

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. MA-10-09

(CLASSIFIED SERVICE APPEAL)

| | | |
|------------------------------|---|---------------------|
| WILLIAM R. BOAZ, |) | |
| |) | |
| Appellant, |) | |
| |) | RULINGS, |
| v. |) | FINDINGS OF FACT, |
| |) | CONCLUSIONS OF LAW, |
| STATE OF OREGON, OFFICE OF |) | AND ORDER |
| PRIVATE HEALTH PARTNERSHIPS, |) | |
| FAMILY HEALTH INSURANCE |) | |
| ASSISTANCE PROGRAM, |) | |
| |) | |
| Respondent. |) | |
| _____ |) | |

On August 11, 2010, this Board heard oral argument on Appellant's objections to a Recommended Order issued on April 30, 2010, by Administrative Law Judge (ALJ) B. Carlton Grew, after a hearing held on September 28, 2009, in Salem, Oregon. The record closed on October 24, 2009, with the submission of the parties' post-hearing briefs.

Sharon C. Stevens, Attorney at Law, Callahan & Stevens, Keizer, Oregon, represented Appellant.

Donna Sandoval Bennett, Senior Assistant Attorney General, Labor and Employment Section, Department of Justice, Salem, Oregon, represented Respondent.

On April 14, 2009, Appellant William R. Boaz (Boaz) filed this timely appeal of his March 6, 2009 dismissal from a classified service position in the State of Oregon

(State), Office of Private Health Partnerships, Family Health Insurance Assistance Program (OPHP or Agency), for alleged misconduct, malfeasance, and other unfitness to render effective service.

The issue is:

Did the Agency appropriately dismiss Boaz from State Service, effective March 6, 2009, for misconduct, malfeasance, or other unfitness to render effective service under ORS 240.555?

RULINGS

The Agency offered as an exhibit a series of e-mails between Boaz and Kristin Schafer (Schafer). Boaz objected on the grounds that the e-mails were not the basis for his discipline, and were printed after the Agency disciplined him. The Agency argued that the e-mails were viewed by its managers during their investigation, and that the managers discussed the volume, tone, and content of these e-mails in connection with their disciplinary process. After taking the issue under advisement to address in his Recommended Order, the ALJ properly admitted the e-mails as relevant evidence of the nature and course of communications between Boaz and Schafer in the relevant time period.

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

FINDINGS OF FACT

Parties

1. The OPHP is a State agency that provides assistance to eligible Oregonians in purchasing private health insurance.
2. In 2004, the Agency hired Boaz as a temporary employee. On January 24, 2005, the Agency hired Boaz as a permanent Administrative Specialist 2, an unrepresented position in the classified service that he held at the time of the dismissal at issue here.
3. Boaz' job duties were to determine applicants' eligibility for Agency health plan coverage stipends, which they would use to buy private sector health insurance. Boaz also acted as a liaison between program clients and the Agency's intake and administrative employees regarding the complicated eligibility process and requirements.

4. In February 2007 and February 2008, Boaz' supervisors evaluated his work and rated his performance as more than satisfactory.

Agency Policies: Confidential Information

5. In order to determine eligibility, Agency employees have access to certain confidential State databases of citizen information, including databases from the Employment Department, Department of Motor Vehicles (DMV), and the Oregon Health Plan (OHP) section of the Department of Human Services (DHS).¹ These databases contain information such as an individual's name, birth date, social security number, public benefits, and employment and wage histories.

6. Agency employees' access to these confidential databases is governed by interagency agreements which limit the use of the databases to the determination of Agency client eligibility. Misuse of the databases can lead to revocation of Agency access. To implement these interagency agreements, the Agency imposes specific limits on use of the information in the database.

7. In 2005, 2007, and 2008, Boaz signed the Agency's "Confidentiality Statement of Understanding," which states in part:

"I understand that during my employment or contract with OPHP, I may be required to access or work with information that is confidential or sensitive in nature. If I am unclear about what information is confidential, I will have a discussion with my manager for clarification. I understand that I am authorized to access only the information necessary to do my job.

