

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. MA-14-09

(MANAGEMENT SERVICE DISCIPLINE)

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

Neither party objected to a Recommended Order issued by Administrative Law Judge (ALJ) Wendy L. Greenwald on January 22, 2010, following a hearing held on August 11, 2009, in Salem, Oregon. The hearing closed after the receipt of post-hearing briefs on August 26, 2009.

Kristin Schafer, Appellant, Salem, Oregon, appeared *pro se*.

Sylvia Van Dyke, Assistant Attorney General, Labor and Employment Section, Department of Justice, Salem, Oregon, represented Respondent.

On June 16, 2009, the State of Oregon, Department of Human Services (DHS) suspended Kristin Schafer, a management service employee, for one week without pay. On July 13, 2009, Schafer filed a timely appeal of the discipline.

The issue is:

Did DHS suspend Appellant without pay in violation of ORS 240.570(3)?

RULINGS

The ALJ's rulings were reviewed and are correct.

FINDING OF FACTS

1. DHS is an agency of the State of Oregon, whose mission is to assist "people to become independent, healthy and safe." The core values of DHS are individual and institutional integrity; stewardship of the public trust; personal responsibility for actions; respect for the "dignity and the diversity of our colleagues, communities and people we assist;" and professionalism.

2. Schafer began her employment with DHS on September 12, 2005. Schafer is employed in a management service position as the assistant manager for the Institutional Revenue Section of the Office of Payment Accuracy and Recovery. Schafer supervises six employees. Prior to the discipline at issue in this matter, Schafer met or exceeded her manager's expectations and had not been the subject of any discipline.

3. When Schafer began her employment with DHS, she was provided with a document entitled "DHS Policy and Procedure Summary." The summary refers employees to the DHS web page for the complete policies, notifies employees they are responsible to act in accordance with the summary and the policies, and further states that "[f]ailure to meet these standards, and all other standards outlined in Department policies and procedures may result in discipline, up to and including termination of employment." In regard to specific policies, the summary provides, in part:

"Discrimination and Harassment. Discrimination and harassment are unacceptable at DHS. The Department strives to maintain program services and a work environment free of intimidation, hostility, or offense and to reasonably accommodate persons with disability. Employees share the responsibility for ensuring that employees, applicants, clients and members of the public are not discriminated against or harassed on the basis of race, color, religion, * * * or other factors unrelated to the job. Instances of alleged employment discrimination or harassment must be reported to a supervisor and/or the Office of Human Resources so that issues can be investigated and corrective action can be taken if warranted."

4. DHS has adopted the Department of Administrative Services' (DAS) "Discrimination and Harassment Free Workplace" policy. That policy provides that the "State of Oregon is committed to a discrimination and harassment free work environment." Under the policy, employees are directed to "conduct themselves in a business-like and professional manner at all times and not engage in any form of discrimination, workplace harassment or sexual harassment." The policy defines workplace harassment as "[u]nwelcome, unwanted or offensive conduct based on or because of an employee's protected class status." Examples of behavior considered to be harassment are specified as "derogatory remarks, slurs and jokes about a person's protected class status." The policy also specifies that managers and supervisors "are held to a higher standard and are expected to take a proactive stance to ensure the integrity of the work environment. Managers/supervisors must exercise reasonable care to prevent and promptly correct any discrimination, workplace harassment or sexual harassment they know about or should know about."

5. DHS also follows the DAS policy on "Maintaining a Professional Workplace," which states that "[i]t is the policy of the State of Oregon to create and maintain a work environment that is respectful, professional and free from inappropriate workplace behavior." The policy directs supervisors to "address inappropriate behavior that they observe or experience and should do so as close to the time of the occurrence as possible and appropriate." The policy defines inappropriate behavior as:

"[u]nwelcome or unwanted conduct or behavior that causes a negative impact or disruption to the workplace or the business of the state, or results in the erosion of employee morale and is not associated with an employee's protected class status.

"Examples of inappropriate workplace behavior include but are not limited to, comments or behaviors of an individual or group that disparage, demean or show disrespect for another employee, a manager, a subordinate, a customer, a contractor or a visitor in the workplace."
(Emphasis in original.)

6. Schafer and her employees held monthly staff meetings. Approximately every six months, during these meetings, they would review DHS policies, including the discrimination/harassment-free workplace policy.¹

¹Schafer mentioned this biannual policy review for the first time at the hearing.

7. During her employment, Schafer attended a number of workplace trainings which addressed the DHS core values, management expectations, the professional workplace policy, and the discrimination/harassment-free workplace policy. Some of these trainings included “Cultivating a Diverse Workforce” on October 20, 2005; “DHS New Manager Orientation” on October 26, 2005; “Core Values Training” on October 15, 2007; and “Cultural Competency and Diversity at DHS: Valuing, Embracing and Implementing” on December 19, 2007.

8. On October 12, 2005, Schafer attended a training entitled “The Essentials of Human Resource Management,” which included a half-day session on the recruitment and selection of employees. Among other matters, this portion of the training covered the process for managers to check applicants’ references. The training established a five-step reference check process and provided managers with a reference check form and a reference release form. During the training, participants spent time discussing difficulties in checking references and engaged in role-playing.

