer utilizes progressive discipline except when the employee's offense is gross or the employee's behavior would not be improved by progressive measures. *Peterson v. Department of General Services*, Case No. MA-9-93, at 10 (1994). Mabe contends that the Department erred by imposing the most serious form of discipline upon him—dismissal—when he had never before been disciplined. Accordingly, we must determine if Mabe's misconduct was gross or his behavior would not be improved by progressive discipline.

Mabe's most serious offense was dishonesty regarding the following matters: (1) on numerous occasions, he signed and submitted time records when he knew, or recklessly failed to know, that they were inaccurate; (2) he claimed time worked on November 13 when he did not work, even after he changed other employees' time records because he learned that absent employees could not claim time worked on that day; (3) he claimed time worked during audit week when he knew he had not worked the hours claimed; and (4) he falsely stated during the investigation and at the pre-termination hearing that he had worked more than forty hours during the audit week.

We have upheld dismissal from state service of a management service employee who gave untruthful or deceptive answers to his manager during an investigation. In *Smith v. State of Oregon, Department of Transportation*, Case No. MA-4-01 (2001), a management service employee made an unauthorized copy of copyrighted software. The employer dismissed Smith from state service because, during the investigation into the unauthorized copying, Smith deceived or lied to his manager on four different occasions. We upheld the dismissal and explained our conclusion as follows:

“The State employed Appellant in a position that requires honesty and trust and involves little direct control by his supervisor. On four occasions over two days, Appellant gave untruthful or deceptive responses during his manager's investigation of his suspected misconduct. Given his untruthfulness in several different conversations, Appellant's length of satisfactory service is not a significant consideration in our analysis. Appellant knew, or reasonably should have known, that dishonesty in an investigation, if discovered, would result in dismissal.

“Appellant defends his actions, in part, by stating that he was untruthful because Frank's investigation put him under pressure and he

panicked. Regardless of the reasons, Appellant made a conscious decision to be untruthful to his manager. This defense has no merit.” *Smith* at 11.

See also Shroll v. Department of Environmental Quality, Case Nos. 1383/1386 at 5 (April 1982) (upholding dismissal from the classified service of an employee who knowingly submitted a false document at an ERB hearing).

Here, the Department has several rules emphasizing the importance of truthfulness and honesty, and requiring employees to submit accurate and truthful reports. (Findings of Fact 62 and 63). The Department proved Mabe believed that these Department standards applied to other employees, but not to him. The evidence shows that Mabe had no interest in accurately documenting his time. Mabe’s justification for his failure to change his November 13 time sheet—that it never occurred to him—is either plainly false or, if true, shows that he was so unconcerned with the obligations of his position as to be equally culpable.

Mabe’s lack of truthfulness during the disciplinary process is troubling. The Department has not persuaded us that Mabe’s conduct during the December 18, 2008 investigatory interview warranted his termination—a surprise, stressful interview about timekeeping would put many employees at a disadvantage. However, Mabe’s subsequent false responses to the investigative report and additional charges, and his repetition and elaboration of those responses at the pre-dismissal hearing and hearing in this case, indicate that Mabe adopted a strategy of dissembling, attacking the credibility of his accusers, and to some extent, blaming his conduct on an utterly irrelevant training issue. Mabe’s overall response to the difficult questions posed to him was to retreat to another falsehood. Thus, Mabe initially stated that “it is well known” that auditing employees have to work evening hours to observe all shifts and review pertinent information related to the audit. After the audit team leader testified that, in fact, there was no work to be done in the evenings, Mabe offered the weaker, and unverifiable claim, that he reviewed the prior year’s audit and his own notes. When confronted with the mathematical fact that, according to his own testimony, he had worked approximately 34 hours instead of over 40, Mabe promptly switched to the contention that he planned to work extra hours in the future, while offering no evidence that he had done so.

Like the appellant in *Smith*, Mabe worked in a position that required honesty and trust and involved little direct control by his supervisor. On repeated occasions, verbally and in writing, Mabe gave untruthful or deceptive responses during the Department’s investigation of his suspected misconduct. Because of this untruthfulness in several different conversations, Mabe’s length of satisfactory service is not a significant consideration in our analysis. Mabe knew, or reasonably should have known, that dishonesty in an investigation, if discovered, would result in dismissal. Like the appellant in *Smith*, Mabe made a conscious decision to be untruthful to his superiors.

Department policies explicitly state that employee truthfulness is important. Mabe does not argue that these policies were unreasonable or arbitrary. Mabe's strategy of making false statements when caught violating the employer's rules, and his deceptiveness in an area where he appears to have believed no one would notice, would reasonably give an employer pause to place him in a position of trust with inmates.

We conclude that the proven charges establish a sufficient breach of trust to warrant the Department's conclusion that Mabe's misconduct was both severe and would not be improved by progressive discipline. We sustain his dismissal from classified service and his removal from management service and dismiss the appeal.

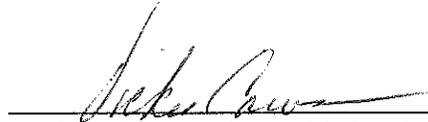
ORDER

1. Mabe's appeal of his removal from management service is dismissed.
2. Mabe's appeal of his dismissal from state service is dismissed.

DATED this 16 day of July, 2010.



Paul B. Gamson, Chair



Vickie Cowan, Board Member



Susan Rossiter, Board Member

This Order may be appealed pursuant to ORS 183.482.