"I am responsible to assure that information accessed or maintained during the course of my employment or contract at OPHP will not be disclosed to unauthorized parties. I understand that I am not authorized to use accessed information for my own purposes, or to provide information to third parties without appropriate authorization. If you have questions or concerns about whether it is appropriate to release information, you should discuss it with your supervisor or project manager.

"* * * * *

¹The Agency is not part of DHS.

"I agree to abide by the statements listed above. I understand that non-compliance may result in disciplinary actions up to and including dismissal from state service for employees * * *."

8. Boaz' supervisor, John McLean, discussed the Agency's confidentiality policy with Boaz during his initial employment orientation, and on at least three subsequent occasions. In these discussions, McLean told Boaz that employees were permitted to use the confidential information only in connection with their work for Agency clients, and that violating the confidentiality policy would result in dismissal, pursuant to the Agency's "zero tolerance" policy.²

9. Boaz was aware that access to the Employment Department database was essential to the Agency's work, and that the Agency would lose that access if the information in the database was misused.

10. The Agency terminated two other employees for misuse of confidential information while Boaz was working there. One employee destroyed documents pertaining to an Agency client; the other discussed the application of an individual for Agency services with the applicant's estranged spouse.

11. Agency employees view information in the confidential databases through different portals, or screens, on their desktop computer monitors. The primary screen is called the ELGR screen, which is connected to a DHS database. It contains information about individuals such as their name, date of birth, social security number, gender, and race, as well as identifying which State entities created case files regarding each individual. The Employment Department portal is referred to as the "wage screen." It includes information such as an individual's name, social security number, employment history, and wage income by calendar quarter.

²At the hearing in this case, Boaz testified that he understood the need for confidentiality while working at the Agency and realized that confidentiality was critical. In addition, he testified that he realized that breaching the confidentiality policy could lead to his dismissal. He denied, however, that the Agency emphasized the importance of maintaining confidentiality, and stated that he did not recall being given specific instructions about what information he was authorized to release to whom. The three confidentiality agreements that Boaz signed, however, emphasized the importance of maintaining confidentiality. By signing these agreements, Boaz acknowledged that he understood that he was not authorized "to use accessed information for my own purposes, or to provide information to third parties without appropriate authorization," and also acknowledged he would consult a supervisor if he was unsure about what information was considered confidential. Consequently, we do not find credible Boaz's statements that the Agency never emphasized confidentiality, and that he did not remember receiving instructions about what information he was authorized (or not authorized) to release.

12. Boaz viewed the ELGR and wage screens on his monitor on a daily basis, using the information they contained to assist Agency clients or those eligible for OHP benefits. Boaz testified that, until the incident at issue here, he had never used this information for any other purpose.

Agency Policies: Use of E-mail

13. On at least two occasions, the Agency provided Boaz with information about its policy on "Use of System Resources," which stated in part:

"[Agency] employees shall use the Agency's resources including electronic media, office equipment, whether owned, leased or rented in an ethical, legal, and professional manner."

14. The Agency policy allowed limited personal use of the equipment, including an "occasional e-mail message." It also stated that

"[u]ses of Agency system resources must not be false, unlawful, offensive, lewd, or disruptive. No employee shall use system resources to make offensive or discriminatory reference to race, age, gender, sexual orientation, religious or political beliefs, national origin, health, or disability."

15. On January 10, 2007, Boaz received comprehensive training on, and a copy of, the Agency's policy against workplace discrimination and harassment.

Events Leading to Termination: Release of Information

16. Schafer worked with Boaz at the Agency for three years before leaving in 2005 to take a position as a manager in the Institutional Revenue Section of DHS. In her DHS position, which she continued to hold through the time of the hearing in this case, Schafer managed the accounts receivable staff at the Oregon State Hospital. After Schafer left the Agency, she and Boaz remained in contact and considered themselves to be friends. Their e-mails contained "flirty" and vulgar content, and Boaz routinely used explicit sexual terminology to express his negative feelings about the way the Agency treated him.

17. On December 10, 2008, Schafer sent Boaz an e-mail which read in part:

"Subject: Favor

“Could you PLEASE look up a [John Doe*]³ probably born around 1983 and should be working at [Auto Shop*]. He is my finalist for my OSI position and I wanted to make sure he works there. I am calling references but he doesn't want me to call them unless I'm 100% [sic] I'm offering him the job. So I'm calling old references first but just wanted to make sure he works where he says he does. THANKS Sunshine.”