9. The materials provided with the training address the process for reference checks as follows:

“Proceed to reference checking. Reference checks are required. Make sure to check with past and current employers, and your Human Resource Generalist, not the applicant’s peers.

“ * * * * *

“Note: The application, the interview and the references should all ‘paint a picture’ of the applicant that is consistent or provides an explanation for a lack of consistency.”

10. Under Step 4 of reference checks, the materials state, in part:

“Using the Reference Check Question Form, contact the finalist’s employer references, ask questions and take notes. Check at least three references and, preferably, all for whom the applicant has performed work similar to the job you have available.”

11. The October 12 training also provided tips on how to obtain references when employers did not respond to reference requests, including the suggestion that a manager should “ * * * [c]ontact the applicant and tell them they are a finalist, but that you cannot proceed unless you can check references, and ask the applicant to help you

obtain the reference.” The trainers also explained that when an applicant has not authorized DHS to contact their current employer, the manager should contact the prior employers first. If the prior employers provide good references, the manager should then tell the applicant that DHS needs to confirm his current employment, and that as long as the employment is confirmed and the current employer provides a good reference, the applicant will be hired. If the applicant still does not give permission to contact the current employer, then the manager must not contact the current employer. Managers were never told during the training that they could or should contact other State agencies to verify employment information during reference checks.

12. Subsequent to the training, Schafer was responsible for three recruitments. Schafer followed the process in which she had been trained to check references during those recruitments and to contact the applicants’ past and current employers. Prior to the incident which is the basis of this discipline, Schafer was never specifically told that she should not contact other State agencies to attempt to verify employment information during a reference check.

13. The DHS Institutional Revenue Section also employs revenue agents who collect money from patients at the State Hospital. Schafer is aware that these agents are encouraged to follow up on all possible information in performing their duties, including contacting other state agencies, banks, and insurance companies to obtain information, some of which may be confidential.

Employment Prior to DHS

14. Prior to her employment with DHS, Schafer worked for approximately three years on the Family Health Insurance Assistance Program (FHIAP) at the Office of Private Health Partnership (OPHP), an independent state agency. FHIAP provides progressive subsidies for Oregonians at certain income levels to purchase private health insurance, either through their employer or individually. Schafer worked at OPHP as an eligibility specialist for 10 days, and then worked as a quality assurance auditor/appeals specialist. In this position, Schafer processed hearing requests and represented the agency at contested case hearings.

15. OPHP has interagency agreements with the Employment Department, the Department of Motor Vehicles, and the DHS Oregon Health Plan program to access information on their databases. The information obtained through accessing these databases is confidential. The information available on these databases includes an individual’s wages, hours, social security number, unemployment benefits, past employment, address, drivers license number, vehicle registration, vehicle liens, Oregon

Health Plan enrollment, and family composition. OPHP employees are authorized to access these databases solely to determine an applicant's eligibility for program benefits. When applying for benefits, OPHP clients sign a release authorizing their information on these databases to be accessed.

16. OPHP provides training to all new employees regarding the restrictions on the use of the information in these confidential databases. Schafer attended one of these trainings when she began her employment at OPHP. OPHP employees are told during the training that they are to access the information in these databases only to determine eligibility for program benefits related to the specific file on which they are working. Employees are not authorized to access these databases for any other reasons. The restrictions regarding the access and use of these databases are reviewed on a regular basis during staff meetings.

17. During her employment at OPHP, Schafer had access to these agencies' confidential databases. Schafer knew that the information in the databases was confidential and that she was to use it only to confirm insurance eligibility. She was aware that there was an information-sharing agreement which allowed her to access these databases. Schafer also knew that OPHP and DHS employees working with the Oregon Health Plan frequently shared information to make sure that plan applicants were not covered under both programs. While at OPHP, Schafer never accessed these databases to verify an employment reference and never had a manager request that she access the information for a reference check.

18. During Shafer's employment at OPHP, FHIAP managers encouraged her and the other eligibility specialists to use whatever means available to verify the information submitted by clients, such as contacting other state agencies, banks, lawyers of trust accounts, and county agencies. An eligibility manager specifically told employees that if they had clients with accounts at one specific bank, they could call the bank's 800 number and use the client's account number and social security number to obtain balances.

Facts Related to the Suspension

19. In December 2008, Schafer conducted a recruitment to fill a position under her supervision. There was a large applicant pool for the recruitment, including approximately 40 applicants who had applied through a special program referred to as

HIRE. The interview panel unanimously selected BC² as the finalist for the position. BC is African American.

20. At some time prior to December 10, 2008, after an employee under Schafer's supervision became aware that BC was a finalist, the employee told Schafer "hey, just a heads up, employee X and Y are racist because they were making comments about [Barack] Obama." (Testimony of Kristin Schafer.) The employee explained to Schafer that weeks previously, while he was off-site on a smoke break, some employees, whom he identified, said they hoped that Obama would be assassinated if he became president. The employee did not object to the conversation, but wanted Schafer to be aware of the discussion since he knew that BC was being considered for a position in the unit.