18. Schafer was aware of the Agency's confidentiality policies, and knew that her question was not related to any connection between Doe and Agency services. Boaz knew that Schafer's agency did not have access to the Employment Department wage records, and believed this was because her agency did not have an interagency agreement.

19. Less than ninety minutes later, Boaz responded by e-mail as follows:

“[a]ccording to the wage screen the young kid is still employed at [Auto Shop].”⁴

20. On December 17, 2008, Schafer asked for additional employment information about Doe.

21. On January 7, 2009, Schafer asked Boaz to provide her with addresses for two other individuals; her request was unrelated to Agency programs. She wrote as the subject “DMV” and stated, “[d]o you still have access? I needed a couple of addresses [for two other individuals] sometimes you can get the address from the employment page which then would tell me where they work.”

³*“John Doe” (Doe) and “Auto Shop” are pseudonyms.

⁴Schafer was disciplined for this e-mail exchange and appealed the discipline to this Board. (Schafer was also disciplined for other issues raised by her e-mail communications to Boaz, none of which are relevant to this action.) Boaz' testimony at Schafer's hearing before this Board is part of the record in this case. Although Boaz's December 10 e-mail to Schafer mentions his use of the “wage screen,” Boaz testified at Schafer's hearing before this Board that he obtained Doe's wage information from the ELGR screen provided by DHS and not the Employment Department wage screen. At the hearing in this case, Boaz testified that he obtained the requested information from the ELGR screen, and specifically and repeatedly denied using the “Employment Department wage screen.” In fact, the ELGR screen does not include the information he sent to Schafer.

Boaz responded, "I will try to pull them up but we don't have ELGR and I still am without DMV.⁵ I will work on getting you what I can."⁶

22. Boaz was involved in a family dispute. On February 2, 2009, Boaz sent an e-mail from his Agency address to his estranged niece,⁷ stating in part,

"I read in the paper this AM that some ugly fat Hispanic girl beat up a little white grade school girl. So your [sic] at it again. Must be fun when you are fat, smelly and tough to be able to beat up little people."

Boaz also referred to his niece as a "stinky fat bitch" in a February 5, 2009 e-mail from his Agency e-mail address to "R. Boaz."

23. In early February, someone contacted the Governor's office to complain about Boaz' February 2 e-mail. On February 10, a representative from the Governor's office called Gretchen Clark, Agency Human Resource Manager. The Governor's representative stated that, on Wednesday, February 2, 2009, at 8:14 a.m., an e-mail message containing an ethnic slur and insults had been sent from Boaz' work computer to a member of the public.

24. Clark then reviewed the contents of Boaz' Agency e-mail computer files. She determined that Boaz had sent the offensive e-mail. She also determined that 85 percent of the e-mail messages that Boaz had saved were personal, with no relationship to his work. Clark also noticed that Boaz had provided information about Doe from a confidential database to a third party, Schafer. Clark determined that 22 of Boaz' e-mail messages were between himself and Schafer.

25. On February 17, 2009, McLean, Boaz's supervisor, and Human Resources Manager Clark met with Boaz. When the managers confronted Boaz about the amount of personal e-mail on his computer, Boaz expressed surprise. He admitted it when shown

⁵At the time of these events, the Agency computer system was beset by problems, and Agency employees could not always view the screens they sought.

⁶There is no e-mail record showing that Boaz provided the information requested in Schafer's December 17 and January 7 e-mails, and Boaz denied that he did so. There are, however, no e-mail replies in which Boaz states that he could not or would not supply the information requested, which leaves open the possibility that he may have communicated further about these matters by telephone or in person.

⁷Boaz is Hispanic, as is his niece. His niece attended the hearing as a hostile audience member.

a printed copy of his e-mail log, and stated that he had been “making some poor decisions.” Boaz explained that a large quantity of e-mail was related to his family dispute, and that McLean was aware of the dispute. Although Boaz had, in fact, informed McLean of the dispute, Boaz never sought, nor was granted, any special privileges from McLean about his use of the Agency e-mail in the dispute. Boaz acknowledged sending the e-mail about his niece, and stated that he was wrong to do so.⁸

26. During the February 17 investigatory meeting, McLean and Clark also confronted Boaz about his John Doe e-mail. Boaz first stated that he did not recall looking into the Employment Department’s wage screen to give Schafer information. When shown the printed e-mail messages, Boaz admitted that he had done so. McLean and Clark placed Boaz on paid administrative leave and directed him to leave the workplace.

27. By letter dated February 23, 2009, the Agency notified Boaz that a pre-dismissal hearing was scheduled for February 26. Boaz requested a one-month extension to obtain legal counsel. The Agency granted a four-day extension, rescheduling the meeting for March 2. On that day, Boaz requested another extension, which the Agency denied. Boaz did not appear at the March 2 pre-dismissal meeting, and did not provide the Agency with any evidence or argument regarding his pending termination. On March 4, the Agency issued a notice of dismissal for Boaz, effective March 5.

28. The notice of dismissal stated that the grounds for the action were “[m]isconduct, malfeasance, and/or other unfitness to render effective service pursuant to ORS 240.555.” The notice summarized the reasons for Boaz’ dismissal as follows:

“[t]he agency must rely on its employees to keep information confidential and not share that information with others. You shared information using your confidential access on December 10, 2008, with an employee in another agency that was not directly related to your work. You sent an e-mail message from your state computer to a member of your family that was perceived as derogatory and racist. An audit of your e-mail account revealed that 85% were personal message. In the investigatory meeting, you admitted that you had sent the e-mail messages.

⁸At the hearing, Boaz acknowledged that he sent the e-mails, that he had been “very very angry,” and that sending the e-mails was a mistake. Boaz denied, however, that the e-mails contained any ethnic slurs, noting that both he and his niece are Hispanic.

“As a result of the breach of confidentiality and inappropriate use of state equipment, the agency has lost its ability to trust and depend on you to meet its critical workload and must dismiss you from state service.”

29. After his termination, Boaz applied for unemployment compensation. A hearing on the claim was held on May 27, 2009.

30. At the May 27 unemployment compensation hearing, Agency Human Resource Manager Clark responded to questions from the ALJ as follows:

“ALJ: Alright, was he – did the fact he sent the email have any role in his discharge or was it for the confidentiality issue?”

“CLARK: It was for the confidentiality issue.

“ * * * * *

“ALJ: Alright. If not for the fact that the employer discovered the breach of confidentiality that occurred in December, would Mr. Boaz have been discharged for the email issues?”

“CLARK: We would not have known about it if he hadn’t sent the email. But once we found out that he had breached the confidentiality, we terminated him and we would terminate anybody who did that.

“ALJ: No I understand that. What I’m asking is would he have been discharged for the email issues alone if the confidentiality issue had not arisen.

“CLARK: No.”

31. Also during the May 27 unemployment hearing, Boaz had the following exchange with the ALJ:

“ALJ: Alright, when you first had contact with [Schafer], what was she asking?”

“BOAZ: Uh the basic question was that she needed to know whether he had worked at [Auto Shop]. Because she was interviewing him for a potential hire job and he was a good - very good possibility.

"ALJ: Okay. And was doing that type of look up part of your official duties?

"BOAZ: Yes your Honor. I had shared information with Oregon Health Plan before. It just - well - sorry Your Honor, but getting back to that it's not one of my official duties but we do - did communicate between - within the agency to different departments.

"ALJ: Alright, when you shared information with the Oregon Health Plan, was that so that they could determine a job candidate?

"BOAZ: No your Honor.

"ALJ: Under what circumstances was that?

"BOAZ: Those circumstances may have been for a social security number for a child - a baby.

"ALJ: In regards to what?

"BOAZ: In regards to just updating their information on - on uh eligibility.

"ALJ: Alright. Did assisting other agencies in their determination for qualified job applicants; did that have anything to do with your official duties?

"BOAZ: I'm sorry your Honor, I don't - I don't understand what you're asking me.

"ALJ: Was it part of your official duties to provide information to other agencies in order for them to determine qualified applicants?