21. Schafer took no specific action in response to the information the employee provided. Employees of different ethnic backgrounds worked in Schafer's work unit and she had never observed any problematic actions or behaviors by the employees who had made the Obama statement. No African American employees worked in Schafer's unit.

22. After BC's selection as a finalist, Schafer attempted to check his employment references. The majority of BC's prior employers were located on the east coast. Schafer became frustrated in attempting to contact those references because, due to turnover, she was unable to talk to most of the managers who had worked with BC. The current staff or managers did confirm that BC had worked at the prior jobs he had listed on his application.

23. At the same time she was checking BC's references, Schafer was also attempting to verify his current employment. Although BC had signed a document authorizing DHS to conduct reference checks, BC asked Schafer not to contact his current employer unless DHS was going to offer him the job because he was concerned the employer would retaliate against him for looking for another job.

24. Although Schafer, for the most part, trusted BC's employment information, she had some reservations because she had been unable to talk with his prior managers. She was also worried by BC's request that she not contact his present employer. Schafer had heard news reports that due to the current economy and the high competition for jobs, some applicants falsified their employment information and used friends or family

²BC and all other initials used in this Order in place of an individual's name are pseudonyms.

members to confirm their references. For these reasons, Schafer wanted to verify the accuracy of the information BC had given her. Schafer believed that if she could confirm BC's current employment, she could trust that all the information he gave her was valid.³ Schafer told her manager about her difficulties in confirming BC's current employment, and he told her to do what she could.⁴

25. Schafer told BC that she was having difficulty confirming his references. She asked him for another reference, which he provided. She never told BC that her inability to contact his current employer was a problem for her or that if she could confirm his current employment by talking to his current employer, he would be offered the job.⁵

26. On December 10, 2008, Schafer contacted WB, a friend and former co-worker, who was employed at OPHP as an eligibility specialist. An eligibility specialist is a classified position. WB processed FHIAP applications. In performing this work, WB had access to the confidential information available under the interagency information-sharing agreements to verify eligibility information provided by the applicant. WB had only previously shared health insurance eligibility information with DHS Health Program staff; no manager had ever asked him to verify an individual's employment as part of a recruitment.

³While we recognize that Schafer was concerned about carrying out a complete and thorough hiring process, we do not find credible her testimony that she sought the information through OPHP because of a specific concern that one of the other applicants would grieve the hiring decision. This rationale was raised for the first time at the hearing and is more likely a subsequent justification.

⁴The Department argues that because Schafer failed to mention her manager's statement during the investigation or in her pre-disciplinary response, the testimony regarding the manager's statement is not credible. However, Schafer does state in the pre-disciplinary response that she communicated with her managers about her difficulties in confirming references. While she did not include her manager's response, it is not unlikely that he would have responded in this manner.

⁵We also do not find credible Schafer's testimony that she asked BC if she could verify his current employment through the computer, which he agreed to allow her to do. Schafer had never provided this information to the Department prior to the hearing either during the interview process or in her written response. In addition, even if we found this credible, Schafer did not seek such authorization from TAS or KM, about whom she also requested information.

27. In January 2005, WB signed an agency confidentiality statement, which provided:

"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 am not authorized to use accessed information for my own purposes, or to provide information to third parties without appropriate authorization."

28. On December 10, 2008, Schafer sent WB an e-mail, which stated:

"Subject: Favor

"Could you PLEASE look up a [BC] probably born around 1983 and should be working at [employer]. 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% 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."

29. After receiving Schafer's e-mail, WB accessed the DHS database to obtain the information Schafer had requested. WB responded to Schafer by e-mail that morning, stating "According to the wage screen the young kid is still employed at [employer]."

30. Soon after receiving WB's e-mail, Schafer responded to him by e-mail, stating, "Thanks!! I got your message. We have a couple of racist employees here, which I have been told have made comments hoping Obama gets assassinated. This kid is from NY and black. Should be interesting huh??" WB responded by e-mail to Schafer, stating "Let me know who they are so I can stir the pot. Sounds like [BC] needs to work there[.]".

31. At some point after receiving WB's e-mail, Schafer contacted BC's current employer to confirm his employment.

32. On December 17, 2008, Schafer sent WB an e-mail which stated: "You know that [BC] kid that works at [employer] that you looked up, could you PLEASE look him up again and tell me where he worked at for [sic] like a developmentally disabled housing thing. SOOOOOOOOOOOO appreciative."

33. On January 7, 2009, Schafer sent WB the following e-mail:

“Subject: DMV

“Do you still have access? I needed a couple of addresses

“[TAS]

“[KM]

“sometimes you can get the address from the employment page which then would tell me where they work. Thanks sunshine.”

34. WB responded that day that “I will try to pull them up but we don’t have ELGR and I still am without DMV. I will work on getting you what I can.”