"BOAZ: No - no. No your Honor.

"ALJ: What was the goal of your duties?

"BOAZ: Goal of my duties was to process applications and determine eligibility.

"ALJ: And what was your understanding of the employer's confidentiality policy?

"BOAZ: That is was a strict confidentiality policy but we could share information with the agency itself.

"ALJ: Was there any understanding that you had regarding what type of information could be shared?

"BOAZ: Yes your Honor.

"ALJ: What was your understanding of the types of circumstances such information could be provided.

"BOAZ: Um well, my understanding was under - depends on which - well it was dependent on the circumstance and definitely if it was something more than what I had shared there would - that would definitely have been communication between me and a supervisor, if it was anything deeper than that.

"ALJ: Okay. Looking at the emails between you and [Schafer] in regards to the request for a look up on the individual, do you see anything that you would have considered to be wrong?

"BOAZ: Um. . .you mean between [Schafer] and me on this particular individual?

"ALJ: Yes.

"BOAZ: No. I actually felt that there was an agreement to share within the agency.

"ALJ: And is it true that [Schafer] worked for the DHS?

"BOAZ: Correct your Honor.

"ALJ: And that would be the Department of Human....

"BOAZ: Services.

"ALJ:Services. Do you know whether or not that Department or that agency had access to the Employment Department records that were provided to your employer?

"BOAZ: I don't believe they did.

"ALJ: Do you know why?

"BOAZ: No I don't your Honor. Evidently they didn't have a - an interagency agreement.

"ALJ: Okay. Was there some reason that you believed Ms. [Schafer] - or excuse me - [Schafer] was entitled to receive that information?

"BOAZ: I thought that information was okay to share with [Schafer] uh - their information sharing agreement. I mean, I believe that it was within the agency to be able to share that information.

"ALJ: Okay, so Mr. Boaz, just so that I'm clear with your understanding of the employers confidentiality policy, did you think that it was okay to release any information to these other agencies or...?

"BOAZ: Oh no, your Honor.

"ALJ: Where there any specific guidelines that you were aware of?

"BOAZ: No specific guidelines.

"ALJ: Alright, there were no specific guidelines so did you think that you could release anything?

"BOAZ: I believe that I could release anything with - to that - basically to agencies within the DHS. Department of Human Services.

"ALJ: Okay and from your understanding of the policy, did it matter what they were using the information for?

"BOAZ: Pardon your Honor, I need that again.

"ALJ: From your understanding of the employer's policy, did it matter what the individual who was requesting the information — did it matter what they wanted the information for?

"BOAZ: Oh yes.

"ALJ: In what way?

"BOAZ: Depends on what [unintelligible] if it was something we didn't even have to deal with — what they were — that particular agency. Uh, if they were doing eligibility — I mean she was doing a hiring and needed some information on the hiring of that individual and it really was determined — was going to be determined on that particular uh — I shared it and felt it was in the guidelines.

"ALJ: Alright.

"BOAZ: I basically thought that it was a part of our partnership with uh - you know, Oregon - OPHP and the DHS. Thought they were basically all together as partners. I would remember seeing before - I believe - I can't say for sure, I just - my memory's.... on the uh internet when you pull up our agency, that did say that we were in partnerships with agencies in DHS. I basically went on that assumption that as partners I could share this information, and that is the first time I've shared that information and uh I don't feel that I was doing anything wrong."

32. Boaz responded as follows to a question from his attorney at his unemployment hearing:

"STEVENS: Did you think that if it was improper for her [Schafer] to get that information from you, that as a manager she would have known that and wouldn't have asked you for it?

"BOAZ: Correct."

33. At Schafer's August 11, 2009, hearing before this Board on her appeal of the discipline imposed upon her for e-mail exchanges with Boaz and other misconduct, Boaz testified in part:

"Van Dyke [attorney for the State]: And if Ms. Schafer was a manager would you think she should know better than to ask for confidential information?"

"Boaz: Ms. Schafer as a manager, to me is a very good person and employee and I trust in her completely and I felt there was nothing wrong with it. Like I said, it was an interagency cooperation.

"Van Dyke: Although you've never provided employment verification for anybody else before.

"Boaz: Had they asked me I would have.

"Van Dyke: But no one ever did ask you

"Boaz: No.

"* * * * *

"Schafer: Did you provide that information to me because you felt since I was a manager you had to? That I was using my manager title to get that from you?"

"Boaz: Not at all."⁹

34. At the hearing in this case and at his unemployment hearing, Boaz testified that he did not believe he was violating the confidentiality policy because he thought he was promoting "interagency cooperation" and sharing information he was permitted to share under an interagency agreement between the Agency and DHS. Boaz suggested that the "Network and Information Systems Access Agreement" authorized his release

⁹At Boaz' ERB hearing, Schafer stated for the first time that she had access to the ELGR screen but did not use it or direct another DHS employee to access it because it would be a "conflict of interest."

of information, but admitted he had never read the agreement and, indeed, had never seen the agreement prior to his ERB hearing. The "Network and Information Systems Access Agreement" does not, in fact, authorize release of the information Boaz provided to Schafer. Schafer also testified, at her hearing, that she believed information sharing agreements allowed her to get the information she requested from Boaz. Boaz and Schafer admitted, however, that they had not read any interagency agreements and never received training, summaries, or supervisory direction about those agreements prior to their hearings.

Boaz also testified that providing the information was a "good step toward [DHS and the Agency] being partners." When asked if he would release the same information again, Boaz testified that he would not because it caused so much "turmoil." Boaz also testified that in giving Schafer the information he was helping his friend and [DHS] and that he was "helping my friend to do a good job and I was punished."¹⁰

CONCLUSIONS OF LAW

1. This Board has jurisdiction over the parties and subject matter of this dispute.
2. The Agency did not violate ORS 240.555 in dismissing Boaz from State Service.

Under ORS 240.555, the State may dismiss a classified unrepresented employee "for misconduct, inefficiency, incompetence, insubordination, indolence, malfeasance or other unfitness to render effective service."

To decide whether the Agency's dismissal of Boaz was lawful under this statute, this Board determines whether, under all the circumstances of the case, the Agency's action is "objectively reasonable." *Van Dyke v. State of Oregon, Department of Fish and Wildlife*, Case No. MA-06-01 (November 2002); *Morisette v. Children's Services Division*, Case No. 1410 (March 1983); *Brown v. Oregon College of Education*, 52 Or App 251, 628 P2d 410 (1981). A "reasonable employer" adheres to the following standards:

¹⁰We do not find credible Boaz' assertion that he, in good faith, believed that an interagency agreement permitted him to give Schafer the information she requested and did so to promote "interagency cooperation." It is not plausible that Boaz would rely on an agreement, the contents of which were unknown to him, to conclude that he was authorized to give Schafer the information she sought. Based on these circumstances, as well as Boaz' prior statements in the record, his demeanor at hearing, the unprecedented nature of this release of information, his failure to consult with his supervisor, the contents of his e-mail to Schafer, and other evidence, we find that Boaz released the information simply to perform a favor for his friend Schafer.

“(1) disciplines employees in good faith and for cause; (2) imposes sanctions that are proportionate to the offense; (3) considers the employee's length of service and service record; and (4) applies the principles of progressive discipline, except where the offense charged is gross.” *Van Dyke v. State of Oregon, Department of Fish and Wildlife*, Case No. MA-06-01 (November 2002) (ellipses/asterisks omitted), citing *Smith v. State of Oregon, Department of Transportation*, Case No. MA-4-01 (June 2001). See also *Oregon School Employees Association v. Klamath County School District*, Case No. C-127-84, 9 PECBR 8832, 8851-8852 (1986).

In addition, a reasonable employer clearly defines performance expectations, expresses those expectations to employees, and informs them when those standards are not being met. *Bellish v. State of Oregon, Department of Human Services, Seniors and People with Disabilities*, Case No. MA-23-03 (April 2004), citing *Stark v. Mental Health Division, Oregon State Hospital*, Case No. MA-17-86 (January 1989), and *Flowers v. Parks and Recreation Department*, Case No. MA-13-93 (March 1994).