35. In February 2009, OPHP received a complaint from the Governor’s office regarding e-mails which had been sent from WB’s work computer. Gretchen Clark, OPHP human resource (HR) analyst, conducted an investigation into the complaint and discovered the December 10, December 17, and January 7 e-mail exchanges between WB and Schafer. Clark subsequently provided this information to DHS. Clark had no involvement in the Department’s investigation or discipline of Schafer.

36. On March 4, 2009, OPHP terminated WB’s employment, in part, for sharing confidential information with Schafer on December 10, 2008.

37. On March 11, 2009, DHS interviewed Schafer about her e-mail contacts with WB. During the interview, Schafer admitted that she sent the December 10, December 17, and January 7 e-mails to WB; that she knew WB would be accessing employment records; and that she knew the records were confidential. Schafer acknowledged that OPHP had access to those records to check applications for health insurance subsidies, and that she understood that DHS Oregon Health Plan staff and OPHP staff shared information to verify insurance eligibility and avoid double coverage. Schafer also stated that she did not know the identities of TAS or KM, but thought she had sent the January 7 e-mail asking for their addresses during the interview process.⁶ TAS and KM were not applicants on the recruitment list.

⁶Schafer never identified TAS or KM or explained why she requested their addresses. She testified that she was unable to review her notes in the recruitment file prior to the hearing to determine why she might have requested this information because DHS removed the file on July 31, 2009. However, she did not explain why she had not reviewed her notes to obtain this information after her interview on March 11, 2009, in which she was questioned about these two individuals, or in response to the pre-discipline notice on May 4, 2009.

During the interview, Schafer explained that she did not think it was a problem to ask WB for the information because she knew that DHS and OPHP had shared information in the past, and that she was seeking the information for business purposes only and not for her personal use. Schafer admitted that other employers could not contact OPHP for employment information and that even other state managers could not obtain such information from OPHP. Schafer stated that she also did not think WB had felt pressured to provide her the information because of her management status.

Schafer was also questioned about the conversation in which an employee had told her he overheard other employees stating that they hoped President Obama would be assassinated. Schafer said that she did not do anything about this information because she was unsure whether the statement had actually been made, and the statement was political and unrelated to BC's employment. Schafer stated that it was not up to her to deal with an employee's opinion of the president. She also stated that she did not think there was anything wrong with her comment to WB that it would be interesting to see what would happen if she hired BC, since she was just referring to BC's status as a New Yorker and African American.

38. By letter dated May 4, 2009, DHS provided Schafer notice of a pre-disciplinary meeting. The letter warned Schafer that she might be disciplined on the following charges: (1) lack of sound professional judgment and deficient conduct in obtaining information from WB at OPHP on three individuals, and (2) violations of DAS and DHS policies concerning discrimination and a harassment-free workplace in sending inappropriate emails. The letter scheduled a pre-disciplinary meeting on May 13, 2009, at which Schafer could discuss the charges, refute the facts, or present mitigating circumstances before DHS made a final decision regarding discipline.

39. On May 12, 2009, Schafer provided DHS with a written response to the charges in lieu of attending the pre-disciplinary meeting. Regarding the charges related to her contacts with WB, Schafer explained that she had requested the information because she knew that OPHP and DHS had an interagency information-sharing agreement; that she needed to verify BC's current employment so she would be sure that BC had not falsified his employment information; that she did not feel she was deficient in her conduct or lacking in sound professional judgment because she utilized any resource she could to ensure she hired the best applicant; and that it was up to OPHP to decide whether it should share the information with her. Regarding the charges related to the discrimination/harassment-free workplace policy, Schafer explained that she believed that no actual harassment or discrimination as defined by the policy had occurred. She stated further that she did not feel she could take any action or had any

authority to pursue any action since it was a political discussion which had occurred during non-work hours and outside the workplace, about which no employee involved in the conversation had complained, and which may or may not have been true. Schafer did indicate that since hiring BC, she had been in contact with him regularly to address any issues that might come up. Schafer also explained that she thought the investigation was a “personal vendetta” by OPHP HR analyst Clark.

40. It is the regular practice at DHS for the senior HR managers to determine appropriate discipline for DHS employees. DHS uses this system because it believes it results in discipline that is fair and consistent throughout the agency. Lower level managers are involved in the investigation process and may make recommendations to the senior HR managers, but are not involved in the discipline decision.

41. After receiving Schafer’s written response, the senior DHS HR managers met to review the information relevant to the proposed disciplinary action: the information obtained during the investigation of the charges, Schafer’s written response to the May 4 pre-discipline letter, her DHS employment history, and comparable disciplinary situations in the agency. These managers concluded that Schafer’s request for confidential information from OPHP was a very serious matter, especially because DHS automatically discharges an employee who gives out confidential client information. The managers recognized that Schafer had asked for the information, but did not give it out. They felt, however, that because Schafer had worked at OPHP, she should have known that her reason for requesting the information was inappropriate.