In an appeal of a dismissal under ORS 240.555, the State has the burden of proving the charges against the employee. OAR 115-045-0030(6). Accordingly, we begin our analysis by determining whether the Agency met its burden of proving its claim that Boaz committed misconduct, insubordination, or demonstrated other unfitness to render effective service when he disclosed confidential information unrelated to his Agency work to Schafer, and made inappropriate use of his State computer.¹¹ If so, we will apply the reasonable employer test to determine whether the Agency was justified in dismissing Boaz from State Service.

¹¹In his post-hearing brief, Boaz claims that the sole reason for his dismissal was the breach of confidentiality. Boaz bases his assertion on Human Resource Manager Clark's testimony at his unemployment hearing, in which she explained how the Agency discovered Boaz' breach of confidentiality after receiving a complaint about the inappropriate e-mail. When the ALJ asked Clark if Boaz “would have been discharged for the email issue alone if the confidentiality issue had not arisen,” Clark answered “[n]o.”

We disagree with Boaz' contention that this testimony indicates that the only reason for his discharge was violation of the Agency's confidentiality policy. In its March 4, 2009, letter dismissing Boaz, the Agency gives two reasons for Boaz' discharge—disclosure of confidential information to Schafer and inappropriate use of his State computer, including sending an offensive e-mail to his niece. Clark's testimony at Boaz' unemployment hearing clarifies the Agency's position that it dismissed Boaz for *both* incidents of misconduct.

Misconduct

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.” *Schellin v. Department of Veterans’ Affairs*, Case Nos. 1381/1384 (March 1983) at 13-14. (Emphasis in original, citation omitted.)

The Agency proved that Boaz intentionally obtained and shared information from a confidential database with an Agency outsider in order to do a favor for a friend, and that he knew that it was wrongful to do so. Boaz was aware of the Agency’s confidentiality policy and the consequences for violating it, both for the employee (termination) and the Agency (potential loss of access to the data). Boaz was not forthcoming about his reasons for sharing the information, repeatedly insisting that his motives were to enhance interagency partnership, and grudgingly admitting that his actions also aided a friend. As discussed above, his other claims are contradictory and not credible—that he gave Schafer the information she wanted because he was uncertain about what information he could share with whom, or because he thought an agreement with DHS permitted him to give Schafer the specific information about Doe she sought. Contrary to his assertions, we find that Boaz responded to Schafer’s request because he wanted to help a friend. Accordingly, Boaz committed misconduct by wilfully violating Agency policies regarding disclosure of confidential information.¹²

The Agency also proved its charge that Boaz inappropriately used his State computer. Agency policy requires that employees make limited personal use of its equipment, and also requires that use of Agency resources “must not be false, unlawful, offensive, lewd or disruptive.” Boaz violated both these policies by making extensive personal use of his Agency computer and sending an offensive e-mail message to his niece. Boaz acknowledged that his actions were wrong. At the February 17, 2009 investigatory meeting with Agency managers, Boaz admitted his personal use of his Agency computer was excessive, and that the e-mail to his niece was a “mistake.”

Other Unfitness to Render Effective Service

Inefficiency is “the quality of being incapable or indisposed to do that which an employe is required to do.” *Bosserman v. Department of Environment Quality, Air Quality Division*, Case No, MA-29-85 at 24 (December 1986). In this case, the actions Boaz was ‘indisposed’ to do were: (1) to keep Agency information confidential, (2) seek

¹²This is not a case where an employee relied in good faith upon a misunderstanding of an employer's policies. Boaz’ references to policy were nothing but unconvincing and contradictory post-hoc attempts to escape responsibility for conduct he knew was wrongful.

appropriate authorization to disclose information to third parties, and (3) obtain supervisory guidance when he had doubts about whether certain information should be provided. Boaz declined to seek authorization or advice when asked to provide information about a non-client to a third party. His failure to obtain appropriate authorization illustrates his personal motives for releasing the information, and his disinclination to observe Agency confidentiality rules. In addition, Boaz further demonstrated his inability to comply with his employer's policies when he used his Agency computer to engage in a personal family dispute and sent an offensive message to his niece. The Agency has met its burden to establish that Boaz committed acts of inefficiency, demonstrating an unfitness to render effective service.

Reasonableness of Dismissal

We now determine whether the Agency acted as a reasonable employer in dismissing Boaz. As discussed above, an employer acts reasonably when it disciplines an employee in good faith for cause, imposes sanctions proportionate to a proven offense, considers the employee's length of service in determining appropriate discipline, and applies principals of progressive discipline unless the offense committed is gross or the employee's behavior would not be improved by progressive measures. *Peterson v. Department of General Services*, Case No. MA-09-93 at 10 (1994).

Here, the Agency conducted a fair investigation of Boaz' conduct, obtained the evidence of his misconduct, and gave Boaz the opportunity to respond to that evidence. There is no evidence that the Agency failed to apply its rules and discipline fairly and consistently; in fact, the Agency previously terminated two other employees who had violated its policies regarding the use of material in confidential databases. The Agency's discipline of Boaz was thus in good faith—there is no evidence that it arose from anything other than Boaz' own conduct, the documentary evidence Boaz created or preserved himself, and Boaz' own statements to investigators. Our conclusions about misconduct and inefficiency establish that Boaz was terminated for cause.

The sanction imposed was proportionate to the offense. Boaz breached clear Agency instructions and practice regarding the use of the confidential databases in order to do a favor for a friend, and failed to seek authorization for this unprecedented use of that information. Once confronted about this misconduct, Boaz consistently failed to acknowledge the wrongfulness of his conduct, and falsely claimed that his actions were justified by Agency policies. Boaz also made contradictory claims regarding the reasons for his actions. At his unemployment hearing, Boaz suggested that he relied on Schafer's managerial status for assurance that he was not acting wrongfully. At Schafer's hearing

before this Board, however, Boaz denied that he gave Schafer the information she wanted because she was a manager.

Boaz contends, however, that the Agency acted unreasonably in dismissing him because it failed to apply appropriate principles of progressive discipline. In support of his assertion, Boaz points to his successful length of regular service (approximately four years), and lack of any prior discipline. The Agency's failure to utilize progressive discipline is justified, however, by the serious nature of Boaz' offense and the likelihood that progressive discipline would be ineffective.

The Agency's access to databases depends on compliance with interagency agreements that restrict and limit the use of highly confidential information. Misuse of the information obtained from these databases could result in revocation of Agency employees' ability to use databases necessary for their work. Accordingly, Boaz' unauthorized disclosure of information to Schafer seriously jeopardized the Agency's mission.

The Agency also demonstrated that it was unlikely that more progressive disciplinary measures would be effective in changing Boaz' behavior.

A key element in the rationale behind progressive discipline is that it gives an employee the opportunity to correct his or her behavior. An employer considers an employee's length of good service in relation to misconduct on the basis that past good performance may indicate that future performance will be good as well. An employee's work history becomes far less significant, however, when the employee refuses to admit wrongdoing or makes dishonest claims in his defense. We agree with the Agency's response to Boaz' claim that his actions were appropriate:

"[e]ven at hearing [Boaz] saw nothing wrong with what he did. In fact, in Ms. Schafer's ERB hearing he implied that, if asked, he'd still provide the same information today. Without being able to recognize right from wrong, it is reasonable to expect that Boaz will commit the same violation again. By his own admission, he renders himself unreliable. OPHP does not have confidence that if Boaz is returned to his previous position, he could perform independently without constant managerial oversight.

"An employee who cannot be trusted to perform his job duties unsupervised has violated a key foundational requirement for employment with OPHP."

Given Boaz' repeated refusal to acknowledge that he failed to follow Agency policies regarding confidential information, we conclude that the Agency acted reasonably in deciding that dismissal was an appropriate sanction for his actions and that less severe discipline would not improve his behavior. Whether this Board would impose the same sanction is not relevant to our inquiry. We will dismiss the Appeal.

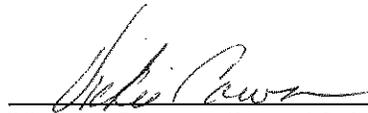
ORDER

The Appeal is dismissed.

DATED this 30 day of November, 2010.



Paul B. Gamson, Chair



Vickie Cowan, Board Member



Susan Rossiter, Board Member

This Order may be appealed pursuant to ORS 183.482.