The managers were also concerned about Schafer’s failure to address a potential discrimination issue. The managers did not expect Schafer to take any action against the employees, but felt a proactive manager would have provided education about the discrimination/harassment-free workplace policy to them. The managers also believed that Schafer had failed to maintain a professional workplace when she told WB about the “racist employees” in the agency, and told him she thought the situation would be interesting. Finally, the managers were troubled by Schafer’s failure to acknowledge any responsibility for her actions or show any understanding that she had done anything wrong.

Based on their discussion, the managers decided that discipline was appropriate. They then considered all levels of potential discipline. They concluded that given the circumstances of this case, including the types and number of charges, an economic sanction was appropriate. The managers decided to issue the lowest level of economic

sanction that they believed could be imposed on a manager exempt under the Fair Labor Standards Practices Act (FLSA), which was a one-week suspension without pay.⁷

42. By letter dated June 16, 2009, DHS notified Schafer that she was suspended for one week without pay. The discipline letter set out the following reasons for this action:

“CHARGES AND SUPPORTING FACTS:

“Deficient Conduct and Lack of Sound Professional Judgment:

“You requested and/or obtained information on three (3) different individuals from an employee who worked at the Office of Private Health Partnerships (OPHP) including but not limited to addresses and/or phone numbers and dates of previous employment.

“* * * * *

“Violation of the DAS and DHS Discrimination and Harassment Free Workplace Policy and the DAS and DHS Maintaining a Professional Workplace Policy:

“You acknowledged in the March 11, 2009 investigatory meeting that you sent [WB] an e-mail on December 10, 2008, which stated “Thanks!! I got your message. We have a couple of racist employees here, which I have been told made comments hoping Obama gets assassinated. This kid is from NY and black. Should be interesting huh??” You stated you did not take any action on the comments because you had heard them third party and that you did not think the comments made by you to [WB] were inappropriate.

“Based on the events set out in this letter, coupled with your responses during the investigatory meeting and the e-mail conversations you had with [WB] the Department of Human Services has concerns about your recent conduct and judgment.

⁷DHS Senior HR Manager Tracy Garcia testified that other economic sanctions which would have had less of an economic impact, such as a suspension for less than one week, were not considered because they would jeopardize Schafer’s exemption under the FLSA.

“Response to the Pre-Disciplinary Notice:

“On May 4, 2009 a Pre-Disciplinary Notice Letter was hand delivered to you notifying you of a pre-disciplinary meeting scheduled for May 13, 2009. You elected to submit a written statement in response to the pre-disciplinary notice in lieu of attending the pre-disciplinary meeting. I have carefully reviewed your written response and considered the information contained in the investigatory file, your employment and training records, as well as the DAS Discrimination and Harassment Free Workplace Policy #50.010.01, and the DAS Maintaining a Professional Workplace Policy #50.010.03. I do not find that your explanations mitigate your actions.

“You do not deny that you contacted [WB] and requested that he access records for you on three (3) individuals to obtain information such as their address, phone number and/or dates of employment. You state you knew OPHP was a partner to DHS and had an interagency agreement to share information. The information you requested from [WB] had nothing to do with that agreement and the confidential information you requested had nothing to do with your job duties. It was done without notice to the applicant or with his consent to have [WB] look into his employment history.

“You acknowledged, at the March 11, 2009 investigatory meeting, that, as a former OPHP employee, you knew that the information shared between the two agencies is related to an applicant’s health care subsidies and to ensure an applicant is not doubled [*sic*] covered for health insurance premiums. The OPHP contract with Family Health Insurance Assistance Program (the eligibility program at OPHP) states the types of information sharing is limited to determining an applicant’s eligibility for either program. The information you requested from [WB] was clearly outside the information needed to establish eligibility and beyond your authority.

“Regarding your statements referring to the DAS Discrimination and Harassment Free Workplace Policy, you do not deny sending the December 10, 2008 e-mail to [WB] in which you acknowledged knowing you have a couple of racist [*sic*] employees. In the same e-mail you also made a comment about the individual’s race and wrote ‘should be interesting huh??’ [WB] had no need to know of these alleged comments and, by passing them along, your conduct can only be viewed as gossip and

a continuation of alleged discriminatory behavior. The DAS policy pertaining to discrimination and a harassment free workplace states, managers must exercise reasonable care to prevent and promptly correct any discrimination, workplace harassment or sexual harassment they know about or should know about. You perpetuated the problem, rather than take reasonable care to prevent or correct the behavior or address workplace harassment.

“Regarding your statements referring to the DAS Maintaining a Professional Workplace Policy, the e-mail you sent to [WB] on December 10, 2008 was not appropriate, professional or respectful and did not align with the DAS Maintaining a Professional Workplace or align with the agency’s Core Values. It fell below the higher standard of behavior and professionalism that DHS has a right to expect from its managers.

“Summary:

“Your May 12, 2009 rebuttal comments were considered when contemplating an appropriate level of discipline. The above supporting facts illustrate your failure to align your behavior with the Core Values of the agency. You demonstrated deficient conduct and an absence of sound professional judgment. Despite having received training and policies, you violated the DAS Discrimination and Harassment Free Workplace Policy and the DAS Maintaining a Professional Workplace Policy. Equally serious, you take no responsibility for your conduct but, rather, deflected and blamed others for your behavior. This is the most serious issue – your lack of understanding of the role you play as a DHS manager and the example you must set.

“In your position, you are expected to take a proactive stance to ensure the integrity of the work environment. When you become aware of discrimination or harassment in the workplace, as a manager you have an obligation to work with administration to eliminate it. Here, you failed to take reasonable care to prevent or correct discriminatory behavior or workplace harassment but, by your gossip, carried it outside the agency.

“Your e-mails contained language that was discriminatory in nature, were inappropriate, did not align with the DAS Maintaining a Professional Workplace Policy and did not reflect the DHS Core Values.”

CONCLUSIONS OF LAW

1. This Board has jurisdiction over the parties and the subject matter of this dispute.
2. DHS did not violate ORS 240.570(3) when it suspended Schafer without pay for one week.

DHS suspended Schafer without pay for one week for the following reasons: (1) she asked that an employee at another agency, with whom she had worked in the past, give her confidential information about three individuals; (2) she gave her former co-worker information about a job applicant's race and commented to the former co-worker that she supervised "racist employees;" and (3) she did not proactively address potentially discriminatory comments made by employees under her supervision.

ORS 240.570(3) provides that after completion of trial service, a "management service employee may be disciplined by reprimand, salary reduction, suspension or demotion or removed from the management service if the employee is unable or unwilling to fully and faithfully perform the duties of the position satisfactorily." DHS has the burden of proving that its discipline did not violate ORS 240.570(3). OAR 115-045-0030(6); *Ahlstrom v. State of Oregon, Department of Corrections*, Case No. MA-17-99 at 14 (October 2001). The Department meets its burden of proof if this Board determines, under all of the circumstances, that the Department's actions were "objectively reasonable." *Brown v. Oregon College of Education*, 52 Or App 251, 260, 628 P2d 410 (1981); *Morisette v. Children's Services Division*, Case No. 1410 at 23 (March 1983).

Basis for the Discipline

A reasonable employer is "one who disciplines employees in good faith and for cause." *Bellish v. State of Oregon, Department of Human Services, Seniors and People with Disabilities*, Case No. MA-23-03 at 8 (April 2004), *recons* (June 2004). Here, there is no dispute about the facts upon which the discipline is based. The issue, then, is whether these facts constitute cause for discipline. We conclude that DHS proved that the charges constitute cause for discipline.

Requests for Information from OPHP

Schafer's requests for confidential information from a prior co-worker at another agency are cause for discipline. DHS provided Schafer with comprehensive training on recruitment and reference checking procedures, which she chose not to follow. DHS trained Schafer to conduct reference checks by contacting past and current employers. Under this procedure, Schafer was to seek assistance from the finalist if she had difficulty confirming a reference. Schafer was also trained on the steps she was to follow if the applicant did not want her to contact the applicant's current employer. In addition, the training materials suggest that Schafer could contact her human resources generalist for assistance. Schafer was familiar with these procedures and had followed them in the past. While Schafer was never specifically told that it was inappropriate to request confidential information from another agency as part of checking references, she was also never told, during the training process or her employment with DHS, that it was appropriate to do this.

Schafer asserts that she believed it was appropriate to obtain the information she sought because she knew that DHS and OPHP regularly exchanged information under an information-sharing agreement. Schafer was aware that the information she requested from her prior co-worker was confidential. Schafer also knew that the information shared between OPHP and DHS was to be used only for purposes of confirming health insurance eligibility. When Schafer worked at OPHP, she had been trained regarding the restrictions on accessing these databases. Schafer had also never previously accessed this information to perform reference checks for anyone at DHS or any other agency.

Schafer defends her decision to request this information based on her desire to verify BC's employment before offering him a job. This is certainly a laudable reason and we do not question Schafer's intent in this regard. Yet even if we accept this reason as justification for the first request, she still provided no explanation or justification for her two subsequent requests for information. Schafer asserted that she requested the information to confirm BC's current employment because she believed if she could confirm that employment she would be comfortable with all of BC's references. However, even after BC's current employment was confirmed, Schafer sought additional information about BC through her contact at OPHP. In addition, Schafer's decision to obtain information regarding TAS and KM clearly cannot be defended based on exigent circumstances, since Schafer is unable to identify who these individuals are and why she needed to obtain information about them in this manner. We are also concerned that she could not provide any explanation for seeking confidential information on these two individuals.

Schafer argued that she was justified in contacting WB because she was following the direction of her manager to do what she needed to confirm BC's references. We do not interpret her manager's general encouragement as authorization for Schafer's decision to access confidential information in the manner she did. Schafer's manager was simply exhorting her to do the best she could by using the process in which she had been trained.

Schafer's reliance on other managers' encouragement of OPHP eligibility workers and DHS revenue agents to use whatever resources they could to obtain the information they needed also does not support her actions. These employees were given specific directions regarding the information they were to obtain and the possible avenues through which it could be collected. Schafer did not work in either of those positions and was not responsible for obtaining the same type of information as these employees. Schafer was attempting to obtain information to verify an employment reference. She had been trained in how to obtain these references and was never trained or encouraged to verify references in the manner she did.

We also reject Schafer's argument that she did nothing wrong by just asking for the information, since it was the gatekeeper of the information who was responsible for deciding if the information would be provided. This argument might be valid if Schafer had formally requested the information through the appropriate channels at either DHS or OPHP. However, she did not. Instead, Schafer asked a former co-worker and friend, who was a classified employee, to do her a favor. While there is no evidence that WB provided the information to Schafer because he felt intimidated by Schafer's management status, he certainly would have been more likely to believe that the request was appropriate because she was a manager.

Schafer's decision to request the information in the manner she did was an exercise of poor judgment. We recognize that Schafer requested the information with the best of intentions and acknowledge the initiative she showed in attempting to confirm BC's employment. In addition, she violated no specific DHS policy and had been given no specific direction not to make this type of request. We previously explained, however, that "[g]ood judgment is what a manager is hired to exercise, regardless of what specific written directives might state." *Hopkins v. Mental Health and Developmental Disability Services Division*, MA-6/23-92 at 11 (1993). Schafer's decision to obtain confidential information through a prior co-worker and friend using a confidential database was not an exercise of good judgment as a manager.

December 10 E-Mail to WB

Schafer's e-mail to WB, in which she stated "[we] have a couple of racist employees here, which I have been told have made comments hoping Obama gets assassinated. This kid is from NY and black. Should be interesting huh?," is also cause for discipline. Schafer sent this e-mail to a classified employee over the State e-mail system. In the e-mail, Schafer described a potentially discriminatory situation in her own agency regarding employees under her supervision. Regardless of the reason for which she sent the e-mail, the e-mail was an act of poor judgment as a manager and a violation of DHS policies.

DHS's professional workplace policy provides for a workplace that is "respectful, professional and free from inappropriate workplace behavior." The policy defines inappropriate workplace behavior as "[u]nwelcome or unwanted conduct or behavior that causes a negative impact or disruption to the workplace or the business of the state * * *." Examples of such inappropriate conduct included "comments or behaviors of an individual or group that disparage, demean or show disrespect for another employee * * *."

Schafer's e-mail to WB was unprofessional, disrespectful, and inappropriate. The e-mail projected a very negative impression of DHS and its employees. Schafer clearly disparaged, demeaned, and showed disrespect for employees under her supervision by referring to them as racists. Schafer's comments were potentially embarrassing to these employees and could certainly have a negative impact on them. In addition, Schafer's e-mail could easily have had a negative impact on DHS's reputation, since it portrayed the failure of a DHS manager to respond to a potentially racial situation of which she was aware.

Failure to Address a Potentially Discriminatory Situation

Schafer argues that the Department did not prove that she violated the agency's discrimination/harassment-free workplace policy by failing to address the employees' conversation about Obama. Schafer first argues that she was not even sure that the information she was given about the conversation was accurate. She also points out that the Department has admitted that no act of discrimination or harassment prohibited under the policy has occurred. She asserts that the policy does not require her to address personal and political beliefs that employees expressed during a non-work-related conversation which occurred weeks earlier when the employees were on a break and away from their worksite. Schafer contends that the policy only requires her to address inappropriate worksite behaviors or actions, and that the Department should not be

allowed to discipline her based on a potential future action or behavior that may or may not occur.

We might agree with Schafer except for the fact that when Schafer became aware of the employees' conversation and its potential affect on the employee she had just hired, she was clearly concerned enough about what had been said to send an e-mail about it to WB. In addition, Schafer's explanation that she did nothing about the employees' comments because she was not sure whether the report was accurate is not credible. Schafer obviously believed that the comments were accurate because she told WB that she had "racist employees" in the office. It is unlikely she would have characterized the employees in this manner if she had not believed that the conversation had occurred.

We also disagree with Schafer's assertion that she did not violate a specific provision of the harassment-free workplace policy. The policy clearly sets expectations for managers to "take a proactive stance to ensure the integrity of the work environment" and to "exercise reasonable care to prevent and promptly correct any discrimination, workplace harassment or sexual harassment they know about or should know about." Since Schafer had reached a conclusion that she had racist employees in the office, as a manager she was obligated to take some affirmative measures "to create and maintain a discrimination and harassment free workplace." This was especially true since she was in the process of bringing into the workplace an African American employee who might be affected by the actions of these "racist employees."

Schafer's defense that she took no action because she did not believe she could discipline employees for such a conversation shows a lack of understanding of her obligations as a manager under the policy. While we agree that the conversation at issue was probably not cause for discipline, Schafer had other less onerous options to proactively address a potentially discriminatory situation. Schafer could have provided special training or, at a minimum, discussed her concerns with her own manager at DHS. Instead, Schafer vented about the conversation with a friend in another agency.

At the hearing, Schafer mentioned for the first time that she reviews the DHS policies at staff meetings every six months. Even if this is true, it is not clear from the evidence that this semi-annual policy overview occurred in a time and manner that was sufficient to address the situation here. More importantly, Schafer did not take action at the time the incident occurred because she believed the semi-annual policy reviews adequately addressed the employees' discriminatory statements. Schafer did not deal with the incident because she did not recognize a need or responsibility to do so. Therefore, under these circumstances, Schafer's failure to address her own concerns about racist employees in the workplace violated her obligation as a manager under the

DHS Discrimination and Harassment Free Workplace policy, and was cause for discipline.

Level of Discipline

Since the Department has proven its charges, our next step is to “determine whether the level of discipline imposed is objectively reasonable in light of all of the circumstances.” *Belcher v. State of Oregon, Department of Human Services, Oregon State Hospital*, Case No. MA-7-07 at 20 (June 2008). In applying the “objectively reasonable” standard to management service discipline cases, this Board allows an employer to hold a management service employee to strict standards of behavior, so long as these standards are not arbitrary or unreasonable. *Helper v. Children’s Services Division*, Case No. MA-1-91 at 22 (February 1992). A significant factor for the Board’s consideration is

“the extent to which the employer’s trust and confidence in the employee have been harmed and, therefore, the extent to which the employee’s capacity to act as a member of the ‘management team’ has been compromised. In addition, [Board precedents] give weight to the effect of the management service employee’s actions on the mission and the image of the agency and the extent to which those actions do or do not reflect the proper use of judgment and discretion.” *Reynolds v. Department of Transportation*, Case No. 1430 at 10 (October 1984) (footnote omitted).

We have previously held that a reasonable employer

“* * * imposes sanctions that are proportionate to the offense, [and] considers the employee’s length of service and service record * * * .” *Smith v. State of Oregon, Department of Transportation*, Case No. MA-4-01 at 8-9 (June 2001); *OSEA v. Klamath County School District*, Case No. C-127-84, 9 PECBR 8832, 8851-8852 (1986); *Bellish v. State of Oregon, Department of Human Services, Seniors and People with Disabilities*, Case No. MA-23-03(April 2004), *recons* at 8 (June 2004).

In addition, “[a] reasonable employer generally uses progressive discipline, except where an employee’s offense is gross or the employee’s behavior probably will not be improved through progressive measures.” *Peterson v. Department of General Services*, Case No. MA-9-93 at 10 (March 1994).

Schafer asserts that no discipline is appropriate under the circumstances of this case. She argues that at most, the Department should have discussed its concerns with her and provided her with expectations for improvement. In taking this position, Schafer relies on the fact that she had worked competently in her position at the Department for approximately four years and had not previously been the subject of any disciplinary actions. In addition, she asserts that the charges, even if proven, do not merit this level of discipline.

We conclude that a one-week suspension is objectively reasonable under the circumstances. We acknowledge that the first level of progressive discipline would normally be a reprimand. The Department, however, has proven all three of the charges which are the basis of the discipline. While one charge alone might merit a written reprimand or warning, these three charges support a higher level of discipline.

Here, the sanction imposed is proportionate to the offense. One of the charges involves a very serious issue, the misuse of confidential information. The fact that the Department normally would dismiss an employee for misuse of DHS confidential client information supports the seriousness of its concerns regarding this charge. While this is not the basis of Schafer's charge, Schafer showed a serious lack of judgment and understanding as a manager in regard to the handling of confidential information when she inappropriately requested confidential information through a friend at another agency. Since she sought this information through another agency, her actions had the potential to affect the mission and image of DHS, and do not reflect the proper use of judgment or discretion on her part.

We are also concerned that Schafer either does not appear to understand, or is unwilling to understand, the problem with her actions in regard to any of the charges. Schafer has never acknowledged that she did anything wrong and has taken no responsibility for her actions. In fact, Schafer has attempted to place the responsibility on others. Schafer initially asserted that the only reason she was being considered for discipline was that the OPHP HR analyst was out to get her. Schafer also argued that she did nothing wrong by asking for the confidential information and that it was the "gatekeeper" of the information who was responsible. For these reasons, we share DHS's concern about Schafer's "lack of understanding of the role you must play as a DHS manager and the example you must set."

Finally, DHS conducted an appropriate investigation, gave Schafer an opportunity to explain her actions, and determined the level of discipline using its regular process,

the purpose of which is to maintain consistency and fairness throughout the agency. DHS concluded, and we agree, that its ability to trust and have confidence in Schafer has been harmed. Therefore, we conclude that the proven charges constitute a sufficient breach of trust to warrant the level of discipline imposed. The one-week suspension without pay is sustained.

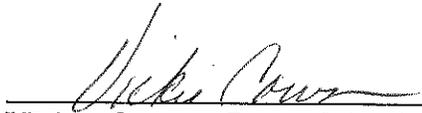
ORDER

The appeal is dismissed.

DATED this 30th day of June, 2010.



Paul B. Gamson, Chair



Vickie Cowan, Board Member



Susan Rossiter, Board Member

This Order may be appealed pursuant to ORS 183.482.